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Ordinary Meaning and Ordinary People

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ARTICLE

ORDINARY MEANING AND ORDINARY PEOPLE

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This Article considers the relationship between ordinary meaning and ordinary people in legal interpretation. Many jurists give interpretive weight to the law's ordinary meaning (i.e., general, nontechnical meaning). Modern textualists adopt a strong commitment to ordinary meaning and justify it by alluding to ordinary people: people understand law to communicate ordinary meanings. This Article begins from this textualist premise and empirically examines the meaning that legal texts communicate to the public. Five original empirical studies reveal that ordinary people consider genre carefully, and regularly take phrases in law to communicate technical legal meanings, not only ordinary ones. Building on the insights from these empirical studies, this Article argues that interpreters who claim fidelity to ordinary people's understanding of law should regularly look beyond "ordinary meaning."

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INTRODUCTION

This Article concerns the relationship between ordinary meaning and ordinary people in legal interpretation. Jurists often give interpretive weight to *ordinary meaning* (i.e., general, nontechnical meaning). Modern textualists adopt a strong commitment to ordinary meaning and justify it with a claim about *ordinary people*: people understand law to communicate ordinary meanings. This Article examines this empirical claim and finds that individuals' understanding of laws is more complex. Laypeople often take laws to communicate legal—not ordinary—meanings. Interpreters who claim fidelity to ordinary people's understanding of legal language should regularly look beyond ordinary meaning.

The presumption of ordinary meaning is conventionally understood to require that terms be interpreted in accordance with their general, nontechnical meanings.[1] Modern textualists tend to endorse this presumption, and recently some have proposed that a broader commitment to ordinary meaning follows from the theory's essential connection to the ordinary public. In the words of Justice Amy Coney Barrett, textualists "view themselves as agents of the people rather than of Congress and as faithful to the law rather than to the lawgiver."[2] These textualists "approach language from the perspective of an ordinary English speaker"[3] which leads them to "insist[] that judges must construe statutory language consistent with its 'ordinary meaning.'"[4] In other words, the commitment to *ordinary meaning* follows from a more fundamental faithfulness to *ordinary people*.[5]

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1 *See* BRIAN G. SLOCUM, ORDINARY MEANING: A THEORY OF THE MOST FUNDAMENTAL PRINCIPLE OF LEGAL INTERPRETATION 2 (2015) ("[C]ourts have agreed that words in legal texts should be interpreted in light of accepted and typical standards of communication.").

2 Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2195 (2017); *see also* District of Columbia v. Heller, 554 U.S. 570, 576 (2008) ("In interpreting this text, we are guided by the principle that 'the Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" (alterations omitted) (quoting United States v. Sprague, 282 U.S. 716, 731 (1931))). To be sure, not all textualists share Justice Barrett's ideal of faithful agency to "the people" (over Congress). *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 100-01 (2006) ("[T]extualists quite reasonably believe that a federal court fulfills its obligation as Congress's faithful agent by trying to 'hear the words of the statute as they would sound in the mind of a skilled, objectively reasonable user of words.'" (alterations omitted) (quoting Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988))).

3 Barrett, *Congressional Insiders and Outsiders*, *supra* note 2, at 2194.

4 Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 CASE W. RSRV. L. REV. 855, 856 (2020) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 69, 77 (2012)).

5 *See* Anya Bernstein, *Democratizing Interpretation*, 60 WM. & MARY L. REV. 435, 442 (2018) ("Judges sometimes base assertions about what statutory terms mean on evidence of how others use those terms . . . . The empirical claim is that people—some people—use the term in some particular way. The normative appeal suggests that those people are, in some democratically appropriate way, the

Scholars beyond Justice Barrett—including non-textualists—appeal to ordinary meaning.[6] Widely shared interpretive values, including fair notice, have been taken to support the consideration of ordinary meaning.[7] Jurists sharing many interpretive philosophies believe that "all persons are entitled to be informed as to what the State commands or forbids."[8] It is plausible that such a fair notice principle is satisfied only if ordinary people are able to "read and understand the law for themselves, without need to absorb distinctively legal training"[9] and that ordinary meaning facilitates ordinary understanding. Thus, ordinary meaning holds a central place in legal interpretation—for textualists and non-textualists alike.

Ordinary meaning is especially central to modern textualism—particularly Justice Barrett's "agents of the people" variation. Ordinary meaning's influence has grown with the rise of "new textualism"[10] and "new originalism."[11] Between 2005 and 2017, the Roberts Court relied on "text" and "plain meaning" in almost fifty percent of majority opinions involving statutory meaning.[12] The 2021 Term

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relevant ones for determining the meaning in the statute." (citation omitted)); *see also* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Progressive Textualism*, 110 GEO. L.J. 1437, 1442 (2022) (explaining textualism's frequent appeal to democracy and "the people").

6 *See, e.g.*, William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1557 (1998) (reviewing ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997)) ("All major theories of statutory interpretation consider the statutory text primary . . . . whether one is a textualist, intentionalist, or pragmatic interpreter of statutes. For any of these, there must be a compelling reason to derogate from the meaning the words would convey to an ordinary speaker or reader."); Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417 (1899) ("[W]e ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English . . . .").

7 *See* discussion *infra* Section IV.D.

8 Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (alterations omitted) (quoting Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)).

9 Richard H. Fallon, Jr., *The Statutory Interpretation Muddle*, 114 NW. U. L. REV. 269, 333 (2019); *see also* Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 719 (2009) ("By definition, the public meaning of a rule is the one apparent to a competent speaker of the language from a mere inspection of the text."); Herman Cappelen, *Semantics and Pragmatics: Some Central Issues*, *in* CONTEXT-SENSITIVITY AND SEMANTIC MINIMALISM: NEW ESSAYS ON SEMANTICS AND PRAGMATICS 3, 19 (Gerhard Preyer & Georg Peter eds., 2007) ("When we articulate rules, directives, laws and other action-guiding instructions, we assume that people, variously situated, can grasp that content in the same way.").

10 *See* William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 623 (1990) ("The new textualism posits that once the Court has ascertained a statute's plain meaning, consideration of legislative history becomes irrelevant."); William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 534 (2013) (reviewing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012)) (describing how certain textualists believe that ordinary meaning should be understood through canons of statutory interpretation).

11 *See, e.g.*, Randy E. Barnett, *The Gravitational Force of Originalism*, 82 FORDHAM L. REV. 411, 412 (2013) ("New Originalism is about identifying the original public meaning of the Constitution and not the original Framers' intent . . . . [I]dentifying the original public meaning of the text is an empirical inquiry.").

12 *See* Anita S. Krishnakumar, *Cracking the Whole Code Rule*, 96 N.Y.U. L. REV. 76, 97 (2021) (analyzing Supreme Court cases between 2005 and 2017, and showing that 49.8% of majority and plurality opinions used the text and plain meaning interpretive canon).

is even more notable: for the first time, a super-majority of Justices clearly accept the primacy of "ordinary meaning."[13] Furthermore, many of the young, Trump-appointed judges appear committed to this principle, suggesting that ordinary meaning's import will continue to grow.[14]

Despite its prominence, ordinary meaning is at a crossroads. Textualist Justices are deeply divided over the meaning of "ordinary meaning."[15] Now that six of the Supreme Court's members are avowed textualists,[16] one might think agreement regarding the proper interpretive philosophy would lead to unified results. But broad philosophical agreement has not prevented methodological disagreement, with Justices jousting about the meaning and scope of ordinary meaning.[17]

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13 *See* Victoria Nourse, *The Paradoxes of a Unified Judicial Philosophy: An Empirical Study of the New Supreme Court, 2020-2022*, 38 CONST. COMMENT. 1 (forthcoming 2023) https://ssrn.com/abstract=4179654 [https://perma.cc/75LJ-N3JB] (canvassing both constitutional and statutory cases to illustrate the emerging dominance of textualism as an interpretive methodology); *see also infra* text accompanying notes 64–69.

14 *See, e.g.*, *In re* Ultra Petroleum Corp., 943 F.3d 758, 763 (5th Cir. 2019) (43 year-old Judge Andrew S. Oldham) ("Let's start with the statutory text . . . . The plain text of § 1124(1) requires that 'the plan' do the altering. We therefore hold a creditor is impaired under § 1124(1) only if '*the plan*' itself alters a claimant's 'legal, equitable, or contractual rights.'" (alterations omitted)); Health Freedom Def. Fund, Inc. v. Biden, No. 21-CV-1693, 2022 WL 1134138, at *6 (M.D. Fla. Apr. 18, 2022) (34 year-old Judge Kathryn Kimball Mizelle) ("Statutory construction is a search for the ordinary, contemporary meaning of terms in their context."); United States v. Hasson, 26 F.4th 610, 623 (4th Cir. 2022) (40 year-old Judge Allison Jones Rushing) ("'As in all statutory construction cases, we assume that the ordinary meaning of the statutory language accurately expresses the legislative purpose.'" (quoting Marx v. Gen. Revenue Corp., 568 U.S. 371, 376 (2013))).

15 *See* William N. Eskridge Jr., Brian G. Slocum & Stefan Th. Gries, *The Meaning of* Sex*: Dynamic Words, Novel Applications, and Original Public Meaning*, 119 MICH. L. REV. 1503, 1519-22 (2021) (discussing two divergent approaches to ordinary meaning using *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) as an example); Kevin Tobia & John Mikhail, *Two Types of Empirical Textualism*, 86 BROOK. L. REV. 461, 462 (2021) ("Empirical textualists frequently rely upon dictionaries . . . . An ordinary meaning textualist might also look to legislative history—not primarily as evidence of the legislators' intent or expected applications considered in isolation, but rather as probative evidence of what the broader community likely understood the text to mean at the time it was adopted." (citations omitted)); Tara Leigh Grove, *Which Textualism?*, 134 HARV. L. REV. 265, 268-271 (2020) ("'[F]ormalistic textualism,' [is] an approach that instructs interpreters to carefully parse the statutory language, focusing on semantic context and downplaying policy concerns . . . . [and] 'flexible textualism,' [is] an approach that attends to text but permits interpreters to make sense of that text by considering policy and social context as well as practical consequences."); Nourse, *supra* note 13 (manuscript at 4-6) (documenting fractures among textualists Justices); William Eskridge Jr., Brian Slocum & Kevin Tobia, Textualism's Defining Moment 65-70 (Dec. 29, 2022) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4305017 [https://perma.cc/UAX5-387P] (documenting the series of complex choices facing modern textualists).

16 *See* Nourse, *supra* note 13 (manuscript at 3) ("Six of the Supreme Court's justices publicly claim to be textualists and originalists.").

17 *See* Nourse, *supra* note 13 (manuscript at 5-6) ("Contrary to what one might expect from a unified philosophy, self-described textualist Justices, including Trump appointees, regularly disagreed, calling each other's interpretations 'schizophrenic' or 'science fiction.' Equally pointed were arguments from liberal Justices (who themselves use textualist argument in some cases) that original public meaning methodology was deployed opportunistically (although the liberal justices themselves deployed history and text in some cases)." (citations omitted)).

Textualists are openly divided about *when* to apply technical rather than ordinary meaning in both statutory and constitutional cases.[18] For instance, in *Van Buren v. United States*, Justice Barrett, writing for the majority, argued that the term "access" to a computer was a technical term.[19] In response, Justice Thomas, joined by Chief Justice Roberts and Justice Alito, dissented and argued that Justice Barrett's approach to the statute was wrong: ordinary meaning (not technical meaning) should prevail, and ordinary meaning led to precisely the opposite result.[20]

The presence of technical terms in legal texts challenges any unequivocal interpretive commitment to ordinary meaning. And for less unequivocal textualists it raises the question: Which terms are technical? Indeed, legal texts are replete with technical legal terms.[21] Some terms are obviously legal terms of art, as they have no ordinary counterpart: "habeas corpus," "res ipsa loquitur," and "parol evidence," for example. Other terms are "ambiguous" in the sense that they might express either an ordinary or technical legal meaning: "intent," "reasonable," and "tribunal," for instance.[22] The significant number of technical terms in legal texts has convinced some prominent scholars that legal language is *primarily* a technical language.[23] The Court

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18 *See* discussion *infra* Section I.B.

19 *See* Van Buren v. United States, 141 S. Ct. 1648, 1657 (2021) ("When interpreting statutes, courts take note of terms that carry 'technical meanings.' 'Access' is one such term . . . ." (alteration omitted) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 73 (2012), and AMERICAN HERITAGE DICTIONARY 10 (3d ed. 1992))). Throughout the Article we use "technical" to mean non-ordinary, which includes specialized legal meaning and other specialized meanings, such as specialized scientific meaning.

20 *See id.* at 1663 (Thomas, J., dissenting) (decrying the interpretation as a departure from "ordinary meaning").

21 *See* Frederick Schauer, *Is Law a Technical Language?*, 52 SAN DIEGO L. REV. 501, 507-09 (2015) (noting that many scholars have argued that a distinct legal language exists). In many cases, the ordinary and technical meanings are related or partially overlapping: an instance of polysemy. *See* Daniel Hemel, The Law, Economics, and Politics of Polysemy 2 (Mar. 8, 2022) (unpublished manuscript), https://law.yale.edu/sites/default/files/area/center/corporate/spring2022_paper_hemeldaniel_3-17-22.pdf [https://perma.cc/KE6A-3NQ7] ("Polysemy—the existence of multiple related meanings for the same word or phrase—is a common phenomenon in the law."); *see generally* Heikki E. S. Mattila, *Legal Vocabulary*, *in* THE OXFORD HANDBOOK OF LANGUAGE AND LAW 27, 30 (Peter M. Tiersma & Lawrence M. Solan eds., 2012); GÉRARD CORNU, LINGUISTIQUE JURIDIQUE (3d ed. 2005).

22 *See* Schauer, *supra* note 21, at 501-02 (providing examples of legal terms of art and "ambiguous" words). Common words frequently have both ordinary and technical meanings. *See, e.g.*, U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1852 n.4 (2020) (Sotomayor, J., dissenting) (recognizing that "land" has both an ordinary and a legal meaning).

23 *See* Schauer, *supra* note 21, at 508 ("Karl Llewellyn recognized that much of the language of law was appropriately divergent from ordinary language and thus suggested that there might even be something like a Committee on Translation to enable disciplines to understand each other."); *see also* John O. McGinnis & Michael B. Rappaport, *The Constitution and the Language of the Law*, 59 WM. & MARY L. REV. 1321, 1372 (2018) (arguing that even ambiguous constitutional terms like "good behavior" are better understood as legal terms); John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 NOTRE DAME L. REV. 919, 921 (2021)

recently acknowledged that "[s]ometimes Congress's statutes stray a good way from ordinary English."[24] Nevertheless, the Court maintains that "affected individuals and courts alike are entitled to assume statutory terms bear their ordinary meaning."[25]

The presence of technical legal language presents a theoretical challenge for textualists who increasingly define and justify their interpretive methodology as consistent with ordinary meaning and ordinary people.[26] Some textualists apply ordinary meanings *because* this mode of interpretation promotes fair notice or reflects faithful agency to the people.[27] But this assumption depends on an untested empirical question. Namely, do ordinary people understand legal language to generally communicate ordinary meanings? Perhaps the assumed connection between ordinary people and ordinary meaning is not so robust. Might ordinary people understand some laws to communicate *technical* meanings?

Promisingly, the (textualist) Supreme Court has shown an increasing interest in using empirical evidence to help inform statutory interpretation.[28] If the Court seeks to base its interpretive principles on facts about how

("While many constitutional provisions seem to be indeterminate, we argue that once the Constitution is properly understood as a legal document, these provisions become more determinate.").

24 Niz-Chavez v. Garland, 141 S. Ct. 1474, 1481 (2021).

25 *Id.* at 1482.

26 *See* Barrett, *Congressional Insiders and Outsiders*, *supra* note 2, at 2208 ("The textualist commitment to the ordinary-reader perspective might be explained by a competing conception of faithful agency—one that understands courts to be the faithful agents of the people rather than of Congress."); Barrett, *Assorted Canards of Contemporary Legal Analysis*, *supra* note 4, at 864 ("[Textualists] care about what people understood words to mean at the time that the law was enacted because those people had the authority to make law."); Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1825 (2020) (Kavanaugh, J., dissenting) ("The ordinary meaning that counts is the ordinary public meaning at the time of enactment . . . ."); *see generally* Bernstein, *supra* note 5, at 442; Tobia et al., *Progressive Textualism*, *supra* note 5, at 1442.

27 *See supra* notes 2–5 and accompanying text.

28 Consider Chief Justice Roberts's recent line of questioning in a statutory interpretation case:

> [O]ur objective is to settle upon the most natural meaning of the statutory language to an ordinary speaker of English, right?
>
> . . . .
>
> So the most probably useful way of settling all these questions would be to take a poll of 100 ordinary—ordinary speakers of English and ask them what [the statute] means, right?

Transcript of Oral Argument at 51-52, Facebook, Inc. v. Duguid, 141 S. Ct. 1163 (2021) (No. 19-511). Similarly, in his concurring opinion in *Duguid*, Justice Alito argued:

> The strength and validity of an interpretive canon is an empirical question, and perhaps someday it will be possible to evaluate these canons by conducting what is called a corpus linguistics analysis, that is, an analysis of how particular combinations of words are used in a vast database of English prose.

Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1174 (2021) (Alito, J., concurring).

ordinary members of the public understand language, empirical studies can provide useful information about those facts. Building on recent empirical work on ordinary meaning,[29] we use methods from the growing field of "experimental jurisprudence" to help resolve the tension between ordinary and technical meaning.[30] A series of original empirical studies of American people reveal that ordinary people's understanding of law is not limited to ordinary meaning. To the contrary, people understand law to communicate *technical* meanings, especially *legal* meanings.

Insofar as modern textualism appeals to "ordinary people" or the "ordinary reader"—out of concern for democracy, fair notice, or rule of law values, or objective inquiry into meaning—this empirical discovery indicates that textualists should rethink a sweeping and unwavering commitment to ordinary meaning. Most critically, the results suggest that a commitment to ordinary people does not entail a broad and strong presumption of ordinary meaning. Ultimately, the results reveal a complex picture of how ordinary people understand legal language: People are sensitive to both the legal context (i.e., does the term appear in law or in nonlaw) and the term type (i.e., is the term ordinary or legal). The evidence reveals that fidelity to ordinary people requires sensitivity to *both* ordinary and legal meaning.

This Article proceeds in four Parts. First, Part I provides background on ordinary meaning. It articulates the challenges facing some interpreters—including modern textualists—that arise from a conflict between ordinary and technical meaning. Textualist theory centers ordinary meaning: lest laws be like Nero's edicts, posted "high up on the pillars, so that they could not easily be read."[31] At the same time, textualist practice regularly gives statutory terms technical legal meanings. Furthermore, even when purporting to give terms their "ordinary" meanings, textualist judges rely on evidence of technical

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29 *See generally* Kevin Tobia, Brian G. Slocum & Victoria Nourse, *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213 (2022) (presenting the empirical findings from a study into how ordinary people actually understand ordinary meaning legal canons); James A. Macleod, *Finding Original Public Meaning*, 56 GA. L. REV. 1 (2021) (examining the meaning of the phrase "because of sex"); James A. Macleod, *Ordinary Causation: A Study in Experimental Statutory Interpretation*, 94 IND. L.J. 957 (2019) (studying causal language); Benedikt Pirker & Izabela Skoczén, *Pragmatic Inferences and Moral Factors in Treaty Interpretation—Applying Experimental Linguistics to International Law*, 23 GERMAN L.J. 314 (2022) (discussing pragmatic inferences in lay interpretation); Noel Struchiner, Ivar R. Hannikainen & Guilherme da F. C. F. de Almeida, *An Experimental Guide to Vehicles in the Park*, 15 JUDGMENT & DECISION MAKING 312 (2020) (investigating the impact of purpose on lay interpretation).

30 *See, e.g.*, Karolina Magdalena Prochownik, *The Experimental Philosophy of Law: New Ways, Old Questions, and How Not to Get Lost*, 16 PHIL. COMPASS, Nov. 2021, at 2-5, 9 (providing a systematic overview of experimental philosophy of law); Roseanna Sommers, *Experimental Jurisprudence: Psychologists Probe Lay Understandings of Legal Constructs*, 373 SCI. 394, 394-95 (2021) (discussing the growing field of experimental jurisprudence); Kevin Tobia, *Experimental Jurisprudence*, 89 U. CHI. L. REV. 735, 758-61 (2022) (proposing a framework to understand the contributions of experimental jurisprudence).

31 ANTONIN SCALIA, A MATTER OF INTERPRETATION 17 (new ed. 2018).

meaning, such as technical definitions from legal dictionaries. An analysis of recent Supreme Court opinions citing a legal dictionary (over 500 opinions in total) reveals that textualists (and non-textualists) regularly appeal to sources of evidence about *technical* meaning when purporting to evaluate ordinary meaning, citing legal dictionaries for claims about the meaning of seemingly ordinary terms like "any" or "so."[32]

Next, Part II introduces one promising solution to the problem of ordinary people and technical terms through the idea of a division of linguistic labor (DLL). According to DLL, "making meaning" is divided among the population, and the meaning of technical terms falls within the ambit of experts. The meaning of scientific terms (e.g., "nucleic acid") falls to the scientific experts, and the meaning of legal terms (e.g., "parol evidence") falls to legal experts. Moreover, people understand this division and defer to experts about the meanings of technical terms. Thus, the public at large can use a host of technical words, even though only a small expert population is able to articulate the precise meanings of those words. If DLL operates similarly in law, textualists can claim fidelity to ordinary people while recognizing unique legal terms of art *because* ordinary people understand laws as containing technical terms and defer to legal experts about those technical terms' meanings.

Crucially, the success of the DLL response depends on empirical claims. One such claim is that people understand unique legal terms (e.g., "parol evidence") to communicate legal meanings. Another untested question, with broader scope and larger stakes is: How do people understand seemingly *ambiguous* terms, ones that could plausibly carry ordinary *or* legal meanings (e.g., "intent," "because of," or "tribunal")? Perhaps ordinary people defer *broadly* about legal terms, understanding even ambiguous terms to take their technical legal meanings.

