

## THE NEW TEXTUALISTS' NEW TEXT

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### I. INTRODUCTION

Most disputes over the meanings of statutes are about the fit between events in the world and the words in the statute: The defendant did  $x$ . The statute says it is a crime to do  $y$ . Should  $x$  be considered a member of the category  $y$  for purposes of interpreting the statute? Sometimes an event appears to fit within the language of the statute, but it seems absurd to think that the legislature intended to make the disputed activity a crime. At other times, the defendant has done something similar to, and just as bad as, the activities included in the statutory language, but it seems like a stretch to say that the words include the event in question. Still, in other cases, it is simply hard to know what to do. The debates are almost always over what information a court should consider when making these decisions, and what a court should do when there is inadequate information on which to base a decision with any level of certainty about either the language or the intention of the legislature.

These issues have generated a polarized debate in both the courts and legal academic literature between those who regard

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themselves as textualists on the one hand, and those who advocate for courts using a broader range of evidence on the other.<sup>1</sup> In simplest terms, textualists claim that it is illegitimate for courts engaged in statutory interpretation to rely upon the intent of the legislature, and especially upon legislative history as evidence of such intent.<sup>2</sup> Their various opponents, in contrast, maintain both the legitimacy and usefulness of these tools.<sup>3</sup> At times, conflicts occur between a statute's seemingly plain meaning, and evidence that appears to suggest intent to the contrary. In these cases, advocates of each position pose different arguments concerning how a dispute should be decided.

Gone largely unnoticed in the battles between these camps during the past quarter century is the fact that both sides in the debate agree upon almost everything when it comes to statutory interpretation. Most of whom textualists call "intentionalists" are really not that at all. Rather, they take a pragmatic, eclectic approach to the interpretation of statutes, seizing on whatever information may appear to provide an interpretation that is loyal to the language of the statute, the intent of its drafters, and coherent with the code in general.<sup>4</sup> Chief Justice Marshall's statement, "[w]here the mind

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1. For a useful summary of some of this literature, see Michael Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369 (1999).

2. ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387 (2003) [hereinafter, Manning, *Absurdity*]; John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) [hereinafter, Manning, *Textualism*]; William T. Mayton, *Law Among the Pleonasms: The Futility and Aconstitutionality of Legislative History in Statutory Interpretation*, 41 EMORY L. J. 113 (1992); Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833 (1998).

3. See, e.g., Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992); Patricia M. Wald, *The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988-89 Term of the United States Supreme Court*, 39 AM. U. L. REV. 277 (1990).

4. See, e.g., RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990); William N. Eskridge, Jr., *Legislative History Values*, 66 CHI-KENT L. REV. 365 (1990); Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. REV. 1417 (2003); Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53

labours to discover the design of the legislature, it seizes every thing from which aid can be derived” characterizes this approach.<sup>5</sup> Sometimes, information that may seem helpful in isolation conflicts with other such information, and courts must exercise discretion. Ordinarily, however, they are not in conflict, and the language of the statute is applied without controversy. Supreme Court justices of all political stripes routinely begin statutory interpretation by analyzing the language of the statute.<sup>6</sup>

By the same token, textualists do not eschew all contexts in the interpretation of statutes, as a cartoon-like description of the approach may suggest. To the contrary, proponents of both approaches find no difficulty looking at the earlier interpretive decisions of courts, background assumptions shared by the relevant community, constitutional considerations, questions of coherence with related statutes, and a host of other considerations. Only some context disturbs textualists, i.e., legislative history adduced as evidence of legislative intent, which they regard as illegitimate.<sup>7</sup> The two camps, then, espouse similar but competing approaches to statutory interpretation that differ largely in the willingness of one but not the other to use a particular species of evidence.

Recent writings from textualists explain how textualism can lead to results in disputed cases that are sensitive to a statute’s purpose without resorting to extratextual materials that create both evidentiary and conceptual difficulties. By adopting an enriched approach to language as an initial matter, a view that considers context an

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VAND. L. REV. 1457 (2000); Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309, 347 (2001); Charles Tiefer, *The Reconceptualization of Legislative History in the Supreme Court*, 2000 WIS. L. REV. 205.

5. *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805). For recent citations by the United States Supreme Court, see *Koons Buick Pontiac GMC, Inc. v. Nigh*, 125 S. Ct. 460, 470 n.1 (2004) (Stevens, J., concurring); *Lamie v. U.S. Tr.*, 540 U.S. 526, 543 n.1 (2004) (Stevens, J., concurring).

6. *Leocal v. Ashcroft*, 125 S. Ct. 377, 382 (2004) (Rehnquist, C.J.) (“Our analysis begins with the language of the statute.”); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 255 (2004) (Ginsburg, J.) (“As in ‘all statutory construction cases, we begin [our examination of § 1782] with the language of the statute.’”) (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)).

7. See *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (“The greatest defect of legislative history is its illegitimacy.”); SCALIA, *supra* note 2, at 31–32; Manning, *Absurdity*, *supra* note 2, at 2431.

important element of how we speak and understand language generally, textualist practice can internalize a great deal of contextual information while at the same time maintaining procedures less likely to lead courts into a decision-making process that conflicts with basic values such as separation of powers. As Professor Manning explains:

Even the strictest modern textualists properly emphasize that language is a social construct. They ask how a reasonable person, conversant with the relevant social and linguistic conventions, would read the text in context. This approach recognizes that the literal or dictionary definitions of words will often fail to account for settled nuances or background conventions that qualify the literal meaning of language and, in particular, of legal language. Accepting this more modern understanding of textual interpretation, I believe, offers a firmer and more legitimate basis for cutting off many problems of absurdity at the threshold.<sup>8</sup>

This approach to statutory interpretation, reflected in many opinions by Justice Scalia,<sup>9</sup> incorporates a context-sensitive perspective on word meaning that helps blunt the bite of reducing the universe of evidence permitted in the interpretive process, thereby increasing the power of the methodology. The key intellectual decision is to focus on the ordinary meaning of statutory words, rather than on their plain meaning, as found in dictionary definitions. What makes ordinary meaning ordinary? It can only be that in the context in which a word is used that meaning stands out as the one that was likely intended, since that is what people generally intend when they use that word. And if that is the case, then textualist judges (and academics) who rely on ordinary meaning have built context into their analysis without ever looking at *anything* outside the text.

The shift from focusing on dictionaries to ordinary usage should be seen as an additional step toward reconciling textualist

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8. Manning, *Absurdity*, *supra* note 2, at 2392–93; *see also* Manning, *Textualism*, *supra* note 2, at 69 (discussing the constitutional danger in the judiciary performing legislative functions).

9. *See* Smith v. United States, 508 U.S. 223, 241–47 (1993), discussed *infra*, in which Justice Scalia dissents from an opinion affirming the conviction of the defendant for “using” a firearm during a drug trafficking crime, where the defendant attempted to trade a weapon for illegal drugs.

methodology with the goal of providing an interpretation that reflects a statute's purpose. If so, it is worth asking how well it achieves this goal. I argue here that in many circumstances it does so very well. Nonetheless, there are several recurring situations in which the textualist effort falls short, even on its own terms.

First, it is not a simple matter to reject the notion of plain, or definitional meaning, in favor of ordinary meaning. In everyday life we think both ways, and judges—even textualist judges—do so as well. Thus, despite the intellectual attractiveness of focusing on ordinary meaning, judges continue to rely upon the dictionary to a great extent in their opinions. The ordinary meaning approach works best when it is independently clear that the legislature really did have the ordinary meaning in mind when it enacted the statute. But that, of course, is exactly the inquiry that textualists argue courts should not make.

Second, just as the use of legislative history is riddled with evidentiary problems that result from the temptation to pick snippets from a long record to support a particular position, corresponding problems arise when attempting to find the ordinary meaning of a statutory term. It is not always easy to decide what makes ordinary meaning “ordinary.” Thus, the linguistic orientation of the new textualists is likely to provide results acceptable to a broad spectrum of legal analysts in a broad range of circumstances. There will remain, however, a residue of disagreement resulting from the subordination of substantive analysis to methodological concerns in a predictable range of cases. This Article explores some of the advantages of the new textualists' approach to text and its underlying psycholinguistic foundations, while examining some of the problems it leaves behind.

## II. TWO APPROACHES TO THE MEANING OF STATUTORY WORDS

Let us begin with *Church of the Holy Trinity v. United States*, the famous case decided by the Supreme Court of the United States in 1892. A statute made it a crime “in any manner whatsoever, to prepay the transportation . . . of [an] alien . . . to perform labor or service of any kind in the United States.”<sup>10</sup> A church was convicted of violating this statute, having prepaid the transportation of its

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10. *Id.* at 458.

rector from England. The Supreme Court reversed the conviction.<sup>11</sup> The opinion expresses the conflict that courts experience when they confront problems of statutory meaning.

