2021

W(h)ither Judgment

Elias Leake Quinn

CARDOZO LAW REVIEW
de•novo

W(H)ITHER JUDGMENT

Elias Leake Quinn†

Meaning is messy. Since our notions of justice often demand clarity from the law, some jurists have set themselves to the task of cleaning it up. Textualists home in on the written word as the key to unlocking clarity. But the textualist's endeavor is less the crusade of a purist than it is the tinkering of a technologist. Textualists labor in hopes they might develop algorithms that would allow them to escape the queasy uncertainty that comes with the exercise of judgment. If only they could consult the right dictionary or apply the right rule—or even build the right search engine—they could, the theory goes, ensure the certain and consistent construction of legal texts, word by word.

That project is founded on an incomplete view of language and meaning. Seventy-five years ago, J.L. Austin recognized that sometimes people do things rather than simply describe things with words—they sanctify marriages, settle scores, swear oaths, level threats. Words don't just describe the world; they shape it. With that simple insight, Austin complicated any effort to deduce a statute's meaning from the words on the page. And when Austin then failed to parse the 'performative' utterances from the 'descriptive' ones—recognizing that every meaningful statement is indelibly both—he put the lie to what's become textualists' fundamental assumption: that meaning is determined exclusively by the words' descriptive content, and that context, authority, audience, and circumstance play no role in answering questions of interpretation.

---

† Elias Leake Quinn keeps a day job as a lawyer in Washington, D.C. His opinions are his own, though, and should not necessarily be credited to his employer or his clients.

But the pure textualists' project is not only misguided, it is self-defeating. In pressing for a detached and mechanized approach to resolving quandaries of meaning, the textualists' project rests on the principle that judges are not to be trusted, and that judgment should be avoided. But trust is the currency of the judiciary, and the erosion of trust imperils the rule of law.

TABLE OF CONTENTS

> *"All those things for which we have no words are lost. The mind—the culture—has two little tools, grammar and lexicon: a decorated sand bucket and a matching shovel. With these we bluster about the continents and do all the world's work. With these we try to save our very lives."*
>
> —Annie Dillard[1]

INTROSPECTION

Here's the opening line of this essay:

> "Article I [of the United States Constitution] assigns Congress, along with the President, the power to make the laws. Article III grants the courts the 'judicial Power' to interpret those laws in individual 'Cases' and 'Controversies.'"

[1] ANNIE DILLARD, *Total Eclipse*, *in* TEACHING A STONE TO TALK: EXPEDITIONS AND ENCOUNTERS 9, 24 (rev. ed. 2013).

Now here's my reference for it:

> Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2120 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) (citing U.S. CONST. art. I, § 7, art. III, §§ 1–2).

Having let fly an epigraph like a kite over a stony field, I attend to my footing and consider these first steps. So far, so good, I'd say. It's a sober statement of first principles, quoted from a now-sitting Supreme Court Justice and published by a top-tier law journal. The citation sports a parenthetical that further points to the original—and hallowed—legal text. There's even a smart use of brackets right there in the first bit. All signs point to an author who knows what he's doing. I've already begun, I hope, to earn your trust.

Of course, legal fundamentals like these aren't consigned to the annals of *Harvard Law Review* or owned only by Supreme Court Justices. My eight-year-old has already come face to face with this legal fact. She would offer up this footnote instead (edited for clarity):

> *See United States Government: Judicial Branch—The Supreme Court*, DUCKSTERS, https://ducksters.com/history/us_judicial_branch.php (a self-described "fun and educational web site with lots of interesting content" that notes "[t]he job of the courts is to interpret the laws of the Congress. They do not make laws. They also only make decisions on actual cases where someone has shown they have been harmed").

Maybe I should use something like this, something a little more familiar and accessible to those who don't recognize section symbols but nonetheless understand the constitutional role of the courts—a footnote that's a little more inclusive to the constitutional realities actually lived by the nation's millions of non-lawyers.

But on second thought, no. Though it speaks to the same point, there's no nameable intellect in that alt-citation, no reference to a text we generally conceive of as a source of law. Use a citation like that for an audience of lawyers and any perceived authority in my authorship might well be underwater from the word go. My "so far, so good," would be downgraded to "rocky start"—or worse. My first steps would be in stumble.

Even the recitation of simple facts, it turns out, is fraught with peril.

{Sigh.}

Well, here goes.

I. THE TOILS OF THE TEXTUALISTS

"Article I [of the United States Constitution] assigns Congress, along with the President, the power to make the laws. Article III grants the courts the 'judicial Power' to interpret those laws in individual 'Cases' and 'Controversies.'"[2] But when those laws are ambiguous, how are judges to settle what they mean? This is a question of fevered concern among certain jurists and scholars. And reasonably so. The pledge of "liberty and justice for all" depends in part on an even hand in implementing the nation's laws. Equal protection, due process, fair notice, and all manner of constitutional rights and democratic values hinge on the law meaning the same thing for everyone. The specter of inconsistent application or indiscriminate interpretation raises a host of concerns about the workings of justice that undergird the rule of law.

Textualists—one prominent camp of jurists and scholars focused on the question—aim to bring a little (more) rigor to the interpretive endeavor, developing and refining their methods in search of reliable and predictive statutory construction. The late Justice Antonin Scalia once described his textualist approach thus:

> The meaning of terms on the statute books ought to be determined . . . on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind.[3]

Though Justice Scalia's formulation there left room for "context" and "compatib[ility] with the surrounding body of law,"[4] it is the

---

2 Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2120 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)) (citing U.S. CONST. art. I, § 7, art. III, §§ 1–2).

3 Green v. Bock Laundry Mach. Co., 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

4 *Id.* The difference between "context" and "compatibility" here is blurry. Justice Scalia and his textualist disciples generally will not tolerate an appeal to legislative history in the interpretive inquiry. *See, e.g.*, *id.* ("I would not permit any of the historical and legislative material discussed by the Court, or all of it combined, to lead me to a result different from the one that these factors suggest."); Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2364 (2019) ("Even those of us who sometimes consult legislative history . . . ."). And the "context" of a term is often smaller than you might think. In *District of Columbia v. Heller*, 554 U.S. 570 (2008), Justice Scalia opened his majority opinion by insisting that the first portion of the Second Amendment's single sentence—the part, Justice Scalia notes, which "announces the purpose for which the right was codified," *id.* at 599—should not inform the assessment of the Amendment's operation or substantive scope. *Id.* at 577. Such a vanishingly small notion of "context" poses problems, though.

"meaning . . . most in accord with . . . ordinary usage"–part that has become the touchstone of the textualists' interpretive endeavor.[5] "After

Later in *Heller*, Justice Scalia focuses on the single word, "keep," in the "operative clause," and derides Petitioners for "point[ing] to militia laws of the founding period that required militia members to 'keep' arms in connection with militia service, and . . . conclud[ing] from this that the phrase 'keep Arms' has a militia-related connotation." *Id.* at 582–83. On his assessment, "[t]his is rather like saying that, since there are many statutes that authorize aggrieved employees to 'file complaints' with federal agencies, the phrase 'file complaints' has an employment-related connotation." *Id.* at 583. But since the Justice started his opinion by setting aside the Amendment's explicit militia-preservation purpose, this proclamation is rather like saying non-employees can "file complaints" under a statute meant for aggrieved employees because—once you explicitly ignore the opening provisions of the statute that limit its intended use to aggrieved employees—the phrase "file complaints" doesn't say otherwise. Avoiding the pitfalls of circular reasoning is a lot easier when you consider more than one word at a time.