Part III then presents a set of experimental studies designed to clarify these questions about ordinary people's understanding of language in legal texts. Five original empirical studies (N = 4,365) support the hypothesis that ordinary people understand legal texts to contain terms with technical meanings and intuitively defer to experts for the meanings of those terms. Moreover, there is good reason to think that people understand some seemingly ambiguous terms (e.g., "intent" or "tribunal") to communicate technical or legal meanings rather than ordinary or non-legal meanings.

Part IV analyzes the implications of these results. First and most broadly, the results support a reorientation of recent textualist debate and practice. Textualists have begun to frame the robust commitment to ordinary meaning as necessarily following from a broader commitment to ordinary people. The results call into question this connection by revealing that ordinary people are

32 *See infra* Appendix.

sensitive to the (legal) genre in which a term appears and the type of term (e.g., legal versus ordinary). Textualists—and other interpreters—who claim fidelity to *ordinary people* or ground their theory in appeals to the "ordinary reader" or "ordinary understanding" should revise their view of ordinary meaning's strength. The studies support a shift from *ordinary* (i.e., non-legal) meaning to a broader *public* meaning concept that includes both ordinary and technical meanings.

Second, the results challenge the strength of a universal presumption of ordinary meaning. People do not generally take ambiguous terms in law to convey ordinary meanings over legal ones. Arguably, the studies provide stronger empirical support for an intuitive presumption of *legal over ordinary* meaning. Ultimately, the results suggest that people do not see "laws'" language as a purely ordinary language or a purely legal one,[33] although ordinary meaning still plays an important role in interpretation. The empirical evidence strongly supports a presumption of ordinary meaning over other types of non-legal technical meanings not commonly reflected in laws. For example, there is stronger support for an intuitive presumption of ordinary meaning over technical sports meaning in law: "Penalty" in law should be presumed to take its ordinary meaning over its technical sports meaning.[34] To accommodate the significance of both ordinary and legal meaning in interpretation, this Article develops a new theory of contrastive presumptions.[35] In sum, we argue that these contrastive presumptions, rather than universal ones, better reflect the genre of legal texts.

Part IV then illustrates the significance of these results in light of recent Supreme Court cases.[36] For example, we provide a novel explanation of the landmark case *Bostock v. Clayton County*,[37] which secured rights for LGBTQ+ persons through a coherent application of legal meaning.

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33 By evaluating a monolithic conception of "law," this Article represents a first step in a broader research program. The Article does not investigate whether people's evaluation of technical meaning varies across different areas of law (e.g., criminal versus tax), different types of rules (e.g., primary rules versus secondary rules), or different perceptions of intended audiences (e.g., lay citizens versus expert agencies). It is plausible that some of these factors might affect how people understand the content of legal rules, and we hope that future scholarship will explore those questions.

34 *See* discussion *infra* Section IV.B.

35 We call these "contrastive presumptions." For example, we suggest that ordinary understanding of law is characterized by a presumption of *legal* over *ordinary* meaning, but also by a presumption of *ordinary* over *technical religious* meaning. *See* discussion *infra* Section IV.B.

36 *See* discussion *infra* Section IV.C.

37 Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020). There is a rich and growing literature on *Bostock* and its implications for textualism. *See, e.g.*, Benjamin Eidelson, *Dimensional Disparate Treatment*, 95 S. CAL. L. REV. 785, 845-55 (2022); Grove, *Which Textualism?*, *supra* note 15, at 279-90; Anuj C. Desai, *Text Is Not Enough*, 93 U. COLO. L. REV. 1, 13-42 (2022); Andrew Koppelman, Bostock*, LGBT Discrimination, and the Subtractive Moves*, 105 MINN L. REV. HEADNOTES 1, 3 (2020); Eskridge et al., Textualism's Defining Moment, *supra* note 15, at 6; Mitchell N. Berman & Guha Krishnamurthi, Bostock *Was Bogus: Textualism, Pluralism, and Title VII*, 97 NOTRE DAME L. REV. 67, 73-119 (2021); Cary Franklin, *Living Textualism*, 2020 SUP. CT. REV. 119, 119-202; Cass R. Sunstein, *Textualism and the Duck-Rabbit Illusion*, 11 CALIF. L. REV.

Finally, Part IV explains that the empirical findings raise new questions about fair notice. Our sample of Americans largely reports wanting to learn about the meaning of some laws. However, prior research has revealed the inaccessibility of lawyers and legal services to some citizens,[38] and the serious impediments to accessing the text of some laws.[39] In light of these barriers, our results are unsurprising: Most of the sample reports not receiving interpretive advice from lawyers. Instead, most people report relying on their own legal research (e.g., Google searching).[40] Combining this result with our earlier experimental findings results in a bleak picture of fair notice: People understand that laws typically contain technical language, but they do not generally have help accessing that technical meaning. Interpreters often connect ordinary meaning with fair notice,[41] and fair notice should include access to elaboration of technical meanings. We propose that interpretive theory center the fact that ordinary people rarely have *perfect* notice of the law's meaning, but they may have *partial* notice.[42]

I. ORDINARY MEANING VS. TECHNICAL MEANING

Legal scholars have long noted the tension between the presumption of ordinary meaning and law's use of technical terms.[43] This tension is one aspect of a broader debate about the extent to which legal texts have specialized meanings not accessible to ordinary people.[44] This Part describes the uncertainty regarding

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ONLINE 463, 474-75 (2020); Robin Dembroff, Issa Kohler-Hausmann & Elise Sugarman, *What Taylor Swift and Beyoncé Teach Us About Sex and Causes*, 169 U. PA. L. REV. ONLINE 1, 1-12 (2020).

38 *See* Lisa R. Pruitt & Bradley E. Showman, *Law Stretched Thin: Access to Justice in Rural America*, 59 S.D. L. REV. 466, 468 (2014) ("Struggles for 'access to justice' are pervasive across the United States, but rural Americans face particular challenges to accessing lawyers and courts, and generally to getting legal needs met.").

39 Scholars have noted the challenges in accessing law. *See* Leslie A. Street & David R. Hansen, *Who Owns the Law? Why We Must Restore Public Ownership of Legal Publishing*, 26 J. INTELL. PROP. L. 205, 221-42 (2019) (documenting barriers to accessing laws regarding copyright, contracts, website terms of use, and even criminal statutes).

40 *See* discussion *infra* Section III.E.

41 *See, e.g.*, *Bostock*, 140 S. Ct. at 1828 (Kavanaugh, J., dissenting) ("A literalist approach to interpreting phrases disrespects ordinary meaning and deprives the citizenry of fair notice of what the law is.").

42 "Partial" notice can be understood as a scalar concept. *See infra* Section IV.D. Scalar words such as "tall" and "bright" have gradable properties where objects or concepts can be compared according to the amount or degree to which the gradable properties are possessed by the object or concept. *See* Bob van Tiel, Elizabeth Pankratz & Chao Sun, *Scales and Scalarity: Processing Scalar Inferences*, 105 J. MEMORY & LANGUAGE 93, 104-06 (2019) (demonstrating empirically how ordinary people process scalar words).

43 *See, e.g.*, Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 404 (1950) ("Words are to be taken in their ordinary meaning unless they are technical terms or words of art.").

44 *See* Schauer, *supra* note 21, at 503 ("[H]aving determined the meaning of some item of legal language—having interpreted it—the lawyer or judge or commentator must then apply it in the

the ordinary meaning presumption and the challenges to fair notice and textualism posed by technical terms in legal texts.

This Part begins in Section A by explaining that jurists committed to ordinary meaning sometimes seem to rely heavily on technical meaning.[45] More broadly, there is judicial uncertainty concerning what the ordinary meaning presumption requires: Does it instruct judges to apply ordinary over competing technical meanings, or does it merely reflect the proposition that most words have only ordinary meanings?[46]

Section B further documents the state of uncertainty, providing an empirical analysis of the frequent use of legal dictionaries in Supreme Court opinions. Legal dictionaries usually (although not always) reflect legal meaning. The data illustrate that justices sometimes look to evidence of a term's technical legal meaning (e.g., a technical definition from a legal dictionary), even when claiming to interpret the term's "ordinary meaning."

Section C develops this empirical data into a new challenge for legal interpreters committed to interpreting law in line with ordinary people's understanding of language. This challenge is particularly pointed for textualists who claim to be "faithful agents of the people." But the problem is also relevant to textualists who claim that the theory promotes fair notice or tracks the "ordinary" or "reasonable" reader's understanding of law. The problem arises from a conflict between modern textualist theory and practice. Modern textualist theory is increasingly grounded in concerns about the *ordinary public*. Textualists seeking to interpret law from the perspective of an ordinary speaker of English claim to adhere to a broad presumption of ordinary meaning. Yet, textualists often appeal to

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resolution of the particular legal matter at hand. This, it is said, is the process of construction, and it is an inevitably legal task drawing on legal tools, legal ideas, and legal goals . . . .").

45 *See, e.g.*, *Bostock*, 140 S. Ct. at 1738-43 (majority opinion) (interpreting the ordinary public meaning using sources relevant to legal meaning such as precedent and language in other statutes).

46 There is support for both views of the ordinary meaning presumption. The Court has famously chosen ordinary over technical meaning in some cases such as *Nix v. Hedden*, 149 U.S. 304, 306-07 (1893). But in many other cases, such as *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), the Court has chosen technical meaning, often without discussion. *See infra* subsection IV.C.2.; *see also* Moskal v. United States, 498 U.S. 103, 114 (1990) ("[W]here a federal criminal statute uses a common-law term of established meaning without otherwise defining it, the general practice is to give that term its common-law meaning." (quoting United States v. Turley, 352 U.S. 407, 411 (1957))). This confusion is reflected in the lower courts' approaches to the ordinary meaning presumption. For example, one court chose the ordinary rather than legal meaning of "assault" in order to provide ordinary people with fair notice of the law. *See* Patrie v. Area Coop. Educ. Servs., No. CV-00-0440418-S, 2004 WL 1489555, at *7 (Conn. Super. Ct. June 16, 2004) (indicating that "assault" should be given its ordinary meaning because ordinary people should "not be expected to reference civil case law and the entire penal code to find out how [the statute] applies to them"). In contrast, some judges have argued that "[b]ecause a court's ultimate task is to give legal effect to a statute, the legal meaning takes precedence over the ordinary meaning." United States v. Scott, 990 F.3d 94, 133 (2d Cir.) (Menashi, J., concurring), *cert. denied*, 142 S. Ct. 397 (2021).

interpretive evidence of terms' *technical* meanings. Consistent textualists, it seems, must either give up their central theoretical commitment (i.e., fidelity to ordinary people through ordinary meaning) or give up significant parts of their real interpretive practice (e.g., appeals to legal dictionaries and other sources of technical meaning).

A. *The Supreme Court's Presumption of Ordinary Meaning*

The longstanding conventional view is that "ordinary meaning" represents a presumption that the definitions of legal terms are to be determined from general non-legal language usage.[47] However, even this basic premise—the primacy of ordinary meaning—has been challenged. Karl Llewellyn famously argued that "there are two opposing canons on almost every point."[48] One main canon (the "thrust" in Llewellyn's terms) provides that "[w]ords are to be taken in their ordinary meaning unless they are technical terms or words of art."[49] The counter-canon (the "parry" in Llewellyn's terms) provides that "[p]opular words may bear a technical meaning and technical words may have a popular signification and they should be so construed as to agree with evident intention or to make the statute operative."[50] Thus, according to Llewellyn, common words may be given technical meanings (and vice versa) depending on the judge's subjective view of the statutory language and scheme.[51]

Llewellyn's classic "thrust" and "parry" canons illustrate the uncertainty about whether the existence of a technical meaning (e.g., as a term of art) automatically displaces an applicable ordinary meaning.[52] The Supreme Court has not since explicitly resolved this uncertainty. In fact, the unresolved tension between ordinary meaning and technical terms extends even to the classic case *Nix v. Hedden*,[53] which is typically viewed as

47 *See* Brian G. Slocum, *The Ordinary Meaning of Rules*, *in* PROBLEMS OF NORMATIVITY, RULES AND RULE-FOLLOWING 295, 296 (Michał Araszkiewicz, Paweł Banaś, Tomasz Gizbert-Studnicki & Krzysztof Płeszka eds., 2015) ("[A]bsent some reason for deviation, such as words with technical or special legal meanings, the language used in legal texts should be viewed as corresponding with that used in non-legal communications." (citation omitted)); *see also* Llewellyn, *supra* note 43, at 404.

48 Llewellyn, *supra* note 43, at 401.

49 *Id.* at 404.

50 *Id.* at 401, 404.

51 *See id.* at 401 ("[T]o make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon: The good sense of the situation and a simple construction of the available language to achieve that sense, *by tenable means, out of the statutory language*.").

52 *See id.*; *see also* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 649-50 n.1 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("The most authoritative legal dictionaries of the founding era lack any definition for 'regulate' or 'regulation,' suggesting that the term bears its ordinary meaning (rather than some specialized legal meaning) in the constitutional text.").

53 Nix v. Hedden, 149 U.S. 304, 306 (1893).

asserting the primacy of ordinary meaning over technical meaning. In *Nix*, the Court decided whether tomatoes were to be classified as "vegetables" or "fruit" under the Tariff Act of 1883.[54] The Court first stated its usual rule that terms must receive their ordinary meanings rather than their technical meanings.[55] The Court then noted that the dictionary definitions cited by the parties "define[d] the word 'fruit' as the seed of plants, or that part of plants which contains the seed, and especially the juicy, pulpy products of certain plants, covering and containing the seed."[56] In the Court's view, though, those definitions "[had] no tendency to show that tomatoes are 'fruit,' as distinguished from 'vegetables,' in common speech, or within the meaning of the Tariff Act."[57]

Instead, relying partly on dictionary definitions and partly on its own world knowledge, the Court reasoned about the proper classification as follows:

> Botanically speaking, tomatoes are the fruit of a vine, just as are cucumbers, squashes, beans and peas. But in the common language of the people, whether sellers or consumers of provisions, all these are vegetables, which are grown in kitchen gardens, and which, whether eaten cooked or raw, are, like potatoes, carrots, parsnips, turnips, beets, cauliflower, cabbage, celery and lettuce, usually served at dinner in, with or after the soup, fish or meats which constitute the principal part of the repast, and not, like fruits generally, as dessert.[58]

The Court thus chose the ordinary meanings of "fruit" and "vegetables" over their scientific meanings.[59] The Court analogized the classification of tomatoes to an earlier case, *Robertson v. Salomon*, which involved an attempt to classify beans as "seeds."[60] In *Salomon*, the Court similarly reasoned that beans should not be "classified as seeds any more than walnuts should be so

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54 *See id.* ("The single question in this case is whether tomatoes, considered as provisions, are to be classified as 'vegetables' or as 'fruit' within the meaning of [the Act].").

55 *See id.* ("There being no evidence that the words 'fruit' and 'vegetables' have acquired any special meaning in trade or commerce, they must receive their ordinary meaning.").

56 *Id.*

57 *Id.*

58 *Id.* at 307.

59 *See id.* at 306 ("The only witnesses called at the trial testified that neither 'vegetables' nor 'fruit' had any special meaning in trade or commerce, different from that given in the dictionaries . . . .").

60 *See id.* at 307 ("As an article of food on our tables, whether baked or boiled, or forming the basis of soup, they are used as a vegetable, as well when ripe as when green. This is the principal use to which they are put. Beyond the common knowledge which we have on this subject, very little evidence is necessary, or can be produced." (citing Robertson v. Salomon, 130 U.S. 412, 413 (1889))).

classified. Both are seeds in the language of botany or natural history, but not in commerce nor in common parlance."[61]

Nix typically stands for the privileging of ordinary meaning over technical meaning, but the decision is not so unequivocal. The Court chose ordinary meaning over scientific meaning, but it also indicated sensitivity to context. The Court explained that the terms "must receive their ordinary meaning" because there was "no evidence that the words 'fruit' and 'vegetables' have acquired any special meaning in trade or commerce."[62] Thus, if there had been a "special meaning in trade or commerce" such that tomatoes were classified as "fruit[s]," arguably that technical (trade) meaning would control.[63]

Like the *Nix* Court, the current Court regularly appeals to ordinary meaning, but its commitment is even stronger. Ordinary meaning sits at the heart of the interpretive philosophy of at least five strictly textualist Justices. As Justice Barrett recently stated, modern textualists "approach language from the perspective of an ordinary English speaker"[64] which leads them to "insist[] that judges must construe statutory language consistent with its 'ordinary meaning.'"[65] Justice Thomas agrees, following a similar line of reasoning: "The term 'salesman' is not defined in the statute, so 'we give the term its ordinary meaning.'"[66] Justice Gorsuch similarly supports a commitment to ordinary meaning: "When called on to interpret a statute, this Court generally seeks to discern and apply the ordinary meaning of its terms at the time of their adoption."[67]

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61 *Salomon*, 130 U.S. at 414. In a manner similar to *Nix*, the Court reasoned that "beans may well be included under the term 'vegetables'" because they are "used as a vegetable." *Id.*

62 *Nix*, 149 U.S. at 306.

63 *Id.*

64 Barrett, *Congressional Insiders and Outsiders*, *supra* note 2, at 2194.

65 Barrett, *Assorted Canards of Contemporary Legal Analysis*, *supra* note 4, at 856; *see also* HollyFrontier Cheyenne Refining LLC v. Renewable Fuels Ass'n, 141 S. Ct. 2172, 2189 (2021) (Barrett, J., dissenting) (proposing that the dissent's statutory reading better respects "ordinary meaning").

66 Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134, 1140 (2018) (Thomas, J.) (quoting Taniguchi v. Kan Pacific Saipan, Ltd., 566 U.S. 560, 566, (2012)). Justice Thomas also appeals to "ordinary meaning" in constitutional interpretation. *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2238 (2018) (Thomas, J., dissenting) ("At the founding, 'search' did not mean a violation of someone's reasonable expectation of privacy. The word was probably not a term of art, as it does not appear in legal dictionaries from the era. And its ordinary meaning was the same as it is today . . . .").

67 BP P.L.C. v. Mayor of Balt., 141 S. Ct. 1532, 1537 (2021) (Gorsuch, J.) (citing Niz-Chavez v. Garland, 141 S. Ct. 1474, 1480-81 (2021)); *see also* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1750 (2020) (Gorsuch, J.) ("[T]he law's ordinary meaning at the time of enactment usually governs . . . ."); Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2070 (2018) (Gorsuch, J.) ("As usual, our job is to interpret the words consistent with their 'ordinary meaning at the time Congress enacted the statute.'" (alterations omitted) (quoting Perrin v. United States, 444 U.S. 37, 42 (1979))).

Justice Kavanaugh advocates for a particularly strong, perhaps conclusive presumption of ordinary meaning: "The best way for judges to demonstrate that we are deciding cases based on the ordinary meaning of the law is to walk the walk, even in the hard cases when we might prefer a different policy outcome."[68] Justice Alito similarly endorses a strong presumption of ordinary meaning: "Without strong evidence to the contrary . . . , our job is to ascertain and apply the '*ordinary* meaning' of the statute."[69] Finally, Chief Justice Roberts, although famous for transforming text to avoid constitutional questions, also professes devotion to "ordinary meaning."[70]

The liberal Justices tend to be more reserved in their adherence to ordinary meaning, but they appeal to it nonetheless.[71] For these Justices, ordinary meaning is not the *primary* or *sole* criterion of interpretation, but it regularly features as one consideration that "informs" interpretation. Consider Justice Kagan's reasoning in a case interpreting the Armed Career Criminal Act: "The elements clause defines a 'violent felony,' and that term's ordinary meaning informs our construction . . . . Ultimately, context determines meaning, . . . and here we are interpreting a phrase as used in defining the term 'violent felony.'"[72] For the liberal Justices, "ordinary meaning" serves an indirect function as evidence of congressional intent.[73]

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68 *Bostock*, 140 S. Ct. at 1836 (Kavanaugh, J., dissenting).

69 *Id*. at 1772 (Alito, J., dissenting) (quoting Chisom v. Roemer, 501 U.S. 380, 410 (1991)); *see also* Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1033 (2021) (Alito, J.) (deciphering the "'ordinary meaning' of the phrase 'relate to'"). Justice Alito's appeal to "ordinary meaning" is also present in his constitutional interpretation jurisprudence. *See, e.g.*, Fulton v. City of Phila., 141 S. Ct. 1868, 1888 (2021) (Alito, J.) ("The correct interpretation of the Free Exercise Clause is a question of great importance, and *Smith*'s interpretation is hard to defend. It can't be squared with the ordinary meaning of the text of the Free Exercise Clause . . . .").

70 *Compare* Bond v. United States, 572 U.S. 844, 861-66 (2014) (Roberts, C.J.) (reading a statute very narrowly to avoid a constitutional question), *with* FCC v. AT&T Inc., 562 U.S. 397, 403 (2011) (Roberts, C.J.) ("When a statute does not define a term, we typically 'give the phrase its ordinary meaning.'" (quotation omitted)).

71 *See also* Appendix (showing that Roberts C.J. agreed with the other textualists 91 percent of the time in the past two terms); *see also* Nourse, *supra* note 13 (manuscript at 25).

72 Borden v. United States, 141 S. Ct. 1817, 1830 (2021) (Kagan, J.) (plurality opinion) (alterations and quotations omitted).

73 *See, e.g.*, Trump v. New York, 141 S. Ct. 530, 543 (2020) (Breyer, J., dissenting) ("Congress was aware that the words of the statute bore this meaning . . . . This understanding was shaped not only by the ordinary meaning of the words, but also by legislators' view of the meaning of those words as they appear in the Constitution.").

B. *Textualism's Interpretive Sources*

Despite the Supreme Court's claimed adherence to "ordinary meaning," its practice reveals frequent inquiries into technical legal meaning. This Section provides empirical evidence of this phenomenon. And in the next Section we underscore the problem created by this tension.

As *Nix* illustrates, ordinary and technical meanings are typically non-identical. The decision to treat language as technical, rather than ordinary, should direct interpreters to different sources of interpretive evidence. If the Court aims to evaluate ordinary meaning, it should consult interpretive sources pointing to the non-legal language comprehension of an ordinary English speaker. By contrast, if the Court seeks to determine technical meaning, it should consult different sources. To find a term's technical scientific meaning, interpreters would look to technical sources—scientific dictionaries or papers. Similarly, when inquiring into the technical legal meaning of a term (e.g., the legal meaning of "infant"), interpreters should look to technical definitions in a legal dictionary—not ones found in an ordinary dictionary.