Writing for a unanimous Court, Justice Brewer first noted that “the act of the [church] is within the letter of this section.”<sup>12</sup> On the next page, he continued: “It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.”<sup>13</sup> He concluded: “No one reading such a title would suppose that Congress had in its mind any purpose of staying the coming into this country of ministers of the gospel, or, indeed, of any class whose toil is that of the brain.”<sup>14</sup>

Brewer understood at an intuitive level that while the minister’s activities were within the *plain meaning* of the statute (labor or service of any kind), they were not within the *ordinary meaning* of the words. Brewer chose the ordinary meaning approach over the plain meaning approach when the two conflicted. What is so special about *Holy Trinity Church* is that the same judge expressed competing views of word meaning on adjacent pages of a single opinion. How did Brewer know the ordinary meaning of “labor?” He relied on his judgment as a native speaker of English, and assumed others shared his view. Scholars often discuss this case for the fact that the Court used legislative history to confirm that Congress intended the word “labor” to be used in the narrower, ordinary sense.<sup>15</sup> It is also possible to understand this case, however, as an example of a Court struggling between these two different notions of word meaning, and choosing the ordinary meaning approach over the plain meaning approach, much in the style of contemporary textualists.

The tension between these two approaches to the meanings of statutes—plain meaning versus ordinary meaning—appears frequently in American legal decisions.<sup>16</sup> The most interesting

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11. *See id.* at 472.

12. *Id.* at 458.

13. *Id.* at 459.

14. *Id.* at 463.

15. *See SCALIA, supra* note 2, at 18–23; Vermeule, *supra* note 2, at 1835–36.

16. *See, e.g.,* *Tenn. Valley Auth. v. Hill*, 437 U.S. 153 (1978); *Comm. for Handgun Control, Inc. v. Consumer Prod. Safety Comm’n*, 388 F. Supp. 216

examples are those where the members of the Court divide between the two approaches. We see this in the 1993 Supreme Court case, *Smith v. United States*.<sup>17</sup> John Smith drove from Tennessee to Florida, where he planned to buy cocaine from a contact he had there.<sup>18</sup> To his dismay, his contact had become a government informant, who arranged a meeting with undercover police officers.<sup>19</sup> At the meeting, Smith offered to trade his unloaded machine gun, which he had in a case, for the drugs.<sup>20</sup> The undercover agents pretended to agree, and said they would return soon with the cocaine.<sup>21</sup> Smith, however, became uncomfortable with the situation, and drove off in his van.<sup>22</sup> The police caught him, and the state prosecuted him for attempting to procure cocaine using a firearm.<sup>23</sup> A federal statute required an enhanced sentence for anyone who “uses or carries a firearm” “during and in relation to any crime of violence or drug trafficking crime.”<sup>24</sup> The court found that Smith did just that.<sup>25</sup> The statute imposed a minimum of five years in prison for those using an ordinary firearm,<sup>26</sup> and a minimum of thirty years for those using a machinegun.<sup>27</sup> The court sentenced Smith to the thirty-year statutory minimum.<sup>28</sup>

The case made its way to the Supreme Court, which affirmed the conviction by a vote of six to three.<sup>29</sup> Writing for the majority, Justice O'Connor first recited the rule of law that “[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.”<sup>30</sup> How does one find the ordinary meaning? She looked up the word “use” in a number of dictionaries: “Webster’s defines ‘to use’ as ‘[t]o convert to one’s service’ or ‘to

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(1974); *United States v. Fisher*, 6 U.S. (2 Cranch) 358 (1805);

17. 508 U.S. 223 (1993).

18. *Id.* at 225.

19. *Id.*

20. *Id.*

21. *Id.*

22. *See id.*

23. *Id.*

24. 18 U.S.C. § 924(c)(1)(A) (2000).

25. *Smith*, 508 U.S. at 241.

26. 18 U.S.C. § 924(c)(1)(A) (2000).

27. *Id.* § 924(c)(1)(B).

28. *Smith*, 508 U.S. at 241.

29. *Id.* at 224.

30. *Id.* at 228.

employ.”<sup>31</sup> Black’s Law Dictionary contains a similar definition: “[t]o make use of; to convert to one’s service; to employ; to avail oneself of; to utilize; to carry out a purpose or action by means of.”<sup>32</sup> Earlier Supreme Court decisions employed similar definitions.<sup>33</sup>

Justice Scalia dissented.<sup>34</sup> Relying upon his judgments about meanings that come from everyday use, Scalia echoed Justice Brewer’s perspective from *Holy Trinity Church*, decided 100 years earlier.<sup>35</sup> He wrote:

In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning. To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks, “Do you use a cane?,” he is not inquiring whether you have your grandfather’s silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane. Similarly, to speak of “using a firearm” is to speak of using it for its distinctive purpose, *i.e.*, as a weapon. To be sure, “one can use a firearm in a number of ways,” including as an article of exchange, just as one can “use” a cane as a hall decoration—but that is not the ordinary meaning of “using” the one or the other. The Court does not appear to grasp the distinction between how a word *can be* used and how it *ordinarily is* used. It would, indeed, be “both reasonable and normal to say that petitioner ‘used’ his MAC-10 in his drug trafficking offense by trading it for cocaine.” It would also be reasonable and normal to say that he “used” it to scratch his head. When one wishes to describe the action of employing the instrument of a firearm for such unusual purposes, “use” is assuredly a verb one could select. But that says nothing about whether the *ordinary* meaning of the phrase “uses a firearm” embraces such extraordinary employments. It is unquestionably *not* reasonable and normal, I think, to say simply “do not use firearms” when

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31. *Id.* at 228–29 (alteration in original).

32. BLACK’S LAW DICTIONARY 1541 (6th ed. 1990).

33. *See* *Arthur v. Morgan*, 112 U.S. 495, 500 (1884); *Astor v. Merritt*, 111 U.S. 202, 213 (1884).

34. *Smith*, 508 U.S. at 241 (Scalia, J., dissenting).

35. *Id.* at 242–43.

one means to prohibit selling or scratching with them.<sup>36</sup> Scalia also referred to the dictionary, but did so only to point out how many definitions of “use” it contains to further emphasize his point that “use” gets most of its meaning from context.<sup>37</sup> O’Connor replied to Scalia’s remarks and disrespectful tone:

There is a significant flaw to this argument. It is one thing to say that the ordinary meaning of “uses a firearm” *includes* using a firearm as a weapon, since that is the intended purpose of a firearm and the example of “use” that most immediately comes to mind. But it is quite another to conclude that, as a result, the phrase also *excludes* any other use. Certainly that conclusion does not follow from the phrase “uses . . . a firearm” itself. As the dictionary definitions and experience make clear, one can use a firearm in a number of ways. That one example of “use” is the first to come to mind when the phrase “uses . . . a firearm” is uttered does not preclude us from recognizing that there are other “uses” that qualify as well. In this case, it is both reasonable and normal to say that petitioner “used” his MAC-10 in his drug trafficking offense by trading it for cocaine; the dissent does not contend otherwise.<sup>38</sup>

The exchange contains important substantive issues, along with some entertaining ironies. Foremost among the latter is the fact that Scalia, in a 1997 book on legal interpretation, ridiculed Brewer’s opinion in *Holy Trinity Church*, especially its reference to the “spirit of the law.”<sup>39</sup> At the same time, Scalia used his dissenting opinion in *Smith* as an illustration of how statutory interpretation should be conducted.<sup>40</sup> Scalia never recognized how similar the approaches really are.

Far more important are the substantive issues. Although O’Connor cast her analysis as one of ordinary meaning, her opinion is far more consistent with a formalistic approach to legal interpretation as embodied in Brewer’s “letter of the law” analysis.

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36. *Id.* (alterations in original) (citations omitted).

37. *See id.* at 241–42.

38. *Id.* at 230 (alterations in original).

39. *See SCALIA, supra* note 2, at 18–23.

40. *Id.* at 23–25.

This approach to interpretation often manifests itself in the “plain meaning rule.” A typical statement appears in *Caminetti v. United States*,<sup>41</sup> a 1917 Supreme Court decision:

It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms.<sup>42</sup>

Courts continue to reference this rule today, and they routinely refer to the “plain language” of a statute or other document as an argument supporting one interpretation over another.<sup>43</sup>

The Court never discusses the tension between plain and ordinary meaning as a phenomenon in its own right. Rather, the tension lies embedded in a larger controversy over the extent to which statutory language can be seen as self-contained, or autonomous, as Professor Tiersma puts it.<sup>44</sup> The more self-contained it is, the less role for judges, who are sometimes seen as an antidemocratic force bent on making their own policy notwithstanding the will of the people reflected in the laws their elected representatives enact. Justice Scalia’s “new textualism”<sup>45</sup> discourages judges from referring to most contextual information, especially information about the statute’s legislative history leading up to its enactment. That is why he remains so bothered by Justice Brewer’s reference to “the spirit” of a law more than a century ago.<sup>46</sup>

Of course, it is impossible to interpret laws out of context. As Manning accurately notes, textualists have no quarrel with this fact, and permit a limited range of tools to be used in statutory

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41. 242 U.S. 470 (1917).

