

Chief Justice Webster

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|------|---|-----|
| I. | INTRODUCTION..... | 299 |
| II. | THE DICTIONARY TURN IN SUPREME COURT JURISPRUDENCE | 301 |
| III. | PATENT LAW’S DICTIONARY DEBACLE AND ITS LESSONS FOR STATUTORY INTERPRETATION | 308 |
| A. | TEXAS DIGITAL AND THE DICTIONARY REVOLUTION IN PATENT LAW..... | 309 |
| B. | THE LESSONS OF TEXAS DIGITAL..... | 316 |
| IV. | CONCLUSION | 323 |

I. INTRODUCTION

The Supreme Court has a love affair with the dictionary. Half of its decisions in the 2018 Term cited a dictionary, often as the primary or exclusive means of defining a statutory term.¹ The Court regularly upends decades of precedent and ignores congressional intent (and sometimes common sense) in favor of a chosen dictionary definition.² The Solicitor General may long have been the “tenth Justice,”³ but in the twenty-first century the Chief Justice of the Supreme Court may as well be, not John Roberts, but Noah Webster.

The Court’s obsession with dictionaries as the arbiter of statutory meaning is a recent phenomenon. A review of cases from 50 or 100 years ago

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1. Bruce Wessel & Brian Weissenberg, *The Role of Dictionaries in Last Term’s High Court Decisions*, LAW360 (July 12, 2019, 2:32 PM), <https://www.law360.com/articles/1177874/the-role-of-dictionaries-in-last-term-s-high-court-decisions> [<https://perma.cc/U3GM-MX4G>].

2. See *infra* Part II.

3. LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 5 (1987).

reveals no such focus.⁴ It's not that dictionaries didn't exist then; they did.⁵ It's not that the Court never turned to them. But it did so rarely, and then only as a last resort after turning to more traditional sources to ascertain the meaning of a term.⁶

The Court's increased use of dictionaries may stem from the idea—very much in vogue today in some quarters—that courts are not to make law but simply “call balls and strikes,” as one overused metaphor has it.⁷ Looking up a term in the dictionary can seem like the height of judicial restraint. A court that does so isn't consciously or subconsciously imposing its own ideology on a statute; it's just turning to a trusted neutral source.

But that impression is misleading. Dictionaries are not the neutral, commonly-accepted panacea the Court seems to suppose. In this Essay, I discuss a historical test case for the use of dictionaries to interpret legal documents. In the early 2000s, patent law flirted with the use of dictionaries to define the terms of patent claims, a process akin to statutory interpretation.⁸ The Federal Circuit (the national patent court) abandoned that experiment after only three years, for a simple reason: It was a disaster.⁹

The lessons of patent law's brief flirtation with dictionary primacy in claim construction suggest that it's a bad idea to turn to dictionaries to interpret statutes. That's true for several reasons. Dictionaries aren't designed to give what courts want: a single definitive meaning that defines what the law is. Dictionaries deliberately define terms expansively and in self-contradictory ways, seeking to capture *all* possible meanings of a term, not to pick among them. They don't take legal nuance into account, and they can't incorporate a background pattern of behavior or centuries of precedent against which Congress may have adopted a term. The use of legislative history is often attacked as a cover for judicial activism,¹⁰ but in fact it is the dictionary that

4. See *infra* Part II.

5. Noah Webster published *An American Dictionary of the English Language* in 1828, and it has been in a consistent cycle of revision and publication ever since. *Happy Birthday, Webster's 1828!*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/noah-webster-dictionary> [<https://perma.cc/58UW-MWF5>]; *About Us: Merriam-Webster FAQ*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/about-us/faq> [<https://perma.cc/QQH6-GWX4>]. Meanwhile, the *Oxford English Dictionary* has been in publication since 1884. *OED Editions*, OXFORD ENG. DICTIONARY, <https://public.oed.com/history/oed-editions> [<https://perma.cc/KTW5-TSAZ>].

6. See *infra* Figure 1 (noting occasional early use of dictionaries).

7. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., nominee to be Chief Justice of the United States). See generally Charles Fried, *Balls and Strikes*, 61 EMORY L.J. 641 (2012) (reflecting on Chief Justice Roberts's use of the metaphor).

8. See *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 338–40 (2015) (Thomas, J., dissenting) (analogizing patent claim construction to statutory interpretation).

9. See *infra* Part III.

10. See Elizabeth A. Liess, *Censoring Legislative History: Justice Scalia on the Use of Legislative History in Statutory Interpretation*, 72 NEB. L. REV. 568, 584–85 (1993) (discussing Justice Scalia's objections to legislative history and their motivations).

provides the easiest cover for activist decisions that depart from congressional intent and precedent. Dictionaries can literally justify any plausible meaning of a term. Courts that turn to them are doing exactly what they purport to disdain: picking the meaning of a statute based on their own personal preferences. The patent law experiment offers a case study of these problems in practice.

In Part II, I discuss the rise of the dictionary in Supreme Court jurisprudence and what might be behind it. In Part III, I discuss patent law's experiment with deferring to dictionaries and the lessons it offers for the Court's turn down the same road.

II. THE DICTIONARY TURN IN SUPREME COURT JURISPRUDENCE

The Supreme Court is the final arbiter of what the law is.¹¹ At the founding of the Republic, that meant primarily explicating the legal doctrine set out in cases. While there was in theory no separate federal common law,¹² federal courts commonly resolved disputes in the way that any common law court would: by looking to prior precedent, the equities of the case, and common sense. As law has become increasingly federal and increasingly statute-based,¹³ the role of the Supreme Court has increasingly become the final interpreter, not of case law, but of statutes.

Much has been written on how to construe statutes; indeed, law schools devote entire courses to the subject.¹⁴ But the nominal purpose of statutory construction is the same: to discern what the statute Congress enacted means

11. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

12. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

13. Congress enacts hundreds of new laws each year. *Statistics and Historical Comparison*, GOVTRACK, <https://www.govtrack.us/congress/bills/statistics> [<https://perma.cc/4TQJ-RY5D>]. Accordingly, the U.S. Code grew significantly over the past century. The original 1925 version of the U.S. Code was published in one thick volume. *Collection: U.S. Code*, LIBR. CONG., <https://www.loc.gov/collections/united-states-code> [<https://perma.cc/J8BG-TQDH>]. The 2012 version was published in 41 thick volumes. *United States Code 2012*, U.S. GOV'T BOOKSTORE, <https://bookstore.gpo.gov/catalog/united-states-code-2012> [<https://perma.cc/6HJ7-AVL2>]. Of course, this set is not truly complete without the Code of Federal Regulations, which is published annually in approximately 200 volumes. *Code of Federal Regulations (CFRs) in Print*, U.S. GOV'T BOOKSTORE, <https://bookstore.gpo.gov/catalog/code-federal-regulations-cfrs-print> [<https://perma.cc/QAA9-5X6E>].

14. See generally WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON STATUTORY INTERPRETATION* (2012) (introducing law students to statutory interpretation doctrines and caselaw); Abbe R. Gluck & Richard A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298 (2018) (describing the statutory interpretation approaches of various federal judges); Adrian Vermeule, *The Cycles of Statutory Interpretation*, 68 U. CHI. L. REV. 149 (2001) (arguing that the rules of statutory interpretation are constantly morphed and reordered); William S. Blatt, *The History of Statutory Interpretation: A Study in Form and Substance*, 6 CARDOZO L. REV. 799 (1985) (detailing the American court system's history of statutory interpretation).

and try to give effect to that meaning.¹⁵ That doesn't mean courts or commentators agree on how best to do that. Interpretive methodologies differ, and over the last decades have become increasingly bound up with ideology.

For some, the logical way to figure out what a statute means is to figure out what Congress thought it was doing. These jurists turn to legislative history, which can explain why Congress chose a particular term or give examples that help illumine the intended reach of the statute.¹⁶ But legislative history can also mislead. Congress rarely speaks with one voice, and official legislative history in committee reports may sometimes reflect the intent of the drafters or of the committee chairs but not the intent of other legislators.¹⁷ Other forms of legislative history, like the floor statements of individual representatives, are even less likely to reflect the views of the body as a whole.¹⁸ In part for these reasons, the use of legislative history is in disfavor in many circles, particularly among conservatives.¹⁹

But if we are not to discern congressional intent from congressional statements, how are we to interpret statutes? The law has a variety of canons of statutory construction to help guide that endeavor, but each can lead or mislead in a particular case. One rule of construction, for instance, holds that we shouldn't construe statutes in a way that makes them redundant or

15. See, e.g., *King v. Burwell*, 576 U.S. 473, 498 (2015) (interpreting provisions of the Affordable Care Act “in a way that is consistent” with Congress’s plan to “improve health insurance markets, not to destroy them”). Textualists and purposivists take different approaches to this basic inquiry, with purposivists trying to determine what the statute was intended to do and textualists more focused on what the words say, regardless of whether they effectuate that purpose.

16. See *Samantar v. Yousuf*, 560 U.S. 305, 316 n.9 (2010) (“[C]ommon sense suggests that inquiry benefits from reviewing additional information rather than ignoring it . . . Legislative history materials are not generally so misleading that jurists should never employ them in a good-faith effort to discern legislative intent.”); *Hertz Corp. v. Friend*, 559 U.S. 77, 95 (2010) (using 28 U.S.C. § 1332(c)(1)’s legislative history to help interpret “principal place of business”); *Bob Jones Univ. v. United States*, 461 U.S. 574, 589–92 (1983) (referencing the Income Tax Act of 1894’s legislative history to help conclude organizations “must demonstrably serve and be in harmony with the public interest” to qualify for tax exemption under 26 U.S.C. § 501(c)(3)).