5 *Green*, 490 U.S. at 528. Cases that emphasize the "ordinary meaning" analysis above other inquiries are not hard to find these days. *See, e.g.*, *Food Mktg. Inst.*, 139 S. Ct. at 2364; Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1140 (2018); Sandifer v. U.S. Steel Corp., 571 U.S. 220, 228 (2014); Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560, 566 (2012); Schindler Elevator Corp. v. United States *ex rel.* Kirk, 563 U.S. 401, 407–08 (2011). But to see the evolution of the "ordinary meaning" maxim in textualist thought, one need look no further than Justice Gorsuch's early work on the Supreme Court. For example, in *Wisconsin Central Ltd. v. United States*, 138 S. Ct. 2067 (2018), Justice Gorsuch began the analysis by proclaiming: "As usual, our job is to interpret the words consistent with their 'ordinary meaning . . . at the time Congress enacted the statute.'" *Id.* at 2070 (alteration in original) (quoting Perrin v. United States, 444 U.S. 37, 42 (1979)). For this proposition, Justice Gorsuch cited *Perrin*. *Wis. Cent. Ltd.*, 138 S. Ct. at 2070. To be sure, in its effort to understand a statute's use of "bribery," the *Perrin* Court acknowledged that "[a] fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. Therefore," the Court continued in the passage Justice Gorsuch pointed to, "we look to the ordinary meaning of the term 'bribery' at the time Congress enacted the statute in 1961." *Perrin*, 444 U.S. at 42 (citing Burns v. Alcala, 420 U.S. 575, 580–81 (1975)). But Perrin had "argue[d] that Congress intended 'bribery' in the Travel Act to be confined to its common-law definition," *id.* at 41, and in the sentence immediately following the passage quoted by Justice Gorsuch, the Court intones, "[i]n light of [a party's] contentions we consider first the development and evolution of the common-law definition." *Id.* at 42–43. So, the "ordinary" in *Perrin* was framed by the specific facts and contentions in the case, and the Court kicked off its inquiry by looking at how a word was ordinarily used *as a common-law term-of-art*. The Court may have started with the language of the statute itself—but its inquiry into the ordinary was directed by the contentions of the parties and the specific "controversy" presented for adjudication. That's something much different from Gorsuch's notion, where the question of the ordinary begins with a context-independent reference to the entries of the *Oxford English Dictionary*. Moreover, a little later in its decision, the *Perrin* Court notes: "The record of the hearings and floor debates discloses that Congress made no attempt to define the statutory term 'bribery,' but relied on the accepted contemporary meaning." *Id.* at 45. Indeed, the Court there recounts its in-depth assessment of legislative history regarding the definition as it attempted to glean the thrust of the statutory provision at issue. *Id.* at 45–46. That's anathema to the modern "ordinary meaning" analysis, which all but precludes a review of legislative history. *See supra* note 4. A year after his *Wisconsin Central* opinion, Justice Gorsuch cited himself quoting (and overselling) *Perrin* in order to further entrench his narrowed view of the "ordinary meaning" test. *See* New Prime Inc. v. Oliveira, 139 S. Ct. 532, 539 (2019). Perhaps he hoped that, by repeating the point, it will become true. *Accord* Parhat v. Gates, 532 F.3d 834, 848–49 (D.C. Cir. 2008) (Garland, J.) (discussing LEWIS CARROLL, THE HUNTING OF THE SNARK 3 (1876) ("I have said it thrice: What I tell you three times is true.")). Then again, from the bench of the Supreme Court, Justice Gorsuch probably only needs to say it once to make it true.

all," Justice Gorsuch explained, "if judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the 'single, finely wrought and exhaustively considered, procedure' the Constitution commands. We would risk, too, upsetting reliance interests in the settled meaning of a statute."[6] So the high-minded textualist rolls up his sleeves and sets to work.

Perhaps a testament to the gravity of their concerns for consistency and the persuasive simplicity of their approach, the ranks of self-described textualists have swelled in recent years—Justice Kagan even announced that, in a way, "we're all textualists now."[7] But even with expanded membership and intellectual comradery, resolving the "ordinary meaning" question—the textualists' first step in statutory interpretation—can prove frustratingly indeterminate. Where should one look for evidence of the "ordinary"? What should one cite?

A jurist in search of "ordinary meaning" evidence might cite literary luminaries in support of their contentions—blurbs from the English canon rendered into lingual law. He might look to see how Chesterton used a word, or Dylan. But then again, citing the likes of Austen, Dickens,[8] or Shakespeare[9] as a measure of the "ordinary" seems a bit more farce than fact. It is hard to suggest world-renowned authors should be the standard-bearers of the "ordinary" with a straight face.

Dictionaries, then, may seem like the better bet. And why not? Everyone has access to dictionaries; they are the go-to reference for understanding words from elementary school on. If you are looking to settle the process of statutory interpretation in the understandings of the ordinary citizen, you could be forgiven for turning to dictionaries.

But dictionaries, the dastardly things, often have more than one entry for a single word. Like "ordinary," for example. Often it is a rough synonym for "routine" or "usual"[10] (though that usage begs the question:

---

6 *Oliveira*, 139 S. Ct. at 539 (citation omitted). Of course, the notion of a "settled meaning of a statute" that is fixed upon its passage cannot be squared with the rigors of logical analysis. *See, e.g.*, Elias Leake Quinn, *The Problem with Nostalgia (or in Defense of Alternative Facts)*, 66 UCLA L. REV. DISCOURSE 138 (2018).

7 Kavanaugh, *supra* note 2, at 2118 (quoting Justice Elena Kagan, Harvard L. Sch., *The 2015 Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, YOUTUBE (Nov. 17, 2015), at 8:29, https://www.youtube.com/watch?v=dpEtszFT0Tg&feature=emb_imp_woyt [https://perma.cc/2VH9-55FS]).

8 Whitfield v. United States, 574 U.S. 265, 267–68 (2015) (first citing CHARLES DICKENS, DAVID COPPERFIELD 529 (Modern Library ed. 2000); then citing JANE AUSTEN, PRIDE AND PREJUDICE 182 (Greenwich ed. 1982), to establish the meaning of "accompany").

9 Seven-Sky v. Holder, 661 F.3d 1, 38 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (citing WILLIAM SHAKESPEARE, MACBETH act 4, sc. 1, for the proposition that sometimes folks want to make "double sure" they're understood, and might repeat themselves in doing so); *see also* Kavanaugh, *supra* note 2, at 2161–62, 2162 n.214 (doubling down on the point).

10 *Ordinary*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/ordinary [https://perma.cc/245R-TRS8] (definition 1 of entry 1).

"ordinary to whom?"). But other times it is used to describe the scope of some judge's power: "having or constituting immediate or original jurisdiction."[11] How is the curious jurist to decide which entry is to be emblazoned as definitively, legally ordinary?

Perhaps consulting multiple dictionaries will help things.[12] Justice Gorsuch has proven adept at this, stringing as many as six dictionaries together in a single footnote.[13] Alas, even mustering apparent consensus among some dictionary entries can complicate, rather than elucidate, the case for the "ordinary." The Supreme Court's dueling opinions in *Wisconsin Central Ltd. v. United States*[14] illustrate the problem. There, Justice Gorsuch's majority opinion cited three dictionaries at a time in its effort to distill the ordinary meaning of "money renumeration" from a statute's text.[15] When Justice Breyer's dissent matched the majority dictionary-for-dictionary,[16] Justice Gorsuch was forced to acknowledge that the dissent had dictionary support for its preferred statutory construction as well.[17] "But," wrote Justice Gorsuch, the dissent's preferred dictionary entries did not describe "how the term was *ordinarily* used at the time of the [statute's] adoption."[18] Evidence of the ordinary, it seemed, lay outside the dictionary. Just where, though, Justice Gorsuch never told; he offered no citation, reference, or heuristic justifying the majority's decision that its reading was the "ordinary" one.[19] Even with a phalanx of law clerks to pore over all the dictionaries held in the Library of Congress, the contours of the "ordinary" assessment remain elusive.[20]

---

11 *Id.* (definition 3 of entry 1).