Despite the theoretical separation between ordinary and technical meaning, the Court's actual interpretive practices are more muddled. For example, consider the connection between legal dictionaries and ordinary meaning. With the help of law school student research assistants, we evaluated every Supreme Court opinion that cited a law dictionary before June 7, 2021.[74] In total, 483 cases (544 separate opinions) were coded.[75] Republican-appointed Justices authored 314 of the opinions, and Democrat-appointed Justices authored 116 of the opinions (114 were classified as "other," including per curiam decisions).[76] Of those 544 opinions, 75 cited a law dictionary even when the opinion explicitly referred to "ordinary meaning" as the relevant standard.[77] In many of the pre-1900 cases, the dictionary was cited in the "arguments presented" section, rather than the opinion section. In many cases, a law dictionary definition was cited even when the terms at issue had clear ordinary

74 *See infra* Appendix.

75 *See infra* Appendix.

76 *See infra* Appendix.

77 *See infra* Appendix; *see also* Kevin Tobia, *Supreme Court Use of Legal Dictionaries*, OPEN SCI. FRAMEWORK (Oct. 29, 2022, 9:40 AM), https://osf.io/hc9sd [https://perma.cc/YLL7-NWHA] (providing the data collected for the empirical analysis of Supreme Court cases).

meanings: "entitle,"[78] "pursuant,"[79] "violent,"[80] "money,"[81] "detain,"[82] "send,"[83] "notwithstanding,"[84] "now,"[85] "in,"[86] "available,"[87] "price,"[88] and "such."[89]

Perhaps this apparent tension could be resolved by noting that legal dictionaries sometimes include popular or ordinary definitions. For example, in *Wisconsin Central Ltd. v. United States*, Justice Gorsuch interpreted the statutory meaning of "money remuneration," appealing to both ordinary and legal dictionaries.[90] But the definition in the law dictionary explicitly noted the "popular sense" of the term "money."[91] So here, the tension between the purported authority of ordinary meaning and the subsequent reference to a legal dictionary is easily resolved.

But many other Supreme Court opinions citing to legal dictionaries in service of ordinary or plain meaning do not make clear that the legal

78 *See* Van Buren v. United States, 141 S. Ct. 1648, 1654 (2021) ("'Entitle' means 'to give a title, right, or claim to something.'" (quoting RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 649 (2d ed. 1987))).

79 *See* BP P.L.C. v. Mayor of Balt., 141 S. Ct. 1532, 1538 (2021) ("'[P]ursuant to' . . . then, just means that a defendant's notice of removal must assert the case is removable 'in accordance with or by reason of' one of those provisions." (quoting BLACK'S LAW DICTIONARY (rev. 4th ed. 1968))).

80 *See* Stokeling v. United States, 139 S. Ct. 544, 551 (2019) ("'[V]iolence' implies force, including an 'unjust or unwarranted use of force.'" (quoting BLACK'S LAW DICTIONARY (7th ed. 1999))).

81 *See* Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2071 (2018) ("'[M]oney' was ordinarily understood to mean currency 'issued by a recognized authority as a medium of exchange.'" (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 1583 (2d ed. 1942), and BLACK'S LAW DICTIONARY (3d ed. 1933))).

82 *See* Jennings v. Rodriguez, 138 S. Ct. 830, 848 (2018) (citing BLACK'S LAW DICTIONARY (7th ed. 1999) to define "detain" as "[t]he act or fact of holding a person in custody; confinement or compulsory delay").

83 *See* Water Splash, Inc. v. Menon, 137 S. Ct. 1504, 1509 n.1 (2017) (using BLACK'S LAW DICTIONARY (10th ed. 2014) to define "send" as "[t]o cause to be moved or conveyed from a present location to another place; esp., to deposit (a writing or notice) in the mail").

84 *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 939 (2017) ("The ordinary meaning of 'notwithstanding' is 'in spite of,' or 'without prevention or obstruction from or by.'" (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1545 (1986), and BLACK'S LAW DICTIONARY (7th ed. 1999))).

85 *See* Carcieri v. Salazar, 555 U.S. 379, 388 (2009) ("[T]he primary definition of 'now' was 'at the present time; at this moment; at the time of speaking.'" (alterations omitted) (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 1671 (2d ed. 1934), and BLACK'S LAW DICTIONARY (3d ed. 1933))).

86 *See* Dunn v. Commodity Futures Trading Comm'n, 519 U.S. 465, 470 (1997) (citing BLACK'S LAW DICTIONARY (6th ed. 1990) to define "in" as synonymous with the expressions "in regard to," "respecting," and "with respect to").

87 *See* Ross v. Blake, 578 U.S. 632, 642 (2016) (referring to BLACK'S LAW DICTIONARY (6th ed. 1990) to define "available" as "capable of use for the accomplishment of a purpose," and that which "is accessible or may be obtained").

88 *See* Fed. Energy Regul. Comm'n v. Elec. Power Supply Ass'n, 577 U.S. 760, 787 (2016) (Scalia, J., dissenting) (defining "price" as the "amount of money or other consideration asked for or given in exchange for something else" by reference to BLACK'S LAW DICTIONARY (10th ed. 2014)).

89 *See* King v. Burwell, 576 U.S. 473, 487 (2015) (using BLACK'S LAW DICTIONARY (10th ed. 2014) to define "such" as "[t]hat or those; having just been mentioned").

90 *See* Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2070-71 (2018) (referencing WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1942), 6 OXFORD ENGLISH DICTIONARY (1st ed. 1933), and BLACK'S LAW DICTIONARY (3d ed. 1933) to define "money remuneration").

91 *Id.* at 2071.

dictionary explicates an ordinary or popular sense.[92] And sometimes the legal definition cited has no such reference to any ordinary or popular sense.[93] In those cases, the Justices seek authoritative definitions in legal dictionaries even when explicitly purporting to determine the "ordinary meaning" of the term at issue when the terms were ambiguous between their legal and ordinary meanings (e.g., "detain"[94]), and even when the terms might appear to ordinary people to only have ordinary meanings (e.g., "notwithstanding"[95] and "such"[96]). If textualists claim to "approach language from the perspective of an ordinary English speaker—a congressional outsider"[97]—it is questionable whether technical definitions in legal dictionaries generally aid in those efforts when the terms at issue are ambiguous and even more so when the words may appear to only have ordinary meanings.

Consider as another example Justice Alito's majority opinion in *Taniguchi v. Kan Pacific Saipan*, which held that the Court Interpreters Act awards compensation only for the interpretation of spoken (but not written) words.[98] The textualist opinion turned on the meaning of the term "interpreter."[99] As Justice Alito noted, the question was: "What is the ordinary meaning of 'interpreter'?"[100] To answer this question, Justice Alito cited several dictionaries, including the Fourth Edition of *Black's Law Dictionary*, which defines interpreter as "a person sworn at a trial to interpret the evidence."[101] This approach clearly defines "interpreter" in a technical-legal sense that concerns a role in a trial. Nevertheless, Justice Alito took this *technical* definition as relevant evidence for the "*ordinary* meaning" of "interpreter."[102]

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92 *See, e.g.*, Hall v. United States, 566 U.S. 506, 511-12 (2012) (Sotomayor, J.) (citing BLACK'S LAW DICTIONARY (9th ed. 2009) for the "plain and natural reading" of "incurred by the estate"); Johnson v. United States, 544 U.S. 295, 315 (2005) (Kennedy, J., dissenting) (citing BLACK'S LAW DICTIONARY (6th ed. 1990) for the definition of "discover" as its "ordinary meaning"); Olympic Airways v. Husain, 540 U.S. 644, 654-55 (2004) (Thomas, J.) (citing BLACK'S LAW DICTIONARY (6th ed. 1990) for the definition of "event" as the "ordinary" definition of the term).

93 *Compare Event*, BLACK'S LAW DICTIONARY (6th ed. 1990) (not indicating that the provided definition is the word's ordinary meaning), *with Discovery*, BLACK'S LAW DICTIONARY (6th ed. 1990) (providing multiple definitions, one of which best suits the term when used in "a general sense").

94 *See* Jennings v. Rodriguez, 138 S. Ct. 830, 848 (2018) (noting that "legal dictionaries define 'detain' the same way" as ordinary English language dictionaries).

95 *See* NLRB v. SW Gen., Inc., 137 S. Ct. 929, 939 (2017).

96 *See* King v. Burwell, 576 U.S. 473, 487 (2015).

97 Barrett, *Congressional Insiders and Outsiders*, *supra* note 2, at 2194.

98 Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560, 562 (2012).

99 *See id.* ("The question presented in this case is whether 'compensation of interpreters' covers the cost of translating documents.").

100 *Id.* at 566.

101 *Id.* at 567 (alteration omitted) (citing BLACK'S LAW DICTIONARY (rev. 4th ed. 1968)).

102 *See id.* at 569 ("Based on our survey of the relevant dictionaries, we conclude that the ordinary or common meaning of 'interpreter' does not include those who translate writings.").

The same slip from technical evidence to "ordinary meaning" occurred in *Kingdomware Technologies*.[103] Justice Thomas sought to identify the "ordinary meaning" of "contract,"[104] and cited the technical definition in *Black's Law Dictionary* as well as the Code of Federal Regulations.[105] Of course, one may think it is appropriate to give "contract" its technical meaning in law.[106] We agree—and this Article examines that intuition in Part III. But for now, we simply note that textualists regularly cite technical evidence (and technical meaning) when claiming to uncover "ordinary meaning."

The Court's reliance on interpretive sources that point to legal meaning extends beyond citations to legal dictionaries. Textualists commonly employ interpretive tools and canons requiring significant legal sophistication, including those that require knowledge of other provisions or the rest of the legal corpus.[107] As with the use of legal dictionaries, interpreters use these interpretive tools even when the justices purport to be determining the "ordinary meaning" of the textual language.

For example, consider the Court's decision in *Bostock*.[108] Justice Gorsuch's textualist majority opinion interpreted Title VII's prohibition against employment discrimination "because of . . . sex" to prohibit employment discrimination against persons on account of their sexual orientation or gender identity.[109] But the Court, in interpreting the "ordinary public meaning" of "because of . . . sex,"[110] relied on sources relevant to legal meaning, such as precedent—namely, how the "because of" phrase was previously applied in case law,[111] and language in other statutes.[112]

In dissent, Justice Alito (also determining "ordinary meaning") considered an even wider range of technical evidence, including: how members of Congress would have understood the statutory language in 1964,[113] decisions by

103 Kingdomware Techs., Inc. v. United States, 579 U.S. 162 (2016).

104 *See id.* at 174.

105 *Id.*

106 In ordinary language, "contract" might refer to non-legal agreements. *See, e.g.*, *Contract*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/contract [https://perma.cc/U9UY-3V89] (defining "contract" as "a binding agreement between two or more persons or parties").

107 *See* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341, 376 (2010) ("The presumption of consistent usage and *in pari materia*, which both accept an interpreter's examination of the context of a particular term and what sort of meaning that term has acquired in other statutes, are implicitly the same canon as the presumption of consistency between statutes.").

108 Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

109 *Id.* at 1738; *see also id.* at 1747. ("As enacted, Title VII prohibits all forms of discrimination because of sex, however they may manifest themselves or whatever other labels might attach to them.").

110 *Id.* at 1739-40.

111 *See id.* at 1739 (citing Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350 (2013)).

112 *See id.* at 1739-40.

113 *See id.* at 1757 (Alito, J., dissenting) ("[T]here is not a shred of evidence that any Member of Congress interpreted the statutory text that way when Title VII was enacted.").

the Courts of Appeals,[114] the views of the Equal Employment Opportunity Commission,[115] U.S. military policy,[116] a wide range of state and federal laws,[117] the legislative history of Title VII,[118] and lower court decisions.[119]

The *Bostock* opinions illustrate that, although today's Court purports to be committed to *ordinary* meaning, its interpretive practices do not obviously match this commitment. This mismatch between theory and practice occurs when interpreters proceed from the perspective of an ordinary English speaker but apply technical concepts or consult interpretive sources unlikely to be known to the ordinary reader.[120]

C. *Textualism's Dilemma*

The tension between ordinary meaning and technical terms creates a dilemma for textualists. On the one hand, textualists profess commitment to ordinary meaning.[121] On the other hand, legal texts typically contain technical terms, and textualists rely on evidence of technical meaning, such as technical definitions from legal dictionaries, when seeking "ordinary" meaning.[122]

The question then becomes: How should textualists resolve this tension? One possibility is to continue to rely on legal dictionaries and other sources of technical evidence and admit that textualism's commitment to "ordinary meaning" and ordinary people is ultimately only a partial commitment. Some textualists might adopt this answer, but it is likely unattractive to textualists who place ordinary people at the center of interpretation. Recall Justice Barrett's view that textualists are "agents of the people rather than of

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114 *See id.* ("[U]ntil 2017, every single Court of Appeals to consider the question interpreted Title VII's prohibition against sex discrimination to mean discrimination on the basis of biological sex.").

115 *See id.* ("[T]he Court's conclusion that Title VII unambiguously reaches discrimination on the basis of sexual orientation and gender identity necessarily means that the EEOC failed to see the obvious for the first 48 years after Title VII became law.").

116 *See id.* at 1758-59 ("In fact, at the time of the enactment of Title VII, the United States military had a blanket policy of refusing to enlist gays or lesbians, and under this policy for years thereafter, applicants for enlistment were required to complete a form that asked whether they were 'homosexual.'").

117 *See id.* at 1768 ("Long before Title VII was adopted, many pioneering state and federal laws had used language substantively indistinguishable from Title VII's critical phrase, 'discrimination because of sex.'"); *see also id.* at 1768-71 (noting examples of laws using the relevant phrase).

118 *See id.* at 1776-77 (examining the legislative history of Title VII's prohibition of sex discrimination and finding it "revealing").

119 *See id.* at 1777-78 (noting several district court opinions).

120 *See* discussion *infra* Section IV.D.

121 *See supra* notes 64–73 and accompanying text (describing the current Supreme Court Justices' reliance on ordinary meaning).

122 *See* discussion *supra* Section I.A; *see also infra* Appendix.

Congress and as faithful to the law rather than to the lawgiver."[123] "Process-based" interpretive theories, which Justice Barrett rejects, "approach language from the perspective of a hypothetical legislator—a congressional insider."[124] In contrast, textualists aim to stand in the shoes of "an ordinary English speaker" defined by Justice Barrett as a "congressional outsider."[125] This commitment to "[f]airness" to the "ordinary English speaker" requires that "laws be interpreted in accordance with their ordinary meaning."[126]

A second option is to "double down" on ordinary meaning by refusing to acknowledge technical meanings and eschewing technical evidence (e.g., technical definitions from legal dictionaries). This is also likely unappealing to textualists. Courts commonly give terms technical meanings and must do so when a term has only a technical meaning. Consider that, between January 1, 2010 and June 7, 2021, the Supreme Court cited legal dictionaries in over 150 cases.[127] Taking this second option would constitute a radical departure from current interpretive practice.

Thus, consistent textualists must either (1) admit that interpretation regularly departs from ordinary meaning, because laws express technical language high on the proverbial pillar, far from the ordinary public; or (2) robustly commit to ordinary meaning, supplanting technical meaning even when it is obviously correct and ignoring sources of evidence that speak to technical meaning (e.g., legal dictionary definitions).

Some textualists might object to the statement of this "dilemma," replying that there is no such predicament. Maybe textualists should appeal to ordinary meaning for all language *except* technical legal language (and other specialized language like scientific terms). This way, modern textualism could remain robustly committed to ordinary meaning without that commitment demanding complete ignorance of technical legal language (or "terms of art"). The textualist would be committed only to ordinary meaning *for ordinary terms*.

123 Barret, *Congressional Insiders and Outsiders*, *supra* note 2 at 2195.

124 *Id.* at 2194; *see also* Rebecca M. Kysar, *Interpreting by the Rules*, 99 TEX. L. REV. 1115, 1116-17 (2021) ("[A] promising new school of statutory interpretation has emerged that tries to wed the work of Congress with that of the courts. It does so by linking rules of interpretation to Congress."). Even Justice Scalia, on occasion, referred to a hypothetical legislator when positing a hypothetical reader. *See, e.g.*, Chisom v. Roemer, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting) ("We are to read the words of that text as any ordinary Member of Congress would have read them, and apply the meaning so determined." (citation omitted)).

125 Barrett, *Congressional Insiders and Outsiders*, *supra* note 2, at 2194.

126 *Id.* at 2209 (alteration omitted) (quoting ANTONIN SCALIA, A MATTER OF INTERPRETATION 17 (new ed. 2018)).

127 *See infra* Appendix.

This hypothetical rule differs from a simple principle of ordinary meaning as espoused by many of the Court's current textualists.[128] Compare the two:

> [1] *The Ordinary Meaning Rule:* In legal interpretation, terms should be given their ordinary meanings.
>
> [1*] *The Ordinary Meaning Rule Plus Legal Meaning Exception:* Apply *The Ordinary Meaning Rule*, but if a term has a technical legal meaning, that term should be given its technical legal meaning.

Adopting [1*] would address the dilemma by creating an exception to the ordinary meaning rule. However, this solution comes at a theoretical cost—at least for versions of textualism that claim to promote rule of law values (e.g., clarity), fair notice, or democracy because textualism theorizes itself as a method of interpretation *most* faithful to ordinary people's understanding of law. The textualist who adopts [1*] endorses a *second* theoretical rule: We interpret *some terms* (i.e., "legal terms") *in line with their legal meanings, even if those meanings sit high on pillars above the average person*. There must be some further explanation why relying on technical meaning for certain terms similarly promotes clarity, fair notice, and/or democracy.

To a textualist who adopts this second principle—some terms receive technical legal meanings—one could ask, why modify the theory with *that* exception? The theorist who abandons [1] for [1*] is no longer a simple textualist (committed to the simple ordinary meaning rule), but rather takes a step toward a more complex analysis, endorsing more than one interpretive criterion. Typically, textualists have resisted such moves, arguing that pluralistic approaches—meaning interpretations that include more than one criteria—encourage judicial activism. To see how significant a second step could be, consider some other simple pluralisms combining a loose commitment to ordinary meaning with a different exception. For example, consider these other possible theories:

> [1**] *The Ordinary Meaning Rule Plus Intended Meaning Exception:* Apply *The Ordinary Meaning Rule* to ordinary language, but if a term has a legislatively-intended meaning, that term should be given its legislatively-intended meaning.
>
> [1***] *The Ordinary Meaning Rule Plus Consequentialist Meaning Exception:* Apply *The Ordinary Meaning Rule* to ordinary language, but if a term has a welfare-maximizing meaning, that term should be given its welfare-maximizing meaning.

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128 *See* Barrett, *Assorted Canards of Contemporary Legal Analysis*, *supra* note 4, at 856; *see also supra* notes 64–73 and accompanying text.

Rules [1*], [1**], and [1***] all commit to the ordinary meaning rule for some subset of language (e.g., all terms that have no technical meaning, or all terms that have no welfare-maximizing meaning). And each identifies another subset of (judicially identified) language to which that rule does not apply.

One could imagine justifying those exceptions on multiple grounds: "judicial interpretation should promote fair notice and also respect the complexities of the legislative process" (in support of [1**]), or "judicial interpretation should promote fair notice and improve social welfare" (in support of [1***]). But it is not clear why textualists' current appeal to ordinary people most strongly supports any rule other than [1]. Nor is it clear that appeal to rule [1*] has a stronger basis in values like fair notice than any other competitor.

In other words, adopting any of these principles—with no further justification—threatens textualism's persuasive force, diluting textualism into a theory that looks more like what it claims to oppose: an unjustified pluralism. The resulting textualist theory is not robustly committed to ordinary meaning; it is only *partially* committed to it. From the textualist's perspective—on which a *thorough* commitment to ordinary meaning best promotes fair notice and democracy—all of these theories (including [1*]) is (at best) only *partially* furthering fair notice and *partially* supporting "democratic" interpretation.

II. THE DIVISION OF LINGUISTIC LABOR

The previous Part introduced the longstanding tension between ordinary and legal meaning and documented a problem that tension raises for some textualists. Textualist theory appeals to "ordinary meaning" to constrain interpretation and provide fair notice. Yet, textualist practice regularly looks to sources of technical legal meaning.

This Part considers one proposal to reconcile technical terms and ordinary people: the "division of linguistic labor."[129] The division of linguistic labor (DLL) theory rejects the assumption that "a language belongs to a community of speakers only if every speaker knows the meaning of every term in the language."[130] Instead, the theory proposes that ordinary people typically rely on

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129 The philosopher Hilary Putnam hypothesized that there is a "division of linguistic labor":

> Every linguistic community exemplifies the sort of division of linguistic labor just described, that is, possesses at least some terms whose associated "criteria" are known only to a subset of the speakers who acquire the terms, and whose use by the other speakers depends upon a structured cooperation between them and the speakers in the relevant subsets.

Hilary Putnam, *The Meaning of "Meaning"*, 7 MINN. STUD. PHIL. SCI. 131, 144-46 (1975).

130 Edgar Andrade-Lotero & Robert L. Goldstone, Division of Linguistic Labor and Collective Behavior 2 (Mar. 2016) (unpublished manuscript), https://researchgate.net/publication/315642784 [https://perma.cc/8WQV-3GLA].

experts to define technical words, and ordinary people use those words even though they may not be able to articulate the criteria of those words themselves.[131]

As an example of DLL, imagine that a scientist told you: "Elm trees flower in late winter." You understand a good deal of what the scientist communicates, even if you cannot explain precisely what counts as an elm tree. Of course, if you really wanted to know, you would ask a scientist what counts as an "elm" (or "Google it"). In this way, ordinary members of the public can make use of a whole host of technical terms, even though only a small percentage of the population can immediately elaborate the specific criteria for applying those terms.

DLL offers a possible response to the textualist's dilemma. The DLL resolution is, roughly, that people understand that some terms in legal texts have technical meanings, and people defer to relevant experts regarding those meanings. Thus, ordinary people may have notice of the meaning of laws even when those laws contain technical terms because they have working or social knowledge of terms even if they cannot reliably identify legal meanings.

This Part proceeds in two Sections. First, Section A outlines the DLL theory. Section B then explains that this solution to the textualist's dilemma depends on an untested *empirical* claim. It is an open empirical question whether ordinary people recognize and defer about technical language in law.