17. See, e.g., *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 73 (2004) (Scalia, J., dissenting) (“[L]egislative history . . . lends itself to a kind of ventriloquism. The Congressional Record or committee reports are used to make words appear to come from Congress’s mouth which were spoken or written by others . . .”).

18. See Mark A. Lemley, *Does “Public Use” Mean the Same Thing It Did Last Year?*, 93 TEX. L. REV. 1119, 1129–30 (2015) (critiquing statements about the intent of a bill made by three senators the day after the bill passed and which were inconsistent with the text and the development of the bill).

19. *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, LPA*, 559 U.S. 573, 611 (2010) (Scalia, J., concurring) (“It is almost invariably the case that our opinions benefit not at all from the make-weight use of legislative history.”); *Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (Justice Kennedy wrote, “[i]f Congress enacted into law something different from what it intended, then it should amend the statute to conform it to its intent”).

superfluous.²⁰ But sometimes redundancy is intended and pretending a statute isn't superfluous leads to bad results.²¹ Another rule of construction—the Latin maxim *expressio unius est exclusio alterius*—teaches that writing a rule in one place but not elsewhere reflects an intent that the rule not apply where it was not written.²² But that too can mislead. As evidenced in a case before the Court during the 2019 Term, several circuits have abandoned a hundreds-of-years-old rule of equity that requires trademark owners to prove willful infringement in order to disgorge a defendant's profits.²³ They abandoned the rule because Congress, in enacting a different law relating to trademarks, made express for a new law what had always been true in equity for the old law—that disgorgement requires willful infringement.²⁴ It makes little sense to assume that by requiring something in a new statute, Congress intended to remove the same requirement from all other statutes. But that is where the *expressio unius* canon has led some circuits.

In any event, even when they work, canons of statutory construction don't solve all our problems. They apply to specific situations, but they don't offer a general methodology for resolving disputes about the meaning of statutory terms. Those who reject legislative history frequently gravitate to an alternative methodology: plain meaning. The idea here is seductively simple: Don't try to figure out what Congress meant, just read the statute and do what

20. See, e.g., *Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 472 (1997) (“[L]egislative enactments should not be construed to render their provisions mere surplusage.”).

21. See Mark A. Lemley, *The Limits of Claim Differentiation*, 22 BERKELEY TECH. L.J. 1389, 1393 n.18 (2007) (“I am skeptical that Congress never passes redundant legislation. Legislators may well have incentives to pass redundant statutes in order to score points with voters or to embarrass adversaries. The statutory interpretation canon may have more to do with discouraging duplicative legislation than with accurately understanding what the legislature has done.”).

California has explicitly rejected the superfluity rule of construction, writing into its statute that “[s]uperfluity does not vitiate.” CAL. CIV. CODE § 3537 (West 2020). Indeed, there is another, opposing canon of construction: *ex abundanti cautela* (“out of abundant caution”), which recognizes that sometimes a legislature says something multiple times because they really, really want to say it. *Ex abundanti cautela*, BLACK’S LAW DICTIONARY (11th ed. 2019). Certainly, the fact that the Republican House voted 35 times to repeal the Affordable Care Act suggests that something other than legislative efficiency was driving the effort.

22. See *Expressio unius est exclusio alterius*, BLACK’S LAW DICTIONARY (11th ed. 2019).

23. *Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492, 1494–97 (2020).

24. See 15 U.S.C. § 1117(a) (2018). Compare *Romag Fasteners, Inc. v. Fossil, Inc.*, 817 F.3d 782, 787–91 (Fed. Cir. 2016) (discussing history of profits disgorgement for trademark infringement and holding willfulness is still required after Trademark Amendments Act of 1999), *vacated*, 140 S. Ct. 1492 (2020), with *Banjo Buddies, Inc. v. Renosky*, 399 F.3d 168, 175 (3d Cir. 2005) (holding willful infringement is not necessary for profit disgorgement after the 1999 amendment). The problem is actually worse than that—there was a way to read the statute that didn't create any such conflict. But even if it did, it is clear that Congress didn't intend to throw out more than a century of precedent in a different legal doctrine merely because it juxtaposed the word “willful” in the same statutory section.

it says.²⁵ This plain meaning approach also purports to promote judicial restraint. While a Justice who is trying to make sense of congressional conduct may end up importing her own preferences into the law, the theory goes, a plain meaning approach is neutral. The Court doesn't imbue a statute with its own ideological preferences; it simply "call[s] balls and strikes."²⁶

But how are we to decide what the "plain meaning" of a term is? After all, statutory construction disputes rarely come before the Court unless there is more than one plausible meaning, and indeed generally not unless appellate courts have disagreed on the meaning of the statute. The meaning of disputed terms, then, isn't plain. Or at least it isn't universally agreed. One of the drawbacks of the plain meaning approach is that it doesn't have a good method for deciding which of several "plain" meanings is the right one.²⁷ And if plain meaning just turns out to be a way for Justices to interpret the statute to achieve a result they like, it becomes a form of the very judicial-activism conservatives claimed to revile (at least until they took control of the courts).

Enter the dictionary. To a Justice interested in a seemingly neutral source of the plain meaning of words, the dictionary is a natural place to turn.²⁸ Dictionaries are generally thought of as neutral arbiters of the meaning of language.²⁹ If the meaning of a term is indeed plain, it stands to reason that meaning should appear in the dictionary. And so, as the Court has increasingly searched for the plain meaning of statutes, it has unprecedentedly relied on dictionaries. Wessel and Weissenberg found that nearly half of all Supreme Court decisions in the 2018 Term cited dictionaries, almost all in statutory interpretation cases.³⁰ Forty-five opinions in 32 of the Court's 67 cases in the 2018 Term relied on 15 different dictionaries and even more editions.³¹ Some of those decisions cited dictionaries from the time the Constitution or a statute was enacted as

25. To be clear, textualism and plain meaning don't overlap completely. A textualist might refuse to look outside the statutory text at all, even to a dictionary. But when the meaning of a term in the text is unclear, a dictionary frequently seems "closer" to the text than other interpretive sources.

26. See Fried, *supra* note 7, at 641–42 (quoting Chief Justice John Roberts).

27. See Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 793–94 (2018) (noting this problem and offering solutions from linguistics).

28. See, e.g., Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 277–78 (1998) ("The Supreme Court's use of dictionaries appears to be increasing and becoming more prominent."); James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483, 490 (2013) ("The substantial growth in Supreme Court dictionary usage seems most likely to stem from the Justices' conception . . . that dictionaries are a valuable asset because they can be promoted to key audiences as objective and neutral proxies for ordinary meaning.").

29. Erin McKean, *Redefining Definition*, N.Y. TIMES MAG. (Dec. 17, 2009), <https://www.nytimes.com/2009/12/20/magazine/20FOB-onlanguage-t.html> [https://perma.cc/5GXK-R3BB].

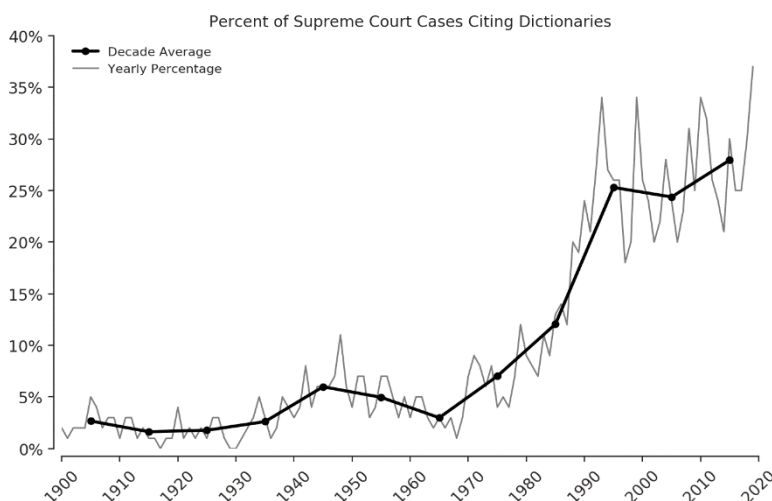
30. Wessel & Weissenberg, *supra* note 1.

31. *Id.*

evidence of the meaning of the term at that time (consistent with the idea that even plain meaning advocates are interested, at least indirectly, in the intent of the Congress that passed the law).³² But many cite contemporary dictionaries without regard to the enactment date.³³

Contrast this with the situation 50 or 100 years ago. While courts have always turned to dictionaries on occasion, the Supreme Court did so far less frequently in the past.³⁴ As shown in Figure 1, the Court referred to dictionaries in an average four percent of their cases each year from 1900 to 1980. This percentage increased exponentially from 1982 to 1993, when 35 percent of the Court's cases referenced dictionaries.³⁵ Since then, dictionary references have appeared in an average of 26 percent of cases each year, and that number increases every year.

Figure 1. Percent of Supreme Court Cases in Which the Court Cites At Least One Dictionary



32. See *id.* The difference is primarily in what sources they would turn to in order to determine that intent. For a strict textualist, looking beyond the text of the statute risks changing the meaning of that statute. Lee & Mouritsen, *supra* note 27, at 875–76. Except that, increasingly, textualists are willing to look beyond the text of the statute, as they do when they turn to the dictionary.