42. *Id.* at 485.

43. See *Laime v. U.S. Tr.*, 540 U.S. 526, 534 (2004); *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000); *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 313 (3d Cir. 2001) (“[W]e have adopted what is called the American Plain Meaning Rule . . .”).

44. Peter M. Tiersma, *A Message in a Bottle: Text, Autonomy, and Statutory Interpretation*, 76 TUL. L. REV. 431 (2001).

45. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) [hereinafter Eskridge, *New Textualism*]; William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509 (1998) [hereinafter Eskridge, *The Unknown Ideal*].

46. SCALIA, *supra* note 2, at 18–23.

interpretation.<sup>47</sup> Such tools include references to dictionaries, to the use of the same words elsewhere in the statute, to the use of the same words in other statutes, to court decisions, and to a set of canons of construction such as the ordinary meaning rule, among others.<sup>48</sup> Yet because ordinary meaning takes into account the ways in which people are most likely to use a word, the concept of ordinary meaning is probabilistic. By assuming that legislators most likely intended to use words in their ordinary sense, textualists import context into their analysis through the back door. For the only thing that is ordinary about ordinary meaning is the increased likelihood of the meaning the author intended to convey in the context in which the word was used.

In fact, judges who employ the ordinary meaning approach justify its use in just that way. Consider the following statement by Justice Scalia: “The question, at bottom, is one of statutory intent, and we accordingly ‘begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.’”<sup>49</sup> To Scalia, then, the ordinary meaning of statutory language provides a method for drawing an inference about the legislature’s intent without engaging in extratextual investigation.<sup>50</sup> He elaborates on the methodological advantages of his approach in a dissent:

I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we

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47. See Manning, *Textualism*, *supra* note 2, at 71–72.

48. See generally Eskridge, *New Textualism*, *supra* note 45 (discussing Scalia’s new textualism approach).

49. *Morales v. TWA*, 504 U.S. 374, 383 (1992) (quoting *Park ’N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 193–94 (1985)).

50. Statements of this sort are inconsistent with Scalia’s stronger position that legislative intent is in principle, irrelevant to the process of statutory interpretation because legislatures can have no intent. For detailed discussion, see Lawrence M. Solan, *Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 *GEO. L.J.* 427, 433–36 (2005).

apply that ordinary meaning.<sup>51</sup>

The plain meaning approach, in contrast, asks only whether the disputed events fit cleanly within the outer boundaries of the disputed word's meaning. Context is not important as long as the event fits within the language of the statute. If one relies upon plain meaning alone, the approach will likely lead to absurd results when the words incorporate a situation that the legislature clearly did not intend to make illegal. A classic example is *United States v. Kirby*,<sup>52</sup> an 1868 case cited by the Supreme Court in *Church of the Holy Trinity*.<sup>53</sup> A statute made it illegal to "knowingly and willfully obstruct or retard the passage of the mail, or of any driver or carrier, or of any horse or carriage carrying the same."<sup>54</sup> Kirby was a local sheriff in Kentucky, chasing a man named Farris, who worked as a letter carrier and was wanted for murder. Kirby arrested Farris, and was later prosecuted for obstructing delivery of the mail. A unanimous Court reversed his conviction because it made no sense to think that Congress would have wanted it otherwise.<sup>55</sup>

Thus, the consequences of choosing between the plain meaning and ordinary meaning approaches to statutory interpretation depend largely upon what other evidence a court is willing to consider. The less extra textual material a court takes into account, the bigger the danger of injustice posed by the plain meaning approach, and the more the need for the ordinary meaning approach. Even the staunchest textualists seem to recognize this.

Making things more difficult for the legal system, neither courts nor legal scholars typically distinguish between these two concepts analytically. Although some scholars recognize and rely upon the distinction,<sup>56</sup> it is not unusual to read that the words of a statute

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51. *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

52. 74 U.S. (7 Wall.) 482 (1868).

53. *Church of the Holy Trinity v. United States*, 143 U.S. 457, 460 (1892).

54. *Kirby*, 74 U.S. at 483.

55. *See id.* at 487.

56. *See generally* Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199 (1999) (arguing for a "critical pragmatism" that candidly acknowledges that the Court goes beyond the plain meaning of text during statutory analysis); Frederick Schauer, *The Practice and Problems of Plain Meaning: A Response to Aleinikoff and Shaw*, 45 VAND. L. REV. 715, 728 (1992) (arguing that courts "use various information-limiting decisional devices of which plain meaning is a preeminent example to allocate scarce

should be given their “plain and ordinary meaning,” assuming that these two terms mean the same thing. For example, the Supreme Court has spoken of the “plain and ordinary meaning” of the word “under” in the expression “an adjudication under section 554.”<sup>57</sup> Other courts use the expression routinely.<sup>58</sup> Often enough, the plain and ordinary meaning will coincide, and contextual information will serve to reinforce the interpretation. But at least in some instances, as we have seen, the difference between the two interpretive approaches matters. To see why this might happen, let us look at the psychology underlying plain and ordinary meaning.

### III. PLAIN AND ORDINARY MEANING: A PSYCHOLINGUISTIC ACCOUNT

Traditionally, linguists and philosophers regarded the meaning of a word as the set of conditions that must obtain for a statement using that word to be true. To take a classic example, a bachelor is an unmarried adult male. These conditions are each necessary and, taken together, are sufficient to define bachelorhood. This approach to meaning, sometimes called the classical approach because it is based on Aristotelean logic, is consistent with both the plain meaning approach to statutory interpretation and, more generally, with everyday notions of a rule of law.<sup>59</sup> A law consists of various elements. Only if you disobey them all do you violate the law.

For the past quarter century, psychologists, linguists and

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decisional resources and to achieve a degree of agreement . . . which might be harder to achieve were decisions based on a wider set of decisionally relevant information”).

57. *Ardestani v. I.N.S.*, 502 U.S. 129, 135 (1991); *see also* *PUD No. 1 v. Wash. Dep’t of Ecology*, 511 U.S. 700, 725 (1994) (Thomas, J., dissenting) (discussing the “plain and ordinary meaning” of “discharge” in connection with the applicability of an environmental statute).

58. *See, e.g.*, *Auguste v. Ridge*, 395 F.3d 123, 145 (3d Cir. 2005) (“[W]e have noted that ‘congressional intent is presumed to be expressed through the ordinary meaning of the statute’s plain language.’”); *United States v. Lachman*, 387 F.3d 42, 50 (1st Cir. 2004) (“[I]f the language of a statute or regulation has a plain and ordinary meaning, courts need look no further and should apply the regulation as it is written.”) (quoting *Textron Inc. v. Comm’r*, 336 F.3d 26, 31 (1st Cir. 2003)); *Carter v. Tennant Co.*, 383 F.3d 673, 682 (7th Cir. 2004) (declaring the “plain and ordinary meaning” of the statutory language clear).

59. For further discussion of this point, see Lawrence M. Solan, *Language and Law: Definitions in Law*, in ELSEVIER ENCYCLOPEDIA OF LANGUAGE AND LINGUISTICS (forthcoming 2005) (manuscript on file with author).

philosophers have questioned the classical approach from a variety of perspectives. First, it is very difficult, if not impossible, to define words with conditions that are both necessary and sufficient. Philosopher Jerry Fodor has been making this point for twenty years.<sup>60</sup> To take a classic example from the legal literature, try to define the word “vehicle” in the statute “no vehicles in the park,” and you will find it very difficult.<sup>61</sup> More basically try to define “book” or “pen” or anything else in your immediate reach so that your definition includes all instances of the concept and not much else and you will find the task both daunting and time consuming. In short, we are not good at defining things, which is one reason that judges run to the dictionary so often.

The linguist Charles Fillmore showed how some problems with definitions apply even to seemingly easy examples, like “bachelor.”<sup>62</sup> All bachelors are unmarried adult males, but we are uncomfortable calling some people bachelors, such as the Pope, Tarzan, and homosexual men.<sup>63</sup> From this, one may conclude that even “bachelor” is a category better described by prototypes and *ordinary* usage than by definitions and *plain* meaning.

Second, in the 1970’s, Berkeley psychologist Eleanor Rosch began to question the psychological reality of the classical model.<sup>64</sup> She observed that classical definitions often understate our understanding of concepts.<sup>65</sup> Not only do we know whether a concept obtains, but we know how well it obtains. Rosch conducted experiments in which she asked subjects to rate how good an

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60. See J.A. Fodor et al., *Against Definitions*, 8 COGNITION 263 (1980).