12 *See, e.g.*, Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560, 569 (2012) (performing a "survey of relevant dictionaries").

13 *See* New Prime Inc. v. Oliveira, 139 S. Ct. 532, 540 n.1 (2019) (citing six dictionaries); *see also* Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2363 (2019) (citing five dictionaries in a paragraph).

14 Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067 (2018).

15 *Id.* at 2070–71 (stringing together three dictionaries).

16 *Id.* at 2075–77, 2079 (Breyer, J., dissenting).

17 *Id.* at 2072 (majority opinion).

18 *Id.*

19 See also Justice Scalia's attendance to only the "most relevant[]" dictionary entries in *District of Columbia v. Heller*, 554 U.S. 570, 582 (2008), discussed *infra* note 102 and accompanying text.

20 I should mention that, in their book, the late Justice Scalia and Bryan Garner endeavored to put forward some rules for using dictionaries in the textualist's quest for ordinary meaning. ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS app. at 415–24 (2012) (Appendix A: A Note on the Use of Dictionaries). To my eye, though, their one example is more befuddling than "illuminating." *Id.* at 415. Justice Scalia and Mr. Garner consider a jurist charged with determining whether fighting cocks should be considered "poultry" under a tax law. *Id.* at 415–18. According to the authors, if the jurist examined five ready-to-hand dictionaries like *The American College Dictionary* or *The Concise Oxford Dictionary*, he might reason that fighting cocks are indeed poultry. *Id.* at 416 nn.3 & 6. But according to Justice Scalia and Mr. Garner, that jurist would be wrong. *See id.* at 417. The "all-important" element of the

Sifting through the rubble left by *Wisconsin Central*'s warring dictionaries, one thing becomes clear: if mustering literary references in support of the ordinary was "akin to '"looking across a crowded room and picking out your friends,'" selecting among dictionary entries is only marginally better, and remains "fraught with risk of hindsight bias or motivated reasoning."[21]

II. DIGGING UP THE CORPUS

> *Corpus* (noun):
>
> 1: the body of a human or animal especially when dead
>
> 2 a: the main part or body of a bodily structure or organ . . .
>
> b: the main body or corporeal substance of a thing . . .
>
> 3 a: all the writings or works of a particular kind or on a particular subject . . .
>
> b: a collection or body of knowledge or evidence
>
> especially: a collection of recorded utterances used as a basis for the descriptive analysis of a language[22]

Recognizing (some) of the difficulties with dictionary justice, (some) textualists aim to modernize the effort by expanding and computerizing it.[23] Utah Supreme Court Justice Thomas R. Lee and Professor Stephen C. Mouritsen recognize and applaud the broad strokes of the textualists' approach.[24] Like Justice Gorsuch, Justice Lee and Professor Mouritsen see determinacy—the assumption that words, once scrutinized, will concede but one right and proper meaning—as playing an invaluable role in the legal process; "it assures notice to the public,

---

definition for purposes of that inquiry was apparently *only* found in the *unabridged* dictionaries. *Id.* So, suggest the authors, the "ordinary" meaning of the word that would satisfy the textualists' jurisprudence could be found only in the dictionaries not ordinarily available on the "[h]ome, [s]chool, and [o]ffice" desk, *id.* at 416 n.5, but rather in those moldering in a library basement. And when the textualist *does* assemble a collection of the proper, multi-volume, multi-entry, etymology-including dictionaries, he should be sure to attend to those parts of the definitions that the lexicographers uniformly left out when they assembled the pocket dictionaries ordinary people ordinarily use. *Id.* at 417. How such a practice serves to protect the "reliance interests" trumpeted by textualists eludes me.

21 Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 867 n.292 (2018) (citation omitted).

22 *Corpus*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/corpus [https://perma.cc/BJ3V-TPFN].

23 *See, e.g.*, Lee & Mouritsen, *supra* note 21.

24 *Id.* at 794–95.

protects reliance interests, assures consistency of application, and respects the will of the legislative body."[25] But for textualism to make good on its promise, they say, more data must feed inquiry. Dictionaries won't cut it.[26] Instead, they propose "computer-aided means of answering such questions" about "ordinary meanings" should be imported from linguistics departments into courtrooms.[27] Lee and Mouritsen call for judges to employ corpus linguistics,[28] a method of populating a database with texts and transcripts to fuel a statistical approach to understanding the meanings of words. Once hundreds, thousands, or even millions of utterances have been gathered, the curious jurist need only ask the dataset which uses are "ordinary" and accepted. Even armed with such a database, they recognize, there must be some jurisprudential norm of allowing only the most likely uses to be adopted as official interpretations—as opposed to the allowable-but-less-common uses, which would not count in the legally-ordinary sense.[29] But once such a norm was settled, the computer would cull the chaff and select a specific meaning for purposes of statutory interpretation—no subjective, judicial assessments necessary!

Corpus linguistics is the natural evolution of Justice Scalia's obsession with dictionaries—a technocrat's solution to the problem of indeterminacy.[30] But by seeking to pull in hard drives full of language-usage data to fuel its computerized assessments, Lee and Mouritsen's proposal expands, rather than resolves, the problems plaguing the textualists' effort. To wit:

---

25 *Id.* at 793.

26 *Id.* at, *e.g.*, 807, 817.

27 *Id.* at 795.

28 Justice Lee and Professor Mouritsen are far from the only legal scholars endeavoring to bring the insights available through corpus linguistics into legal decision-making. An excellent introduction and overview into this type of work was set forth in Brief for Corpus Linguistics Professors and Experts as Amici Curiae Supporting Respondents at 3–4, N.Y. State Rifle & Pistol Ass'n v. City of New York, 140 S. Ct. 1525 (2020) (No. 18-280). But Lee and Mouritsen's approach is a little more aggressive than that of many others. Many enthusiasts for the work employ corpus linguistics to answer specific usage questions and supply one line of evidence among many. But by tying their forays to the "ordinary-ness" inquiry, Lee and Mouritsen argue the corpus linguistics results should basically supplant—rather than augment—the interpretive effort of a jurist. *Accord supra* note 5. It is this more aggressive application of the empirical linguistic research that poses unique concerns and to which this Essay attends.

29 Lee & Mouritsen, *supra* note 21, at 800, 806.

30 Credit where it's due, Justice Lee and Professor Mouritsen's approach endeavors to make room for context and pragmatics. *Id.* at 815–17. But while it strives to look beyond the formalism of the traditional textualist, it retains the textualists' unshakable belief in the formulaic. *Id.* at 829.

A. *Dataset Bias and Equal Protection*

Though different in scale, populating a dataset poses the same problems as selecting dictionaries or cherry-picking literary references: who makes the selections—and with what criterion? Should natural language collections reach back fifty years? One hundred years? Should it bookend the date of the statute's passage by twenty years?[31] What if the statute was amended, but the language of concern was not touched—does the natural language collection get updated to exclude the old entries and acknowledge the drift of language in the intervening time?