33. Wessel & Weissenberg, *supra* note 1.

34. We wrote a simple computer program that collected this data by searching for and extracting references to dictionaries in each Supreme Court case since 1900, similar to a method previously used by John Calhoun in his Note, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 125 YALE L.J. 484, 493 (2014). And by “we wrote the program” I mean “my research assistant Tyler Robbins wrote it.”

35. Not coincidentally, Justice Scalia joined the D.C. Circuit in 1982 and the Supreme Court in 1986. As Calhoun shows, the rise of dictionaries is strongly associated with his influence. *Id.* at 503; see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* app. A at 415–24 (2012) (“A Note on the Use of Dictionaries”).

The Court does not simply use dictionaries as window dressing or secondary source support for an argument based elsewhere.³⁶ To the contrary, the dictionary is often the centerpiece of the Court's reasoning. In *Mont v. United States*, for instance, the Court split 5-4 on the interpretation of the phrase "imprisoned in connection with a conviction."³⁷ Both sides cited dictionaries defining "imprison," with the majority using them to include pretrial detention in the scope of imprisonment in connection with a conviction and the dissent using them to distinguish imprisonment after conviction from detention before trial.³⁸ And in *New Prime Inc. v. Oliveira*, the Court held that the term "contracts of employment" in the 1925 Federal Arbitration Act included independent contractors because "employment" at the time meant any kind of work, at least according to contemporaneous dictionaries.³⁹ In *Peter v. Nantkwest, Inc.*, the Court acknowledged that "[d]efinitions of 'expenses' provide scant guidance"—but then went on to rely on those very definitions "alongside neighboring words in the statute" by looking up definitions of phrases using the term "expenses."⁴⁰

The Court regularly relies on dictionaries to upset the settled meaning of statutory terms in the courts. In *Food Marketing Institute v. Argus Leader*, the Court used the dictionary meaning of the term "confidential" to overrule the definition that every circuit court had given that term for the past 50 years.⁴¹ Because the dictionaries defined "confidential" as "private" or "secret," the Court held, the Freedom of Information Act had to be reinterpreted to protect from disclosure anything private parties considered private or secret.⁴²

36. That is occasionally true. See *Obduskey v. McCarthy & Holthus LLP*, 139 S. Ct. 1029, 1038 (2019) (defining "repossession" and "repo man" to distinguish the term from "debt collector"). To be sure, not every use of a dictionary in court is dispositive. Courts naturally cite whatever sources support their proposition, and some of the courts that cite dictionaries may do so only as secondary authority for a proposition they believe can be established through other interpretive means. See Brudney & Baum, *supra* note 28, at 488 (categorizing uses of dictionaries); Anita Krishnakumar, *Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 232 (2010); Anita S. Krishnakumar, *Backdoor Purposivism*, 69 DUKE L.J. (forthcoming 2020) (manuscript at 9, 17-18), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3352773 [<https://perma.cc/7YPY-548U>].

37. *Mont v. United States*, 139 S. Ct. 1826, 1832 (2019).

38. *Id.* (holding that "pretrial detention later credited as time served for a new conviction is 'imprison[ment] in connection with a conviction'" (alteration in original)); *id.* at 1837 (Sotomayor, J., dissenting) (finding "that the detention has the requisite connection to a conviction").

39. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 535 (2019). For other examples from 2019, see *Rimini St., Inc. v. Oracle USA, Inc.*, 139 S. Ct. 873, 878 (2019) (interpreting the term "full costs" in the copyright statute: "Full" is a term of quantity or amount. It is an adjective that means the complete measure of the noun it modifies." (first citing AMERICAN HERITAGE DICTIONARY 709 (5th ed. 2011); then citing OXFORD ENGLISH DICTIONARY 247 (2d ed. 1989))).

40. *Peter v. Nantkwest, Inc.*, 140 S. Ct. 365, 372 (2019).

41. *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2363 (2019).

42. *Id.* In so doing, the Court eliminated any requirement that disclosure of that confidential information cause any harm to the private party. *Id.* For criticism of this result, see

And the 2018 Term was not an anomaly. In recent years the Court has repeatedly overturned long-settled statutory interpretations by pointing to dictionary definitions. In *Octane Fitness v. ICON Health and Fitness*, for instance, the Court rejected both the Federal Circuit’s long-standing interpretation of the patent statute governing attorneys’ fees (providing for such fees “in exceptional cases”) and the challenger’s proposed interpretation, turning instead to the dictionary.⁴³ Because the dictionary the Court chose defined “exceptional” as “out of the ordinary,” the Court’s new test for attorneys’ fees was whether the case was ordinary or not.⁴⁴

Similarly, in *Halo v. Pulse*, the Court swept away a well-thought-out test for determining willful patent infringement, replacing it with a veritable word salad of words taken from the dictionary that were synonyms for “willful.”⁴⁵ In *Star Athletica LLC v. Varsity Brands*, the Court replaced all of the (admittedly multifarious and problematic)⁴⁶ tests for determining how to “conceptually separate” the aesthetic from the utilitarian aspects of a useful article with a test that commentators widely agree is not only a step backwards but insolubly incoherent.⁴⁷ It did so in part in reliance on the definition of “capable” in the Oxford English Dictionary, though capable was not the word actually in dispute⁴⁸ and in any event the definition Justice Thomas cited for it (“having the needful capacity, power, or fitness for”) provided no support for the test he crafted from it (“In other words, the feature must be able to exist as its own pictorial, graphic, or sculptural work . . . once it is imagined apart from the useful article.”)⁴⁹ And in *Romag v. Fossil*, the Supreme Court turned to a dictionary to throw out centuries of equity precedent that had required conscious wrongdoing before awarding disgorgement of profits as a remedy,

Sharon Sandeen, *High Court FOIA Ruling Has Trade Secrets Implications*, LAW360 (July 3, 2019, 10:16 AM), <https://www.law360.com/articles/1175163/high-court-foia-ruling-has-trade-secrets-implications> [<https://perma.cc/3NCZ-SgKD>].

43. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553–54 (2014).

44. *Id.*

45. *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1932 (2016). (“The sort of conduct warranting enhanced damages has been variously described in our cases as willful, wanton, malicious, bad-faith, deliberate, consciously wrongful, flagrant, or—indeed—characteristic of a pirate.”); Michael Feldman & Mark A. Lemley, “Characteristic of a Pirate”: *Willfulness and Treble Damages*, DAILY J., June 29, 2016, at 1, 7, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2811773 [<https://perma.cc/7PLN-Pg9N>].

46. For a closer look at the issues with the former tests, see generally Michael S. Mireles, Jr., *Aesthetic Functionality*, 21 TEX. INTELL. PROP. L.J. 155 (2013); and Mark P. McKenna, *(Dys)Functionality*, 48 HOUS. L. REV. 823 (2011).

47. See *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1016 (2017). For examples of some of the multitude of criticisms of *Star Athletica*, see generally Barton Beebe, *Star Athletica and the Problem of Panaestheticism*, 9 U.C. IRVINE L. REV. 275 (2019); Mark P. McKenna, *Knowing Separability When We See It*, 166 U. PA. L. REV. ONLINE 127 (2017); and Rebecca Tushnet, *Shoveling a Path After Star Athletica*, 66 UCLA L. REV. 1216 (2019).

48. As Beebe observes, the Court’s test cannot survive looking up the term “independently,” which actually was at the center of the dispute, in the same dictionary. Beebe, *supra* note 47, at 282.

49. *Star Athletica*, 137 S. Ct. at 1010.

dismissing the trademark statute's express adoption of those "principles of equity" with the curious argument that congressional use of the term "principles," per Black's Law Dictionary, must mean that they were more guidelines than actual rules and thus could safely be ignored.⁵⁰

While I cannot prove that the Court's increased reliance on the dictionary stems from its new focus on plain meaning, it seems logical.⁵¹ As the Court deemphasizes the traditional sources of statutory interpretation—legislative history, precedent, context, and the rules of statutory construction—it is casting about for something other than *ipse dixit* to take their place. The dictionary seems like a definitive source for the thing the Court is desperately looking for—a clear, plain meaning for statutory terms that has eluded lower courts and the parties.

Unfortunately, that certainty is illusory. Dictionaries turn out to be a very poor guide to legal meaning, as we will see in the next Part.⁵²

III. PATENT LAW'S DICTIONARY DEBACLE AND ITS LESSONS FOR STATUTORY INTERPRETATION

We don't need to look too far back in history for an example of a legal regime that made the dictionary the authoritative arbiter of the meaning of legal terms. From 2002 to 2005, patent law used dictionaries as the main source of meaning for patent "claims" (the legal definition of the invention over which the patentee has exclusive rights). I detail that history in Section

50. *Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492, 1496 (2020) (quoting the definition of a "principle" as "fundamental truth or doctrine, as of law; a comprehensive rule or doctrine which furnishes a basis or origin for others" and drawing the bizarre conclusion that since principles were general things the reference to them did not compel the application of specific rules of equity: "[I]t seems a little unlikely Congress meant 'principles of equity' to direct us to a narrow rule about a profits remedy . . .").

51. See Anya Bernstein, *Democratizing Interpretation*, 60 WM. & MARY L. REV. 435, 435 (2018) (arguing that the use of dictionaries falsely "seems to constrain judges' authority by handing the reins to someone else, giving interpretation a democratized veneer").