61. This example has a long history in American legal literature. H. L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 663 (1958). For recent discussion, see Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 526 (1988); Pierre Schlag, *No Vehicles in the Park*, 23 SEATTLE U. L. REV. 381 (1999); Steven L. Winter, *An Upside/Down View of the Counter-majoritarian Difficulty*, 69 TEX. L. REV. 1881, 1885–1905 (1991).

62. Charles J. Fillmore, *Towards a Descriptive Framework for Spatial Deixis*, in SPEECH, PLACE, AND ACTION 31–59 (Robert J. Jarvella & Wolfgang Klein eds., 1982).

63. *Id.* at 34.

64. See Eleanor Rosch, *Cognitive Representations of Semantic Categories*, 104 J. EXPERIMENTAL PSYCHOL.: GEN. 192 (1975).

65. See *id.*

exemplar a concept is of a category.<sup>66</sup> For instance, she found that people generally agreed that chairs and tables were good examples of furniture, but that lamps were questionable examples.<sup>67</sup> Yet this knowledge cannot be characterized by reference to defining conditions, whether necessary or sufficient conditions.<sup>68</sup> Rosch argued that prototypes, rather than definitions, better capture what people really know about categorization.<sup>69</sup>

Third, concepts become fuzzy at the margins. We can elongate a chair into a love seat and a love seat into a sofa. People might find it hard to know what to call in-between sizes and are likely to disagree with one another.

While examples like these may appear to threaten the use of definitions as a psychologically-plausible theory of word meaning, other research shows that it is too early for the funeral to begin. Returning to the definition of “bachelor,” the classic definition is not all bad, even according to critics. No one thinks that anyone other than an unmarried adult male can be called a “bachelor.” So at worst, the definition contains conditions that are necessary but not sufficient. Other attacks on definitions, such as Fodor’s,<sup>70</sup> recognize this fact.

Anna Wierzbicka, a linguist and lexicographer, found a way to bridge the gap between these two approaches to meaning. According to Wierzbicka,<sup>71</sup> the problem with definitions is not that they do not work, but rather that they often refer only to external information to the exclusion of internal psychological states.<sup>72</sup> Wierzbicka adds to the definition of “bachelor:” “a man . . . thought of as a man who can marry if he wants to.”<sup>73</sup> Turning to a more legally relevant example, the Clinton scandals provoked a societal debate over the nature of truth and lying. Clinton’s critics argued that a false statement intentionally made is a lie, and that lying under oath is perjury.<sup>74</sup> His

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66. *See id.*

67. *Id.* at 229.

68. *Id.* at 192.

69. *Id.*

70. *See generally* Fodor et al., *supra* note 60 (discussing alternatives to definitional treatments of language and mind).

71. ANNA WIERZBICKA, *SEMANTICS: PRIMES AND UNIVERSALS* (1996).

72. *See id.* at 16–19.

73. *Id.* at 150.

74. For discussion of this dynamic, see Robert W. Gordon, *Legalizing*

supporters retorted that some lies are worse than others.<sup>75</sup> We routinely tolerate white lies, exaggerations, and other untruths. In fact, the perjury statute which refers to “material” false statements recognized this fact.<sup>76</sup> Using a standard definition that corresponds to the substance of the perjury statutes, Wierzbicka defines lying as knowingly saying something that is not true while wanting the hearer to believe that it is true.<sup>77</sup> But she adds to her definition that we believe lying to be bad.<sup>78</sup> Thus, we are uncomfortable calling some false statements lies because we do not think it was wrong to have made them.<sup>79</sup>

What this move accomplishes, for the cases of both “bachelors” and “liars,” is to introduce context into the definitions themselves. Part of what it means to be a bachelor rests on our everyday experience concerning courtship and marriage, which might differ significantly from one society to another, and at least at the margins within a society. Similarly, we are most comfortable when we reserve the word “liar” for a person who makes socially unacceptable false statements. Once we incorporate this fact into the definition, the distinction between plain and ordinary meaning shrinks. Thus, Wierzbicka has embedded knowledge of the word’s prototypical use into the definition itself.<sup>80</sup>

Not only do definitional features seem to play at least some role in how we conceptualize and categorize, the extent of the role of prototypes in the psychology of word meaning has been the subject of some debate. Rosch demonstrated that people are willing, when

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*Outrage, in* AFTERMATH: THE CLINTON IMPEACHMENT AND THE PRESIDENCY IN THE AGE OF POLITICAL SPECTACLE 97 (Leonard V. Kaplan & Beverly I. Moran eds., 2001) [hereinafter AFTERMATH].

75. *See id.* For discussion of gradations of lying in the context of perjury prosecutions, see RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 147–48 (1999).

76. 18 U.S.C. § 1621 (1) (2000). For discussion, including the vocabulary for true, but misleading statements, see STEVEN L. WINTER, A CLEARING IN THE FOREST (2001).

77. *See* WIERZBICKA, *supra* note 71, at 152–53.

78. *Id.*

79. For fuller discussion of this issue, see Lawrence M. Solan, *Perjury and Impeachment: Rule of Law or Rule of Lawyers?*, in AFTERMATH, *supra* note 74. LAWRENCE M. SOLAN AND PETER M. TIERSMA, SPEAKING OF CRIME: THE LANGUAGE OF CRIMINAL JUSTICE (2005)(chapter 11).

80. *See* WIERZBICKA, *supra* note 71, at 152–53.

asked, to grade natural categories.<sup>81</sup> For example, a robin is a good example of a bird, an ostrich a poor one.<sup>82</sup> Armstrong, Gleitman and Gleitman demonstrated, however, that while prototype effects indeed occur with categories such as “bird,” when later asked, subjects do not think that a prototypical bird is any more a bird than a non-prototypical one, and disagree with the proposition that “bird” is a graded category at all.<sup>83</sup> Thus, while prototypes are part of our psychology, they do not seem to provide a full explanation of how we form concepts. Others agree. For example, while continuing to eschew definitions, Fodor’s recent work recognizes that prototypes are part of our knowledge of meaning without constituting that knowledge.<sup>84</sup>

Most psychologists now believe that we think both ways. We think in terms of prototypes in some circumstances, and in terms of rules in others. Medin, Wattenmaker and Hampson found that people prefer to rely on defining features when they do not have much information about the surrounding circumstances.<sup>85</sup> They found, however, that when people have greater information about context, they use family resemblance models based on prototypes.<sup>86</sup> Sloman suggests that people employ both rule based and associative systems in reasoning and that conflicts between the two occur frequently in everyday life.<sup>87</sup> As an example, he suggests the dilemma of deciding whether to wear a seatbelt for a car ride of a very short distance,<sup>88</sup> say moving one’s car from one parking space to an adjacent one. An individual can rely upon experience-based intuitions about danger and not don the seat belt, or can apply a rule:

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81. Rosch, *supra* note 64.

82. *Id.* at 233.

83. Sharon Lee Armstrong et al., *What Some Concepts Might Not Be*, 13 *COGNITION* 263, 267 (1983).

84. See JERRY A. FODOR, *CONCEPTS: WHERE COGNITIVE SCIENCE WENT WRONG* 88–108 (1998).

85. Douglas L. Medin et al., *Family Resemblance, Conceptual Cohesiveness, & Category Construction*, 19 *COGNITIVE PSYCHOL.* 242 (1987).

86. *Id.* For more detailed discussion of these issues, including suggestions for how broader theories make their way into our concepts, see GREGORY L. MURPHY, *THE BIG BOOK OF CONCEPTS* (2002).

87. See Steven A. Sloman, *The Empirical Case for Two Systems of Reasoning*, 119 *PSYCHOL BULL.* 3 (1996).

88. *Id.* at 19.

always wear a seatbelt.<sup>89</sup> Many other psychologists have reached similar conclusions.

What all this means for legal interpretation, I believe, is that the battle between plain and ordinary meaning is only natural. It appears that people reason about concepts from both the top down, consistent with the classical model, and from the bottom up, consistent with prototype analysis. Even if the two approaches can be married, as Wierzbicka's work suggests,<sup>90</sup> the two modes of reasoning continue to exist side by side. The two rules of legal construction—plain meaning and ordinary meaning—capture this fact.<sup>91</sup> Judges routinely use both methods, although the plain meaning approach is the more common. This is not a surprising observation given that it appears, at least superficially, to be the more “law-like” of the two.

#### IV. CHALLENGES TO STATUTORY INTERPRETERS

In this section, I look at some of the problems that remain even after courts adopt the ordinary meaning approach to statutory language. While that approach does incorporate a great deal of contextual information, difficulties recur. First, it is not always as easy to abandon the dictionary approach as it may seem, and it is not always clearly legitimate to do so if the goal is to establish a reliable proxy for actual legislative intent. Second, once one chooses the ordinary meaning approach, it is not always easy to determine what the ordinary meaning is. This section will also look at some promising approaches to interpreting legal texts that solve some, but not all, of these problems.