A. *A Division of Linguistic Labor in Law*

The proposal to resolve the tension between ordinary people and technical terms through a DLL requires an understanding of philosophical theories of the social nature of meaning. In the philosophy literature, DLL typically relates to scientific meaning.[132] An ordinary person may (competently) use the terms "beech" or "elm" without being able to elaborate the specific scientific criteria of beech or elm trees. That person nevertheless uses the terms in competent ways and understands the "social arrangement" in which a relevant expert defines the terms, allowing the layperson to use the terms without an expert understanding of them.[133] As

131 *See* Putnam, *supra* note 129, at 145 ("In case of doubt, other speakers would rely on the judgment of these 'expert' speakers.").

132 *See* Jeff Engelhardt, *Linguistic Labor and Its Division*, 176 PHIL. STUD. 1855, 1856 (2019) ("[T]he sociality of the division of linguistic labor is plausibly obscured by the tendency among many philosophers to focus exclusively on scientific terms as examples of terms subject to the division of linguistic labor."); *see also* Jules L. Coleman & Ori Simchen, *"Law"*, 9 LEGAL THEORY 1, 18 (2003) (explaining that the DLL account extends to other common nouns beyond natural kinds).

133 *See* Coleman & Simchen, *supra* note 132, at 11 ("[T]he social dimension of content-determination allows ordinary speakers of a language to succeed in referring to items with whose nature they possess only a superficial and largely uninformed rapport by relying on the discriminatory capacities of experts within the community.").

the philosopher Hilary Putnam put it, "[n]ot only am I unable to reliably distinguish elms from other species of tree; the fact is that *I do not have to be able to do this on my own*."[134] Thus, "DLL is a social phenomenon where a community of speakers as a whole possesses a linguistic repertoire that no speaker in isolation possesses."[135]

There are several types of technical language that may be relevant in legal interpretation, including legal and scientific language.[136] A DLL principle for legal texts would hold that ordinary people generally defer to legal authorities about the legal meaning of technical legal terms—and perhaps to other authorities about the meaning of other types of technical terms (e.g., scientific terms).[137] For now, we set aside the controversial question of who or what should count as the relevant authority of legal meaning. However, it is worth noting that the legal meaning authorities are *not* simply the judges deciding the case at issue. For originalists and textualists, "public meaning" is assumed to exist *prior* to the judicial pronouncement.[138] It is a fact for a judge to uncover, not a novel legal meaning for a judge to create. If judges had license to create new meanings (legal or otherwise) in each act of legal interpretation, fair notice would not exist prior to that judicial interpretation.

Professor Lawrence Solum appeals to a DLL principle in textualist interpretation. He proposes that for a term with *only* a technical legal meaning (e.g., "ex post facto law"), DLL explains how the technical meaning is the public meaning.[139] Solum argues that "[w]hen members of the general public encounter a constitutional term of art, their understanding of its

134 HILARY PUTNAM, NATURALISM, REALISM AND NORMATIVITY 206 (2016).

135 Andrade-Lotero et al., *supra* note 130, at 6.

136 There are many other types of terms, such as specialized terms from industry or trade. For example, the Supreme Court in *Nix v. Hedden*, 149 U.S. 304 (1893) indicated that a meaning from commerce might trump an ordinary meaning. *See supra* text accompanying notes 53–63.

137 *See* Engelhardt, *supra* note 132, at 1860 ("My knowledge and capacities don't suffice to fix the extensions of the [legal] terms, so I defer to the legal authorities to do it for me. The linguistic labor for the terms is divided so that legal authorities do it and I don't.").

138 *See* Note, *Textualism as Fair Notice*, 123 HARV. L. REV. 542, 557 (2009) ("The traditional concept of fair notice demands that no person be held to account under a law the content of which he was unable to know beforehand.").

139 *See* Lawrence B. Solum, *Incorporation and Originalist Theory*, 18 J. CONTEMP. LEGAL ISSUES 409, 429-31 (2009) (discussing the role of the division of linguistic labor and technical meaning); *see also* Lawrence B. Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269, 276 (2017) ("[T]he claim is not that the full communicative content was immediately known to all members of the public who read the text: some of the content may have been contained in technical language (for example, 'ex post facto Law') accessible via the division of linguistic labor between experts (lawyers) and other members of the public." (citation omitted)); Lawrence B. Solum, *Communicative Content and Legal Content*, 89 NOTRE DAME L. REV. 479, 500 (2013) ("[S]ome constitutional language seems to be technical in nature—the full account would need to tell a story about constitutional terms (and phrases) of art and the division of linguistic labor that explains their success conditions.").

meaning can be described as involving a process of deferral."[140] Solum imagines the following train of thought:

> An ordinary citizen reads the phrase "letters of marque and reprisal," and thinks, "Hmm. I wonder what that means. It sounds like technical legal language to me. If I want to know what it means, I should probably ask a lawyer or maybe a judge."[141]

The DLL idea is that an ordinary person would recognize or understand that a term in law is a technical term and defer to expert authority regarding the meaning of that technical term.

As a matter of *theory*, DLL offers a resolution to the tension between ordinary and technical meaning in law by connecting ordinary people and technical terms. Solum argues that the "technical meaning is (in a special sense) still a 'public meaning'" because ordinary people recognize the meaningfulness of a term of art even if they do not know its meaning.[142] This "special sense" of public meaning might be true only for terms with only technical meanings: for example, if the term "letters of marque and reprisal" only had meaning to lawyers.[143] Solum indicates that the issue of ambiguous terms (those with both ordinary and technical meanings) "is a difficult one,"[144] but he has recently argued that ambiguous terms in the Constitution should be resolved in favor of ordinary meaning.[145]

DLL as applied to law works as a theory, but it ultimately represents an empirical question. If DLL is empirically accurate, in the sense of accurately capturing ordinary people's understanding of legal texts, modern textualists have reason to embrace it. Textualists and new originalists have, after all, emphasized that their interpretive criteria are *empirical* ones.[146] If the goals of focusing on "ordinary meaning"—or the broader "public meaning"

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140 Solum, *Incorporation and Originalist Theory*, *supra* note 139, at 430.

141 *Id.*

142 *See id.; cf.* Richard H. Fallon Jr, *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1244-51 (2015) (describing the varied ways to account for "meaning" in legal interpretation).

143 In fact, an ordinary reader could puzzle out some parts of the meaning of "letters of marque or reprisal." For example, "letters" suggest a document and "reprisal" means to fight back. So, even this term does not have a solely legal meaning. In fact, these letters were licenses to individuals to engage in reprisals against foreign citizens or nations, typically at sea.

144 *See* Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 BYU L. REV. 1621, 1632 n.18 ("The question as to how public meaning originalism should handle cases of 'public-meaning versus technical meaning ambiguity' is a difficult one . . . .").

145 *See* Lawrence B. Solum, *The Public Meaning Thesis: An Originalist Theory of Constitutional Meaning*, 101 B.U. L. REV. 1953, 2029 (2021) ("There is strong evidence from the constitutional record that terms with technical and ordinary meanings were understood as having their ordinary meaning.").

146 *See, e.g.*, Barnett, *supra* note 11, at 412 ("New Originalism is about identifying the original public meaning of the Constitution . . . . [T]he interpretive activity of identifying the original public meaning of the text is an empirical inquiry.").

concept, which incorporates ordinary and technical meanings—include capturing what law communicates to ordinary readers or promoting fair notice, the key (empirical) question concerns what law communicates to ordinary people. In the context of DLL, the essential empirical question is whether ordinary people understand law to communicate some technical meanings—and if so, when.

B. *A Division of Linguistic Labor as an Empirical Hypothesis*

Readers may find the legal DLL claim to be an obvious hypothesis. Ordinary people would clearly understand unique legal terms (e.g., "habeas corpus") as technical terms. But there is an important distinction between an untested hypothesis and evidence. Even if most share this prediction, whether ordinary people actually defer to legal experts about meaning remains an open empirical question—and one that has significant implications for the Supreme Court's dominant interpretive theory.

Assessing the validity of a legal DLL requires empirical evidence including an examination of (a) which terms ordinary people *understand* as technical-legal and (b) whether ordinary people defer to expert legal authority regarding the meanings of these terms. Empirical evidence can also help fill in less obvious details of the DLL account and its scope. For example, do ordinary people *readily* evaluate terms as technical terms? People may take "habeas corpus" to express a legal meaning, but how do they understand *ambiguous* terms like "tribunal" or "intent"? Do those terms communicate ordinary or legal meanings in law? What about terms like "building" or "the" when included in a legal text?

Answers to these questions also bear on the presumption of ordinary meaning. Traditionally, courts have adopted a presumption of ordinary meaning, but whether this reflects ordinary people's understanding of language in law is untested. To preview one more surprising empirical discovery: Our results provide some evidence in favor of the *opposite* view, that ordinary people generally take ambiguous terms in law to have *legal* meanings.[147]

Again, DLL as a principle of ordinary understanding *of law* is currently an *untested empirical claim*.[148] We read Professor Solum (and other textualists

147 *See infra* Part III.

148 The untested claim concerns how ordinary people understand language in law. Prior empirical work supports an intuitive division of linguistic labor about some (non-legal) terms in other (non-legal) domains, such as the meaning of scientific language in ordinary life. For example, a recent study shows that people report having a better understanding of scientific phenomena when they are told that scientists understand the phenomena. *See* Steven A. Sloman & Nathaniel Rabb, *Your Understanding Is My Understanding: Evidence for a Community of Knowledge*, 27 PSYCH. SCI. 1451,

who endorse a DLL principle) as essentially hypothesizing or predicting that ordinary people understand legal language consistently with a DLL principle. If the DLL prediction is incorrect—if ordinary people do not understand laws to contain technical language—the dilemma raised by technical terms retains its bite. If the DLL prediction is true, however, this would indicate that (textualist) courts can rely on evidence about technical legal meaning *because* the ordinary public understands legal texts to communicate legal meanings.

III. THE EXPERIMENTAL STUDIES

Parts I and II of this Article raised a series of questions at the heart of modern legal interpretation. Do ordinary people understand technical terms in law (e.g., "ex post facto") to communicate technical meanings? And if so, how broadly does this principle extend? Do people understand even ambiguous terms in law (e.g., "intent," or "tribunal") to express technical over ordinary meanings?

We conducted five original experimental studies (N = 4,365) designed to evaluate how ordinary people understand ordinary and technical language in law. This Part begins with four of those experiments (Studies 1-4).[149] This Part's final Section presents the results from a series of exploratory survey questions that we asked at the end of each of the main experiments (Study 5).[150]

1458 (2016) ("Participants rated their own understanding slightly higher when they believed that someone else understood the object of judgment."). More broadly, people tend to "cluster" knowledge, seeing scientists as experts about a range of scientific topics. *See* Frank C. Keil, Courtney Stein, Lisa Webb, Van Dyke Billings & Leonid Rozenblit, *Discerning the Division of Cognitive Labor: An Emerging Understanding of How Knowledge Is Clustered in Other Minds*, 32 COGNITIVE SCI. 259, 260-62 (2008) ("[O]ne way to infer how knowledge clusters in other minds is to assume that someone who can answer how and why questions about a phenomenon is likely to understand other phenomena that arise from the same causal and relational patterns, even if they involve dramatically different surface objects."). Very recent evidence suggests that children and adults may even underestimate the extent to which they divide linguistic labor. *See* Jonathan F. Kominsky & Frank C. Keil, *Overestimation of Knowledge About Word Meanings: The "Misplaced Meaning" Effect*, 38 COGNITIVE SCI. 1604, 1625 (2014) (finding that study participants "seem aware of the division of linguistic labor but still overestimate their own knowledge").

149 Given space limitations, one other Study is presented in Open Science. *See* Kevin Tobia, *Ordinary Meaning and Ordinary People*, OPEN SCI. FRAMEWORK (Oct. 29, 2022, 9:40 AM), https://osf.io/jvhbr [https://perma.cc/4MNN-LNUJ].

150 The research involving human subjects was approved by the Georgetown University Institutional Review Board (IRB) (IRB Protocol ID STUDY00003956). All studies were preregistered on Open Science. *See* Kevin Tobia, *Ordinary Meaning and Ordinary People*, OPEN SCI. FRAMEWORK (Oct. 29, 2022, 9:40 AM), https://osf.io/jvhbr [https://perma.cc/4MNN-LNUJ].

Before turning to the studies, it is worth describing our broader empirical aims. The experiments are designed to assess the following key questions about how ordinary people understand law:

1. *Legal Experts' Semantic Expertise:* Do ordinary people take legal experts to have expertise (i.e., know more than others) about the meaning of legal terms?

2. *Deference About Technical Meaning in Law:* When evaluating legal rules, do ordinary people defer to technical authorities about the meaning of technical terms?

3. *Competence with Deference:* If ordinary people defer to technical authority about the meaning of technical terms in law, do ordinary people still have some understanding of the law? This seemingly philosophical question has practical significance: If a law contains some technical language, about which laypeople must defer to an expert, can the law nevertheless communicate effectively to ordinary people to successfully guide action?

4. *Presumptions of Meaning:* Is ordinary people's understanding of terms in law influenced by the *legal genre*?[151] Would a presumption of "legal meaning" or "ordinary meaning" better characterize how people understand terms appearing in legal texts?

5. *Learning About Technical Meanings:* Insofar as ordinary people defer about the meaning of technical terms in law, how do they learn about those meanings (e.g., do they consult legal dictionaries, lawyers, or other sources)?

Studies 1-4 (respectively) address each of the primary questions 1-4. Each of those experimental studies concluded with a set of exploratory survey questions, concerning how participants engage with law and investigate technical language. The exploratory questions included ones like: "how often have you consulted a legal dictionary?" and "how often have you consulted a lawyer about legal interpretation?" The results are

151 "Genre" is a rich and contested term. *See generally* ANIS S. BAWARSHI & MARY JO REIF, GENRE: AN INTRODUCTION TO HISTORY, THEORY, RESEARCH, AND PEDAGOGY (2010); CHARLES BAZERMAN, A RHETORIC OF LITERATE ACTION: LITERATE ACTION VOLUME 1 (2013). Here we use the term to refer to a distinction among different types of texts which have different stylistic features, are addressed to different audiences, and relate to different social purposes. Through the studies in this Article, we attempt to vary the legal genre (e.g., laws) from other technical genres like sports (e.g., sports magazines) and religion (e.g., the Bible), as well as from an ordinary genre (e.g., newspapers). Our project is concerned only with lay perceptions of these different genres; the results of these studies suggest that laypeople are sensitive to these different set of texts, in the way one might expect. Legal texts (perhaps understood as part of the legal genre) are taken to communicate legal meaning more so than other texts (perhaps understood as part of other genres).

presented as Study 5, offering insight into empirically grounded theories of interpretation.

All studies were preregistered on Open Science.[152] That preregistration explained our inclusion criteria: participants must pass a simple comprehension check question (what is the sum of two plus three?) and reCAPTCHA. We also included a set of demographic questions at the end of each study. The online Appendix contains the full demographic information.[153] All participants were recruited from Lucid, a large survey platform that recruits American participants based on demographically representative quotas.[154] This enables us to study a balanced sample of Americans, with respect to age, gender, ethnicity, and political affiliation.

A. *Study 1: Lay Views of Legal Expertise*

1. Study 1a: People Attribute Semantic Expertise to Legal Experts

Our first experiment was designed to assess whether ordinary people take legal professionals to have semantic expertise. It is likely that people evaluate legal professionals as having expertise in certain legal domains (e.g., expertise in the rules of civil procedure), but it is an open question whether people see legal professionals as authorities about the meaning of language in legal texts. We aimed to assess different types of language—unique legal terms (e.g., "letter of marque and reprisal"), seemingly ordinary terms (e.g., "object"), and terms that are seemingly ambiguous between ordinary and legal meanings (e.g., "intent," "tribunal").

Participants were randomly assigned to evaluate whether a non-legal or legal professional knows more about a particular term in a particular source. For example, some participants evaluated this scenario:

> *Oliver works as a chemistry professor. Larry works as a lawyer. Imagine that the term "intent" appears in a law. In your opinion, who knows more about the meaning of "intent" in that law, Oliver or Larry?*

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152 *See* Kevin Tobia, *Ordinary Meaning and Ordinary People*, OPEN SCI. FRAMEWORK (Oct. 29, 2022, 9:40 AM), https://osf.io/jvhbr [https://perma.cc/4MNN-LNUJ].

153 *See id*.

154 Lucid screens every participant with attention checks and open-ended questions, using machine learning to screen out participants that do not respond with care. *See* Alexander Coppock & Oliver A. McClellan, *Validating the Demographic, Political, Psychological, and Experimental Results Obtained from a New Source of Online Survey Respondents*, RSCH. & POL., Jan.–Mar. 2019, at 1. Lucid also uses technology including Google reCAPTCHA to block bots.

Figure 1: Study 1a Rating Scale

(1)	(2)	(3)	(4)	(5)	(6)	(7)
Oliver knows more			*Oliver and Larry each know the same amount*			*Larry knows more*

The experiment randomly varied the non-legal profession (i.e., baseball, chef, chemistry professor, financial analyst), legal profession (i.e., Congressperson, EPA member, lawyer, judge); source of writing (i.e, (ordinary) newspaper, (legal) law, or (unspecified) "writing"); and term type (i.e., legal, ordinary, ambiguous). The legal terms were "letter of marque and reprisal," "interpleader," and "habeas corpus." The ordinary terms were "the," "building," and "object." The ambiguous terms were "intent," "contract," and "tribunal." Each participant received *one* question (e.g., whether a chef or judge knows more about the term "the" in a newspaper). We recruited a sample of 503 participants. Of those, 486 (97%) correctly answered a comprehension check question and reCAPTCHA and were included in the analyses, subject to our preregistration plan.[155]

2. Study 1a: Key Results

The results from Study 1a provide evidence supporting the hypothesis that laypeople attribute legal-semantic expertise to legal professionals. Laypeople evaluated legal professionals as comparatively more expert about the meaning of legal terms (e.g., "letter of marque and reprisal") and even the meaning of ambiguous terms (e.g., "tribunal") compared to the meaning of ordinary terms

155 Our primary analyses concerned a predicted effect of Term Type, Source, and their interaction. A 4 (Ordinary Profession: baseball, chef, chemistry professor, financial analyst) * 4 (Legal Profession: Congressperson, EPA member, lawyer, judge) * 3 (Term: legal, ordinary, ambiguous) * 3 (Source: newspaper, law, writing). ANOVA revealed a significant effect of Term, $F(2, 471) = 8.3$, $p = .00028$, $\eta^2_p = .034$, a significant effect of Source, $F(2, 471) = 4.0$, $p = .01938$, $\eta^2_p = .017$, and no significant Source*Term interaction, $F < 1$.

Preregistered follow-up t-tests were conducted to assess the effect of Term type. Ratings for ordinary terms were significantly lower than ratings for ambiguous terms, $t(471) = -3.23$, $p_{holm} = .00263$, d = -.37 [95% CI = -.59, -.14], and ratings for legal terms, $t(471) = -3.77$, $p_{holm} = .00056$, d = -.42 [95% CI = -.65, -.20]. There was no significant difference in ratings between ambiguous and legal terms, $t(471) = -0.503$, $p_{holm} = .61542$, d = -.0568 [95% CI = -.28, .17].

Preregistered follow-up t-tests were conducted to assess the effect of Source. Ratings for the ordinary source ("newspaper") were significantly lower than ratings for the legal source ("law"), $t(471) = -2.655$, $p_{holm} = .02460$, d = -.30 [95% CI = -.53, -.08]. Ratings for the ordinary ("newspaper") source were not significantly lower than ratings for the ambiguous source ("writing"), $t(471) = -0.560$, $p_{holm} = .57594$, d = -.06 [95% CI = -.29, .16]. Ratings for the ambiguous source ("writing") source were not significantly lower than ratings for the legal source ("law"), $t(471) = -2.109$, $p_{holm} = .07087$, d = -.24 [95% CI = -.46, -.02].

(e.g., "object"). Moreover, laypeople evaluated legal professionals as comparatively more expert about terms when those terms occurred in *law*, as opposed to when those terms appeared in an ordinary source (newspapers).[156]

3. Study 1b: People Defer to Legal-Expert Interpretations

Our second experiment was designed to assess whether people defer to legal experts in ascertaining the meaning of technical legal language. The study provided participants with a vignette that described a judge who was settling a legal interpretive dispute. In all vignettes, the judge had to choose between a term's *ordinary* or *technical* meaning; the technical meaning was either a "legal" meaning or a "scientific" meaning. The judge chose either the ordinary or technical meaning, and participants evaluated whether this was the correct choice.

Participants were randomly assigned to one Contrast (ordinary versus legal; or ordinary versus scientific) and one Term Type (technical, ambiguous, ordinary). Thus, participants were randomly assigned to one of six cells. Within that cell, participants were randomly assigned one of two terms.

Table 1: Experimental Assignment: Term Type by Contrast

Term Type	Contrast: Legal	Contrast: Scientific
Technical	"letter of marque and reprisal" "habeas corpus"	"chlorofluorocarbon"; "ultraviolet"
Ambiguous	"intent" "tribunal"	"ocean"; "fire"
Ordinary	"September" "twenty-five."	"September"; "twenty-five."

We also randomly assigned the legal source in which the contested term appeared: the dispute concerned either a state constitution, statute, or contract. Finally, we randomly varied which option the judge chose (selecting the ordinary meaning or the technical (i.e., legal or scientific) meaning).

156 We were also interested in assessing a Term*Source interaction to test the hypothesis that laypeople see legal professionals as more expert about legal terms, particularly when those legal terms appear in law. However, the results did not support that interaction. Instead, we found two main effects: one of Term, and one of Source. Legal professionals were evaluated as knowing more about the meaning of terms appearing in law, regardless of the term type.