More troubling than these matters of logistics are issues of population: whose English warrants collection? Only the King's? Should entries come from books and newspapers (which are edited)? What about transcripts of television programs? Social media posts?[32] Communities and regional groups develop slang, and word usage is sometimes used by (or against) individuals to proclaim affiliation to one group or another.[33] Individuals straddling social community lines often engage in "codeswitching" behavior, adopting language usage norms prevalent in whatever context they happen to inhabit at the time.[34] So, which codes make the cut for corpus? How can we ensure that decisions to include—

---

31 Justice Lee and Professor Mouritsen recognize this to be an open question, but treat it as a passing and answerable dilemma—and even suggest that it's more a matter for database architects than one for judicial theorists. *See id.* at 839 ("Because the statute at issue in *McBoyle* [*v. United States*, 283 U.S. 25, 25–26 (1931)] was enacted in 1919, and because the [corpus being discussed] only allows us to search in ten-year increments, it may make sense to include data from 1910 through 1930." (footnote omitted)).

32 Again, Justice Lee and Professor Mouritsen acknowledge the issue, but again seem to think it a secondary matter rather than a central concern. *See* Lee & Mouritsen, *supra* note 21, at 834 ("Spoken dialects of American English show sharp (and increasing) differences in vocabulary, grammar, and phonology, but the norms and conventions of the written variety of American English (sometimes called standard written American English) tend to be more uniform. Since we are interpreting a written text, evaluating that text through the lens of standard written American English (from newsprint) may be the right approach." (footnote omitted)).

33 Do you call a soft drink a "pop"? You're probably a Midwesterner. *See* Samuel Arbesman, *The Invisible Borders that Define American Culture*, BLOOMBERG CITYLAB (Apr. 26, 2012, 7:44 AM), https://www.citylab.com/equity/2012/04/invisible-borders-define-american-culture/1839 [https://perma.cc/NVT7-QRPK].

34 *E.g.*, Shana Poplack, *Code Switching: Linguistic*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 2062, 2062–65 (Neil J. Smelser & Paul B. Baltes eds., 2001); Marisol Pérez Casas, Codeswitching and Identity Among Island Puerto Rican Bilinguals (Dec. 9, 2008) (Ph.D. dissertation, Georgetown University), https://repository.library.georgetown.edu/bitstream/handle/10822/553245/perezMarisol.pdf [https://perma.cc/N53J-2BX4]; Gene Demby, *How Code-Switching Explains the World*, NPR (Apr. 8, 2013, 9:14 AM), https://www.npr.org/sections/codeswitch/2013/04/08/176064688/how-code-switching-explains-the-world [https://perma.cc/YX5E-6JLY]; John McWhorter, *It Wasn't 'Verbal Blackface.' AOC Was Code-Switching.*, ATLANTIC (Apr. 9, 2019) https://www.theatlantic.com/ideas/archive/2019/04/alexandria-ocasio-cortez-code-switches-black-english/586723 [https://perma.cc/8SDK-3PAY].

and so legitimize under the law—certain entries and not others are not racially or sexually discriminatory?

Finally, there's the problem that, in practice, words have sexist or racist meanings that are less obvious in a single usage but may become apparent across populations and over time. Take, for example, Amazon's attempt to develop artificial intelligence that would learn from the company's prior hiring experience and select successful candidates from among pools of job applicants.[35] Here was the company's notion: "They literally wanted it to be an engine where I'm going to give you 100 resumes, it will spit out the top five, and we'll hire those."[36] But, having learned from a long history of Amazon's hiring in a male-dominated field, the program's early efforts spat out male-skewed lists of designees.[37] "In effect," one reporter noted, "Amazon's system taught itself that male candidates were preferable."[38] Importantly, programmers attempted to correct for the bias, excluding certain items from the program's consideration.[39] But even after scrubbing the system of its reliance on explicitly gendered items (pronouns, names, all-girl colleges), "the technology favored candidates who described themselves using verbs more commonly found on male engineers' resumes, such as 'executed' and 'captured.'"[40] Historic and institutionalized racism and sexism infect language usage in ways we're still struggling to understand. As such, dehumanizing and decontextualizing language hurts the marginalized first. Those whose humanity is already under attack—those perhaps most in need of empathy—suffer first and most under a regime that strips human concerns from the law and automates justice based on a dead-eyed reading of a corpus that serves to legitimize the status quo.

Bluntly, algorithm bias is a thing.[41] More than that, it can be a deep-rooted or an intractable thing, even for those with the best intentions.[42]

---

35 Jeffrey Dastin, *Amazon Scraps Secret AI Recruiting Tool that Showed Bias Against Women*, REUTERS (Oct. 10, 2018, 7:04 PM), https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G [https://perma.cc/UD8R-Z9XA].

36 *Id.* (quoting a source).

37 *Id.*

38 *Id.*

39 *Id.*

40 *Id.* (quoting a source).

41 Karen Hao, *This Is How AI Bias Really Happens—And Why It's So Hard to Fix*, MIT TECH. REV. (Feb. 4, 2019), https://www.technologyreview.com/s/612876/this-is-how-ai-bias-really-happensand-why-its-so-hard-to-fix [https://perma.cc/K4CY-4FHC]; Deborah Raji, Opinion, *How Our Data Encodes Systemic Racism*, MIT TECH. REV. (Dec. 10, 2020) https://www.technologyreview.com/2020/12/10/1013617/racism-data-science-artificial-intelligence-ai-opinion [https://perma.cc/MU3T-QEZV].

42 *See generally* SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM (2018); VIRGINIA EUBANKS, AUTOMATING INEQUALITY: HOW HIGH-TECH TOOLS PROFILE, POLICE, AND PUNISH THE POOR (2018); Rashida Richardson et al.,

And in the textualists' program, those biases should be of constitutional concern.

B. *Diluting the Case or Controversy Requirement*

The let's-ask-a-database approach to statutory interpretation poses another constitutional problem: the broader you cast your database net, the less tied to a specific "Case" or "Controversy" your language usage examples become.

The Constitution requires a case to have real stakes before a judge has jurisdiction to resolve it. That makes sense for several reasons. Among them: deciding cases without stakes—and instead for the pure academic curiosity of it—is a recipe for unintended consequences in a system where past precedent is supposed to weigh on future proceedings. Moreover, the stakes themselves can provide an important insight into the case and often serve as the launch point for the interpretive endeavor.[43]

The development of the textualists' decision algorithms increasingly drives the interpretive process toward the rendering of outsourced, mechanized, advisory opinions. Judges that would rather type "define: [statutory term]" into Google—an approach Lee and Mouritsen describe as the right instinct but the wrong search bar[44]—divorce the process entirely from context or consequence. The controversy before the court—the lived-in dispute that has disrupted lives and requires adjudication—becomes but an awkward preamble to the judicial pronouncement, which could just as easily be printed out and appended to the back of the latest Federal Reporter without it. The Constitution's case or controversy requirement,[45] no longer an insightful or integral part of the judicial endeavor, is left—at best—a box-checking hurdle, a bureaucratic precondition. Click-wrap for internet justice.

The corpus linguistics proposal does not introduce new problems to the textualists' approach so much as it exaggerates existing ones. Textualists have always been technologists in search of algorithms that would cure judges of any need to render judgment when answering questions of statutory interpretation. To my eye, their proposal seems fraught. By insisting that the question of "ordinary meaning" is a purely

---

Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice, 94 N.Y.U. L. REV. ONLINE 15 (2019).

43 Remember, *Perrin*'s framing of the "ordinary" begins with the arguments presented by the parties and the ways those arguments put guardrails on the inquiry. Perrin v. United States, 444 U.S. 37, 42–43 (1979).