##### *A. Choosing Between Plain and Ordinary Meaning*

Given the way our minds work, we should not expect it to be a simple matter to eschew the plain meaning approach to word meaning in favor of the ordinary meaning approach as a matter of doctrinal imperative. They are both firmly embedded in the way we think. This creates two problems. The first is that it may not always be the case that the legislature has intentionally limited the scope of a statute to the ordinary occurrences of the events that come within

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89. *See id.*

90. WIERZBICKA, *supra* note 71, at 148.

91. *Smith v. United States*, 508 U.S. 223, 228–37 (1993).

statutory language. For example, Vermeule argues that the Supreme Court, in deciding *Holy Trinity Church*, should have adopted a broader interpretation of “service or labor of *any* kind,” even if it meant banning the transportation of preachers.<sup>92</sup>

To take a more recent case that has been the source of controversy, consider *Chisom v. Roemer*,<sup>93</sup> a 1991 case interpreting Section 2 of the Voting Rights Act. The Act prohibits states from affording protected classes of people “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>94</sup> In *Chisom*, the question was whether the Act applies to judicial elections as well as to legislative elections.<sup>95</sup> At issue, then, was the scope of the word “representative” in the statute.<sup>96</sup>

In a 6–3 decision holding that judicial elections are within the bounds of the Voting Rights Act,<sup>97</sup> the majority noted that the statutory language came from an earlier Supreme Court opinion,<sup>98</sup> *White v. Regester*.<sup>99</sup> That opinion, however, used the word “legislators” where the statute in *Chisom* uses the word “representatives.”<sup>100</sup> The Court inferred that the change in language is best explained by a desire to expand the scope of the statute to elections other than legislative elections,<sup>101</sup> a goal consistent with the overall purpose of the Voting Rights Act.<sup>102</sup>

In his dissent, Justice Scalia scolded the Court for straying from the ordinary meaning of “representative,” which he determined from looking at the dictionary.<sup>103</sup> He noted that “[t]here is little doubt that the ordinary meaning of ‘representatives’ does not include

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92. See Vermeule, *supra* note 2, at 1850–57.

93. 501 U.S. 380 (1991).

94. 42 U.S.C. § 1973(b) (2000).

95. *Chisom*, 501 U.S. at 391.

96. *Id.* at 398–99.

97. *Id.* at 380–81.

98. *Id.* at 398.

99. 412 U.S. 755, 766 (1973).

100. *Chisom*, 501 U.S. at 398.

101. *Id.* at 398–99.

102. *Id.* at 398–401.

103. For discussion of Scalia’s selective use of dictionaries in this case, see Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 317 (1998).

judges.”<sup>104</sup> Without question, Scalia was right about that much. When we think of elections of representatives, we ordinarily think of legislators, not judges. He further stated:

The Court, petitioners, and petitioners’ *amici* have labored mightily to establish that there is a meaning of “representatives” that would include judges . . . and no doubt there is. But our job is not to scavenge the world of English usage to discover whether there is any possible meaning of “representatives” which suits our preconception that the statute includes judges; our job is to determine whether the *ordinary* meaning includes them, and if it does not, to ask whether there is any solid indication in the text or structure of the statute that something other than ordinary meaning was intended.<sup>105</sup>

The issue then becomes whether courts must limit their interpretation of statutory words to prototypical instances, even in the face of evidence that the legislature had a more expansive meaning in mind.

To the extent that Scalia justifies his position on the premise that the ordinary meaning of a statute serves as an adequate proxy for the intention of the legislature, however, the reasoning is questionable. Legislators are not such consistent probabilistic reasoners that we can always assume that any instance of a statutory word that strays from the prototype is necessarily outside a statute’s scope. They, too, use words with both prototypical and defining features in mind. While the ordinary meaning rule provides a useful rule of thumb as to how a word was most likely used, it can do no more than that.

Moreover, as many commentators have noticed, legislators are not the only ones who cannot help thinking in definitional terms. Judges cannot help themselves either. Since Justice Scalia’s appointment in 1986, references to dictionary definitions have not declined in favor of ordinary meaning analysis.<sup>106</sup> To the contrary, they have

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104. *Chisom*, 501 U.S. at 410 (Scalia, J., dissenting). As Professor Aprill points out, the third edition of Webster’s had come out prior to the opinion, but appears to be less helpful to Scalia’s argument than was the second, which he cited in support of his analysis of word meaning. See Aprill, *supra* note 103, at 317.

105. *Chisom*, 501 U.S. at 410 (Scalia, J., dissenting).

106. See Aprill, *supra* note 103, at 277.

increased, with Scalia himself being the largest contributor.<sup>107</sup>

To illustrate, consider Justice Scalia's majority opinion in *MCI v. AT&T*.<sup>108</sup> The case required the Court to construe the word "modify" in the Federal Telecommunications Act, which authorizes the Federal Communications Commission to "modify" the requirement that carriers file schedules of charges.<sup>109</sup> If construed broadly, it would permit the FCC to grant total exemptions to small carriers from onerous tariff publication requirements.<sup>110</sup> If construed narrowly, such exemptions would be beyond the authority vested in the agency by the statute.<sup>111</sup> If ambiguous, the agency's interpretation would prevail under familiar principles of administrative law.<sup>112</sup>

Various dictionaries provide definitions that support a broad view, which might include the elimination of certain obligations entirely, and other dictionaries define "modify" in terms of small changes, which appears to be more in keeping with a narrower interpretation.<sup>113</sup> The case became a battle over which dictionary should be considered the most authoritative.<sup>114</sup> We will return to such battles in the next section of this Article.<sup>115</sup> For now, though, my point is that judges, including textualist judges, are perfectly susceptible to construing words in terms of classical definitions: conditions that must obtain for the word to be used appropriately. In this case, Scalia held that, as a matter of law, modification requires only "modest" change.<sup>116</sup> The opinion does not consider that a change may be modest in that it applies to only a small percentage of

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107. *See id.* at 277 n.2; Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 261 (1999) ("Justice Scalia has relied on the dictionary more times than any other Justice in the history of the Court."); Note, *Looking it Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1439 n.14 (1994).

108. *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218 (1994).

109. *See* 47 U.S.C. §§ 203(a), 203(b)(2) (2001).

110. *See MCI*, 512 U.S. at 228–29.

111. *See id.*

112. *See id.* at 226 (citing *Chevron USA, Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)).

113. *See id.* at 225–28.

114. *See id.*

115. *See* discussion *infra* Part IV.C.

116. *MCI*, 512 U.S. at 228.

the overall tariffs.

Cases like these make it difficult to rely too heavily on pronouncements that textualism's methodology uses an enlightened vision of language. The best that can be said is that textualist judges understand that the ordinary meaning canon is itself context sensitive and that the methodology is willing to exploit that much context without recourse to legislative history. How this plays out in actual practice, however, may be an entirely different matter.

### *B. Ordinary Meaning is Hard to Find*

A second, evidentiary question arises when judges rely upon the ordinary meaning of statutory terms. When a court decides to base its decision on the ordinary meaning of a statutory term, how does it decide what the ordinary meaning is? The answer, somewhat to the embarrassment of the American legal system, is that courts find ordinary meaning anywhere they look and judges are not restrained in deciding where they are willing to look.

To see this dynamic in play, let us return to the statute at issue in *Smith v. United States*,<sup>117</sup> which made it a crime to use or carry a firearm during and in relation to a drug trafficking crime.<sup>118</sup> *Smith* was actually the first of three cases in which the United States Supreme Court construed the statute. The second, *Bailey v. United States*,<sup>119</sup> was decided in 1995, two years after *Smith*. *Bailey* also involved a person convicted of using a firearm during a drug-trafficking crime.<sup>120</sup> In that case the gun was in the trunk of the car, with Bailey and the drugs riding in the front of the car.<sup>121</sup> The government argued that this constituted using a gun because Bailey was taking advantage of the weapon to permit him to be bolder during any drug transaction.<sup>122</sup> A similar case, heard with *Bailey*, involved a drug dealer keeping a weapon in a trunk in her bedroom while she engaged in drug transactions in the front of her apartment.<sup>123</sup>

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117. 508 U.S. 223 (1993).

118. *See id.*

119. 516 U.S. 137 (1995).

120. *Id.*

121. *Id.* at 139.

122. *See id.* at 145.

123. *See id.* at 140.