The scenario read as follows:

> *Imagine that an American judge is presiding over a legal dispute about [SOURCE: a state's Constitution, a federal statute, a contract between two people]. The key issue concerns the meaning of the term "[TERM]" in the [constitution, statute, contract].*
>
> *The judge can either evaluate the term as an "ordinary term" or as a "[CONTRAST: legal, scientific]" term. To interpret the term as an ordinary term, the judge would evaluate how ordinary people would likely understand that term. To interpret the term as a [legal; scientific] term, the judge would consider how those in the [legal, scientific] profession would likely understand that term.*
>
> *The judge decides to interpret "[TERM]" as [CHOICE: an ordinary; a scientific/legal] term.*
>
> *Please rate whether you agree with the following statement: This was the correct way to evaluate what the law means.*

Figure 2: Study 1b Rating Scale

(1)	(2)	(3)	(4)	(5)	(6)	(7)
Strongly disagree			*Neither agree nor disagree*			*Strongly agree*

We recruited a sample of 506 participants. Of those, 494 (98%) correctly answered a comprehension check question and reCAPTCHA and were included in the analyses, subject to our preregistration plan. Following our preregistration, ratings for a judge choosing the ordinary meaning (ordinary Choice condition) were reverse coded. Thus, on the recoded scale, all higher ratings indicate stronger agreement with the conclusion that the term should take a technical (legal or scientific) meaning.[157] The results indicate that the mean ratings for ordinary terms were significantly lower than ratings for technical terms.

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157 A 2 (Contrast: legal, ordinary) * 3 (Term: ordinary, ambiguous, technical) * 3 (Source: Constitution, statute, contract). ANOVA revealed a significant effect of Choice, $F(1, 485) = 75.1$, $p < .00001$, $\eta^2_p = .13$. There was no significant effect of Contrast, $F<1$, no significant effect of Source, $F<1$, no significant effect of Term Type, $F(2, 485) = 1.04$, $p = .3555$, and no significant Term Type * Contrast interaction, $F(2, 485) = 1.73$, $p = .17754$. Follow-up t-tests to assess the effect of Choice reveal that mean ratings for ordinary terms were significantly lower than ratings for technical terms, $t(485) = -8.66$, $p_{holm} < .00001$, d = -.80 [95% CI = -.99, -.61]. There was no significant difference in ratings between ambiguous and legal terms, $t(471) = -0.503$, $p_{holm} = .61542$, d = -.0568 [95% CI = -.28, .17].

B. *Study 2: Ordinary People Defer About Technical Meanings*

Studies 1a and 1b suggest that laypeople see legal professionals as having at least comparative expertise about legal meaning, particularly concerning the meaning of unique legal terms and even concerning ambiguously legal terms (e.g., "intent" or "tribunal"). Moreover, laypeople see professionals as more authoritative when the relevant language (of any type) occurs in a law, compared to an ordinary source. Finally, the view of legal professionals as experts in the legal domain is strong; we find laypeople were inclined to defer to judicial decisions to interpret terms as either "ordinary" or "technical" terms.

Study 2 turns from lay evaluation of legal decision-makers and outcomes (e.g., who knows more about legal terms, and did a judge evaluate meaning correctly?) to lay evaluation of *language* in law. Our key question is whether ordinary people understand (some) terms in law to have technical meanings, which require deference to technical experts or authorities. In this study we use the concept of a technical dictionary to measure whether participants understand a term to be technical in nature. For example, if a participant understands a term's meaning (in context) to be a technical-religious meaning, they should evaluate that the term's meaning is better expressed by the definition in a religious dictionary than one in an ordinary dictionary.[158]

To assess this question, we presented participants with a vignette in which a judge was deciding a legal dispute arising from one of three legal sources (state constitution, federal statute, or contract), about either a legal, ordinary, or scientific term. The terms were from one of five categories: Ordinary (i.e., "September" or "twenty-five"), Science (i.e., "chlorofluorocarbon" or "ultraviolet"), Legal (i.e., "habeas corpus" or "letter of marque and reprisal"), Science-Ambiguous (i.e., "ocean" or "fire"), or Legal-Ambiguous (i.e., "intent" or "tribunal"). For example, participants assigned to the "statute" source and term "intent" (a "legal-ambiguous" term) would read:

> *Imagine that an American judge is presiding over a legal dispute about a federal statute. The key issue concerns the meaning of the term "intent" in the statute.*

Participants evaluated whether the judge should rely on an ordinary, legal, sports, science, music, or religion dictionary. All six questions had the same 1–7 scale: from 1 (strongly disagree) to 7 (strongly agree), with a midpoint of 4 (neither

158 We do not make any claim that dictionaries are (un)reliable measures of ordinary or technical meaning. We simply use the concept of dictionaries to evaluate lay perceptions of the ordinary or technical nature of terms in context. This dictionary measure is conservative given our hypothesis: Laypeople understand terms in law to (sometimes) have technical meanings. Ordinary dictionaries define more words, and ordinary dictionaries sometimes contain technical definitions; while technical dictionaries are shorter and more rarely provide nontechnical definitions. These features could lead some participants to choose an ordinary dictionary as the source of a technical meaning; as such, our studies may underestimate laypeople's evaluation of the technical nature of terms.

agree nor disagree). Finally, participants answered one forced choice question. For our participant reading about "intent" in a statute, that question would read:

> *If the judge did look at multiple dictionaries and found differing definitions of the term "intent", which one should the judge favor, if the judge was trying to find the meaning of this term in the statute?*

The full experimental materials are found in the online Appendix.[159] In total we recruited a sample of 1,002 participants.[160] Of those, 981 (98%) correctly answered a comprehension check question and reCAPTCHA and were included in the analyses, subject to our preregistration plan.[161]

Across all term types, the proportions of dictionary choice varied significantly from chance: 62% chose the legal dictionary, 18% the ordinary dictionary, 11% the science dictionary, 4% the religion dictionary, 3% the sports dictionary, and 2% the music dictionary.[162]

For ordinary terms, the proportions of dictionary choice varied significantly from chance: 55% chose the legal dictionary, 24% the ordinary dictionary, 10% the science dictionary, 7% the religion dictionary, 2% the sports dictionary, and 2% the music dictionary.[163]

For science-ambiguous terms, the proportions of dictionary choice varied significantly from chance: 48% chose the legal dictionary, 25% the ordinary dictionary, 17% the science dictionary, 4% the religion dictionary, 2% the sports dictionary, and 4% the music dictionary.[164]

For science terms, the proportions of dictionary choice varied significantly from chance: 39% chose the legal dictionary, 18% the ordinary dictionary, 34% the science dictionary, 3% the religion dictionary, 5% the sports dictionary, and 2% the music dictionary.[165]

For legal-ambiguous terms, the proportions of dictionary choice varied significantly from chance: 70% chose the legal dictionary, 17% the ordinary

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159 *See* Kevin Tobia, *Ordinary Meaning and Ordinary People*, OPEN SCI. FRAMEWORK (Oct. 29, 2022, 9:40 AM), https://osf.io/jvhbr [https://perma.cc/4MNN-LNUJ].

160 Following our preregistration plan, we aimed to recruit a sample of 500 participants. In total, 502 participants were recruited, but because of a recruitment error, all participants were assigned to the legal-ambiguous category. To correct this, we recruited 500 additional participants, who were assigned randomly to each of the other conditions (which would otherwise have had zero participants).

161 A 5 (Term Type: ordinary, science-ambiguous, science, legal-ambiguous, legal) * 3 (Source: constitution, statute, contract) MANOVA was conducted to assess the effect of Term Type and Source on ratings of the ordinary, legal, sports, science, music or religion dictionaries. There were no significant effects of Source, but there were significant effects of Term Type on ordinary dictionary, $F(4, 966) = 3.99$, $p = .00325$; legal dictionary, $F(4, 966)$ 18.12, $p < .00001$; sports dictionary, $F(4, 966) = 3.35$, $p = .00982$; science dictionary, $F(4, 966) = 29.25$, $p < .00001$; and music dictionary, $F(4, 966) = 2.84$, $p = .02323$.

162 $X^2(5, 981) = 1537.3$, $p < .00001$.

163 $X^2(5, 121) = 148.5$, $p < .00001$.

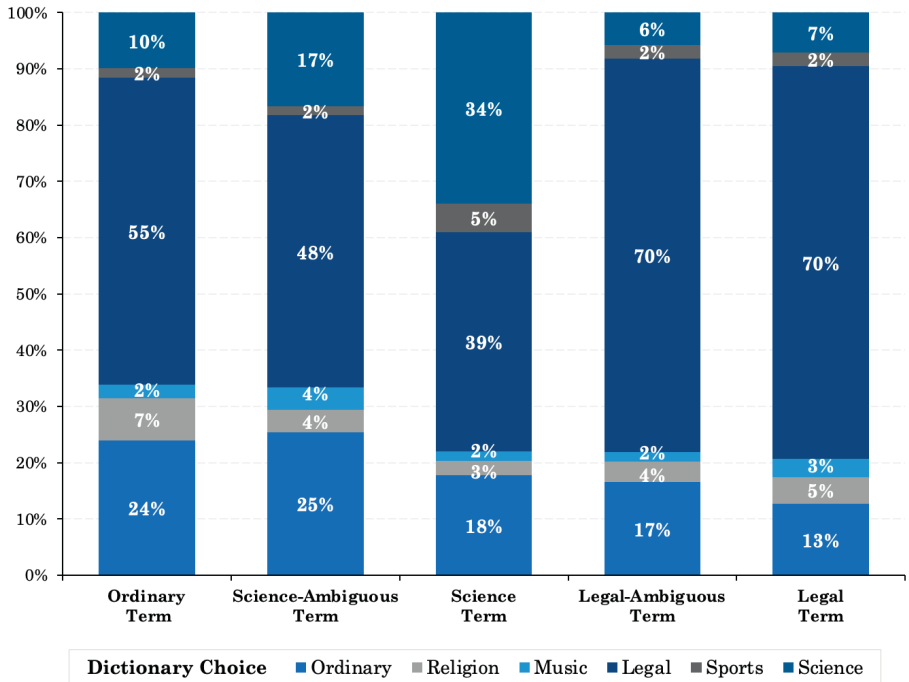
164 $X^2(5, 126) = 123.5$, $p < .00001$.

165 $X^2(5, 118) = 123.5$, $p < .00001$.

dictionary, 6% the science dictionary, 4% the religion dictionary, 2% the sports dictionary, and 2% the music dictionary.[166]

For legal terms, the proportions of dictionary choice varied significantly from chance: 70% chose the legal dictionary, 13% the ordinary dictionary, 7% the science dictionary, 5% the religion dictionary, 3% the sports dictionary, and 3% the music dictionary.[167]

Figure 3: Percentage Choosing a Dictionary to Find a Term's Meaning, by Term Type[168]



As a robustness check—and to more precisely estimate the strength of participants' propensity to choose a particular source (e.g., legal dictionary)—we conducted one follow-up analysis that was not part of our preregistration plan, a multinominal logistic regression, regressing dictionary choice on Source and Term Type. The results were extremely similar to those reflected in Figure 3.[169]

166 $X^2(5, 490) = 1047.5, p < .00001$.

167 $X^2(5, 126) = 261.7, p < .00001$.

168 Across all Term Types, many participants selected the legal dictionary. For legal terms and legal-ambiguous terms participants were more inclined to select the legal dictionary. For science terms and science-ambiguous terms participants were more inclined to select the science dictionary.

169 For the full results, see Kevin Tobia, *Ordinary Meaning and Ordinary People*, OPEN SCI. FRAMEWORK (Oct. 29, 2022, 9:40 AM), https://osf.io/jvhbr [https://perma.cc/4MNN-LNUJ].

The results from Study 2 are consistent with the hypothesis that laypeople understand technical terms as having technical meanings. Participants were most strongly inclined to defer to scientific dictionaries for science terms (in comparison to any other type of term) and most strongly inclined to defer to legal dictionaries for legal (and legal-ambiguous) terms.

Importantly, the experimental materials did not label any term as "scientific" or "legal." Thus, given that participants might not know the criteria of these terms (e.g., "chlorofluorocarbon," or "habeas corpus"), the experiment suggests that participants could nevertheless recognize and categorize the terms into the relevant field. In other words, it is not that participants randomly selected *any* technical dictionary (e.g., music or sports or religion dictionary) for a term they did not know. Instead, participants looked more to science dictionaries for science terms and legal dictionaries for legal terms, consistent with a sophisticated form of linguistic deference.

At the same time, a large proportion of participants endorsed legal dictionaries for all term types. This is consistent with the results of Study 1: People may be disposed to understand language as having a "legal meaning," merely by virtue of that language appearing *within* a law.

C. *Study 3: Deference is Compatible with Competence*

Studies 1 and 2 provide evidence in favor of the hypothesis that ordinary people understand legal and scientific language technically via deference to expert authorities (e.g., legal professionals; scientific dictionaries). Our third Study tests another key predicted feature of the division of linguistic labor hypothesis: Even if people defer about the meaning of some technical terms, that deference does not render the entire law meaningless. In other words, the mere existence of a technical term in a law (e.g., "habeas corpus") does not render the law entirely incomprehensible.

This prediction has important implications for fair notice; if this hypothesis is correct, it suggests that "fair notice" is not necessarily obviated by the existence of technical language. Some theorists might go further, taking ordinary people who defer about technical meaning to nevertheless retain *competence* in the use of that technical language and understanding of propositions containing it. Ordinary people who do not know the precise criteria of a scientific term can nevertheless understand propositions containing that term and reason about them. For example, even ordinary people who do not know the scientific criteria of "Elm tree" can nevertheless understand much of what is expressed by the proposition, "that forest is full of elm trees." Perhaps, similarly, ordinary people can understand technical language in law.

Study 3 randomly assigned participants to one Source (constitution, statute, or contract) and one Term Type (real or nonce). Participants then evaluated a vignette about a law containing certain terms. For example, a participant in the *statute* and *real term* condition read:

> *Imagine that a state legislature enacted a law that states that "Elm trees may not be planted on any residential property. Each violation of this rule is subject to a $1,000 fine, and co-owners of residential property are jointly and severally liable for violations of this rule."*

A participant in the *nonce* condition would read a similar text, but with fake terms in place of "Elm" and "jointly and severally liable":

> *Imagine that a state legislature enacted a law that states that "Grezo trees may not be planted on any residential property. Each violation of this rule is subject to a $1,000 fine, and co-owners of residential property are liable in jointata for violations of this rule."*

The terms "Grezo" and "liable in jointata" are fake and have no ordinary, legal, or scientific meaning. Using these terms in the nonce condition allows us to assess participants' understanding of laws that seem to involve technical terms, whose meanings participants cannot possibly know.

Participants then received twelve questions, in a random order, asking whether each of an ordinary, legal, sports, and science dictionary would be "very helpful as evidence of the meaning" of each term ("Elm"/"Grezo" or "jointly and severally liable"/"liable in jointata"). All six questions had the same 1–7 scale from 1 (strongly disagree) to 7 (strongly agree), with a midpoint of 4 (neither agree nor disagree). Next, participants evaluated three forced choice questions about which source (ordinary, legal, sports, or science dictionary) is the "best evidence" of the meaning of each term in the source. Finally, participants evaluated four statements designed to assess their competence of the text. For each of the four statements, participants could answer "True," "False," or "I don't know." The answers that are consistent with competence are: True, False, True, False. The four statements read as follows:

> 1. The [SOURCE] means that [SCIENCE_TERM: (Elm; Grezo)] trees *may not* be planted on residential property. ["True", "False", or "I don't know"].
>
> 2. The [SOURCE] means that [SCIENCE_TERM: (Elm; Grezo)] trees *may* be planted on residential property. ["True", "False", or "I don't know"].

> 3. The [SOURCE] means that co-owners of residential property *are* [LEGAL_TERM (jointly and severally liable; liable in jointata)] for violations of the rule. ["True", "False", or "I don't know"].
>
> 4. The [SOURCE] means that co-owners of residential property *are not* [LEGAL_TERM (jointly and severally liable; liable in jointata)] for violations of the rule. ["True", "False", or "I don't know"].

The online Appendix contains the full experimental materials.[170]

We recruited a sample of 506 participants. Of those, 495 (98%) correctly answered a comprehension check question and reCAPTCHA and were included in the analyses, subject to our preregistration plan. Consistent with the results of Study 2, most participants evaluated science dictionaries as the best evidence of the science term ("Elm" or "Grezo"): 46% selected the science dictionary, 30% the ordinary dictionary, 17% the legal dictionary, and 7% the sports dictionary.[171] Consistent with the results of Study 2, most participants evaluated legal dictionaries as the best evidence of the legal term (jointly and severally liable or liable in jointata): 72% selected the legal dictionary, 12% the ordinary dictionary, 9% the sports dictionary, and 7% the science dictionary.[172] Consistent with the results of Study 2, most participants evaluated ordinary dictionaries as the best evidence of the ordinary term ("not"), although a large proportion also selected the legal dictionary: 46% selected the ordinary dictionary, 42% the legal dictionary, 6% the sports dictionary, and 5% the science dictionary.[173]

For all four competence Statements, participants selected the correct answer at rates greater than chance. For Statement 1, 62% of participants selected the correct answer (True), more than False (17%) or I don't know (21%); this differed significantly from chance (33%).[174] For Statement 2, 59% of participants selected the correct answer (False), more than True (21%) or I don't know (20%); this differed significantly from chance (33%).[175] For Statement 3, 69% of participants selected the correct answer (True), more than False (11%) or I don't know (20%); this differed significantly from chance (33%).[176] For Statement 4, 58% of participants selected the correct answer (False), more than True (18%) or I don't know (20%); this differed significantly from chance (33%).[177]

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170 *See* Kevin Tobia, *Ordinary Meaning and Ordinary People*, OPEN SCI. FRAMEWORK (Oct. 29, 2022, 9:40 AM), https://osf.io/jvhbr [https://perma.cc/4MNN-LNUJ].

171 $X^2(3) = 168.1, p < .00001$.

172 $X^2(3) = 593.3, p < .00001$.

173 $X^2(3) = 593.3, p < .00001$.

174 $X^2(2) = 189.7, p < .00001$

175 $X^2(2) = 149.0, p < .00001$.

176 $X^2(2) = 295.0, p < .00001$.

177 $X^2(2) = 136.8, p < .00001$.

The results from Study 3 are consistent with those of Study 2: Ordinary people identify and evaluate technical terms as legal and scientific, and they defer to a *relevant* technical authority (e.g., legal dictionary, science dictionary). Moreover, Study 3 suggests that lay deference does not imply that laypeople take laws with legal terms to be incomprehensible. Participants are unlikely to know the precise technical criteria of "Elm" trees or "joint and several liability," and they cannot know the criteria of "Grezo" trees or "liability in jointata," as those terms have no real scientific or legal meaning. Nevertheless, participants report and display significant understanding of legal texts containing those terms.

This evidence supports a conclusion that the presence of technical terms does not wholly transform legal texts into incomprehensible documents written in "legal language." Ordinary people's understanding of law does not require that it only include ordinary terms. Instead, participants successfully navigate unknown technical terms by deferring to expert legal authority about their meanings.

D. *Study 4: Testing the Presumption of Ordinary Meaning*

The previous results support a conclusion that laypeople's understanding of a term's ordinary versus technical meaning is sensitive to the *type* of term (e.g., Studies 1a, 1b, 2) and the technical or ordinary *context* in which a term appears (e.g., Study 1a). Nevertheless, the previous studies have some limitations. First, the total number of terms tested is small. No study relies on just one term to represent the category (e.g., Study 1 uses "letter of marque and reprisal" and "habeas corpus" as unique legal terms), but it would be useful to examine a much larger set of terms. Second, some might critique the non-objective term selection. Our term selection was not arbitrary: legal terms like "letters of marque and reprisal" are drawn from the legal literature about technical terms,[178] and other terms like "tribunal" reflect examples that have been contested at the Supreme Court.[179] Nevertheless, it would be useful to conduct a study in which terms were selected with less researcher freedom in selection.

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178 For instance, Professor Lawrence Solum noted:

> The solution to the problem of technical meanings is to recognize a division of linguistic labor. The intuitive idea is simple. When members of the general public encounter a constitutional term of art, their understanding of its meaning can be described as involving a process of deferral. Consider the following example. An ordinary citizen reads the phrase "letters of marquee and reprisal," and thinks, "Hmm. I wonder what that means. It sounds like technical legal language to me. If I want to know what it means, I should probably ask a lawyer or maybe a judge." That is, ordinary citizens would recognize a division of linguistic labor and defer to the understanding of the term of art that would be the publicly available meaning to those who were members of the relevant group and those who shared the understandings of the members of the relevant group.

Solum, *Incorporation and Originalist Theory*, *supra* note 139, at 430.

179 *See* ZF Auto. US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078, 2083 (2022).

The primary aim of Study 4 was to examine the two main findings (the effect of term type and the effect of context) in an experiment using a much larger set of terms, selected in a way that reduces researcher degrees of freedom in selection. We designed an experiment in which each participant was randomly assigned to one Context (ordinary, legal, religious, science, sports) and one Term Type (ordinary, legal, religious, science, sports). Each participant was randomly assigned to consider one specific term in one specific context.

The study materials read:

> *Imagine that the term "[specific term, e.g., intent]" was written in a [specific context, e.g., federal statute, passed by Congress].*
>
> *In your judgment, the meaning that "[specific term, e.g., intent]" has in the [specific context, e.g., federal statute, passed by Congress] would be closest to the meaning of "[intent]" that is described by:*
>
> - *An ordinary definition in an ordinary English dictionary*
> - *A technical legal definition in a dictionary of law*
> - *A technical religious definition in a dictionary of religion*
> - *A technical science definition in a dictionary of science*
> - *A technical sports definition a dictionary of sports*

Here, we treat selection of one of these options as indicating that a participant evaluates the meaning of the term in context as either ordinary or technical in nature. For example, we interpret the choice of "a technical science definition in a dictionary of science" to indicate that the participant understands the term as taking a scientific meaning. [180]

A list of *specific terms,* within each Term Type, was created by relying on external sources:

- *Ordinary terms*: The Oxford 3000 word list (a list of the most common and significant words in English)[181]
- *Religious terms*: Wikipedia's glossary of Christianity[182]

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180 Some readers may prefer a weaker interpretation of the participants' choice. Perhaps the choice here (e.g., the choice of the science-technical definition) merely indicates that the participant evaluates the science meaning as more likely than the other meanings. Ultimately, we propose a theory of "contrastive presumptions," which would be supported even on this weaker interpretation.

181 *See The Oxford 3000 Word List*, GITHUB, https://github.com/sapbmw/The-Oxford-3000 [https://perma.cc/WD8H-2S4H] (noting words that occur most frequently across a range of English text and words that are familiar to most English users).