52. I am not the first person to discuss the problems with dictionaries in statutory interpretation by any means. Among other discussions, see generally William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013); Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. (forthcoming 2020); Christopher J. Walker, *Inside Agency Statutory Interpretation*, 67 STAN. L. REV. 999 (2015); and Kevin Werbach, Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994). Others have criticized the supposed neutrality of dictionaries outside the legal context. See David Foster Wallace, *Tense Present: Democracy, English, and the Wars Over Usage*, HARPER'S MAG., Apr. 2001, at 39, <https://harpers.org/wp-content/uploads/HarpersMagazine-2001-04-0070913.pdf> [<https://perma.cc/3ZCJ-BgFT>]. But I believe I am the first to bring the experience of patent law to bear on the question. For a discussion of the analogy aimed in the opposite direction—drawing lessons from statutory interpretation for claim construction—see generally Dan L. Burk, *Dynamic Claim Interpretation*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* 107, 107 (Shyamkrishna Balganesh ed., 2013).

III.A. In Section III.B, I offer some lessons from that history for the current lexicographic age of statutory interpretation.

A. TEXAS DIGITAL AND THE DICTIONARY REVOLUTION IN PATENT LAW

A patent is a limited legal right to exclude others from using a technology, granted to the first to invent that technology⁵³ in order to encourage invention.⁵⁴ But unlike other IP rights, the scope of a patent is defined, not by what the patentee actually built or described, but by a legal “claim” written by patent lawyers.⁵⁵ Patent claims are often compared to the “metes and bounds” of a real property definition, though they are far less clear than those boundary lines.⁵⁶ They define in words what the patent covers. Those patent claims are central to patent law, so much so that Judge Giles Rich, the drafter of the 1952 Patent Act, says “the name of the game is the claim.”⁵⁷

Patent claims, like statutes, aren’t always clear. They may be applied to technologies unknown at the time the patent was written.⁵⁸ Words may mean different things to different people.⁵⁹ The patentee may deliberately blur the lines in order to preserve flexibility in enforcing the patent, treating it as narrow to avoid having the patent invalidated or broad to prove infringement.⁶⁰ Most commonly, words may simply be imperfect vehicles for

53. Or, more recently, to the first inventor to file for a patent application covering that technology. 35 U.S.C. § 102 (2018) (incorporating the 2011 amendments relating to conditions for patentability).

54. For works discussing the basic theory of patent law, see generally DIRECT PROTECTION OF INNOVATION (William Kingston ed., 1987); Mark A. Lemley, *The Economics of Improvement in Intellectual Property Law*, 75 TEX. L. REV. 989 (1997); and A. Samuel Oddi, *Un-Unified Economic Theories of Patents—The Not-Quite-Holy Grail*, 71 NOTRE DAME L. REV. 267 (1996).

55. Mark A. Lemley & Mark P. McKenna, *Scope*, 57 WM. & MARY L. REV. 2197, 2205 (2016).

56. See, e.g., *Thorne v. Sony Comput. Ent. Am. LLC*, 669 F.3d 1362, 1367 (Fed. Cir. 2012) (“It is the claims that define the metes and bounds of the patentee’s invention.”). For a discussion of some pitfalls and limitations of this real property analogy, see generally Dan L. Burk & Mark A. Lemley, *Fence Posts or Sign Posts? Rethinking Patent Claim Construction*, 157 U. PA. L. REV. 1743 (2009); and Mark A. Lemley, *Property, Intellectual Property, and Free Riding*, 83 TEX. L. REV. 1031 (2005).

57. Giles S. Rich, *Extent of Protection and Interpretation of Claims—American Perspectives*, 21 INT’L REV. INDUS. PROP. & COPYRIGHT L. 497, 499 (1990).

58. See Mark A. Lemley, *The Changing Meaning of Patent Claim Terms*, 104 MICH. L. REV. 101, 119–20 (2005); Robert Merges, *Intellectual Property Rights and Bargaining Breakdown: The Case of Blocking Patents*, 62 TENN. L. REV. 75, 75 (1994); Joshua D. Sarnoff, *Abolishing the Doctrine of Equivalents and Claiming the Future After Festo*, 19 BERKELEY TECH. L.J. 1157, 1167–69 (2004); Doug Lichtman, *Substitutes for the Doctrine of Equivalents: A Response to Meurer and Nard*, 93 GEO. L.J. 2013, 2013 (2005).

59. Jeremy W. Bock, *Behavioral Claim Construction*, 102 MINN. L. REV. 1273, 1274–75 (2018).

60. As Justice Bradley famously noted, “[s]ome persons seem to suppose that a claim in a patent is like a nose of wax which may be turned and twisted in any direction.” *White v. Dunbar*, 119 U.S. 47, 51 (1886). For a discussion of this phenomenon and problems it creates, see generally Jason Rantanen, *The Malleability of Patent Rights*, 2015 MICH. ST. L. REV. 895; and Lemley & McKenna, *supra* note 55.

conveying the intended universe of possible variations and applications of a new technology.⁶¹ The words of a patent claim, like the words of a statute, don't always have a self-evident meaning. They require interpretation. We call this process "claim construction," and it has analogs to both contract interpretation and statutory interpretation.⁶²

Construing the terms of a patent claim is the most common source of disputes in patent cases.

In 1996, the Supreme Court held in *Markman v. Westview Instruments, Inc.* that this process of claim construction was a matter for the judge, not the jury, and should be done pretrial in a "Markman hearing."⁶³ That holding—and particularly the resulting norm that the definition of patent claim terms be done in a written opinion with reasons—led to the frenzied development of both canons of claim interpretation and a hierarchy of permissible sources of meaning.⁶⁴ Patent courts consulted a number of interpretive sources to help define patent claims in the years after *Markman*. The text of the patent itself (called the "specification"), the "prosecution history" (the record of interactions between the patent applicant and the Patent and Trademark Office ("PTO")), technical treatises, and expert testimony were all used at various points to inform the meaning of patent claims.⁶⁵ And they use a number of canons of interpretation in applying those interpretive sources to reach an understanding of what patent claims mean.⁶⁶

61. *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 723 (2002) ("[P]atent claim language may not describe with complete precision the range of an invention's novelty."); *Autogiro Co. of Am. v. United States*, 384 F.2d 391, 397 (Ct. Cl. 1967) ("Often the invention is novel and words do not exist to describe it. The dictionary does not always keep abreast of the inventor. It cannot. Things are not made for the sake of words, but words for things.").

62. Sometimes both these analogies appear in the same case and the decision turns on which is more appropriate. *Compare* *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 325–26 (2015) ("[A] judge, in construing a patent claim, is engaged in much the same task as the judge would be in construing other written instruments, such as deeds, contracts, or tariffs."), *with id.* at 342 (Thomas, J., dissenting) ("Because they are governmental dispositions and provide rules that bind the public at large, patent claims resemble statutes.").

63. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 388–89 (1996).

64. See PETER S. MENELL ET AL., *PATENT CASE MANAGEMENT JUDICIAL GUIDE* 5-1 to 5-124 (3d ed. 2016); PETER S. MENELL, MARK A. LEMLEY, ROBERT P. MERGES & SHYAMKRISHNA BALGANESH, *1 INTELLECTUAL PROPERTY IN THE NEW TECHNOLOGICAL AGE*: 2020, at 325–57 (2020).

65. See, e.g., *Phillips v. AWH Corp.*, 415 F.3d 1303, 1314, 1317 (Fed. Cir. 2005). The text of the patent and the record of patent prosecution are called "intrinsic evidence" because they are a public record fixed at the time the patent issues. Sources outside the record of patent prosecution like treatises and expert testimony are "extrinsic evidence." Extrinsic evidence is generally disfavored because it is more subject to manipulation. See, e.g., *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1583 (Fed. Cir. 1996).

66. For example, courts may rely on the examples given in the specification to understand and interpret the meaning of claim language, but they may not use examples to read new limitations into those claims. See, e.g., *Renishaw PLC v. Marposs Societa' Per Azioni*, 158 F.3d 1243, 1248 (Fed. Cir. 1998). Courts generally should not interpret a claim in a way that excludes the preferred embodiment. See, e.g., *Burke, Inc. v. Bruno Indep. Living Aids, Inc.*, 183 F.3d 1334,

But at the top of the hierarchy is our old friend “plain meaning.” The Federal Circuit has said at various times that if the meaning of the claim is plain, that is the end of the inquiry.⁶⁷ That’s true even when the plain meaning of the claim terms is obviously nonsensical. In *Chef America, Inc. v. Lamb–Weston, Inc.*, for example, the patent claim called for pre-baked dough to be heated “to 400[] degrees.”⁶⁸ Bread dough heated to 400 degrees is inedible charcoal; the inventor obviously meant that the dough was baked in an oven set to 400 degrees. But the court refused to interpret the claim that way, holding that the word “to” was unambiguous and so there was nothing it could do, even though the result wasn’t intended and rendered the patent worthless.⁶⁹ The court applied the “plain” meaning of the word “to,” but it ignored plain common sense—the fact that any reasonable reader would understand from context what the words *meant* even if it was different from what they literally *said*.