44 Lee & Mouritsen, *supra* note 21, at 795 n.21, 813.

45 U.S. CONST. art. III, § 2, cl. 1.

empirical one (whether it is to be answered by reference to a dictionary or database), textualists overlook the normative requirements of answering such a question.[46] You cannot answer even empirical questions without relying on normative assertions about what kinds of evidence are to be used and how that evidence is to be assessed.[47] Where dictionaries seemed to fall flat, Justice Lee and Professor Mouritsen suggest more data will serve to prop up the effort; they fail to recognize that, in their vision, all the thorny questions of meaning will be answered, not in the results returned by the be database on specific inquiries, but in the database architecture or its user's manual. But Justice Lee and Professor Mouritsen do, I think, put their finger on part of the issue worth thinking about: The problem besetting many approaches to statutory interpretation stems from an inconsistent—or at least ill-defined—theory of meaning.[48]

III. AUSTIN'S GREAT FAILURE

When J.L. Austin took the podium at Harvard for the William James Lectures in 1955, he started simple: sometimes, he observed, we don't just say things with words. Sometimes we do things with our words.[49] For example: "I take you to be my lawful, wedded partner." With such a proclamation, Austin noted, "I am not reporting on a marriage: I am indulging in it."[50] So, too, with "I give and bequeath my watch to my brother," or "I bet you sixpence it will rain tomorrow."[51] These are not statements that can be adjudicated as "true" or "false" in the ways we often think of statements about the world. These "performatives" (as he called them provisionally) were statements that did not "'describe' or 'report' or constate anything at all."[52] Rather, the deployment of such sentences was—at least part of—doing some action.[53]

---

46 Lee & Mouritsen, *supra* note 21, at 798.

47 Lee and Mouritsen intermittently recognize as much. For example, they admit that deciding "whose meaning" counts for the corpus will have an impact on how the corpus is populated and examined. *Id.* at 857–58. But insisting that a word or phrase's ordinary meaning is measurable while leaving such other questions "of legal theory" for another day seems a bit like detailing the sale and distribution of perpetual motion machines while leaving the pesky matter of their invention for others. *Accord id.* at 795, 858.

48 Lee & Mouritsen, *supra* note 21, at 806, 813.

49 J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 6–7 (J.O. Urmson ed., 1962).

50 *Id.* at 5–6.

51 *Id.* at 5.

52 *Id.* at 5–6.

53 *Id.* at 6–7.

This, Austin knew, was not a groundbreaking revelation. The notion that some statements are performative rather than descriptive in nature[54] was, even then, "neither difficult nor contentious."[55] Indeed, as Sigmund Freud had noted in his own lecture series decades earlier:

> The uneducated relatives of our patients—persons who are impressed only by the visible and tangible, preferably by such procedure as one sees in the moving picture theatres—never miss an opportunity of voicing their scepticism as to how one can "do anything for the malady through mere talk." Such thinking, of course, is as shortsighted as it is inconsistent. For these are the very persons who know with such certainty that the patients "merely imagine" their symptoms. Words were originally magic, and the word retains much of its old magical power even to-day. With words one man can make another blessed, or drive him to despair; by words the teacher transfers his knowledge to the pupil; by words the speaker sweeps his audience with him and determines its judgments and decisions. Words call forth effects and are the universal means of influencing human beings.[56]

So, language's performative power was not only well recognized by the time Austin took the stage, it had already taken the turn toward clinical application.[57] But Austin was not setting out to stake academic claim to the distinction between doing things with words and merely describing things. He wanted to figure out why we succeed in doing the things we set out to do with words—and why we sometimes fail. Because, just as not every descriptive statement is accurate, not every performative statement is effective. Were I to say "I take you as my lawful wedded partner" while standing alone in a room and staring at a picture of a loved one, the proclamation will neither be accepted by my friends nor recognized by a judge. Marriage takes more than that. There is something about context and a role for the audience, then, in the recipe for a successful performative.[58] As with the textualists, I imagine Austin rolling up his sleeves: "Let's get ourselves organized, shall we?" And so, he set about trying to figure out how performative utterances worked.

Austin's insight that language is used to do things other than simply describe the world should resonate with legal scholars and practitioners.

---

54 Austin preferred "constative" to "descriptive" for a variety of reasons, *id.* at 3, but I am sticking with "descriptive" here in a (probably doomed) attempt to keep jargon to a minimum.

55 *Id.* at 1.

56 SIGMUND FREUD, INTRODUCTION TO PSYCHOANALYSIS 7–8 (1917) (ebook).

57 Austin worried that some grammarians had not seen through language's descriptive disguise, and that if philosophers of language had, it was incidental. But, interestingly, Austin felt confident that lawyers must know better, lest they "succumb to their own timorous fiction, that a statement of 'the law' is a statement of fact." AUSTIN, *supra* note 49, at 4 n.2.

58 *Id.* at 8 ("Speaking generally, it is always necessary that the *circumstances* in which the words are uttered should be in some way, or ways, *appropriate*, and it is very commonly necessary that either the speaker himself or other persons should *also* perform certain *other* actions . . . .").

After all, what is a legislative statement but the quintessential performative? With its passage into law, statutory provisions aim to define relationships, establish rights, shape obligations, and proscribe conduct. The legislative utterance sets out to do something concrete, to guide social actions and change our assessments of behavior in our midst in this, our nation of laws and consequences. Getting to the bottom of how they work seems like a worthwhile endeavor.

Austin's efforts began as many investigations of that era did: separate, categorize, examine. Cleave the performatives from the descriptives, he thought, then inspect their inner workings.[59] But the project quickly ran into a problem. Even simply stating things—like facts—was also an act of sorts. Copyright law recognizes the value in simply selecting and arranging others' work.[60] Similarly, the mere collection and utterance of facts can be an active, performative event, both value laden and valuable.

After lobbing thought experiment after thought experiment in search of the rules of the performative road, it became increasingly clear to Austin that performative utterances could not be disentangled from descriptive ones. Every effort to divide the performative from the descriptive failed. Even statements of fact (like, say, recitations of legal premises) imply something about the necessity and sufficiency of their contents. And so, Austin realized, when we state something, we are always doing something as well as—and distinct from—just saying something.[61] In any given utterance, we might set the dial more toward the descriptive or more toward the performative, but neither aspect is entirely escapable. Purely performative or strictly descriptive utterances are but theoretical constructs, Austin concluded: "every genuine speech act is both."[62] Indeed, "the traditional 'statement' is an abstraction, an ideal, and so is its traditional truth or falsity."[63]

Faced with the impossibility of parsing the performative from the descriptive, Austin turned to a new project: understanding the performative nature of language in context, and alongside its more descriptive ends. "The total speech act in the total speech situation is the *only actual* phenomenon which, in the last resort, we are engaged in elucidating."[64] And in the decades that followed, the elucidation efforts

---

59 *Id.* at 1–39.

60 Copyright in "compilation"—a term that includes "collective works," 17 U.S.C. § 101 (2018)—is afforded the compiler's original "selection, coordination, and arrangement." Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 356, 358 (1991).

61 AUSTIN, *supra* note 49, at 132–33.

62 *Id.* at 146.

63 *Id.* at 147.

64 *Id.*

continued. Judith Butler,[65] Stuart Hall,[66] and ranks of careful thinkers and wide-eyed researchers have endeavored to elucidate the total speech act. Performativity is now understood to be bound up with politics and power, identity and circumstance. Critical analysis has found its way into many academic disciplines. And the proliferation of this work has revealed that the inhabited world is a contested and negotiated one: its truths are asserted, and they have human purpose.