182 *See Glossary of Christianity*, WIKIPEDIA, https://en.wikipedia.org/wiki/Glossary_of_Christianity [https://perma.cc/PLJ9-WZ9J] (providing a glossary of religious terms used in Christianity).

- *Sports terms*: Wikipedia's glossary of American football terms[183]
- *Science terms*: Wikipedia's glossary of biology[184]
- *Legal terms*: The ABA's glossary of legal terms[185]

One-hundred terms were selected from each list of N terms, by selecting the N/100th term on each list, arranged alphabetically, until 100 terms were reached.[186] This resulted in a list of 500 terms, 100 of each Term Type: ordinary, religious, sports, science, and legal.

Within each Context, there were three *specific contexts*:

- *Ordinary contexts*: front page of a newspaper; fiction book; TV comedy show transcript
- *Religious contexts*: religious text; prayer book; religious sermon transcript
- *Sports contexts*: sports magazine; sports almanac; sports radio transcript
- *Science contexts*: science magazine; science textbook; TV science documentary transcript
- *Legal contexts*: country's constitution; federal statute, passed by Congress; contract, signed by two people

We aimed to recruit 1,250 participants. In response to the survey provider's recruitment, 1,345 participants began the survey. Of those, 1,287 (97%) correctly answered a comprehension check question and reCAPTCHA and were included in the analyses, subject to our preregistration plan. Following our preregistration plan, we conducted a multinomial logistic regression to assess the effect of Context (ordinary, religious, sports, science, legal), Term Type (ordinary, religious, sports, science, legal) and their interaction on participants' evaluation of the term's meaning. We used the choice of "a technical X definition in a dictionary of X" to indicate that participants assessed the term as having "X" meaning in the context. There was a significant effect of Context and a significant effect of Term Type. The estimated probability of selecting each meaning is shown in Tables 2 and 3.

183 *See Glossary of American Football Terms*, WIKIPEDIA, https://en.wikipedia.org/wiki/Glossary_of_American_football_terms [https://perma.cc/K3G3-97H7] (providing a glossary of American football terms).

184 *See Glossary of Biology*, WIKIPEDIA, https://en.wikipedia.org/wiki/Glossary_of_biology [https://perma.cc/29DJ-9TG5] (defining fundamental biology terms and concepts).

185 *See Glossary*, AM. BAR ASS'N, https://www.americanbar.org/groups/legal_services/flh-home/flh-glossary [https://perma.cc/A2YW-8RVN] (providing a glossary of legal terms).

186 Given our goal of reducing researcher degrees of freedom and promoting reproducibility, this method has advantages over a random selection of terms.

Table 2: Estimated Probability of Choosing a Type of Meaning, Across Contexts

Context	Meaning	Probability	Standard Error	95% Confidence Interval, Lower	95% Confidence Interval, Upper
Ordinary	Ordinary	0.44	0.03	0.38	0.50
	Religious	0.15	0.02	0.11	0.19
	Sports	0.10	0.02	0.07	0.13
	Science	0.18	0.02	0.13	0.23
	Legal	0.13	0.02	0.10	0.17
Religious	Ordinary	0.32	0.03	0.26	0.37
	Religious	0.50	0.03	0.44	0.56
	Sports	0.06	0.01	0.03	0.09
	Science	0.08	0.02	0.04	0.11
	Legal	0.05	0.01	0.02	0.07
Sports	Ordinary	0.25	0.03	0.19	0.30
	Religious	0.07	0.01	0.04	0.10
	Sports	0.48	0.03	0.42	0.54
	Science	0.12	0.02	0.09	0.16
	Legal	0.07	0.02	0.04	0.11
Science	Ordinary	0.29	0.03	0.23	0.34
	Religious	0.11	0.02	0.08	0.15
	Sports	0.08	0.02	0.05	0.11
	Science	0.39	0.03	0.33	0.45
	Legal	0.13	0.02	0.09	0.17
Legal	Ordinary	0.29	0.03	0.24	0.35
	Religious	0.13	0.02	0.09	0.17
	Sports	0.06	0.01	0.03	0.08
	Science	0.10	0.02	0.07	0.14
	Legal	0.41	0.03	0.35	0.47

Table 3: Estimated Probability of Choosing a Type of Meaning, Across Term Types

Term Type	Meaning	Probability	Standard Error	95% Confidence Interval, Lower	95% Confidence Interval, Upper
Ordinary	Ordinary	0.53	0.03	0.47	0.59
	Religious	0.11	0.02	0.08	0.14
	Sports	0.10	0.02	0.07	0.14
	Science	0.14	0.02	0.10	0.19
	Legal	0.12	0.02	0.08	0.16
Religious	Ordinary	0.26	0.03	0.20	0.31
	Religious	0.43	0.03	0.37	0.49
	Sports	0.11	0.02	0.08	0.15
	Science	0.11	0.02	0.07	0.15
	Legal	0.09	0.02	0.06	0.13
Sports	Ordinary	0.26	0.03	0.21	0.32
	Religious	0.14	0.02	0.10	0.18
	Sports	0.35	0.03	0.30	0.41
	Science	0.12	0.02	0.08	0.16
	Legal	0.12	0.02	0.08	0.16
Science	Ordinary	0.23	0.03	0.17	0.28
	Religious	0.17	0.02	0.12	0.21
	Sports	0.09	0.02	0.06	0.13
	Science	0.37	0.03	0.31	0.42
	Legal	0.14	0.02	0.10	0.18
Legal	Ordinary	0.31	0.03	0.25	0.37
	Religious	0.12	0.02	0.08	0.16
	Sports	0.11	0.02	0.08	0.15
	Science	0.13	0.02	0.09	0.18
	Legal	0.32	0.03	0.27	0.38

Study 4 provides an important robustness check on the earlier results. We employed a very large list of terms drawn from objective sources (e.g., the most common 3,000 English words, the American Bar Association (ABA) glossary of legal terms). The results are consistent with the earlier studies.

First, lay participants are sensitive to context or genre. When a term appears in a legal source (e.g., a statute), people are much more inclined to understand it to take a technical legal meaning, compared to other kinds of technical meaning.[187]

Second, this ordinary genre-sensitivity is not unique to law. The same sensitivity characterizes people's understanding of language in a sports source, religious source, or science source.[188]

Third, across all these areas, ordinary meaning appears to be a reliable "second best" option. In the legal context, participants tend to understand terms as having technical legal meanings. But more took the term to have an ordinary meaning than other kinds of technical meanings (e.g., sports meaning). This suggests that "all-or-nothing" presumptions (e.g., a universal presumption of ordinary meaning) may be missing some important nuance. A more accurate characterization of participants' judgments is a *hierarchy* of contrastive understandings. In the legal context, participants tend to understand terms as having legal meanings over all other kinds of meaning. But it is also true that participants tend to understand terms in legal contexts to have ordinary meanings over, for example, technical religious meanings.

Fourth, people are sensitive to the Term Type. Importantly, participants did not receive any indication that "appeal" is a legal term or that "audible" is a sports term. Nevertheless, participants distinguished among different Term Types and were more inclined to categorize legal terms as having technical legal meanings (independent of the context of writing).[189]

In this study, our primary interest was in the effect of Term Type and Context. These effects are evidence that people understand technical terms in technical domains as expressing technical meanings. We were also interested in *comparing* the rates of choice within specific contexts or for term types; for example, were participants more likely to choose ordinary or sports meaning in the legal context? Such comparisons lay the groundwork for our theory of "contrastive presumptions" in the next Part.

187 *See supra* Table 2.

188 *See supra* Table 2.

189 *See supra* Table 3.

We were less interested in the *overall* rate at which participants choose a meaning (e.g., did 90% or 50% or 30% choose ordinary meaning in the legal context?). The significance of those rates is more difficult to interpret.

Together, these results support the DLL account. Ordinary people understand that many terms have technical meanings, and they can distinguish among different technical meanings. Moreover, context has a reasonably large effect on people's perception of meaning. People do not generally take terms in law to have ordinary meanings; in fact, they more often understand terms in law to have technical legal meanings.[190]

E. *Study 5: How Do Ordinary People Learn About Law?*

The experimental studies (Studies 1–4) were designed to assess whether ordinary people understand legal texts to communicate technical meanings. When we made this prediction, we also considered a set of follow-up survey questions that would be of interest if the hypothesis were true. Those questions concerned how ordinary people learn about the meaning of technical language in law. We preregistered these questions and asked them at the end of each study. As such, we have a large dataset speaking to these questions.[191]

More detail about the survey questions and results can be found at our online Appendix,[192] but this section highlights key findings from our large sample of over 4,000 Americans:

1. Most people report frequently using an ordinary dictionary but never using a law dictionary.

Compare responses to these two survey questions: (1) In your whole life, have you ever looked up a word in *an ordinary English dictionary* (either a print or online ordinary English dictionary)?; and (2) In your whole life, have you ever looked up a word in a *law dictionary* (either a print or online law dictionary)?

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190 *See supra* Table 2.

191 Across all experiments we recruited 4,365 participants, of which 4,239 correctly answered the comprehension check question and completed the reCAPTCHA. For the analyses in only this Section, the 4,239 participants who correctly answered comprehension check questions are included. Of those, the vast majority (98%, 4,138) reported that they were citizens of the United States.

192 *See* Kevin Tobia, *Ordinary Meaning and Ordinary People*, OPEN SCI. FRAMEWORK (Oct. 29, 2022, 9:40 AM), https://osf.io/jvhbr [https://perma.cc/4MNN-LNUJ].

While our participants reported frequently using an ordinary dictionary, most have *never* consulted a legal dictionary.

Figure 4: Participants' Reported Frequency of Lifetime Usage of an *Ordinary Dictionary*

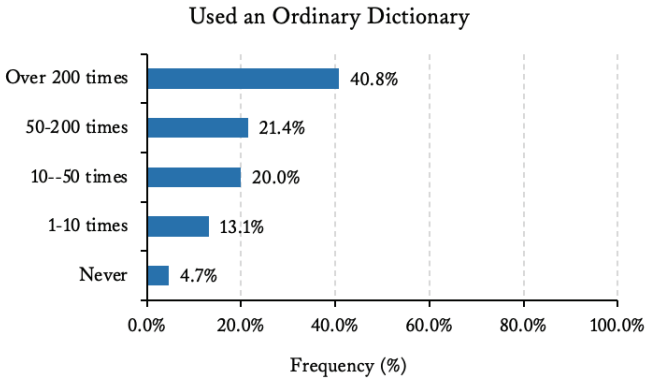
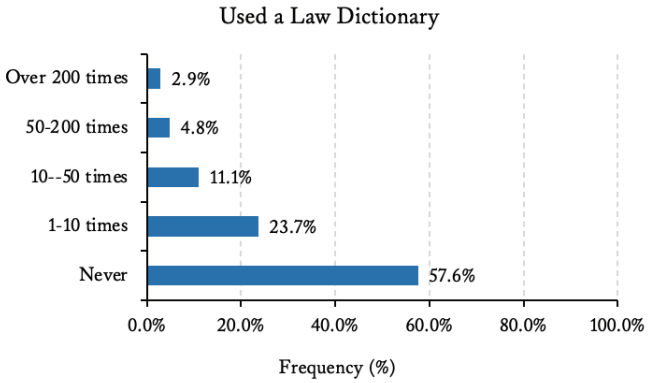


Figure 5: Participants' Reported Frequency of Lifetime Usage of a *Legal Dictionary*



2. Most people report they have *not* received advice from a lawyer about how to understand a legal text but that they would have sought such advice (at some point) if those services were freely available.

Next, compare responses to these two survey questions: (1) In your whole life, have you ever received legal advice from a lawyer *about how to understand the meaning of a legal text* (e.g., a law, a contract)?; and (2) If you had access to a lawyer *for free*, how often do you think you would have sought legal advice about understanding the meaning of legal texts (e.g., laws, contracts), across your whole life?

Figure 6: Participants' Reported Actual Frequency of Lifetime Interpretive Advice from a Lawyer

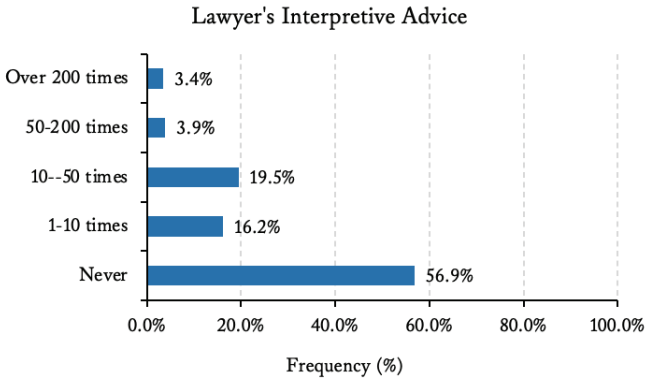
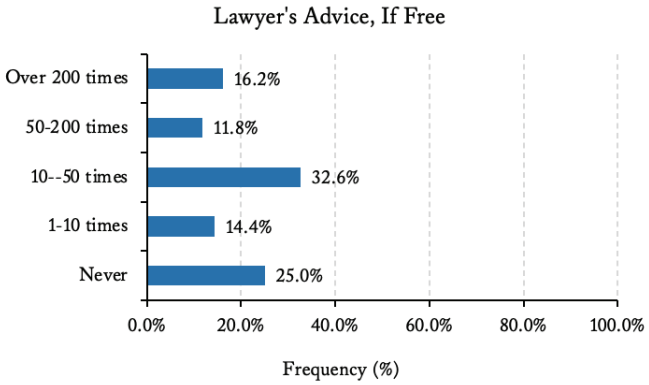


Figure 7: Participants' Reported Desired Frequency of Lifetime Interpretive Advice from a Lawyer



3. Most people report having researched a law on their own, and the most common resource is Google.

Although most report having never consulted a lawyer for interpretive advice, most (77%) report having looked up what a law means on their own. The vast majority of those people rely on sources like Google. Unsurprisingly, there are serious limitations to the success of search engines like Google to provide to accurate legal information.[193]

The full results of this study are presented in the online Appendix.[194] Together, these findings suggest that textualist judges who aim to act as interpretive *"outsiders"* (i.e., ordinary people) may not account for the empirical realities facing real Americans. For example, some textualists interpret from the perspective of the "ordinary lawyer," assuming that most Americans can simply seek interpretive advice from their lawyers. For example, Justice Barrett's solution to the tension between faithful agency to the people and technical meaning appeals to lawyers as intermediaries: "In reading a statute as a lawyer would, a court is not betraying the ordinary people to whom it owes fidelity, but rather employing the perspective of the intermediaries on whom ordinary people rely."[195] Extant literature shows that many Americans lack access to lawyers and legal services.[196] Our survey results add more reason to doubt the success of a "lawyer intermediary" solution if that proceeds on the assumption that people can and will obtain such legal advice. Many people report wanting interpretive advice, but most are not gaining access to it.

IV. IMPLICATIONS OF AN EMPIRICALLY GROUNDED PUBLIC MEANING

The empirical studies support the DLL hypothesis as applied to law. Ordinary people understand some terms in legal texts to communicate technical meanings and defer to expert legal authority about those meanings. The results also indicate that these phenomena are not unique to law: People's understanding of a term's technical nature is sensitive to context and the type of term at issue (ordinary, technical, or ambiguous), across different technical domains, from law to science to religion. This Part elaborates several significant implications from these results.

First, the results provide empirical support for the DLL solution to "textualism's dilemma" and support a call to broaden debates about ordinary

193 *See generally* Margaret Hagan & Nóra Al Haider, *Does Googling Justice Work? Auditing Search Engines' Performance as Intermediaries of Legal Help Information Online*, UCLA J.L. & Tech. (forthcoming) (on file with author).

194 *See* Kevin Tobia, *Ordinary Meaning and Ordinary People*, OPEN SCI. FRAMEWORK (Oct. 29, 2022, 9:40 AM), https://osf.io/jvhbr [https://perma.cc/4MNN-LNUJ].

195 Barrett, *Congressional Insiders and Outsiders*, *supra* note 2, at 2209.

196 *See* Pruitt & Showman, *supra* note 38, at 480-96.

meaning and legal interpretation. Today's legal interpreters, especially textualists, are increasingly committed to *ordinary people*, seeking to act as agents of ordinary people in interpretation. At the same time, textualist theory and practice focuses heavily on giving legal texts their "ordinary meanings."[197] Our studies suggest that textualists concerned with "ordinary people" should not focus solely on ordinary meaning, but rather on a broader concept of *public meaning*, which includes both ordinary and technical meanings.

Second, the results challenge the universal presumption of ordinary meaning. Instead, the results reveal a more complex picture. Regarding lay understanding in a legal context, both ordinary and legal meaning generally prevail over other types of technical meaning (e.g., ordinary over religious meaning). We argue that interpreters seeking to promote fair notice or remain faithful to ordinary understanding of law should apply *contrastive*, rather than universal, presumptions. For example, one could abstain from applying a universal presumption of ordinary meaning, while still employing a contrastive presumption of ordinary *over* religious meaning, and also a contrastive presumption of legal *over* religious meaning. These contrastive presumptions reflect the comparative importance of legal and ordinary meaning (and the comparative non-importance of other meaning types).

Third, the results provide guidance to legal interpreters and offer new explanations of recent textualist disagreement. As one case study, we examine a recent issue addressed by the Supreme Court concerning the meaning of "tribunal" in a statute. As a second case study, we revisit the recent landmark decision in *Bostock v. Clayton County*.[198] This Article's theory and empirical data offer a new explanation of Justice Gorsuch's majority opinion as one justified by reliance on legal meaning.

Finally, the empirical findings raise implications about the concept of *fair notice*. Some textualists equate fair notice with ordinary meaning,[199] but Part III's evidence suggests that textualists should understand fair notice to include access to the technical meanings of terms in law. We consider the

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197 On textualist theory, see Barrett, *Congressional Insiders and Outsiders*, *supra* note 2, at 2195. Justice Barrett proposes that ordinary people can gain access to technical meaning through their lawyer intermediaries. Our studies suggest that people understand law to have a great deal of technical language—consistent with the views of some legal scholars. *See* Schauer *supra* note 21, at 501. If so, typical ordinary people may need frequent and regular access to intermediaries to gain understanding. Our survey results (Study 5), and prior work on access to lawyers, count against this possibility. *See* Pruitt & Showman, *supra* note 38, at 480-96. For a discussion of textualist practice and Supreme Court Justices' appeals to "ordinary meaning," see *supra* notes 65–73.

198 *See infra* subsection IV.C.2 (describing the Court's decision in *Bostock v. Clayton County*, 140 S. Ct. 1731, 1828 (2020)).

199 *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1828 (2020) (Kavanaugh, J., dissenting) ("A literalist approach to interpreting phrases disrespects ordinary meaning and deprives the citizenry of fair notice of what the law is.").

arguments of some prominent textualists who have offered bridges between ordinary people and such technical-legal meaning.[200] Ultimately, we conclude that interpreters should attend to fair notice,[201] but that ordinary people rarely have *perfect* notice of law's meaning. As such, interpreters should begin to theorize *partial* notice—for example, how an ordinary person might have partial notice of the meaning of a technical term, given the overlap between ordinary and legal meanings. This view rejects the traditional "all-or-nothing" approach to notice, recognizing that in legal interpretation the best-case scenario is often partial notice.

A. *Public Meaning and Ordinary People*

The first implication begins from common premises of modern textualism and public meaning originalism—which concern ordinary people and empiricism. First, judicial interpretation should be constrained by the "ordinary meaning" of the textual language.[202] Second, ordinary meaning should be determined from the viewpoint of the ordinary people subject to the law.[203] Textualists view ordinary meaning as a purely or partly empirical issue,[204] and it follows that they should do the same in considering how ordinary people understand language and legal texts.[205] In light of the studies

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200 *See, e.g.*, SCALIA, *supra* note 31, at 17 ("The evidence suggests that, despite frequent statements to the contrary, we do not really look for subjective legislative intent. We look for a sort of "objectified" intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the *corpus juris*."); ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 252 (2012) ("So, if possible, [a word or phrase] should no more be interpreted to clash with the rest of that corpus than it should be interpreted to clash with other provisions of the same law."); Barrett, *Congressional Insiders and Outsiders*, *supra* note 2, at 2209 ("[T]he fiction that the people are on constructive notice of the law—and must therefore conform to it regardless of whether they are actually aware of it—does not depend on the proposition that the language of the law is accessible to all people.").

201 *Cf.* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 205-12 (1985) (criticizing the unsophisticated ways in which courts have made reference to "fair notice" but arguing that "there is a core concept of notice as a requirement of fairness to individuals that is, and should be, taken very seriously").

202 *See supra* notes 1–6 and accompanying text. Many textualist judges have *in practice* relied on evidence of legal meaning, as Part II's empirical study demonstrates. Our claim here is about textualist theory, which focuses on ordinary meaning.

203 *See supra* notes 1–6 and accompanying text.

204 *See, e.g.*, Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 795 (2017) ("When we speak of *ordinary meaning*, we are asking an empirical question—about the sense of a word or phrase that is most likely implicated in a given linguistic context.").

205 There is some recognition by textualists that their commitment to language empiricism should extend to empiricism about ordinary people. *See, e.g.*, Barrett, *Congressional Insiders and Outsiders*, *supra* note 2, at 2203-04 ("[T]he linguistic canons are designed to capture the speech patterns of ordinary English speakers and, in some cases, of the subclass of lawyers. . . . Whether the canons actually capture patterns of ordinary usage is an empirical question. If they do not track common usage, then the textualist rationale for using them is undermined." (citation omitted)); *see*

presented here, a commitment to the "public" and empiricism requires adopting a broader *public meaning* standard, which includes both ordinary meaning and legal meaning—and perhaps other types of technical meaning.[206]

This Article's studies provide empirical support for the "division of linguistic labor" solution to textualism's "dilemma," and with it, a shift from ordinary meaning to public meaning.[207] Recall that textualism's dilemma involves tension between (1) the commitment to interpret law in light of its ordinary meaning (rather than some other meaning, like its legislatively intended meaning), and (2) the practice of regularly relying on sources of technical meaning. This first commitment is often taken to support fair notice, rule of law values, and democracy.[208] On the other hand, textualist practice treats law as full of terms with *technical-legal* meanings. Our survey of Supreme Court cases citing legal dictionaries reveals that justices regularly rely on technical definitions from legal dictionaries.[209] This practice is not merely to define the occasional unique term of art (e.g., "ex post facto law"). Textualists also rely on technical evidence even for seemingly very ordinary words, like "any" or "so."[210]

As we explained in Part II, the most promising resolution of this tension is via the division of linguistic labor (DLL). This view holds that ordinary people understand that certain terms in law have technical meanings, allowing textualists to interpret such terms as technical ones, while still adopting the "public meaning" of the text. We find empirical evidence supporting DLL in law. Ordinary people understand terms like "habeas corpus" to have technical legal meanings.[211] Furthermore, ordinary people defer to legal authorities about the meanings of those terms.[212]

This much may be unsurprising. More surprisingly, we find that ordinary people's willingness to defer to legal authorities about terms is strong. People do not defer just for terms with obvious legal content (e.g., "letter of marque and reprisal"), but also for terms that have both ordinary and legal meanings (e.g., "contract," "intent," "tribunal"). This suggests that ordinary people do not understand law as always composed of "ordinary language." Rather, ordinary people understand law as expressing several kinds of technical terms (e.g., legal, scientific) or mixed terms. If textualists and other interpreters aim to interpret

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also Tobia & Nourse, *Progressive Textualism*, *supra* note 5, at 1448 (discussing textualism's failure to account for empirical evidence of how ordinary people understand legal texts).