The Supreme Court decided nine to zero that Bailey was not “using” a firearm.<sup>124</sup> The Court first reaffirmed its earlier decision in *Smith*,<sup>125</sup> and made mention of the various dictionaries.<sup>126</sup> But most of the opinion, written by Justice O’Connor, who also wrote the majority opinion in *Smith*, concerned the need to interpret statutes in context.<sup>127</sup> She explained that in the context of the statute, “use” implies some kind of active use that goes beyond mere possession.<sup>128</sup> In fact, the Court attributed this sense to the dictionaries as well.<sup>129</sup> Interestingly, the strongest argument was a linguistic one. The Court gave the following example: “I use a gun to protect my house, but I’ve never had to use it.”<sup>130</sup> The Court surmised that in enacting the statute, the legislature contemplated the second occurrence of “use” in that sentence: active use of some kind.<sup>131</sup>

If the argument sounds more linguistically sophisticated than we should expect from a judge not trained in linguistics—it is. As the Court was deciding *Bailey*, Clark Cunningham, a law professor, and Charles Fillmore, a linguist, published an article using the precise example contained in the Court’s opinion.<sup>132</sup> They made the linguistic argument that the court relied upon.<sup>133</sup> The opinion did not mention the article, which clearly influenced the Court’s thinking regardless of attribution. So one answer to the question of where courts find ordinary meaning is that they use their judgments as native speakers, enhanced by serious linguistic analysis performed by linguists when such analysis can be helpful.<sup>134</sup>

*Bailey*’s reliance on the analysis of linguists, however, is

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124. *Id.* at 138.

125. *Id.* at 143.

126. *Id.* at 145.

127. *See id.* at 144–50.

128. *Id.* at 143.

129. *Id.* at 145.

130. *Id.* at 143.

131. *See id.* at 144.

132. Clark D. Cunningham & Charles J. Fillmore, *Using Common Sense: A Linguistic Perspective on Judicial Interpretation of ‘Use a Firearm’*, 73 WASH. U. L.Q. 1159 (1995).

133. *Id.* at 1186.

134. For an analysis of situations in which phrasal analysis might lead to more nuanced interpretation than reliance on the dictionary, see Craig Hoffman, *Parse the Sentence First: Curbing the Urge to Resort to the Dictionary when Interpreting Legal Texts*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 401 (2003).

unusual. More typical (at least in this respect) is the third of the Supreme Court's three "use or carry" cases, *Muscarello v. United States*,<sup>135</sup> decided in 1998. The facts are much like those in *Bailey*: drugs in the front of the car, a weapon in the back.<sup>136</sup> But this time, probably because of the *Bailey* decision some three years earlier, the government charged Muscarello not with using a firearm, but with carrying one, which the statute also covers.<sup>137</sup> In defense, Muscarello argued that the ordinary meaning of the expression "carry a firearm" is to carry the gun on one's person.<sup>138</sup> The government argued that carrying a gun in a vehicle is the more ordinary sense of the word.<sup>139</sup> The Court had to decide which sense of "carry" *should* be considered the ordinary one for purposes of interpreting the statute.<sup>140</sup>

Ultimately, the Court ruled in favor of the government by a five-to-four vote. In the majority opinion, written by Justice Breyer, the Court first established that the issue before it was the ordinary meaning of the disputed expression:

We begin with the statute's language. The parties vigorously contest the ordinary English meaning of the phrase "carries a firearm." Because they essentially agree that Congress intended the phrase to convey its ordinary, and not some special legal, meaning, and because they argue the linguistic point at length, we too have looked into the matter in more than usual depth. Although the word "carry" has many different meanings, only two are relevant here. When one uses the word in the first, or primary, meaning, one can, as a matter of ordinary English, "carry firearms" in a wagon, car, truck, or other vehicle that one accompanies. When one uses the word in a different, rather special, way, to mean, for example, "bearing" or (in slang) "packing" (as in "packing a gun"), the matter is less clear. But, for reasons we shall set out below, we believe Congress intended to use the word in its primary sense and

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135. 524 U.S. 125 (1998).

136. *Id.* at 126.

137. 18 U.S.C. § 924(c)(1) (2000).

138. *Muscarello*, 524 U.S. at 127–28.

139. *Id.*

140. *Id.*

not in this latter, special way.<sup>141</sup>

Note that the Court framed the issue by answering its own question without the benefit of supporting evidence. What the Court called “the first, or primary, meaning . . . as a matter of ordinary English”<sup>142</sup> is precisely the meaning that the Court would have to find to be ordinary in order to reach the result it did.

Next, the Court set out to answer its question more fully. Not surprisingly, it first turned to the dictionary and quoted several definitions that support its position. The Court acknowledged that some dictionaries, including *Black's Law Dictionary*, appear to support the defendant's position.<sup>143</sup> Black's defines “carry arms or weapons” as follows: “[t]o wear, bear, or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person.”<sup>144</sup> But the Court rejected these as providing what it called “special definitions.”<sup>145</sup> It opted instead for the “primary definitions” contained in the dictionaries cited by the majority.<sup>146</sup>

To bolster its choice of dictionary, the Court turned to the etymology of the word “carry” and found that it shares its Latin origin with the word “car”<sup>147</sup>—good news for the government, assuming (without presenting a reason) that word origins should make a legal difference. For anyone questioning the relevance of this history, the Court brought out the Bible, with two quotes: “His servants carried him in a chariot to Jerusalem”,<sup>148</sup> and “They will carry their riches upon the shoulders of young asses.”<sup>149</sup> Apparently, we should infer that if this use of the word “carry” was good enough for the Bible, it is good enough for the Supreme Court. It was irrelevant that the Book of Kings was originally written in Hebrew, and that the ordinary way of carrying a person is in a vehicle, while the ordinary way of carrying a small object may be otherwise. Not to

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141. *Id.*

142. *Id.* at 128.

143. *See id.* at 128–39.

144. *Id.* at 130 (quoting BLACK'S LAW DICTIONARY 214 (6th ed. 1990)).

145. *See id.* at 130.

146. *See id.* at 128.

147. *Id.* at 128.

148. *Id.* at 129 (quoting 2 *Kings* 9:28 (King James)).

149. *Id.* (quoting *Isaiah* 30:6 (King James)).

offend the non religious among us, the Court also found some examples from Daniel Defoe's novel, *Robinson Crusoe*, and from Melville's *Moby Dick*.<sup>150</sup>

Perhaps somewhat more to the point, the Court observed that it previously used the word "carry" in its opinions to refer to the transportation of drugs in a vehicle.<sup>151</sup> The Court also did its own lexicography, using a computerized database of newspaper and magazine articles that contained sentences using "carry," "vehicle," and "weapon."<sup>152</sup> The Court found "that many, perhaps more than one-third, are sentences used to convey the meaning at issue here, *i.e.*, the carrying of guns in a car."<sup>153</sup> In dissent, Justice Ginsburg, writing for herself and three others, cited her own dictionaries, her own passages from the Bible, and her own literary allusions.<sup>154</sup> Each supported the defendant's position that the ordinary meaning of "carry a firearm" means to carry the weapon on one's person.<sup>155</sup> She further pointed out that many English translations of the Bible do not use the word "carry" in the passages quoted by the majority.<sup>156</sup> In response to the majority's survey of newspaper and magazine articles, she wrote: "The Court's computer search of newspapers is revealing in this light. Carrying guns in a car showed up as the meaning 'perhaps more than one-third' of the time. One is left to wonder what meaning showed up some two-thirds of the time."<sup>157</sup> The dissent also considered the legislative history and the use of "carry" in other portions of the statute.<sup>158</sup> Ultimately, it concluded that the language of the statute is hopelessly ambiguous, and neither

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150. *Id.*

151. *Id.*

152. *Id.* at 129–30.

153. *Id.* at 129.

154. *Id.* at 139–44 (Ginsburg, J., dissenting).

155. *See id.*

156. *Id.* at 143 n.4 (citing different translations to the Bible, other than King James, including THE NEW ENGLISH BIBLE, THE NEW AMERICAN BIBLE, and TANAKH: THE HOLY SCRIPTURES). In a conversation with Professor Aaron Twerski, a biblical scholar and legal scholar, he stated that in the first example, the original is translated literally as "cause to ride." Interview with Aaron Twerski, Dean, Hofstra University School of Law, in Brooklyn, N.Y. (2001). It refers to a dead body. In the second, the better translation is "lift." *Id.*

157. *Muscarello*, at 143 (citation omitted).

158. *Id.* at 140–41.

meaning is clearly more obvious than the other.<sup>159</sup> When that happens, courts sometimes apply the rule of lenity which resolves the ambiguity in favor of the defendant.<sup>160</sup> That was how the court decided *Bailey*,<sup>161</sup> at least in part, and that is how the dissent believed the Court should have decided *Muscarello* as well.<sup>162</sup>

I dwell on this case at such length largely because it illustrates how bankrupt courts are when they must actually decide just what makes ordinary meaning ordinary. The argument more resembles a food fight in a school for children with disciplinary problems than a serious argument among distinguished jurists. One problem may be that the majority is not entirely sincere when claiming that it actually sought the ordinary meaning. In response to the dissent's marching out dictionaries like *Black's Law Dictionary*, the majority said:

These special definitions, however, do not purport to *limit* the "carrying of arms" to the circumstances they describe. No one doubts that one who bears arms on his person "carries a weapon." But to say that is not to deny that one may *also* "carry a weapon" tied to the saddle of a horse or placed in a bag in a car.<sup>163</sup>

But this statement has nothing to do with discovering the *ordinary* meaning. Rather, it says only that the majority's interpretation falls within the range of the statute's possible meanings. The statement is more consistent with the plain meaning approach, which leads to broader, less nuanced interpretations. At least in part, the dispute over ordinary meaning may be only an apparent battle. The real fight is over the rule of law: is it acontextual and available from reading the statute, or do we need to introduce context, whether from the ordinary meaning rule or from information outside the language itself?