IV. AUTOMATING JUSTICE

Austin's failure reveals the textualists' difficulty with dictionaries is but a symptom of a deeper ill. Like Austin at the outset of his lectures, textualists perceive a fork in the road when it comes to meaning—one path leads toward performative statements, another toward the descriptive. Where Austin hoped to investigate the performative process, textualists endeavor to constrain interpretation to language's descriptive aspects.

But Austin—with his fifty-year head start—already discovered the division of performance and description is illusory and that efforts to understand one without the other lead only to dead ends.[67] Ultimately, understanding a specific utterance requires taking it as it is presented—in context, written with intent, offered by an authority, and received by an audience.[68] But textualists still insist the words are all we have—and the words are enough.[69] And as such, the textualist endeavor denies much of what goes into making meaning has any relevance or worth in the interpretative process.

Make no mistake: textualists are not alone in their concern for word choice, comma placement, clause construction, or the like. Other jurists have long attended to the gritty reality of the printed page.[70] They just

---

65 *E.g.*, Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 THEATRE J. 519 (1988).

66 *E.g.*, Stuart Hall, *Encoding/Decoding*, *in* CULTURE, MEDIA, LANGUAGE 128–38 (Stuart Hall et al. eds., 1980).

67 *Id*.

68 Put another way: "The crucial question for legal interpreters isn't 'what do these words mean,' but something broader: What law did this instrument make? How does it fit into the rest of the *corpus juris*? What do 'the legal sources and authorities, taken all together, *establish*'?" William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079, 1083 (2017) (quoting 4 JOHN FINNIS, *Introduction* to PHILOSOPHY OF LAW: COLLECTED ESSAYS 1, 18 (2011)).

69 *Supra* Part I.

70 *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 155–56 (1803) (examining the text of various statutory provisions and constitutional phrases).

attend to other things, too.[71] What makes a textualist a textualist is the degree to which he refuses to consider anything else. It is a club based on exclusion.[72]

But in turning a blind eye on so many modes of communication—in denigrating the value of understanding the "total speech act in the total speech situation"[73]—the textualist leaves his process feeling oddly divorced of human concern, a tickertape receipt pushed out of an automated justice machine.

A for instance: In *Whitfield v. United States*,[74] the Supreme Court considered the imposition of a sentence pursuant to 18 U.S.C. § 2113(e), which provides:

> Whoever, in committing [a bank robbery], or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or if death results shall be punished by death or life imprisonment.[75]

Writing for the Court, Justice Scalia recognized "Congress enacted the forced-accompaniment provision in 1934 after 'an outbreak of bank robberies committed by John Dillinger and others.'"[76] Indeed, he conceded, "[t]he Congress that wrote this provision may well have had most prominently in mind John Dillinger's driving off with hostages."[77]

Meanwhile, the circumstances presented in Whitfield's case bore little resemblance to Dillinger's tag-along hostages: "fleeing police after a botched bank robbery, [Whitfield] entered the home of 79-year-old Mary Parnell through an unlocked door. Once inside, he encountered a

---

71 *E.g.*, *id.* at 156 (examining structure: "The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the [C]onstitution."); *id.* (employing *reductio ad absurdum* and examinations of hypothetical consequences to illustrate the infirmity of certain propositions); *id.* at 161 (considering the parties' practice: "That this is the understanding of the government, is apparent from the whole tenor of its conduct."); *id.* at 174 (considering what the words *don't* say: "Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.").

72 SCALIA & GARNER, *supra* note 20, at 16 ("The exclusive reliance on text when interpreting text is known as *textualism*.").

73 AUSTIN, *supra* note 49, at 147.

74 Whitfield v. United States, 574 U.S. 265 (2015).

75 18 U.S.C. § 2113(e) (2018).

76 *Whitfield*, 574 U.S. at 267 (quoting Carter v. United States, 530 U.S. 255, 280 (2000) (Ginsburg, J., dissenting)).

77 *Id.* at 269.

terrified Parnell and guided her from the hallway to a computer room," less than ten feet away.[78] "There, Parnell suffered a fatal heart attack."[79]

To assess whether the conditions of the statute were met in Whitfield's case, Justice Scalia looked to Congress's use of "accompany" as dispositive of the matter.[80] Congress may have been worried about things like driving off while making the bank tellers stand on the running boards of the getaway car, but Justice Scalia never allowed for the possibility that the legislature could have leveraged old words to criminalize then new conduct. Instead, Justice Scalia insisted (after examining snippets from *David Copperfield* and *Pride and Prejudice* and an entry in the 1933 *O.E.D.*) that "accompany," as found in the statute, does not—indeed cannot—impose any requirement that the victim was forced to accompany the bank robber over a substantial distance.[81] Forcing someone from the hallway to an adjacent room suffices.

Justice Scalia's *Whitfield* opinion did nod toward social and contextual concerns at one point:

> [I]t does not seem to us that the danger of a forced accompaniment varies with the distance traversed. Consider, for example, a hostage-taker's movement of one of his victims a short distance to a window, where she would be exposed to police fire; or his use of the victim as a human shield as he approaches the door.[82]

Had it been given top billing—or even been allowed to play a supporting role—this line of argument would have carried the day for the Government, too. The penalties leveled by the statute, Justice Scalia seemed to say, were fair and justified and within the scope of Congress's proclamation.[83] But, the Justice was quick to add, none of that fluff really mattered: "[E]ven if we thought otherwise, we would have no authority to add a limitation the statute plainly does not contain."[84] Social assessments like whether the punishment fit the crime was wasted space. At the end of the day, the one thing—the only thing—that mattered was that it "simply [was] not in accord with English usage to give 'accompany' a meaning that covers only large distances."[85]

More striking in Justice Scalia's opinion than anything he quoted from any dictionary is his insistence that nothing else was relevant to the determination.[86] Not the word's use in the sentence (which sandwiches

---

78 *Id.* at 266.

79 *Id.*

80 *Id.* at 269.

81 *Id.* at 267–69.

82 *Id.* at 268–69.

83 *Id.*

84 *Id.* at 269.

85 *Id.*

86 *Id.*

forced accompaniment between mentions of killing someone or causing their death).[87] Not the statute's history or context (which Justice Scalia conceded was likely a reaction to circumstances very different from those presented in the case).[88] Nothing.

This leaves Justice Scalia's opinion feeling less like a targeted ruling and more like a dodge. It's like bickering over whether aerosolized, irritant mist lobbed at peaceful protestors can really be called "tear gas"[89]—somehow, the process of answering the question sidesteps the point of the question entirely.[90]

"Accompany," said Congress.

"*O.E.D.*, Q.E.D.," said Justice Scalia, upholding a life sentence.

V. MAGIC WORDS

When Justice Scalia wrote "[t]extualism, in its purest form, begins and ends with what the texts says and fairly implies,"[91] he was fairly implying that the words on the page were enough to resolve any disputes about meaning. He shunned the "total speech situation" and insisted that the text was enough.

And he was wrong.

To be fair, "[o]ne of the hardest notions for a human being to shake is that a language is something that *is*, when it is actually something always *becoming*[,] . . . [that] a word is a thing, when it's actually something going on."[92] But Justice Scalia's "pure" textualism misses the

---

87 18 U.S.C. § 2113(e) (2018).

88 *Whitfield*, 574 U.S. at 269.

89 Philip Bump, *Attorney General Barr's Dishonest Defense of the Clearing of Lafayette Square*, WASH. POST (June 8, 2020, 7:12 AM), https://www.washingtonpost.com/politics/2020/06/08/attorney-general-barrs-dishonest-defense-clearing-lafayette-square [https://perma.cc/TS7W-T5P5].