As with statutory interpretation, patent claim construction also has to confront the problem of how to distinguish competing “plain” meanings. In *Unique Concepts, Inc. v. Brown*, for instance, the patent claim referred to “right angle corner border pieces” for use in framing wall fabrics.⁷⁰ The question was whether the pieces themselves must be preformed at right angles or whether it was sufficient that the pieces fit together into a right angle corner.⁷¹ The majority and the dissent differed on this question. Both invoked the plain meaning doctrine to support their interpretations. As Judge Rich’s dissent put it: “We arrive at different ‘plain meanings.’”⁷² And indeed this problem is common in patent law. Take the simplest possible term: “a.” The Federal Circuit has interpreted the term “a” or “an” in dozens of reported opinions and given it three different plain meanings at different times.⁷³

1341 (Fed. Cir. 1999). Courts have also long applied a canon that patent claims should be construed to preserve their validity. *See, e.g.,* *Modine Mfg. Co. v. U.S. Int’l Trade Comm’n*, 75 F.3d 1545, 1557 (Fed. Cir. 1996), *abrogated by* *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 234 F.3d 558 (Fed. Cir. 2000), *vacated*, 535 U.S. 722 (2002). Though, that canon is in some disfavor today and is applied only in marginal cases. *See, e.g., Phillips*, 415 F.3d at 1327; *Rhine v. Casio, Inc.*, 183 F.3d 1342, 1345 (Fed. Cir. 1999). There is even a “tie-breaker” canon that provides that if two alternative interpretations are equally plausible, the court will choose the narrower interpretation to avoid unfair surprise to the public. *See, e.g., Athletic Alts., Inc. v. Prince Mfg., Inc.*, 73 F.3d 1573, 1581 (Fed. Cir. 1996); *cf. N. Telecom Ltd. v. Samsung Elecs. Co.*, 215 F.3d 1281, 1295 (Fed. Cir. 2000) (noting the limited nature of this tie-breaker rule).

67. *See, e.g., Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*, 711 F.3d 1348, 1361 (Fed. Cir. 2013) (“If the claim term has a plain and ordinary meaning, our inquiry ends.”).

68. *Chef Am., Inc. v. Lamb–Weston, Inc.*, 358 F.3d 1371, 1373 (Fed. Cir. 2004).

69. *Id.* at 1375–76.

70. *Unique Concepts, Inc. v. Brown*, 939 F.2d 1558, 1561 (Fed. Cir. 1991).

71. *Id.* at 1561–62.

72. *Id.* at 1565 (Rich, J., dissenting).

73. *Compare Braintree Lab’ys, Inc. v. Novel Lab’ys, Inc.*, 749 F.3d 1349, 1357 (Fed. Cir. 2014) (interpreting “a patient” to mean “a patient population”—that is, the normal or average patient), *with KCJ Corp. v. Kinetic Concepts, Inc.*, 223 F.3d 1351, 1356 (Fed. Cir. 2000)

Faced with the problem of a multiplicity of interpretive sources and competing plain meanings, the Federal Circuit in 2002 turned to the dictionary to bring unity to claim construction. In *Texas Digital Systems, Inc. v. Telegenix, Inc.*, it held that not only was plain meaning more important than any other interpretive source, but that the dictionary was the single best guide to the plain meaning of a term.⁷⁴ *Texas Digital* unleashed a flurry of cases over the next three years turning to dictionaries to resolve the meaning of claim terms. Those cases used hundreds of different dictionaries, some technical but many lay dictionaries like Webster's and the Oxford English Dictionary.⁷⁵

Turning to the dictionary didn't resolve the fights over plain meaning in patent law. To the contrary, it intensified them. With dozens of dictionaries, each with multiple, sometimes conflicting definitions of a word, parties could and did find a dictionary to support their preferred meaning in most every case.⁷⁶ Told to turn first to the dictionary, but given no guidance about *which* dictionary or which meaning to choose, Federal Circuit panels splintered. Some picked a preferred definition from among the competing offerings.⁷⁷ Some cited multiple different dictionaries in the same case to support their proposition.⁷⁸ Others chose not to decide, instead declaring that the meaning of a claim term encompassed *every* definition in the dictionary.⁷⁹ Courts even used dictionaries to define terms they found in other dictionary definitions for claim terms.⁸⁰ That led to some pretty incoherent meanings (how can the term "a" in a patent claim mean *both* "one or more" and "one and only one" at the same time?). Scholars tried to limit the damage by suggesting that the

(construing "a" to mean "one or more"), and *N. Am. Vaccine, Inc. v. Am. Cyanamid Co.*, 7 F.3d 1571, 1575-76 (Fed. Cir. 1993) (holding "a" in one disputed term had "its normal singular meaning").

74. *Tex. Digit. Sys., Inc. v. Telegenix, Inc.*, 308 F.3d 1193, 1202-03 (Fed. Cir. 2002).

75. Miller and Hilsenteger found the Federal Circuit used 268 distinct dictionaries and treatises to construe 209 claim terms from 1995 to 2003. Joseph Scott Miller & James A. Hilsenteger, *The Proven Key: Roles and Rules for Dictionaries at the Patent Office and the Courts*, 54 AM. U. L. REV. 829, 860-61 (2005).

76. *See id.* at 864 (detailing the frequency with which certain Federal Circuit judges cited dictionaries in regard to claim construction). For just one example in which the parties turned to three different dictionaries to debate the meaning of the term "solid-state," see *Premier Networks, Inc. v. Lucent Tech. Inc.*, No. 99C3787, 2003 WL 21290835, at *4 (N.D. Ill. May 29, 2003) (where plaintiff's expert first used a non-technical dictionary to define "solid state," defendant's expert witness countered with a dictionary from the field of solid state physics, and then plaintiff's same expert witness countered with the *Modern Dictionary of Electronics*).

77. *See, e.g., Novartis Pharms. Corp. v. Eon Labs Mfg.*, 363 F.3d 1306, 1308-10 (Fed. Cir. 2004) (using five different dictionaries to identify two conflicting definitions for "hydrosol" before choosing the suitable definition).

78. Miller & Hilsenteger, *supra* note 75, at 860-61 (finding this to be true in roughly 20 percent of cases).

79. *See Nystrom v. TREX Co.*, 374 F.3d 1105, 1112 n.2 (Fed. Cir. 2004) ("[C]laim terms may be construed to encompass *all* dictionary definitions not inconsistent with the intrinsic record."), *withdrawn and superseded*, 424 F.3d 1136 (Fed. Cir. 2005).

80. Miller & Hilsenteger, *supra* note 75, at 863-64.

courts, the PTO, or the inventors themselves pick a canonical dictionary that would be used to interpret any disputed terms,⁸¹ or limit the use of dictionaries to technical treatises that define scientific terms courts would not otherwise be able to understand.⁸² But the Federal Circuit during the 2002–2005 period defined the meaning of most patent claim terms by relying on general-purpose dictionaries, not technical treatises, just as the Supreme Court does today when it interprets statutes.⁸³

While the primary result of *Texas Digital* was chaos and uncertainty in the meaning of patents, it did have some notable substantive effects. As a general matter, it broadened the scope of patent claims by including *all* possible interpretations of the claim within the scope of what the patent owner controlled.⁸⁴ And the formalism of dictionary interpretation⁸⁵ moved the meaning of the patent claim (and the legal scope of the patent right) further away from what the inventor actually built or described, putting more importance on the art of patent lawyering (both claim drafting and litigating the meaning of patent claims) and less on the act of inventing.⁸⁶ The focus on lexicographic meanings divorced from what the patentee actually thought of also contributed to the rise of patent trolls—plaintiffs who don’t build products but opportunistically sue those who do.⁸⁷ Trolls profit by reading their patents to cover as many products as possible, often things made decades after the invention that seem to bear little resemblance to that invention.⁸⁸ The *Texas Digital* movement fed that business model by allowing patent lawyers to use ambiguous words to cover things far removed from what the inventor actually had in mind.⁸⁹

81. *Id.*; J. Jonas Anderson & Peter S. Menell, *Empirical Studies of Claim Construction*, in 2 RESEARCH HANDBOOK ON THE ECONOMICS OF INTELLECTUAL PROPERTY LAW 168 (Ben Depoorter, Peter S. Menell & David L. Schwartz eds., 2019).

82. See J. Jonas Anderson & Peter S. Menell, *Informal Deference: A Historical, Empirical, and Normative Analysis of Patent Claim Construction*, 108 NW. U. L. REV. 1, 75 (2013).

83. Miller & Hilsenteger, *supra* note 75, at 832–35 (noting the reliance on general-purpose dictionaries).

84. See *supra* text accompanying note 81.

85. Burk, *supra* note 52, at 114–15 (noting this problem).

86. See Burk & Lemley, *supra* note 56, at 1754–55.

87. See generally Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117 (2013) (analyzing the economic impact of patent litigation by both patent trolls and practicing entities, and discussing why costly problems exist regardless of who asserts the patent); James Bessen, Jennifer Ford & Michael J. Meurer, *The Private and Social Costs of Patent Trolls*, 34 REGUL. 26 (2011) (discussing potential societal benefits of patent trolls); Brian J. Love, *An Empirical Study of Patent Litigation Timing: Could a Patent Term Reduction Decimate Trolls Without Harming Innovators?*, 161 U. PA. L. REV. 1309 (2013) (an empirical analysis comparing litigation initiated by practicing and nonpracticing entities—otherwise known as patent trolls).

88. Love, *supra* note 87, at 1343 (showing that patent trolls tend to enforce their patents at the end of their lives).

89. See Greg Reilly, *Patent “Trolls” and Claim Construction*, 91 NOTRE DAME L. REV. 1045, 1051 (2016) (showing that the focus on the words of patent claims contributed to the rise of patent trolls by allowing plaintiffs to sue companies who made products that didn’t look much like what

By 2005, just three years later, the Federal Circuit had had enough of dictionaries. It took *Phillips v. AWH Corp.* en banc to unify its rules for claim construction.⁹⁰ And while the en banc court didn't dethrone plain meaning completely, it did overrule *Texas Digital* and unanimously reject the primacy of dictionaries as the guide to that meaning.⁹¹ In its place, the court elevated the description of the technology in the patent and how scientists would understand that description.⁹² "Importantly, the person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification."⁹³

Dictionaries, by contrast, no longer had primacy, though they could still be considered:

[E]xtrinsic evidence may be useful to the court, but it is unlikely to result in a reliable interpretation of patent claim scope unless considered in the context of the intrinsic evidence. Nonetheless, because extrinsic evidence can help educate the court regarding the field of the invention and can help the court determine what a person of ordinary skill in the art would understand claim terms to mean, it is permissible for the district court in its sound discretion to admit and use such evidence.⁹⁴

The en banc court's reasoning is worth considering at length:

Although the concern expressed by the court in *Texas Digital* was valid, the methodology it adopted placed too much reliance on extrinsic sources such as dictionaries, treatises, and encyclopedias and too little on intrinsic sources, in particular the specification and

the patentee actually designed). Patent trolls didn't arise exclusively during 2002–2005, though that's when they really took off. But the reliance on dictionaries accelerated a trend begun by *Markman* of focusing less on what patentees actually built and more on what their lawyers said.

90. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1310 (Fed. Cir. 2005).

91. *Id.* at 1317, 1320–21 ("[W]hile extrinsic evidence [including dictionaries] 'can shed useful light on the relevant art,' we have explained that it is 'less significant than the intrinsic record in determining 'the legally operative meaning of claim language.'"" (quoting *C.R. Bard, Inc. v. U.S. Surgical Corp.*, 388 F.3d 858, 862 (Fed. Cir. 2004))). Eleven of the 12 judges joined in the opinion rejecting *Texas Digital*. Judge Mayer dissented from the judgment and would have taken a different approach, but he too would not have followed *Texas Digital*. *Id.* at 1330–33 (Mayer, J., dissenting).

92. *Id.* at 1313 (majority opinion) ("The inquiry into how a person of ordinary skill in the art understands a claim term provides an objective baseline from which to begin claim interpretation.").

93. *Id.*; see also *id.* at 1315 ("[T]he specification 'is always highly relevant to the claim construction analysis. Usually, it is dispositive; it is the single best guide to the meaning of a disputed term.'" (quoting *Vitronics Corp. v. Conceptric, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996))).

94. *Id.* at 1319.

prosecution history. . . . That approach, in our view, improperly restricts the role of the specification in claim construction.

. . . .

The main problem with elevating the dictionary to such prominence is that it focuses the inquiry on the abstract meaning of words rather than on the meaning of claim terms within the context of the patent. Properly viewed, the “ordinary meaning” of a claim term is its meaning to the ordinary artisan after reading the entire patent. Yet heavy reliance on the dictionary divorced from the intrinsic evidence risks transforming the meaning of the claim term to the artisan into the meaning of the term in the abstract, out of its particular context, which is the specification. . . .

Although the Texas Digital line of cases permit the dictionary definition to be narrowed in some circumstances even when there is not an explicit disclaimer or redefinition in the specification, too often that line of cases has been improperly relied upon to condone the adoption of a dictionary definition entirely divorced from the context of the written description. The problem is that *if the district court starts with the broad dictionary definition in every case and fails to fully appreciate how the specification implicitly limits that definition, the error will systematically cause the construction of the claim to be unduly expansive.* The risk of systematic overbreadth is greatly reduced if the court instead focuses at the outset on how the patentee used the claim term in the claims, specification, and prosecution history, rather than starting with a broad definition and whittling it down.

Dictionaries, by their nature, provide an expansive array of definitions. General dictionaries, in particular, strive to collect all uses of particular words, from the common to the obscure. By design, general dictionaries collect the definitions of a term as used not only in a particular art field, but in many different settings. In such circumstances, it is inevitable that the multiple dictionary definitions for a term will extend beyond the “construction of the patent [that] is confirmed by the avowed understanding of the patentee, expressed by him, or on his behalf, when his application for the original patent was pending.”⁹⁵

Jonas Anderson and Peter Menell found that dictionaries receded into the background after *Phillips*.⁹⁶

Interestingly, the Federal Circuit didn’t replace dictionaries with prosecution history (the rough patent law analog to legislative history). To

95. *Id.* at 1320–22 (alteration in original) (emphasis added) (quoting *Goodyear Dental Vulcanite Co. v. Davis*, 102 U.S. 222, 227 (1880)).

96. Anderson & Menell, *supra* note 82, at 57.

the contrary, it deemphasized the importance of prosecution history too.⁹⁷ Instead, the court held that the most important single factor in determining the meaning of claim terms was context.⁹⁸ That context often comes from the rest of the patent document itself (the patent specification), but it can also come from the rest of the language of the claim, from other claims, from the patentee's explicit efforts to define their terms in the patent itself,⁹⁹ from the problem the patentee was intending to solve,¹⁰⁰ or from the knowledge and experience of scientists in the field at the time.¹⁰¹ Technical treatises can help inform the court about the knowledge and experience of scientists, particularly when technical terms are at issue.¹⁰² But they shouldn't override what the context of the invention indicates as the common sense meaning.

B. THE LESSONS OF TEXAS DIGITAL

Patent law isn't statutory interpretation, exactly, though it is construction of a legal document ultimately approved and given legal force by a government agency.¹⁰³ But patent law's dictionary debacle and the way it was resolved carry important lessons for courts hoping that dictionaries will solve the problems of statutory construction. Here are a few.¹⁰⁴

There are a lot of dictionaries. First, it is a misnomer to speak of "the dictionary" as "the" source of a single meaning of a term. There are many dictionaries in the world, and they do not always agree. Patent courts cited hundreds of different dictionaries in just three years under *Texas Digital*.¹⁰⁵ Legal prose expert Bryan Garner's company, LawProse, touts the thousands of dictionaries it makes available for shaping statutory arguments.¹⁰⁶ Even if

97. See, e.g., *Phillips*, 415 F.3d at 1317.

98. *Id.* at 1313.

99. Under the lexicographer rule, inventors may define claim terms however they like so long as they do so with "reasonable clarity, deliberateness, and precision." *In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994). For a debate over whether that had happened in a particular case, see *Martek Biosciences Corp. v. Nutrinova, Inc.*, 579 F.3d 1363, 1379–85 (Fed. Cir. 2009) (majority and dissent disagreeing whether the patent had defined "animal" in a way that included humans).

100. See, e.g., *Renishaw PLC v. Marposs Societa' Per Azioni*, 158 F.3d 1243, 1251–53 (Fed. Cir. 1998) (using the claimed touch probe's functionality to construe the meaning of "when").

101. See, e.g., *Phillips*, 415 F.3d at 1313.

102. *Id.* at 1318.

103. Compare *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 574 U.S. 318, 325–26 (2015) (analogizing patent claim construction to contract interpretation), with *id.* at 338–40 (Thomas, J., dissenting) (analogizing patent claim construction to statutory interpretation). Because patents have legal force imbued by the government, Justice Thomas's analogy seems more apt. Patent claims are not merely private agreements governing only the behavior of those who agreed.

104. A number of the statutory interpretation scholars cited above have made many of these points in the abstract, but patent law offers a concrete test case for the use of dictionaries.

105. See *supra* notes 74–80 and accompanying text.

106. Bryan A. Garner, *LawProse Lesson #335: Making a Textual Argument*, LAWPROSE (June 11, 2020), <https://www.lawprose.org/lawprose-lesson-335-making-a-textual-argument> [[https://](https://www.lawprose.org/lawprose-lesson-335-making-a-textual-argument)

all those dictionaries have similar meanings for a term, the meanings are probably not identical. After all, if they were, why ever publish more than one dictionary? So courts that turn to “the dictionary” are in fact opening up a pretty wide array of different “authoritative” sources of meaning, ones likely to have at least subtle differences in definition. And exploiting subtle differences in language is what lawyers do. Once patent courts declared the dictionary to be top dog, lawyers for both sides aggressively combed through multiple editions of multiple dictionaries to find the turn of phrase that was most helpful for them. Judges do the same thing. Indeed, both the majorities and the dissents in several recent Supreme Court statutory interpretation cases cited different dictionaries to bolster their competing claims.¹⁰⁷ Sometimes the cited definitions flatly contradict each other.¹⁰⁸

perma.cc/EAZ9-8MDZ] (“At LawProse, we maintain more than 4,500 dictionaries, 1,900 English grammars, and 80 books on punctuation.”).

107. See, e.g., *Bostock v. Clayton County*, 140 S. Ct. 1731, 1740, 1756 (2020). *Bostock* is notable as a debate between originalism and textualism. Often thought of as the same thing—both came from conservative ideology that objected to changing the meaning fixed in the Constitution or a statute—the former chooses context but ignores subsequent developments, the latter ignores context but can adapt to changes in the meaning of the words over time. Justice Gorsuch’s majority opinion can read “on the basis of sex” to include discrimination on the basis of sexual orientation because the words themselves, read today, seem to compel it. *Id.* at 1742–43, 1750–53. Justice Alito’s dissent, by contrast, looked to what people understood the statute to mean in 1964 at the expense of what the statute actually said. *Id.* at 1755 (Alito, J., dissenting).

Contemporaneous dictionaries, which many courts rely on, may be the worst of both worlds on this view, combining the lack of context of a purely textual approach with the obsolescence of a purely historical approach.