206 *See* Solum, *Incorporation and Originalist Theory*, *supra* note 139, at 430 (arguing similarly that public meaning should exceed the scope of ordinary meaning).

207 *See supra* Section I.C.

208 *See supra* notes 1–6 and accompanying text.

209 *See supra* Section I.C.

210 *See supra* Section I.C.

211 *See supra* Part III.

212 *See supra* Part III.

law in an empirically supported way, reflecting people's understandings and expectations, they should incorporate such understandings and expectations into their theory of interpretation.

The findings support the broader "public meaning" concept rather than only a commitment to "ordinary meaning." Public meaning can include ordinary (i.e., general, non-legal) meanings, as well as various kinds of technical meanings (e.g., legal, scientific). At least in name, this shift aligns with the Court's recent rhetoric. For example, *Bostock v. Clayton County* suggests that the Court may now view public meaning and ordinary meaning as interchangeable.[213] Indeed, Justice Gorsuch's majority opinion conflated them, referencing both "ordinary meaning" and "ordinary public meaning" as the governing standard.[214]

However, the two are not synonymous. In a legal text, a term's "public meaning" is what that term communicates to the public in its context of utterance. A term's "ordinary meaning" (what it means in general, non-legal contexts) does not always coincide with its legal meaning (what it means in general legal contexts). A term's public meaning may be its ordinary meaning, but it might instead be a distinct and different *legal* meaning. This Article's findings suggest that this latter possibility may occur more frequently and broadly than some jurists and theorists believe.

Putting this all together, judges should update the picture of legal interpretation as largely exhausted by "ordinary meanings." On the revised picture, a law's public meaning—what it communicates to the ordinary public—is regularly informed by considering terms' legal meanings.

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213 Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (majority opinion); *see also infra* subsection IV.C.2 (discussing *Bostock*). The majority and dissenting opinions in *Bostock* were all written by self-avowed textualists attempting to determine the "ordinary public meaning" of the text. *See Bostock*, 140 S. Ct. at 1738 (referring to "ordinary public meaning"); *id.* at 1825 (Kavanaugh, J., dissenting) ("The ordinary meaning that counts is the ordinary public meaning at the time of enactment . . . ."). Justice Gorsuch has referred to "original public meaning" or "ordinary public meaning" when interpreting statutes on several occasions. *See, e.g.*, Atl. Richfield Co. v. Christian, 140 S. Ct. 1335, 1363 (2020) (Gorsuch, J., concurring in part and dissenting in part) ("When interpreting a statute, this Court applies the law's ordinary public meaning at the time of the statute's adoption . . . ."); Kisor v. Wilkie, 139 S. Ct. 2400, 2426 (2019) (Gorsuch, J., concurring in the judgment) (referring to the "original public meaning" of "a statute, regulation, or other legal instrument"); Food Mktg. Inst. V. Argus Leader Media, 139 S. Ct. 2356, 2362 (2019) (Gorsuch, J.) (referring to an argument by a party about the "the ordinary public meaning of the statutory term 'confidential'"); Wis. Cent. Ltd. v. United States, 138 S. Ct. 2067, 2075 (2018) (Gorsuch, J.) (referring to the statute's "original public meaning").

214 *See Bostock*, 140 S. Ct. at 1738 (majority opinion) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment."); *id.* at 1750 ("[T]he law's ordinary meaning at the time of enactment usually governs . . . .").

B. *Examining the Presumption of Ordinary Meaning*

A second implication concerns the presumption of ordinary meaning itself. The tension between the presumption of ordinary meaning and the existence of technical terms in law has created jurisprudential uncertainty.[215] Does the ordinary meaning presumption still apply when a term has an available technical meaning, or is the presumption merely a recognition that most words only have ordinary meanings? The difference between the two possible understandings of the presumption impacts a significant number of cases, even if courts tend to gloss over the distinction.[216]

For judges committed to interpreting law in line with what it communicates to the public, the study's results suggest a way to move forward in this debate. Contrary to the traditional ordinary meaning presumption, we find that ordinary people do not overwhelmingly presume that terms in legal texts take "ordinary" meanings. In fact, there is stronger empirical support for an intuitive presumption of *legal* meaning. Overall, the results indicate that legal theorists' longstanding debate between ordinary and legal meaning reflects a conflict present in ordinary people's understanding of law. Our ultimate conclusion is a theory of "contrastive presumptions," which we elaborate in the next subsection. This theory does not make textualism simpler, but we think it makes it a more accurate reflection of ordinary understanding of language. It would be simpler to adopt a robust general presumption of ordinary meaning, but ordinary people understand law in a more complex manner, as regularly expressing both ordinary and legal meanings.

1. Contrastive Presumptions

The experimental results indicate the limitations of an all-or-nothing "universal" presumption of ordinary meaning. Such an approach would presume that terms *always* take their ordinary meanings, rather than any alternative meanings. But in any given context it might be that some meaning types are more viable than others. For example, consider the term "penalty." In a statute, should that term be presumed to have its ordinary meaning, its technical legal meaning, or its technical sports meaning?

This question has an easy part and harder part. The harder part of the question concerns ordinary versus legal meaning—this Section returns to that question later. But to start with the easy part: it is ridiculous to assume that "penalty" in a statute takes a "technical sports meaning." A presumption

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215 *See* discussion *supra* Part I.

216 *Cf.* Schauer, *supra* note 21, at 512 ("But as long as at least some terms are technical, then any interpretive act within law will have to confront at the outset whether the term to be interpreted is one of those terms.").

that language takes its technical "sports meaning" might be appropriate for the interpretation of sports handbooks, but it is not appropriate as a presumption of legal interpretation. Empirical studies reflect this intuition. Studies 2–4 indicate that ordinary people also hold this view.[217]

Our new terminology of "contrastive presumptions" helps clarify how ordinary meaning is still incredibly important. There are likely many contrastive presumptions that favor ordinary meaning over non-legal technical meanings. This line of reasoning reflects an important element of truth in law's standard presumption of ordinary meaning: there are many technical meanings that are not generally communicated by legal texts. It is safer to presume that "penalty" in a law has its ordinary meaning, rather than some technical meaning it takes in sports. In other words, in legal interpretation there is a presumption of ordinary, *rather than sports*, meaning. Moreover, there is some empirical support that ordinary people intuitively understand some of these contrastive presumptions. Studies 2–4 suggest there are also contrastive presumptions of ordinary over religious meaning and ordinary over sports meaning.[218]

With this terminology in mind, we can now reintroduce our more provocative suggestion: for an interpreter who seeks to interpret law consistently with what that law communicates to the public, a general, *unwavering* presumption of ordinary meaning does not find robust empirical support. There is empirical support in favor of many other contrastive presumptions (ordinary meaning over religious or sports meaning). But, importantly, the empirical data suggests that there is not a strong presumption of ordinary over legal meaning. Arguably, the evidence more strongly supports the opposite presumption: legal over ordinary meaning.

To further illustrate this idea, through the data collected in Part III, consider the following table drawing from the results of Study 4. If we treat a participant's selection of a definition to indicate that participant's implicit categorization of that term (e.g., selection of a legal definition implies a preference for a legal category) the table displays participants' propensities to evaluate a term as falling within one or another category.[219]

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217 *See supra* Part III.

218 *See supra* Part III.

219 There is a "strongly supported" presumption of X over Y only if the data indicates that people are at least twice as likely to understand a term as X than Y. Other statistically significant positive ratios are treated as "weakly supported presumptions." Because there were five options, we would expect about 20% of participants to choose each option, if selecting randomly. As such, we do not include in the tables any presumption in favor of a view that received less than 20% of responses. We think that these categorization rules are defensible, but they involve inevitable line-drawing.

Table 4: Summary of Presumptions for Terms in Law

Presumption	Category
Strongly Supported Presumption	Legal meaning over religious meaning Legal meaning over scientific meaning Legal meaning over sports meaning Ordinary meaning over religious meaning Ordinary meaning over scientific meaning Ordinary meaning over sports meaning
Weakly Supported Presumption	Legal meaning over ordinary meaning
No Clear Presumption	Religious versus scientific versus sports meaning

2. Situating the Revised Picture Within Legal Interpretation

To be clear, we do not take our empirical studies to *settle* debate about ordinary versus legal meaning, within textualist debate or otherwise. Although the Table above roughly quantifies some of these presumptions' intuitive strengths, we see the main import of this Section as problematizing popular theories of legal interpretation. Whether ambiguous terms should receive ordinary or legal meanings should be one of the central concerns of modern textualists and originalists. And in terms of the correct presumption, there are three Options worthy of consideration:

1. A presumption of ordinary over legal meaning.
2. No presumption of ordinary versus legal meaning.
3. A presumption of legal over ordinary meaning.

For those seeking to adjudicate among 1–3 by appealing to ordinary people's understanding of law, our studies reveal a surprising result. They provide more support for Options 2 and 3 than Option 1. Insofar as legal interpreters are committed to "the public"—via fair notice, democracy, rule of law, or other justifications—they owe more thorough consideration to these alternative possibilities.

We imagine there may be some objections to a proposed presumption of legal meaning.[220] Before turning to the next Section, we consider and respond to four likely objections.

> *Objection 1*: A presumption of legal meaning seems unworkable. Most words—like "cup"—don't even have a legal meaning.

Objection 1 correctly states that some terms have ordinary meanings but no unique legal meanings. But conventional wisdom might overestimate the number of such terms because, once within a legal context, even seemingly ordinary terms may take on legal meaning. Consider, for example, common pronouns like "his." In ordinary conversation, "his" usually stands for a masculine possessive. In unusual circumstances, "his" can refer to his, hers, or theirs, but that gender-neutral use of "his" has grown increasingly unpopular in ordinary English.[221] However, in U.S. statutes "his" is *generally presumed* to have a special legal meaning: unless context indicates otherwise, "his" includes "hers."[222]

Consider other classes of terms like nouns and verbs where special legal meanings are used. Despite ordinary usage distinguishing between singular and plural nouns, in statutes, a noun-phrase like "a cup" is presumed to mean "one or more cups."[223] Ordinary verbs raise the same issue once encased in a legal context. In law, present-tense verbs like "drives" are presumed to also include the future ("drives now or in the future").[224] In ordinary conversation that may sometimes be true, but it is not a generally applied presumption. Sadly, in ordinary language, "I love you" does not mean "I will always love you." So, we question to some degree the premise of Objection 1 as based on the idea that one can typically decontextualize seemingly ordinary meaning from legal contexts.

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220 To be sure, there are also objections to the current presumption of ordinary meaning in statutory interpretation because even ordinary terms in law are contained within distinctive legal structures and those legal structures provide the context for understanding ordinary meaning. *See, e.g.*, David A. Strauss, *Why Plain Meaning?*, 72 NOTRE DAME L. REV. 1565, 1568 (1997) ("Terms like 'witness,' 'zoning,' and even 'speed limit,' when used in a legal context, can mean something quite different from what they might mean when used in other contexts. Even in the simple case, we are assuming that the legislature is expressing its decisions in a distinctive legal language. It is the ordinary meaning of the terms in that language that governs.").

221 *See* DENNIS BARON, WHAT'S YOUR PRONOUN? 72-78 (2020) (tracing the decline of the pronoun "he").

222 *See* 1 U.S.C. § 1 (2012) ("[W]ords importing the masculine gender include the feminine as well . . . .").

223 *See* 1 U.S.C. § 1 (2012) ("[W]ords importing the singular include and apply to several persons, parties, or things . . . .").

224 *See* 1 U.S.C. § 1 (2012) ("[W]ords used in the present tense include the future as well as the present . . . .").

> *Objection 2*: Even if we accept that legal context matters, many words—like "the"—have no distinctive legal meaning. How can a universal presumption of legal meaning make sense of those words in statutes?

First, note that a version of this challenge arises for *any* theory of universal presumptions—not just our proposal. Take even the familiar presumption of ordinary meaning. Generally, scholars speak of that presumption as applying universally to every undefined term in a legal text.[225] But if the presumption means "give a term its ordinary meaning rather than its technical meaning," that guidance does not apply to a term with no ordinary meaning (e.g., "parol evidence" or "habeas corpus"). Thus, the logic of an ordinary meaning presumption is conditional: if a term has an ordinary meaning, presume that it takes that meaning in the law.[226] This guidance means that interpreters should first ask whether a given term has an ordinary meaning at all (which is presumed to apply).[227]

This same logic applies to a presumption of legal meaning. Rather than first asking whether the term has an ordinary meaning, interpreters would first ask whether it has a legal meaning. If yes, there is a presumption favoring that meaning. If no, no presumption applies. In some cases, an interpreter may make this determination quickly and easily. For example, if the word "two" has no specific legal meaning in the context, the presumption of legal meaning is easily rebutted (or, more precisely, its consequent need not follow).

> *Objection 3*: Your previous response appealed to the conditional structure of the presumptions: *if a term has a legal meaning and an ordinary one*, there is a presumption of legal meaning. But, in that case, there is nothing new about the proposal. The "new presumption of legal meaning" just restates the entirely familiar view that there is an exception to the ordinary meaning presumption for legal terms of art.

Our claim is analytically distinct from that familiar idea. Variations on the well-known "old" view hold that there is a presumption of ordinary meaning, which is overcome by pointing to a statutory definition, evidence of a term's status as a legal term of art, or evidence that the term should take its legal

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225 *See supra* Part I.

226 Note that even this conditional phrasing is contestable. For some courts, the conditional is more like the following: "Assume that a term has only an ordinary meaning, but if a term has a technical legal meaning, apply the technical legal meaning." For these courts, an explicit presumption of legal meaning would coincide with their already existing interpretive practice.

227 Some technical legal meanings may give rise to ordinary meanings, including ordinary meanings that diverge from the legal one. A proponent of the ordinary meaning presumption might propose that the ordinary meaning is still presumed to apply, but that presumption is defeated by considering the context of the statute.

meaning in a particular context.[228] The new view *rejects* the initial presumption of ordinary over legal meaning. It replaces it with a new presumption: Interpreters begin with the presumption that a term in law takes its legal meaning, and that presumption can be overcome with evidence that (in the law's context) the term communicates its ordinary (or scientific, or other) meaning.

But the novelty of our proposed presumption of legal meaning is not merely philosophical. Objection 3 also underestimates the significant contribution to legal interpretation that would result from recognizing a presumption of legal meaning. First, it would resolve the longstanding doctrinal uncertainty regarding whether the ordinary meaning presumption merely recognizes that most words have only ordinary meanings or, instead, instructs judges to apply ordinary over competing technical meanings.[229] With a presumption of legal meaning, the first question an interpreter should ask is not "is there an ordinary meaning" but rather "is there a legal meaning." Furthermore, if a term has both an ordinary and a legal meaning, courts are to presume that the legal meaning is correct, as opposed to requiring evidence that the legal meaning is correct in the circumstances of the statute.[230] In the next Section, we provide two concrete examples—"tribunal" in *ZF Automotive* and "because of" in *Bostock*—that would likely lead to a different interpretive conclusion than the Court would reach if presuming ordinary meanings.

> *Objection 4*: A presumption of legal meaning moves the most difficult question to ambiguity assessment. For instance, to know whether to apply the legal meaning presumption to "because of,"[231] we first must assess whether that term is ambiguous.

This Objection misunderstands the function of a presumption. A presumption of legal meaning would make legal interpretation more accurate—in the sense of cohering with ordinary people's understanding of legal language. Whether this presumption makes interpretation easier or more difficult is a separate question. In any case, it is not obvious that a presumption of legal meaning would make interpretation any more difficult than does the current presumption of ordinary meaning.

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228 *See, e.g.*, SCALIA & GARNER, *supra* note 200, at 73 (stating that legal "terms of art" should be given their technical meanings pursuant to the "technical-meaning exception" to the presumption of ordinary meaning).

229 *See* discussion *supra* Part I.

230 One problem with existing views, as exemplified by Justice Scalia's reference to legal "terms of art," is that it is not clear whether a term is a legal "term of art" merely because it has a legal meaning that might differ from its ordinary meaning. *See* SCALIA & GARNER, *supra* note 200, at 73.

231 *See infra* subsection IV.C.2 (discussing the legal meaning of "because of" in the context of Title VII).

In this way, a presumption of legal meaning (or ordinary meaning) is similar to some well-accepted substantive canons of interpretation. For instance, defeating the presumption against retroactivity requires statutory language that is "so clear that it [can] sustain only" a meaning that retroactive application is intended.[232] The presumption against retroactivity does *not* assist a court in determining whether statutory language is clear or ambiguous.[233] Rather, it mandates a certain interpretation (that of prospective application only) *if* the presumption has not been rebutted. Similarly, the function of a presumption of legal meaning is not to help determine the meaning of any of the words in a statute. Instead, it represents an understanding that a word's legal meaning should be adopted unless there exists a competing ordinary meaning and a good reason to prefer that ordinary meaning.

C. *A Presumption of Legal Meaning as Applied*

Hearing of a possible "presumption of legal meaning," one might wonder: How exactly would this presumption of legal meaning work, and what practical legal consequences would it entail? As an illustration, this Section considers two examples. First, this Section considers *ZF Automtive v. Luxshare*, which posed a question regarding the meaning of "tribunal" within the context of 28 U.S.C. § 1782.[234] Second, it revisits *Bostock v. Clayton County*, the landmark civil rights case decided on controversial textualist grounds.[235] The presumption of legal meaning offers a novel and compelling explanation of the Supreme Court's reasoning in *Bostock*.

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232 *See* Lindh v. Murphy, 521 U.S. 320, 328 n.4 (1997) ("And cases where this Court has found truly 'retroactive' effect adequately authorized by a statute have involved statutory language that was so clear that it could sustain only one interpretation.").

233 Of course, courts can create additional rules for determining whether statutory language is sufficiently "clear" that retroactivity is intended, such as the inclusion of certain language (like "retroactive"). *See* John F. Manning, *Lessons from a Nondelegation Canon*, 83 NOTRE DAME L. REV. 1541, 1557-58 (2008) ("It is true, of course, that judges can disagree about the question whether a statute is clear. But one can at least articulate a plausible standard against which to argue about clarity . . . ." (citation omitted)). Similarly, courts could create additional rules for determining whether the presumption of legal meaning has been rebutted.

234 *See* ZF Auto. US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078, 2083 (2022) ("The current statute, 28 U.S.C. § 1782, permits district courts to order testimony or the production of evidence 'for use in a proceeding in a foreign or international tribunal.' These consolidated cases require us to decide whether private adjudicatory bodies count as 'foreign or international tribunals.'").

235 Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

1. "Tribunal"

First, consider the issue raised in *ZF Automotive*.[236] Relevant questions for our analysis in this Article include (1) does "tribunal" have an ordinary meaning or a legal meaning?; (2) if "tribunal" has both an ordinary meaning and a legal meaning, which should be presumed correct?; and (3) if "ordinary meaning" is the correct standard, should the Court's interpretation of "tribunal" rely on sources of legal meaning (e.g., legal dictionaries)?

This Article's empirical studies provide fairly specific guidance regarding the above issues. Studies 1a, 1b, and 2 all use the term "tribunal" as one of the legal-ambiguous test terms.[237] The empirical evidence indicates that ordinary people understand the term "tribunal" (in a statute) as a term with a *legal* meaning. Thus, if "tribunal" does have an applicable technical legal meaning, ordinary people expect it will be given that meaning, and the Supreme Court should consult sources of legal meaning in order to interpret the term accurately.

The interpretive issue in *ZF Automotive* and its predecessors was whether a private arbitral tribunal is a "tribunal" within the context of a statute allowing discovery in foreign countries. The provision aimed to "provid[e] an efficient means of assistance to participants in international litigation and encourag[e] foreign countries to provide a similar means of support to US courts."[238] Section 1782 achieves this by providing "a mechanism for foreign parties and tribunals to take depositions and obtain discovery from companies and individuals located within the United States for use in foreign or international proceedings."[239] Subsection 1782 now reads in relevant part as follows:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . . The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person and may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.[240]

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236 *See ZF Auto.*, 142 S. Ct. at 2085 ("We begin with the question whether the phrase 'foreign or international tribunal' in § 1782 includes private adjudicative bodies or only governmental or intergovernmental bodies.").

237 *See supra* Part III.

238 Gabriela Barriuso Clark, Note, *Interpretative Challenges of 28 U.S.C. § 1782 in the Aftermath of* Intel Corp. v. Advanced Micro Devices, Inc., 53 VAND. J. TRANSNAT'L L. 1377, 1379 (2020).

239 *Id.* Section 1782 was expanded in 1964 to allow for assistance in a larger number of proceedings, including "administrative and quasi-judicial proceedings." *See id.* at 1385.

240 28 U.S.C. § 1782(a) (1996).

While it is undisputed that § 1782 may be used in cases involving litigation in a foreign court, numerous questions exist as to whether and to what extent the statute can be used in situations involving international arbitration. A longstanding circuit split concerned whether "tribunal" includes a private foreign arbitral tribunal within the meaning of § 1782. The Fourth and Sixth Circuits recognized a private international arbitration as a "tribunal," but the Second, Fifth, and Seventh Circuits rejected that interpretation.[241]

In interpreting § 1782, the only explicit references to a standard of interpretation are to "ordinary meaning" by the Second Circuit and Sixth Circuit.[242] Yet, the Second Circuit and the Sixth Circuit came to different conclusions regarding the meaning of "tribunal" within the context of § 1782.[243] Significantly, the references to "ordinary meaning" had an unclear influence on the courts' interpretations. Neither the Second Circuit nor the Sixth Circuit explained how ordinary meaning constrained the interpretive sources consulted or how the information from those sources helped determine ordinary meaning.