90 Or as Hobbes once quipped to Calvin: "Maybe we can eventually make language a complete impediment to understanding." BILL WATTERSON, HOMICIDAL PSYCHO JUNGLE CAT 53 (1994).

91 SCALIA & GARNER, *supra* note 20, at 16.

92 JOHN MCWHORTER, WORDS ON THE MOVE: WHY ENGLISH WON'T—AND CAN'T—SIT STILL (LIKE, LITERALLY) 3 (2016). The "becoming" of words is not confined to glacial progression and can often be found in a rapid-prototyping stage of our national dialogue. Take, for example, "fake." Since 2016 or so, some have used "fake" to mean something not yet contained in any dictionary. As marshalled in the now-commonplace allegations of "fake news," "fake" means something like 'a statement injurious to a person's reputation made by a source allegedly aligned against that person's interests, the substance of which should be (according to the claimant) regarded with suspicion.' It is an allegation of untruth combined with an implication of improper motive; it is a proclamation—generally leveled without a proffer of evidence—that a report was manufactured or altered for its injurious effect. In other words, "fake" has been broadly used (or quoted) to mean something akin to *libelous* or *slanderous*—though without the legal baggage that goes along with those words. "Fake" has become a crime with neither clear elements to assess nor

wealth and humanity of language. By overlooking its performative aspects and focusing exclusively on a word's descriptive content, textualists give short shrift to the legislation they claim to interpret. On the textualists' theory, legislatures may face novel situations, but the words those legislatures use are set in stone, inflexible, and incapable of doing something new to address any novelty. This view of the legislature's power is woefully incomplete. The performance of language is an inextricable part of its use. Or, to put a Freudian spin on it, Austin showed us there's always a bit of magic in language. There are descriptive aspects, sure, but a tinge of the performative is everywhere.

But Justice Scalia wasn't just wrong.

Jurists are not only VIP audience members to the speech performances of legislatures; they are performers themselves. Judges' decisions select and decree relevant evidence, settle and declare party obligations—and all manner of consequences flow from a judge's words.[93] Like a legislature's laws, judges' decisions endeavor to do things as much as they say things. Judges may cast about to blame others for their decisions—dictionaries, Dickens—but judgement is, inescapably, part of the job. Austin's failure revealed that "Because I said so" is part of every judge's toolkit. In fact, it is indelibly part of every judicial decision.

"The motion is GRANTED." "The decision is REVERSED."

Voilà.

Magic.

Recognizing the magic within language generally—and within judicial opinions in particular—helps bring a few things into focus regarding the jurist's effort. Successful performatives have preconditions. As Justice Marshall intoned in *Marbury v. Madison*, "in all cases of letters patent, certain solemnities are required by law, which solemnities are the evidences of the validity of the instrument."[94] And all magic—whether street-corner, curtained, or celestially confounding—generally requires: (1) the right words; (2) said by the right person; and (3) in the right way

---

a courthouse for its adjudication—and so an allegation that can never be disproved. Instead, it is a labeling exercise that encourages a "for-or-against" assessment of the person claiming "fake"-ness rather than a "true-or-false" assessment of the report's contents. Of course, this new usage distresses those that would confine the "fake" to mean something more like "demonstrably incorrect," which is accompanied by an implied invitation to detail the techniques and evidence that would go into such a demonstration. The fight over "fake" highlights the word is a public arena as much as it is an adjective, and it's right-and-proper application in a specific instance cannot be determined with a simple reference to contemporary dictionaries, which—with their narrow, hindsight focus—are entirely ignorant of "fake's" modern usage or the layered and political realities that now attend it.

93 *See, e.g.*, Carlos L. Bernal, *A Speech Act Analysis of Judicial Decisions*, 1 EUROPEAN J. LEGAL STUD. 391, 398 (2007) ("In uttering [a legal] premise . . . the judge is not merely reporting that the rule . . . is a legal rule. He is also stating that this rule is a correct legal interpretation of a sentence or a set of sentences belonging to the sources of law.").

94 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 159–60 (1803).

or to a receptive audience.[95] So, we can assess the performative character of judicial textualism element by element.

A. *The Right Words*

For judicial opinions, "It is so ORDERED" is all that it takes. The decision is final. The word is law. Of course, even then, the words of the order require a recognition of context and circumstance—applicable rules of appellate procedure being foremost among them. But when it comes to the doing of law, there are no words more powerful.

B. *The Right Person*

For a judicial proclamation, "the right person" would seem to be a judge. True enough: you can't give a judicial order without being a judge.

But not all judges wield the same power. Whether it's (Posner, J.) writing a dissent for the casebooks or (Sotomayor, J.) writing from the Second Circuit prior to her elevation to the Supreme Court, lawyers have long used trailing parentheticals to citations in tacit recognition that personality can serve as a kind of precedent. Some judge's words are worth more than others'.

More importantly, the office of "judge" doesn't maintain the same degree of respect and credibility through time. The institution's power has its own ebbs and flows. Here, the financial crisis of the late aughts offers a fable of sorts. In the lead-up to the Great Recession, mortgage-backed securities played the role of a hijacked mint, printing money that looked and smelled and bought things just like real money—until the diluted economy caught on and trust in the proclaimed (and performed) value of things plummeted.[96] It took the better part of a decade for the economy to recover, to rebuild the base of trust and value once shared.[97]

Like the Economy, the Rule of Law is a story told by millions of narrators, this time by abiding laws and consenting to judgments rather than accepting payments or signing loans. And, like the Economy, the Rule of Law may be similarly vulnerable to crises of confidence. Any political assembly line that confirms judges in an effort to print its own

---

95 Consider, *e.g.*, AUSTIN, *supra* note 58.

96 THE FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT 102–26 (2011), http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf [https://perma.cc/B3QJ-E8DM].

97 *See*, *e.g.*, *S&P 500 Index—90 Year Historical Chart*, MACROTRENDS, https://www.macrotrends.net/2324/sp-500-historical-chart [https://perma.cc/DG2R-EKX8]; *Dow Jones—DJIA—100 Year Historical Chart*, MACROTRENDS, https://www.macrotrends.net/1319/dow-jones-100-year-historical-chart [https://perma.cc/3ZTY-HLKR].

credibility—that confirms judges over the objection of professional groups that insist the nominee is unqualified, or over the objection of home-state senators, or without any public hearing or examination at all—threatens to dilute the very currency it covets. To be sure, such a process is not the fault of any single judge that is honored with a nomination—that would be like blaming the house for the faulty line of credit that paid for it. But an overly-politicized confirmation process leans into the notion that there are some judges for some people and other judges for other people—a notion at odds with any one judge's job description to render equal justice to all. Unchecked, that impression may prove corrosive to the "purchasing power" of judicial decisions. It erodes judges' performative powers by casting jurists as political operatives. The unspoken "because I said so" of every judicial opinion becomes increasingly divisive, and the decisions themselves become less and less certain or secure.

For an enduring judicial proclamation, the right person, then, is a trusted one. And for jurists these days, trust isn't a given.

C. *The Right Way*

The signature, and signature block. The case caption, the clerk's seal. The trappings—the solemnities—that attend a successful judicial performance are more than mere formalities. They evince and even validate the performance. And there is no more important solemnity of a judicial decision than the opinion that serves like a pages-long preamble to the "ORDER." The reasons stated and arguments rendered provide its persuasive power, instill it with the (variable) momentum of precedent.