A more useful approach might be to turn to corpus linguistics to try to find something closer to a consensus. Lee & Mouritsen, *supra* note 27, at 788; cf. Neal A. Hoopes, *Reclaiming the Primary Significance Test: Dictionaries, Corpus Linguistics, and Trademark Genericide*, 54 TULSA L. REV. 407, 410 (2019) (suggesting this approach to decide whether a word is generic); 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, 401 (2003) (“As with leeches in the Middle Ages, dictionaries sometimes address the interpretive puzzles judges are trying to solve, and the practice continues. However, just as medical science has progressed since the time of leech treatments, the science of linguistics has progressed since the time that scholars believed that dictionaries held the key to sentence meaning.”); Lisa Larrimore Ouellette, *The Google Shortcut to Trademark Law*, 102 CALIF. L. REV. 351, 354 (2014) (arguing that Google searches may be a better indicator of meaning). Notably, corpus linguistics attempts to place words in context—a superior approach to the dictionary. Lee & Mouritsen, *supra* note 27, at 795. And it can trace the change in the use and meaning of words over time. Still, some have criticized its use in the interpretation of legal text for necessarily ignoring the doctrinal and institutional context in which statutory terms are adopted. See Anya Bernstein, *Legal Corpus Linguistics and the Half-Empirical Attitude*, 106 CORNELL L. REV. (forthcoming 2021) (manuscript at 3–4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3567408&download=yes [<https://perma.cc/ZB72-PXE7>]. That’s still better than the dictionary, but not as good as a true contextual analysis.

108. See, e.g., *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225–26 (1994) (holding that “modify” refers only to a minor change, citing one dictionary definition, while rejecting a competing dictionary—Webster’s, no less—that defined “modify” to include a basic or important change).

It might be possible to reduce this risk by picking one authoritative dictionary and relying only on it.¹⁰⁹ But which one? Some dictionaries are generally held in higher esteem than others, creating several possible contenders; the Oxford English Dictionary, Webster's, Black's Law Dictionary all come to mind. If the Court were to pick one, legislators and litigators might begin acting strategically, choosing different terms based on the meaning in that dictionary or even lobbying to change the definition.¹¹⁰ We might reasonably worry about delegating that much influence to an unaccountable private party. In any event, the Court has not done that. Instead, the Court cherry-picks from different dictionaries as the definitions suit it.¹¹¹ And it's hard to imagine the Justices agreeing for all time on a single dictionary and resisting the temptation to cite dictionaries that support their position in a particular case.

Each dictionary has a lot of definitions. Even if the courts were to settle on one dictionary for all purposes, that wouldn't solve the problem. For dictionaries aren't designed to give a single, authoritative meaning for a term. Quite the contrary. The point of a dictionary is to cover the waterfront of possible meanings. That's why virtually all words in a dictionary have multiple meanings.¹¹² Some of those are synonyms: efforts to say the same thing in different ways. But quite often they are substantively different meanings. "Lead" is, in various contexts, a verb meaning to take somewhere, a verb meaning to rule a group, a noun referring to the ruler of that group, a noun referring to an element on the periodic table, a noun referring to things made from that element, a clue in an investigation, a component in an electrical device, an adjective referring to the first or main element of a story, and some other things as well. To direct courts to look up the meaning of "lead" in the dictionary (even one specific dictionary) doesn't tell you which of those meanings is the right one. Nor is there any reason to think that the first meaning in a given dictionary will be the one that matters to any particular law.¹¹³

109. Miller & Hilsenteger, *supra* note 75, at 896–901 (suggesting this approach for patent law).

110. Trademark owners do this with some success in trying to keep their brand names out of the dictionary for fear they will become generic. See Laura A. Heymann, *The Grammar of Trademarks*, 14 LEWIS & CLARK L. REV. 1313, 1325–29 (2010); Gary C. Robb, *Trademark Misuse in Dictionaries: Inadequacy of Existing Legal Action and a Suggested Cure*, 65 MARQ. L. REV. 179, 181–84 (1981).

111. See Aprill, *supra* note 28, at 281. See generally ESKRIDGE ET AL., *supra* note 14 (discussing the use of different dictionaries).

112. See Brudney & Baum, *supra* note 28, at 513–14.

113. *Id.* at 514 (discussing complaints by Justices that other Justices weren't using the first definition in a dictionary). Indeed, while some dictionaries list meanings by frequency of use, others, including the Oxford English Dictionary, list their meanings historically, with older meanings first. See Barrie England, Comment to *Order of Definitions in Dictionaries*, ENG. LANGUAGE & USAGE STACK EXCH. (Oct. 8, 2012, 1:57 PM), <https://english.stackexchange.com/questions/85058/order-of-definitions-in-dictionaries> [<https://perma.cc/KSA3-L6UC>] (quoting *Guide to the Third Edition of OED*, OXFORD ENG. DICTIONARY, <https://www.oed.com/public/oed3guide/>

To know which meaning is the “right” one requires context. That is, it requires that the courts abandon the idea that the answer can come from the plain meaning of the term itself. More on this later.

Worse, the definitions may contradict each other, as we saw with the word “a,” which regularly means both one and only one (“I want a job”) and one or more (“I want a birthday present”). But that’s true of other words too. To say that A “or” B must happen is commonly understood to be satisfied if A alone happens, if B alone happens, or¹¹⁴ if both A and B happen. But in some contexts, particularly electrical engineering, “or” has a different meaning, encompassing A alone and B alone but excluding A and B together.¹¹⁵ The term “when” may mean “at the same time as,” but it might also mean “at any time after” or “as soon as possible after.”¹¹⁶ And so on. Dictionaries can’t help us choose between those contradictory meanings because their purpose is to include all of them and not to do what courts must do: choose between them. Only context can tell us which meaning makes sense.

Dictionary definitions rarely eliminate ambiguity. Courts want a meaning of a term that resolves a concrete dispute between two parties in a particular context. Dictionary definitions might do that, but if they do it’s largely by happenstance. Sometimes dictionary definitions aren’t much help at all. A surprising number of definitions define the term by using the term itself.¹¹⁷ That won’t guide a court trying to interpret that term and exclude alternative meanings. Even if the definition uses different words, it is often composed primarily of synonyms. True, a court can replace one ambiguous word with one or more of those synonyms, and courts often do so. In *Octane Fitness*, for instance, the Court abandoned a structured set of rules for determining when a patent infringer was willful and therefore subject to enhanced damages with a word salad of synonyms picked from dictionaries.¹¹⁸ But there is no reason to think that replacing one ambiguous word with one or more other words will make the ambiguity go away. To the contrary, there is every reason to think that those words (which themselves all have dictionary definitions) will be the subject of new fights over their meaning. Replacing “willful” with “deliberate” or “intentional” doesn’t tell us what “willful” means; it just moves the argument to what “deliberate” or “intentional” means.

guide-to-the-third-edition-of [<https://perma.cc/59BG-78AK>]). Use of the first definition in those sources may be more likely than not to mislead as to the current common meaning.

114. There’s that word.

115. See, e.g., *Kustom Signals, Inc. v. Applied Concepts, Inc.*, 264 F.3d 1326, 1330–32 (Fed. Cir. 2001) (discussing these different definitions for “or”).

116. *Renishaw PLC v. Marposs Societa’ Per Azioni*, 158 F.3d 1243, 1252–53 (Fed. Cir. 1998).

117. For example, the Oxford English Dictionary defines “self-referential” as “[c]haracterized by or involving self-reference.” *Self-Referential*, OXFORD ENG. DICTIONARY ONLINE (Jan. 2018), <https://www.oed.com> [<https://perma.cc/LD9G-GJHR>].

118. See generally *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545 (2014).

Patent law's experience with claim construction bears this out. If the goal is to describe a group of things, replacing one disputed word with other, theoretically clearer, words just lead lawyers and judges to fight over the meaning of those defining terms. Patent law, having defined the terms of a patent claim during claim construction, then frequently faced what we might call "meta-construction": the fight over the meaning of the terms used to define the terms in the patent claim.¹¹⁹ If the goal is to capture a concept, or a particular application of the term, replacing words with other words is rarely enough. Indeed, it can frequently move us in the wrong direction by moving the focus away from the words the legislature or patentee actually chose and towards an ancillary debate over the meaning of words chosen by a dictionary writer who didn't know the context in which her words would be used.

Dictionary definitions generally use lay rather than legal meanings. With certain specialized exceptions, dictionaries aren't written for courts. Technical dictionaries are written for scientists, explaining the scientific meaning of a term. They might seem particularly well-suited to patent law, because the purpose of patent claim construction of technical terms is to determine what those terms mean to a person having ordinary skill in the art.¹²⁰

General-purpose dictionaries are written for the lay public, and so they tend to provide a general lay understanding of the term, not a specialized legal meaning.¹²¹ Sometimes that's fine; Congress, too, might have meant for a term to have its lay meaning.¹²² But more commonly, law uses terms of art that have very different meanings to lawyers than they do to everyone else.¹²³

119. Burk & Lemley, *supra* note 56, at 1762 (describing this process).

120. Dan L. Burk & Mark A. Lemley, *Is Patent Law Technology-Specific?*, 17 BERKELEY TECH. L.J. 1155, 1185 (2002) (discussing the hypothetical "person having ordinary skill in the art" as patent law's equivalent of a "reasonable person"); Rebecca S. Eisenberg, *Obvious to Whom? Evaluating Inventions from the Perspective of PHOSITA*, 19 BERKELEY TECH. L.J. 885, 886 (2004).

121. Courts often use general-purpose dictionaries. Scholars have found no consistency in when courts choose legal as opposed to generalist dictionaries for instance. Brudney & Baum, *supra* note 28, at 510; see 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, 268 (1999).