### *C. Where Should Courts Look?*

Where courts should look for word meaning depends upon what they are looking for. If one really believes the best way to execute the legislative will is by assuming that the legislature used statutory

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159. *See id.* at 148.

160. *See id.*

161. *Bailey v. United States*, 516 U.S. 137 (1995).

162. *See id.* at 140.

163. *Id.* at 130.

words in their most ordinary sense, simple introspection is a generally adequate way to discover that sense. After all, linguists rely heavily on their own knowledge of their native languages. They have enjoyed great success exploring their own judgments about grammaticalness, felicity, and preferences of one structure or meaning over another. With the help of research assistants, I examined cases in which the United States Supreme Court relied upon the ordinary meaning rule in statutory interpretation through the year 1999. Although our study no doubt missed some, the cases we did study form a reasonable corpus for evaluation. We looked at 122 cases, the first one occurring in 1817.<sup>164</sup> Forty-seven (39%) were decided since 1980, demonstrating the important role that textual analysis has played in recent times. During most of American judicial history, the predominant methodology for discovering ordinary meaning has been introspection. Without fanfare, judges simply rely upon their own sense of how common words are typically used. Although controversies sometimes emerge, as in *Muscarello*, for the most part what judges say rings true

This did not change significantly until the 1980's, when Justice Scalia was appointed to the Supreme Court. Although the 1890's, the decade the Court decided *Holy Trinity Church*,<sup>165</sup> was also a time when the Court experimented with different methodologies, in the past twenty years, dictionaries, precedent, and the use of similar language in the same and other statutes have gained prominence, with introspection declining in popularity. This suggests that Scalia's textualism, so influential in American jurisprudence, is a departure from the legal tradition, a point to which I return later. First, let us look briefly at the various techniques that courts employ.

I will not say much about precedent as a method of finding ordinary meaning. The notion is that if the courts have already interpreted the word in the statute, or in other related statutes, then the earlier decision is determinative of later cases.<sup>166</sup> And when the legislature enacts a law adopting the language of a prior court

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164. *United States v. Sheldon*, 15 U.S. 119, 121 (1817). The next instance was *Buel v. Van Ness*, 21 U.S. 312, 323 (1823).

165. *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

166. *See Bryan v. United States*, 524 U.S. 184 (1998) (reviewing cases in which the Court had construed "willfully" as part of effort to construe that word in a statute requiring a license to sell certain firearms).

decision, it is presumed that the legislature intended the words in the statute to be understood as the court had earlier construed them.<sup>167</sup> Similarly, when the same word is used multiple times in a statute, and the meaning is clear in some instances, then courts draw an inference that the legislature intended the word to have that interpretation in the other instances. This assumption may not always be well founded, but it is sensible enough as a rule of thumb. Moreover, legislators, knowing that a court will impose this interpretation, are in a position to draft statutes that take these issues into account.

Somewhat more problematic is the examination of how statutes remote from the one in dispute use the same word. The Supreme Court has done this occasionally throughout history, but it has only become a popular method of interpretation in the past two decades. A recent article by Professor Buzbee criticizes this method as unconvincing.<sup>168</sup> If meaning depends in part on context, then why would a mental health statute provide the appropriate context for interpreting a word in, say, a statute dealing with the regulation of the mining industry?<sup>169</sup> One function of the ordinary meaning approach is to use prototypical experiences as a proxy for contextualization. Searching for ordinary meaning in particular contexts remote from the one in dispute seems doomed to cause misinterpretations, as Buzbee convincingly demonstrates.<sup>170</sup>

Without question, the biggest change in the search for word meaning in the past twenty years is the almost obsessive attention courts now pay to dictionaries, including using them as authority for ordinary meaning.<sup>171</sup> Until the late twentieth century, Supreme Court justices only infrequently used the dictionary as a source of ordinary meaning. For example, they used legal dictionaries only twice for this purpose before 1980, but fourteen times since (through

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167. *Williams v. Taylor*, 529 U.S. 420, 434 (2000) (“When the words of the Court are used in a later statute governing the same subject matter, it is respectful of Congress and of the Court’s own processes to give the words the same meaning in the absence of specific direction to the contrary.”).

168. William W. Buzbee, *The One-Congress Fiction in Statutory Interpretation*, 149 U. PA. L. REV. 171 (2000).

169. *See, e.g., id.* at 181–82.

170. *See id.*

171. For references to works showing the overall increase in the Court’s reliance on dictionaries, see *supra* note 107.

1999). They referred to standard dictionaries as a source of ordinary meaning seventeen times before 1980, and seventeen times since. They indeed referred to the dictionary for other purposes, but not as authority for the ordinary meaning of a word. That, as discussed earlier, came from the linguistic judgments of justices as native speakers of English.

The problem with using dictionaries to determine the ordinary meaning of a word, as we have seen, is that the purpose of a dictionary is to determine the outer boundaries of appropriate usage for each entry. Of course, many dictionaries present definitions in the order of the frequency of their usage, so that information can be helpful. But most of the time, the issue is not whether the statute uses one distinct sense of a word over another (river bank versus savings bank, for example). Rather, the question is whether, within a particular definition, the situation before a court is so remote from the circumstances in which a person would ordinarily use the word to describe it, that it is only fair to conclude that the legislature most likely did not have this sort of scenario in mind when it wrote the statute.<sup>172</sup> Other than providing an articulate expression of the general meaning to assist in that inquiry, dictionary definitions do little to aid in that inquiry. And once judges begin to fight over which dictionary to use,<sup>173</sup> the use of dictionaries to determine ordinary meaning is virtually futile.

Amidst all this squabbling, however, are some instances of creative analysis. Among them is the use of linguistic analysis, which the Court adopted in *Bailey*,<sup>174</sup> and the use of large linguistic corpora, which the Court used in *Muscarello*.<sup>175</sup> While courts have from time to time accepted advice from linguists concerning statutory interpretation, a court's use of the LEXIS database to engage in lexicographical analysis is most likely unique to *Muscarello*.<sup>176</sup>

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172. *Bailey v. United States*, 516 U.S. 137, 150 (1995) (“the word ‘use’ . . . cannot support the extended applications that prosecutors have sometimes placed on it . . .”).

173. *E.g.*, *Muscarello v. United States*, 524 U.S. 125, 139–44 (1998) (Ginsberg, J., dissenting).

174. *Bailey*, 516 U.S. at 141–50.

175. *Muscarello*, 524 U.S. at 128–31, 134–35.

176. *Id.* at 129.

Let us return to the linguistic example in *Bailey*,<sup>177</sup> which the Court borrowed from Cunningham and Fillmore: “I *use* a gun to protect my house, but I’ve never had to *use* it.”<sup>178</sup> As Cunningham and Fillmore point out, it is no accident that the words “to protect my house” appear with the nonprototypical occurrence of “use.”<sup>179</sup> Generally, unmodified forms reflect the prototypical, or unmarked case in language. Compare their example to: “I use a gun, but I’ve never had to use it to protect my house.” This implies that the speaker has experience shooting a gun, but has not done so to ward off intruders.

Now let us turn to *Muscarello*,<sup>180</sup> and the ordinary meaning of “carry.” The question is whether carrying a gun in a glove compartment or trunk of a car comes within the “ordinary” meaning of “carry.”<sup>181</sup> The question answers itself. The very fact that one needs to add “in a glove compartment” or “in a trunk” suggests that these are not the prototypical uses of the word. To see why, let us return to the Biblical examples that the majority opinion used to support its position:<sup>182</sup> “His servants carried him in a chariot to Jerusalem,” and “They will carry their riches upon the shoulders of young asses.”<sup>183</sup>

Putting aside that both of these are poor translations of the Hebrew version,<sup>184</sup> in each example a prepositional phrase describing how the carrying is to occur modifies the word “carry.” In the first, it is “in a chariot.” In the second, it is “upon the shoulders of young asses.” Compare these to the following: “His servants carried him to Jerusalem,”<sup>185</sup> and “They carried their riches.” The default assumption is that they physically carried the corpse or the riches. Further support of this analysis comes from sentences like the following: “The chariot carried him to Jerusalem.” Here, the verb is

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177. 516 U.S. 137.