A jurist that thought himself the right person in command of the right words might be tempted to merely assert his conclusion and call it a day. But decrees without reasons or any semblance of transparency are a breach of the public trust. Without them, how can we differentiate between the dictates of dogma and the considered judgment of a careful jurist? What's more, such reliance on the performative can run amok. If (say, in some halls or on some channels) the recitation of facts is more about willing things into existence than about describing things that exist, then the 'truth' of a fact has more to do with who said it than it does with what was said. The source of a claim becomes more important than any method might be employed to help individuals verify the claim or arrive at the same conclusion. And so epistemic bubbles form in which communities express, exchange, and rely on blinkered worldviews that favor certain kinds of assertions from certain kinds of people. Those epistemic bubbles harden into echo chambers which actively exclude

contrary content or dissenting voices.[98] And the lived-in world of asserted truths fractures.

So yes, there is a real danger in leaning too hard on the performative.

But in all things: balance.[99]

It is one thing for a decision's reasoning to prioritize the entries of unabridged dictionaries in an effort to emphasize the descriptive content of a statute's word choices—indeed, it would be odd not to hold such evidence in some esteem. It is still another thing, though, to insist that such entries are the end of the matter. The earnest textualist takes pains to avoid the appearance of any performance, insisting the decision was dictated by the dictionary (or some undefined-but-definitive community usage). But, like a driver that overcorrects to avoid one ditch only to land across the road in another, these efforts are often difficult to distinguish from those of the ideologue.

Take, for example, Justice Scalia's majority opinion for the Supreme Court's decision in *District of Columbia v. Heller*.[100] There, Justice Scalia considered the right secured by the Second Amendment to "keep and bear Arms."[101] Zooming in on a single word, Justice Scalia informed us that pertinent dictionaries defined "'keep' as, most relevantly, '[t]o retain; not to lose," and other phrases meaning, roughly, "possess[]."[102] But that "most relevantly" is doing a lot of work for the argument there. "Keep" can also mean—and has long meant—"to take notice of by appropriate conduct; [fulfill]" (hence, keep the faith or keep time); or "preserve" or "maintain" (hence, keep us safe, or keep records), often in reference to a specific object or purpose (*e.g.*, keep a promise).[103] Of course, these other meanings (never mentioned in the majority opinion) rely on context

---

98 *See generally* C. Thi Nguyen, *Echo Chambers and Epistemic Bubbles*, 17 EPISTEME 141 (2020).

99 One of the more poignant fables on this point is Crockett Johnson's *Magic Beach*. CROCKETT JOHNSON, MAGIC BEACH (2005). A meditation on language from the writer best known for *Harold and the Purple Crayon*, it provides urgent linguistic philosophy as much as an enchanting children's tale. In it, Ben and Ann stroll along the titular seashore. *See generally id.* Ben voices his boredom with the textualist's knack for reductivism: "'Nothing really happens in . . . stor[ies]' . . . . ''Stories are just words. And words are just letters. And letters are just different kinds of marks.'" *Id.* at 3. The two children meander down the beach, spelling words in the sand as they go. *See, e.g.*, *id.* at 5. The waves wash over the letters—but as the water recedes, it leaves behind whatever the words described: snacks, trees, a fisher king and his distant kingdom, spires sparkling in the sun. *See, e.g.*, *id.* at 5–6. As readers, we know Ben's complaint about stories woefully underestimates language: language is more than the sum of its parts. Words can cast a spell. But when at last the tide comes for the kingdom on the beach and chases the children up the dunes, we are reminded that even magic words have their limitations.

100 District of Columbia v. Heller, 554 U.S. 570 (2008).

101 *Id.* at 576.

102 *Id.* at 582 (first alteration in original).

103 *Keep*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/keep [https://perma.cc/GLY2-VTHR] (noting that the first known use of the word is along these lines).

beyond the word to relay just what is being kept and how—and to what end. For anyone bothering to look around for such context, these other uses of "keep" sit well with the phrase "to keep and bear Arms" as a whole, and have the added bonus of aligning with uses of "keep" in militia requirements of the time.[104] But for his part, Justice Scalia did not explain just why the definitions he selected for "keep" were "most relevant" for consideration in construing the Second Amendment's "natural reading."[105] It's a bit further into the weeds, but Justice's Scalia's "most relevant" assertion is just as blunt as the ideologue's unsupported "because I said so." Like it or not, "strictly adhering to the text" still involves judicial assertions, and the Justice's failure to acknowledge as much can leave his cunning passages feeling more than a little conniving to anyone trying to follow along in the pages of dictionary.

Taken as a total speech act in context, pure textualism corrodes the very authority it seeks to wield—if the dictionary dictates the outcome of a sticky statutory conundrum, why should we give special weight to the (often flawed and incomplete) readings of dictionaries trotted out by jurists? The unspoken assertion that jurists have better access to the truths enshrined in dictionaries colors the order as an effort of vanity and ego rather than one of careful consideration.

And it belittles the judgement. By pretending judicial interpretation can be reduced to the blunt application of a cereal box decoder ring, the pure textualist proclaims either:

> I believe judges shouldn't be trusted with this question, so I've employed an interpretive tool to ensure that the text determines everything and I add nothing;

or

> I'm not going to disclose the real reasons for my decision, and will instead present the fig leaf of determinism and proclaim my decision was a foregone conclusion.

You can choose your own adventure, but the conclusion is always the same: don't trust judicial decisions. The judge's authority—and ability—to perform deeds with words should be all but self-evident. Textualists deny that authority. Ideologues abuse it. Both courses are corrosive to trust in the judiciary, and so erode the rule of law. The one is the farmer that abandons his crop, the other a mono-culturing obsessive. Neither approach yields sustainable, healthy results.

---

104 *Heller*, 554 U.S. at 650 n.12 (Stevens, J., dissenting) (recounting such context-specific and era-appropriate uses of "keep").

105 *Id.* at 582.

CONCLUSION

As a theory of meaning, textualism oversimplifies language and misses its performance. Textualists insist there is one and only one true meaning, and that meaning can be deduced from the words on the page. But that is a hollow premise, and it deflates when you poke at it with logic or linguistics, evidence or empathy. Meaning is quintessentially viral, a communicated thing that exists between and among people. It does not linger long on the surface of the page; it requires communities to propagate and survive—and evolve.

Considered as performance, pure textualism is thin gruel, undermining the trust in the judiciary required to implement and sustain its assertions. Every time textualists insist the answers to questions of statutory interpretation are encoded in the dictionary or captured in a database, they invite disruption from Silicon Valley—"If we just bypass the pesky human element, we can provide double the judicial efficiency at half the cost." And every time judicial opinions devolve into warring dictionary entries, our jurisprudence reflects all the intellectual complexity of the "nuh-*uhs*" and "yuh-*huhs*" of school-yard arguments. Caselaw becomes a team sport, and the rule of law suffers.

So where does all this leave us in the search for better guidelines on statutory interpretation? How should a judge render judgment on ambiguity? Locating judicial authority within the law is a good start.[106] But maybe, as with so many things, the best advice is simple (if not easy): check the ego and approach questions with humility, curiosity, and caution. Consider the human case and controversy before the court, as the Constitution requires. Try to steer clear of Cartesian doubt and Machiavellian menace. Strive for wisdom over wit. And rather than aim to prove judgment is unnecessary, endeavor to render judgments that cultivate trust in the process, trust that will allow judicial resolutions to resonate and endure.

Does that leave a lot of room for interpretation in practice?

It sure does.

---

106 *Accord* Baude & Sachs, *supra* note 68.