122. See Lawrence M. Solan, *Law, Language, and Lenity*, 40 WM. & MARY L. REV. 57, 94 (1998) (theorizing that this is more often true of criminal statutes that apply to the general public). In *Muscarello v. United States*, 524 U.S. 125 (1998), for instance, the Court split on whether a sentence enhancement for someone "carrying a firearm" could be applied to a defendant whose gun was locked in the glove compartment of his car. The majority said yes, relying on a definition of the word "carry," but as the dissent noted, that seems inconsistent with the common lay understanding of what it means to "carry a firearm"—to possess it on one's person. *Id.* at 128–31.

123. Patent law, for instance, uses the terms "comprising" and "consisting of" as legal terms of art to distinguish between "open" and "closed" patent claims. A patent claim that uses comprising is open. The use of the term means that a device infringes if it has all the elements listed after the word "comprising" even if it also has additional elements. "Consisting of," by contrast, is closed; a device infringes such a patent only if has each of the elements *and only those elements*. See Burk & Lemley, *supra* note 56, at 1756–57. Patent lawyers all understand this, but one would search the dictionary in vain for any indication that the words have such specialized meanings.

They are intended to be more precise and often more circumscribed.¹²⁴ When that is so, reliance on a non-legal dictionary will likely mislead courts as to what the legislature actually intended.¹²⁵ That happened in *Mont*, when the Court relied on the lay meaning of “imprison” to conflate detention after a felony conviction (the legal meaning of imprisonment, which is distinct from jailing) with other reasons a person might be put behind bars (the broader lay understanding of imprisonment).¹²⁶

An interesting twist on this problem is *New Prime*, where the Court used the broader lay understanding of “employment” as “work,” rather than its legal meaning of a particular relationship between companies and certain groups of workers, to apply an exception to the Federal Arbitration Act.¹²⁷ While Justice Gorsuch tried valiantly to limit the scope of his opinion by looking at 1925 dictionaries and saying that employment must have meant something different and broader back then, his own dictionary methodology belies that claim. “Employment” means “work” to lay people, and modern dictionaries similarly reflect that usage.¹²⁸ If “employment” means any sort of work for purposes of the 1925 Federal Arbitration Act because a dictionary said so, it presumably means any sort of work for many other purposes, from labor to employment discrimination to tax law. The consequences of such a ruling would be dramatic. But I’m willing to bet that “employment” won’t be so broadly construed—and that it will be the very Justices currently relying on the broad definition of work who reject it in those other contexts.

Dictionaries provide cover for injecting ideology into court decisions. While *New Prime* logically seems to expand the scope of many different employee protections to independent contractors, I seriously doubt it will be read that way. Justice Gorsuch was careful to say that he wasn’t planning to extend his broad definition of the term “employment” to the term “employee,” claiming,

124. See Adam Liptak, *Justices Turning More Frequently to Dictionary, and Not Just for Big Words*, N.Y. TIMES (June 13, 2011), <http://www.nytimes.com/2011/06/14/us/14bar.html> [<https://perma.cc/HY3Q-8XZT>] (quoting the former editor of the Oxford English Dictionary as saying “it’s probably wrong, in almost all situations, to use a dictionary in the courtroom . . . Dictionary definitions are written with a lot of things in mind, but rigorously circumscribing the exact meanings and connotations of terms is not usually one of them.”). Gluck and Bressman note that legislators don’t use dictionaries when defining terms in statutes, an indication that the dictionary definition is rarely the one they are looking for. Gluck & Bressman, *supra* note 52, at 938–40 (“[N]o one uses a freaking dictionary.”).

125. Chamber of Com. of the U.S. v. Whiting, 563 U.S. 582, 612 (2011) (Breyer, J., dissenting) (“[N]either dictionary definitions nor the use of the word ‘license’ in an unrelated statute can demonstrate what scope Congress intended the word ‘licensing’ to have *as it used that word in this federal statute*.”).

126. *Mont v. United States*, 139 S. Ct. 1826, 1832 (2019).

127. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 535 (2019).

128. See, e.g., *Work*, OXFORD ENG. DICTIONARY ONLINE (Sept. 2014), <https://www.oed.com> [<https://perma.cc/LD9G-GJHR>] (“Action or activity involving physical or mental effort and undertaken in order to achieve a result, esp. as a means of making one’s living or earning money; labour; (one’s) regular occupation or employment.”).

among other things, that the meaning of “employment” had changed since 1925.¹²⁹ And that leads to the final, most significant problem with dictionaries as arbiters of plain meaning: They are often ultimately nothing more than cover for judicial decisions about the scope of a statute made using other, often political, precommitments.¹³⁰ Judges don’t generally decide how far a statute should extend by consulting the dictionary; like litigants, they find a meaning in a dictionary that supports the result they already want to reach.¹³¹

It isn’t news, of course, that courts engage in political rather than purely legal decisions; the legal realist movement taught us as much.¹³² But dictionaries provide cover for decisions that might otherwise be obviously arbitrary or political. Justices can point to dictionary definitions as neutral keys to the correct meaning of a term. But as we have seen, they are no such thing. Dictionaries aim to cover the waterfront, including all possible meanings of a term. By picking a term (and indeed a dictionary), courts can offer evidence to support any meaning of a term they like. By conferring a fig leaf of legitimacy on a decision that may not even be a good faith attempt to discern what Congress intended, the focus on dictionaries makes the problem of ideologically-driven statutory construction worse, not better.¹³³

In *Phillips*, the Federal Circuit replaced the focus on dictionaries with a primary focus on the context of the words of the patent claim.¹³⁴ The Supreme Court should do the same. It is that context that is the most reliable guide to

129. *New Prime Inc.*, 139 S. Ct. at 542 (“The words ‘employee’ and ‘employment’ may share a common root and an intertwined history. But they also developed at different times and in at least some different ways. The only question in this case concerns the meaning of the term ‘contracts of *employment*’ in 1925. And, whatever the word ‘employee’ may have meant at that time, and however it may have later influenced the meaning of ‘employment,’ the evidence before us remains that, as dominantly understood in 1925, a contract of *employment* did not necessarily imply the existence of an employer-employee or master-servant relationship.”).

130. Bernstein, *supra* note 51, at 438 (arguing that while the use of dictionaries purports to constrain judges’ power to impose their own preferences, it “actually keep[s] power firmly in the judge’s hands”).

131. To be fair to Justice Gorsuch, his opinion in *Bostock* arguably took a position he didn’t necessarily support as a political matter because he took a dictionary definition seriously. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1740 (2020).

132. For works discussing the legal realist movement, see generally H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1961); Brian Leiter, *American Legal Realism*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 50, 50 (Martin P. Golding & William A. Edmundson eds., 2005) (“[T]he Realists frequently claimed that existing articulations of the ‘law’ were not, in fact, ‘confirmed’ by actual observation of what the courts were really doing.”); Bryant Garth & Elizabeth Mertz, *New Legal Realism at Ten Years and Beyond*, 6 U.C. IRVINE L. REV. 121 (2016); and Stewart Macaulay, *New Legal Realism: Unpacking a Proposed Definition*, 6 U.C. IRVINE L. REV. 149, 156 (2016) (noting the politicization of the judicial process: “[W]ell-funded political action committees have worked to finance the election of state supreme court judges, who will decide cases ‘reasonably’ from the PAC’s point of view.”).

133. For an argument in favor of statutory interpretation that changes with the times, see generally Eskridge, *supra* note 52.

134. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1320 (Fed. Cir. 2005).

the meaning of a word. But that leaves the question of where we find that context and how we interpret it. Context can be found from a number of sources: the surrounding text, the purpose of the statute, the record of enactment, and the body of law against which the statute was enacted. The new science of corpus linguistics can also be a helpful tool, precisely because it is focused not on abstract definitions but on how words are actually used by people in context.¹³⁵ Notably, context-driven meaning does not necessarily mean reliance on legislative history. Nor does it mean that dictionaries can play no role at all. As post-*Phillips* patent claim construction demonstrates, courts can look to context for meaning without parsing the history of the drafting process in most cases.¹³⁶ And courts can use dictionaries without treating them as the primary source of meaning.¹³⁷ Indeed, for a court truly interested in the “plain” meaning of a statute, the context of the words and the background of the law that led those words to be chosen are much more likely to offer a neutral source of meaning than a definition chosen randomly (or strategically) from a dictionary.¹³⁸

IV. CONCLUSION

The Supreme Court’s love affair with the dictionary won’t help it discover the plain meaning of statutes. Nor will it increase judicial predictability. To the contrary, as patent law’s flirtation with the dictionary 15 years ago shows, dictionaries are ill-suited to serve as guides to statutory construction. They are written for different audiences and serve different purposes. They seek to identify every meaning, not the one meaning courts are looking for. And they give a cloak of legitimacy to decisions that are ultimately political. Indeed, by ignoring the context of statutory language in favor of looking the term up in a dictionary, the Supreme Court is taking a significant step away from finding the plain meaning of the terms it construes.

135. See *supra* note 107 (discussing corpus linguistics).

136. Anderson & Menell, *supra* note 81, at 169 (noting the decline in the use of prosecution history after *Phillips*).

137. Even after *Phillips*, the Federal Circuit still turns to dictionaries in some circumstances. See, e.g., *Mass. Inst. of Tech. v. Abacus Software*, 462 F.3d 1344, 1351 (Fed. Cir. 2006) (using dictionaries to help understand how the words “scan” and “scanner” were used when the patent application was filed in 1982).

138. Not only does Congress rarely rely on dictionary definitions, see Gluck & Bressman, *supra* note 52, at 938–40, but when Congress defines terms in statutes it often includes phrases like “unless context otherwise provides.” Indeed, the Dictionary Act, 1 U.S.C. § 1 (2018), includes that limitation in general-purpose statutory definitions.