178. *Id.* at 143.

179. Cunningham & Fillmore, *supra* note 132, at 1186–87.

180. *See Muscarello*, 524 U.S. at 125.

181. *See id.* at 127.

182. *See id.* at 129.

183. *Id.*

184. THE JEWISH PUBLICATION SOCIETY, TANAKH: THE HOLY SCRIPTURES: THE NEW JPS TRANSLATION ACCORDING TO TRADITIONAL HEBREW TEXT 581, 678 (1998).

185. *Muscarello*, 524 U.S. at 129.

also unmodified and the carrying is direct, suggesting further that the most ordinary use of “carry” implies direct carrying.

Recall that the statute speaks of “us[ing] or carr[ying] a firearm” “during and in relation to . . . [a] drug trafficking crime,” but says nothing about the manner of carrying the firearm.<sup>186</sup> The absence of any mention of a means of transportation suggests one of two possibilities: either Congress intended that the ordinary meaning apply, in which case *Muscarello* should not have been convicted, or Congress intended the statute to apply to more than ordinary instances of carrying a firearm.

This method of analysis, which we might call linguistically motivated introspection, is not new to judges. For example, the dissent in *Muscarello* makes the following argument: the word “transport” better conveys what the majority says is the ordinary meaning of “carry.”<sup>187</sup> In fact, Congress used the word “transport” in other sections of the same statute.<sup>188</sup> Therefore, in order to give effect to the legislature’s choice of words, “carry” should receive the narrower interpretation.

The structure of the two arguments is similar: the fact that the statute does *not* say certain things—how the carrying is to occur in my example, and the use of the word “transport” in the dissent’s argument<sup>189</sup>—provides evidence of legislative intent, or at least evidence of how a legislature concerned about coherent interpretation of its statutes might want a court to proceed. The problem is that judges and lawyers, who have not learned about linguistic markedness, are not likely to come up with such examples. Once they are presented, however, the examples and arguments are perfectly accessible.

In the adversarial system, it is basically up to the lawyers to learn how to make these arguments. Whether they do so by reading language-oriented legal literature, or by consulting with language experts when a difficult linguistic issue arises in a case, they clearly bear the burden. While judges, especially at the appellate level, conduct their own research beyond that presented to them by

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186. 18 U.S.C. § 924(c)(1) (2000).

187. *Muscarello*, 524 U.S. at 146–47 (Ginsburg, J., dissenting).

188. 18 U.S.C. § 924(b) (“Whoever, with intent to commit . . . an offense . . . ships, transports, or receives a firearm . . .”).

189. *Muscarello*, 524 U.S. at 146–47 (Ginsburg, J., dissenting).

attorneys for the parties, it is expecting a lot of a judge with a heavy caseload to search for exotic linguistic arguments.

*D. Interpretive Communities: Technical vs. Ordinary Language*

Finally, let us return to Justice Breyer's use of computerized databases to discover the ordinary meaning of "carry."<sup>190</sup> While the dissent rightly criticizes the conclusion that ordinary meaning can be inferred from approximately one-third of examples,<sup>191</sup> the use of this method is both creative and promising. Over the past decade, a great deal of work has been published in the growing field of corpus linguistics, both for basic research,<sup>192</sup> and in legal settings.<sup>193</sup>

This is not the place to explore the use of corpus linguistics thoroughly. Yet even brief consideration raises questions that remain hidden in current statutory analysis. For example, there are now extensive linguistic corpora of English in both the United Kingdom and the United States that include both written and spoken language. These corpora can be further sorted by the source of the language, whether literary texts, spoken language from law enforcement officers, newspaper and magazine articles, and so on. When the legal system decides to rely on the ordinary meaning of a word, it must also determine which interpretive community's understanding it wishes to adopt.<sup>194</sup> This choice is made tacitly in legal analysis, but becomes overt when the analysis involves linguistic corpora because the software displays the issue on a screen in front of the researcher.

To illustrate this point, in *Nix v. Hedden*,<sup>195</sup> the Supreme Court had to decide whether a tomato is a fruit or a vegetable.<sup>196</sup> Lexicographers and botanists call it a fruit.<sup>197</sup> American people generally call it a vegetable, even those who know that it is

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190. *Id.* at 129.

191. *See id.* at 143 (Ginsburg, J., dissenting).

192. *See, e.g.*, TONY MCENERY & ANDREW WILSON, *CORPUS LINGUISTICS* (1996).

193. *See, e.g.*, Malcolm Coulthard, *On the Use of Corpora in the Study of Forensic Tests*, 1 *FORENSIC LINGUISTICS* 27 (1994).

194. *See*, William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 *NW. U. L. REV.* 629 (2001).

195. 149 U.S. 304 (1893).

196. *Id.* at 306.

197. *Id.* at 307.

botanically a fruit. At the time, higher tariffs were imposed on imports of vegetables than on imports of fruit.<sup>198</sup> The government maintained that imported tomatoes were subject to the higher duty.<sup>199</sup> The importer said otherwise; that they should be considered fruit.<sup>200</sup> The Court chose the ordinary meaning above the technical meaning.<sup>201</sup> Somewhat ironically, this means that the ordinary people lost. Tomatoes would cost more. Commenting on another case in which the dispute was whether beans should count as seeds or vegetables, the Court observed: “Both are seeds in the language of botany or natural history, but not in commerce nor in common parlance.”<sup>202</sup> This suggests that the distinction between ordinary meaning and technical meaning is one of audience.

Access to computers now makes it relatively simple to see how words are used in commerce and in common parlance. This allows judges to easily become their own lexicographers. If they perform that task seriously, they stand to learn more about how words are ordinarily used, than by today’s method of fighting over which dictionary is the most authoritative. But if they do their own research, they still must decide whether to apply the plain or ordinary meaning, and if the ordinary meaning, whose ordinary meaning.

## V. CONCLUSION

The new textualist methodology relies heavily on a vision of language that itself contains an enriched vision of context. In particular, it has replaced the plain meaning, dictionary approach to word meaning, with the ordinary meaning, probabilistic approach. The result is that it is possible to rely on language judgments alone for a great deal of context-sensitive analysis of statutes.

I believe that this approach has a great deal to say for itself. For one thing, the principles upon which it relies are both sophisticated and traditional. Through most of American history, courts looked for the ordinary meaning of the words in a statute to determine what the legislature intended the scope of the statute to be.<sup>203</sup> For another,

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198. *Id.* at 305.

199. *See id.* at 306.

200. *See id.* at 305.

201. *See id.* at 306.

202. *Id.* at 307.

203. *Minor v. Mechanics’ Bank*, 26 U.S. (1 Pet.) 46, 64 (1828) (“The

most of textualist methodology, including the use of such evidence as the statute taken as a whole, judicial precedent, and so on, are not terribly controversial.

Yet matters are not so simple. For example, it is not entirely clear that legislatures always have the prototypical meanings of statutory language in mind. In some instances, they may be thinking in terms of a broader interpretation.<sup>204</sup> The ordinary meaning rule serves only as a proxy for the intent of those who wrote the statute. There is no reason to overestimate the success of using this proxy, especially when evidence to the contrary presents itself in particular cases.<sup>205</sup> Next, judges, including textualist judges are unable to stick with their program.<sup>206</sup> Because we typically use both definitional and prototypical information in understanding the meanings of words, it is simply impossible to eschew a dictionary-like analysis, even if one's politic vision says that one should do so.

Finally, it is not a simple matter to determine what constitutes the ordinary meaning of a word in a close case.<sup>207</sup> When such debates occur, the courts are in complete disarray, with unbecoming fights over the status of one dictionary over another, one literary allusion over another or still worse, one biblical reference over another.<sup>208</sup>

Ultimately, the choice is between a more standard set of methodologies, sensible enough most of the time but sure to result in errors, even on its own terms, and a more relaxed set of evidentiary standards, less able to constrain judicial discretion, but better able to head off results that are likely at odds with what an enacting legislature intended its law to accomplish. How one weighs in on this debate is largely a matter of political preference, but at least to some extent, an empirical matter. For that reason, I agree strongly with those scholars who have called for more empirical research into the real likelihood of mischief when judges resort to legislative history, or perhaps other species of evidence that textualists reject.<sup>209</sup>

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ordinary meaning of the language must be presumed to be intended, unless it would manifestly defeat the object of the provisions.”).

204. See discussion *supra* Part IV.

205. See discussion *supra* Part IV.A.

206. *Id.*

207. See discussion *supra* Part IV.B.

208. See discussion *supra* Part IV.C.

209. See William N. Eskridge, Jr., *Should the Supreme Court Read The*

However one decides such matters for oneself, it is a healthy start to acknowledge that we will not develop methods or standards that will permit us to dispense with judicial discretion and still have a system that does justice. Language, whether ordinary or plain, works well—but not that well.

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Federalist *but Not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1323 (1998); Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1998).