Despite some courts' citations to "ordinary meaning," all five Circuits seemed to be assessing legal meaning. For instance, the Sixth Circuit considered ordinary dictionaries for the meaning of "tribunal" but also considered legal dictionaries, judicial usage, other statutory references, precedent, and the relationship between § 1782 and the Federal Arbitration Act—all of which may reveal legal usage but not ordinary usage.[244] The courts that did not explicitly indicate a standard of interpretation were not any more

241 *Compare In re* Application to Obtain Discovery for Use in Foreign Proceedings, 939 F.3d 710, 714 (6th Cir. 2019) ("Upon careful consideration of the statutory text, the meaning of that text based on common definitions and usage of the language at issue, as well as the statutory context and history of § 1782(a), we hold that this provision permits discovery for use in the private commercial arbitration at issue."), *and* Servotronics, Inc. v. Boeing Co., 954 F.3d 209, 210 (4th Cir. 2020) ("[W]e conclude that the arbitral panel in the United Kingdom is indeed a foreign tribunal for purposes of § 1782 . . . ."), *with* Republic of Kaz. v. Biedermann Int'l, 168 F.3d 880, 881 (5th Cir. 1999) ("[W]e elect to follow the Second Circuit's recent decision that § 1782 does not apply to private international arbitrations."), Nat'l Broad. Co. v. Bear Stearns & Co., 165 F.3d 184, 185 (2d Cir. 1999) (holding that a commercial arbitration held In Mexico under a French organization does not constitute a "proceeding in a foreign or international tribunal"), *and* Servotronics, Inc. v. Rolls-Royce PLC, 975 F.3d 689, 693 (7th Cir. 2020) (siding with the Second and Fifth Circuits' interpretation of "tribunal").

242 *See Nat'l Broad. Co.*, 165 F.3d at 188 ("Because the term 'foreign or international tribunal' is undefined, it is to be given its ordinary or natural meaning."); *In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d at 717 ("In determining the meaning of a statutory provision, we look first to its language, giving the words used their ordinary meaning." (quoting Artis v. District of Columbia, 138 S. Ct. 594, 603 (2018))).

243 *Compare Nat'l Broad. Co.*, 165 F.3d at 185 (holding that a commercial arbitration conducted in Mexico under the auspices of the International Chamber of Commerce, a private organization headquartered in France, is not a "proceeding in a foreign or international tribunal" under § 1782), *with In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d at 714 (holding that § 1782 "permits discovery for use in the private commercial arbitration at issue").

244 *See In re Application to Obtain Discovery for Use in Foreign Proceedings*, 939 F.3d at 719-29.

coherent. They too considered a mix of interpretive sources relevant to both ordinary meaning and legal meaning.[245]

At least with respect to public meaning, the Circuit Courts failed to follow a coherent methodology of interpretation. By citing to the long-standing "ordinary meaning" presumption (or no interpretive presumption at all) but consulting a wide and contrasting mix of interpretive sources (including ones relevant to legal meaning), the courts conflated ordinary and legal meaning, leaving it unclear which meaning they were seeking to give "tribunal." Furthermore, our empirical results indicate that ordinary people understand "tribunal" to have a legal meaning and defer to expert legal authorities about that meaning. Our empirical findings thus call into question the lower court opinions that purported to give "tribunal" its "ordinary meaning."

In the end, the Supreme Court held that a private adjudicatory body does not fall under "foreign or international tribunal" in 28 U.S.C. § 1782; the statute applies only to governmental or intergovernmental adjudicative bodies. The Court resolved this issue in a largely textualist manner, focusing on the meaning of "tribunal" in its statutory context. The Court did not explicitly appeal to "ordinary" or "legal" or "technical" meaning, but simply "meaning."[246] But its citation of evidence suggests a consideration of both ordinary and technical meaning. The Court cited both legal dictionaries and ordinary dictionaries to conclude that the definition in *Black's Law Dictionary* was more appropriate given the statutory context.[247] Thus, although the Court did not explicitly announce favoring legal over ordinary meaning in its textualist analysis, the reasoning is consistent with that approach.

2. Bostock v. Clayton County

As a second example, consider the recent case of *Bostock v. Clayton County*.[248] Recall that the case concerned the interpretation of Title VII of the Civil Rights Act, which prohibits employers from taking actions that discriminate against any individual "because of such individual's . . . sex."[249] The Court held that Title VII's "because of such individual's sex" language

245 For instance, the Seventh Circuit's opinion in *Servotronics, Inc. v. Rolls-Royce PLC*, did not explicitly refer to "ordinary meaning," but the opinion was methodologically similar to the Sixth Circuit's opinion. The court considered (1) both legal and non-legal dictionary definitions of "tribunal," (2) legislative history, (3) related provisions, (4) the relationship between § 1782 and the Federal Arbitration Act, and (5) an earlier Supreme Court decision. *See Servotronics*, 975 F.3d at 693-96.

246 *See* ZF Auto. US, Inc. v. Luxshare, Ltd., 142 S. Ct. 2078, 2086 (2022).

247 *Id.* at 2086-87 (citing BLACK'S LAW DICTIONARY (4th ed. rev. 1968), AMERICAN HERITAGE DICTIONARY (1969), and RANDOM HOUSE DICTIONARY (1966)).

248 Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (majority opinion).

249 *Id.* at 1738.

prohibited discrimination on the basis of an employee's sexual orientation or gender identity.[250]

Justice Gorsuch's majority opinion claimed to rely on the law's "ordinary meaning."[251] But the opinion also appeals to something that seems very much like *legal* meaning, elaborating what "because of" means "in the language of law."[252] Consider the crux of Justice Gorsuch's argument:

> [A]s this Court has previously explained, the ordinary meaning of "because of" is "by reason of" or "on account of." In the language of law, this means that Title VII's "because of" test incorporates the simple and traditional standard of but-for causation. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause.[253]

Justice Gorsuch did not explicitly declare that he was giving "because of" a technical legal meaning. For example, he did not refer to the phrase as a legal term of art. But his insistence on "the language of law" is telling.[254] Consider his response to the dissenting opinions. Justices Kavanaugh and Alito made numerous appeals to ordinary conversation (e.g., an employee would tell friends "I was fired because of my sexual orientation," rather than saying I was fired because of my sex).[255] Gorsuch's reply suggests that this ordinary conversational meaning of "because of" is essentially irrelevant:

> But this submission rests on a mistaken understanding of what kind of cause the law is looking for in a Title VII case. In conversation, a speaker is likely to focus on what seems most relevant or informative to the listener . . . . To do otherwise would be tiring at best. But these conversational conventions do not control Title VII's legal analysis, which asks simply whether sex was a but-for cause . . . . You can call the statute's but-for causation test what you will—expansive, legalistic, the dissents even dismiss it as wooden or literal. But it is the law.[256]

Indeed, the Court suggested that its reasoning was not overly formal or wooden (as the dissenters charged), but it had properly given "because of" its

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250 *Id.* at 1753-54.

251 *See id.* at 1738 (referring to "ordinary public meaning"); *see also id.* at 1825 (Kavanaugh, J., dissenting) (indicating that "[t]he ordinary meaning that counts is the ordinary public meaning at the time of enactment . . . .").

252 *Id.* at 1740 (majority opinion).

253 *Id.* at 1739 (citations omitted).

254 *Id.*

255 *See id.* at 1759 n.10 (Alito, J. dissenting); *id.* at 1828 (Kavanaugh, J., dissenting) (arguing that, both in 1964 and today, sexual orientation discrimination is not a form sex discrimination); *see also id.* at 1745 (majority opinion) (addressing criticism of the but-for causation test from the dissenting Justices).

256 *Id.* at 1745 (majority opinion).

public meaning (which, in this case, is a legal meaning).[257] Ultimately, Justice Gorsuch's opinion is not entirely clear. He explicitly referenced "the language of law" and *Gross v. FBL Financial Services, Inc.*, as precedent.[258] But *Gross* itself articulates "ordinary meaning" by appealing to both "legislative purpose" and ordinary dictionary definitions.[259]

With these complexities in view, we offer our "legal meaning" reading of *Bostock* as one possible reconstruction of Gorsuch's opinion. As the data provided in Part III indicates, giving a term its legal meaning may be more consistent with the way in which the public understands legal texts.[260] This is true even for ambiguous terms that have both ordinary and legal meanings.[261] Furthermore, the judicial creation of a technical legal meaning should not be surprising. As textualist theorists note, "in the law, modulation can create a new technical meaning for a word that also has an ordinary sense."[262] In *Bostock*, Justice Gorsuch's opinion may similarly recognize a modulation of the meaning of "because of."

Resolving the apparent tension between ordinary and legal meaning in the Court's opinion can therefore be accomplished through the division of linguistic labor theory and a presumption that ambiguous terms should be given their legal meanings.[263] There is a legal meaning of "because of," a meaning announced previously by the Court in *Gross v. FBL Financial Services, Inc.* and *University of Texas Southwestern Medical Center v. Nassar*.[264] On this view, to interpret "because of" in line with its ordinary meaning—

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257 *Id.*

258 *See id.* at 1739 ("And, as this Court has previously explained, 'the ordinary meaning of because of is by reason of or on account of.'" (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350 (2013), and Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009))).

259 *See Gross*, 557 U.S. at 175-76 (using both legislative purpose and several ordinary dictionaries to define the terms).

260 In addition, it may have practical consequences. For example, research suggests that the ordinary meaning of "because of" is not a mere but-for test. *See* Macleod, *Ordinary Causation*, *supra* note 29, at 1007 ("These results demonstrate that the courts have been incorrect in claiming that but for causation tracks the ordinary, plain meaning of the statutory causation language . . . ."); Macleod, *Finding Original Public Meaning*, *supra* note 29, at 9-10 (summarizing research results finding that ordinary Americans agree with the *Bostock* majority's interpretation of "because of"); *see also* Tobia & Mikhail, *Two Types of Empirical Textualism*, *supra* note 15, at 484 ("[T]here appears to be a significant divergence between but-for causation and the ordinary concept of causation.").

261 *See supra* Part III.

262 Solum, *Triangulating Public Meaning*, *supra* note 144, at 1637.

263 *See supra* Part II (describing the division of linguistic labor theory).

264 *See* Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 176 (2009) (interpreting the phrase "*because of* such individual's age" in the Age Discrimination in Employment Act); Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 350 (2013) (interpreting the phrase "because of" in Title VII).

the meaning it has in non-legal conversation—would be a disservice to the people who expect it to take its announced legal meaning.[265]

This idea—that legal meaning is an essential part of public meaning—offers one way to understand Justice Gorsuch's *Bostock* opinion and justify its crucial move, which carries politically progressive implications for LGBTQ+ persons and potentially many others.[266] Justice Gorsuch's simultaneous appeal to "ordinary public meaning" and "language of law" is not a contradiction. Rather, it is an implicit recognition that law regularly communicates legal meanings to the public.

D. *Public Meaning and Fair Notice*

Finally, this Article's studies have implications for the concept of fair notice and the claim that textualism achieves it.[267] The experimental studies suggest that ordinary people understand law to include technical terms,[268] and the survey studies suggest that most report wanting to learn about the meaning of laws but have not received interpretive advice from lawyers.[269] Thus, most people understand laws to communicate technical legal language, yet those same citizens have no reasonable way to reliably access the underlying technical criteria. These findings raise questions about the ability to achieve fair notice; people should be able to access the meaning of law.[270]

A theory of fair notice should address how the ordinary public can gain access to specific technical meanings that those same people understand law

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265 *See supra* Section IV.A (explaining that ordinary people expect that terms in legal texts will be given technical legal meanings).

266 *See, e.g.*, Joan C. Williams, *Employment Law: Proving Racial and Gender Bias Under Title VII*, 5 THE JUDGES' BOOK 57, 57-58 (2021) (arguing that *Bostock* serves as a helpful precedent for intersectional employment discrimination claims); Katie Eyer, *The But-For Theory of Anti-Discrimination Law*, 107 VA. L. REV. 1621, 1710 (2021) ("This set of holdings affords myriad opportunities to argue—in both the statutory and constitutional contexts—that all disparate treatment must be proscribed.").

267 *See* Note, *Textualism as Fair Notice*, *supra* note 138, at 542 ("Perhaps the most intuitive and straightforward argument for textualism is that it promotes fair notice of the law."); *see also* Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 352 (2005) ("'Textualists' . . . emphasiz[e] that statutes have serious consequences for people outside of the legislature and that people should not be held to legal requirements of which they lacked fair notice . . . ." (citations omitted)). For another recent empirical study related to fair notice, which finds that lay judgment of fair notice is influenced by the severity of the legal consequences, see Benjamin Minhao Chen, *Textualism as Fair Notice?*, 97 WASH. L. REV. 339, 374 (2022).

268 *See supra* Part I.

269 *See supra* Section III.E; *see also* Kevin Tobia, *Ordinary Meaning and Ordinary People*, OPEN SCI. FRAMEWORK (Oct. 29, 2022, 9:40 AM), https://osf.io/jvhbr [https://perma.cc/4MNN-LNUJ].

270 *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) ("[A]ll persons are entitled to be informed as to what the State commands or forbids." (alteration and citation omitted)).

to so often express.[271] In this Section, we first consider two responses to the fair notice problem from prominent textualists. We argue that these accounts do not vindicate the claim that textualism uniquely satisfies fair notice.

In the final Section, we propose that textualists should grapple with this reality: Ultimately, ordinary people are unlikely to have *perfect* notice of law's meaning. We develop the theoretical implications of this point, arguing that theories committed to notice should move past the traditional "all-or-nothing" approach, recognizing that ordinary people typically have (at best) *partial* notice of law.

1. One Textualist Solution: The Extraordinary "Ordinary Interpreter"

Consider one textualist response to the tension between ordinary people and technical terms. Justice Scalia posited a hypothetical interpreter of seemingly extraordinary, even heroic, abilities.[272] Crucially, this hypothetical Herculean interpreter has knowledge of technical terms, thus eliding for textualists one difficulty of the choice between ordinary and technical meanings.[273] Justice Scalia's hypothetical interpreter is capable of considering not only the "text of the law" but also its meaning "alongside the remainder of the *corpus juris*."[274] Thus, legal interpretation involves:

> [D]etermining . . . how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued. The endeavor requires aptitude in language, sound judgment, the suppression of personal preferences regarding the outcome, and, with older texts, historical linguistic research. It also requires an ability to comprehend the *purpose* of the text, which is a vital part of the context. But the purpose is to be gathered only from the text itself, consistently with the other aspects of its context. The critical word *context* embraces not just textual purpose but also (1) a word's historical associations acquired from recurrent patterns of past usage, and (2) a word's immediate syntactic setting—that is, the words that surround it in a specific utterance.[275]

This theory of the "hypothetical reader" offers a bivalent theory of notice. Readers of extraordinary ability, knowledge, and time might have fair notice,

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271 *See* Solum, *The Public Meaning Thesis*, *supra* note 145, at 2023 (arguing that public accessibility is accomplished if it is apparent from the constitutional text that the word or phrase is a term of art with a technical meaning reasonably accessible to the public).

272 *See* SCALIA, *supra* note 31, at 17.

273 *Cf.* Larry Alexander & Saikrishna Prakash, *"Is That English You're Speaking?" Why Intention Free Interpretation Is an Impossibility*, 41 SAN DIEGO L. REV. 967, 974-78 (2004) (arguing that positing an ordinary speaker raises the problem of "how much background context we ought to provide to the average interpreter").

274 SCALIA, *supra* note 31, at 17.

275 SCALIA & GARNER, *supra* note 200, at 33.

but readers of ordinary ability, knowledge, and time have, at best, hypothetical notice. Put more cheekily, the reasonable reader with actual notice is the one with abilities more common to the highly educated elite. Others are simply presumed to have this notice.

2. A Second Textualist Solution: The "Ordinary Lawyer"

Justice Scalia's extraordinary "reasonable reader," who is aware of technical meanings and other sophisticated interpretive arguments and interpretive sources, is not a reasonable proxy for real ordinary people. Insofar as the debate concerns real notice, textualists must proffer an alternative that better aligns with facts about the world. Justice Barrett has responded to the challenge by suggesting that the proper standard may *not* always be the "ordinary English speaker." Law does *not* have to be directly accessible to ordinary people in all circumstances.[276] Sometimes, according to Justice Barrett, the proper standard is an "ordinary lawyer" standard.[277] The rationale for an ordinary lawyer standard is that "[i]n reading a statute as a lawyer would, a court is not betraying the ordinary people to whom it owes fidelity, but rather employing the perspective of the intermediaries on whom ordinary people rely."[278] Thus, because ordinary people can consult lawyers, judges can assume that ordinary people are "capable of deciphering language that is sometimes specialized and technical."[279]

Like Justice Scalia's version of the "ordinary interpreter," Justice Barrett's description of the "ordinary lawyer" has some limitations. For example, Justice Barrett assumes that her interpreter would reject certain commonly consulted interpretive sources, such as legislative history.[280] Justice Barrett rejects legislative evidence, but if an "ordinary lawyer" is the standard, what justifies such a restriction?[281] Lawyers frequently consult and

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276 *See* Barrett, *Congressional Insiders and Outsiders*, *supra* note 2, at 2209 ("[T]he fiction that the people are on constructive notice of the law—and must therefore conform to it regardless of whether they are actually aware of it—does not depend on the proposition that the language of the law is accessible to all people.").

277 *See id.* (explaining that textualists sometimes use "the perspective of the 'ordinary lawyer' rather than the ordinary English speaker"). Justice Barrett's position is not a firm one. She goes on to conclude that "[m]ore should be said about whether and when a court should interpret statutes through the eyes of an ordinary lawyer rather than an ordinary person." *Id.* at 2210.

278 *Id.* at 2209.

279 *Id.*

280 *See id.* at 2207 (arguing that textualists should consider legislative history only to the extent it reveals how ordinary people use language).

281 *See id.* at 2209 ("This is reason both to employ sources that capture ordinary meaning, such as usage canons and dictionaries, and to refuse to strain ordinary meaning to account for the vagaries of the legislative process.").

cite legislative materials, and presumably advise clients based on those materials.[282]

So, while Justice Barrett's view eliminates one fictional aspect of Justice Scalia's standard (the extraordinary interpreter), it substitutes a standard that is similarly problematic—one that claims "fair notice" without consideration of empirical realities. Our empirical evidence, as well as earlier work,[283] challenges the core empirical assumptions of this view. Many Americans lack access to lawyers, and most Americans do *not* receive regular legal interpretive advice from lawyers, despite wanting that advice.[284]

3. Fair Notice as Imperfect Notice

Consider fair notice in light of empirical and linguistic realities. Ordinary people are aware that legal texts contain technical terms and defer to expert authorities about those terms' meanings. Nevertheless, because laws often contain technical terms, ordinary people are usually not able to articulate the criteria of all terms in a law.

Do people still have fair notice? There are several different senses of "fair notice" worth considering. Ordinary people could have *methodological notice*, in the sense that they understand that courts give technical terms technical meanings. But if ordinary and legal meanings tend to differ substantially, ordinary people may lack *application notice*, in the sense that they will not be able to accurately predict applications of a legal text. Application notice does not necessarily require that courts default to ordinary meaning; application notice could be secured, perhaps, if people had regular access to lawyers or other sources of accurate legal information. Insofar as people lack that access,[285] application notice may fall short.

With respect to American law today, it seems ordinary citizens rarely have "perfect" application notice. But they may have *partial* application notice for two reasons. First, there is often similarity and overlap between ordinary and technical criteria, which leads to overlapping applications. For example, the ordinary meaning of "fruit" may diverge from its technical meaning (with respect to tomatoes), but there is also significant overlap (with respect to many other fruits). Second, even when people defer to lawyers about technical meaning, they still have some understanding of propositions

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282 *See* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION 114 (2006) (arguing that lawyers feel obligated to include discussions of legislative history in all of their legal arguments).

283 *See* Pruitt & Showman, *supra* note 38, at 480-96.

284 *See supra* Section III.D; *see also* Kevin Tobia, *Ordinary Meaning and Ordinary People*, OPEN SCI. FRAMEWORK (Oct. 29, 2022, 9:40 AM), https://osf.io/jvhbr [https://perma.cc/4MNN-LNUJ].

285 *See supra* Part III (discussing access to lawyers); *see also* Hagan et al., *supra* note 193 (noting the reliability of Google).

containing the language. People can reason accurately about laws that contain obscure technical legal and scientific terms.

If the conversation about "fair notice" is about application notice—whether people have access to law's meaning in the sense that they can rely upon it when planning their actions—that conversation must take into consideration empirical realities. This begins with the observation that notice is rarely perfect for ordinary people, nor is notice entirely absent. Fair (application) notice should not be considered as an all-or-nothing criterion of interpretation. Instead, it should be treated as a *scalar* criterion.

To illustrate, consider a situation like *Nix v. Hedden*, in which a court must decide whether some entity is a fruit.[286] Assume that "fruit" has both an ordinary meaning and a technical, scientific meaning. Our empirical evidence indicates that ordinary people understand that courts may give scientific terms in legal texts technical scientific meanings, which supports a case for methodological notice if the court gave the term its technical meaning.[287] Moreover, people would have application notice if they correctly predicted that the term would be given a technical meaning and could determine that meaning.[288]

Even when a court gives terms their technical meanings and ordinary people give them their ordinary meanings (or vice-versa), ordinary people may still have partial application notice. Suppose the Court in *Nix* gave "fruit" its technical scientific meaning.[289] Even if some people incorrectly predict that a tomato is a vegetable under the statute, they would nevertheless have correctly predicted many other potential applications of the terms. The reason is that the extension (or range of coverage) of the ordinary and technical meanings of "vegetable" and "fruit" are similar.[290] Ordinary people largely agree on the extension of "fruit" and "vegetable" and that extension corresponds to a large degree with the technical meanings of "fruit" and "vegetable."[291] Thus, even if ordinary people incorrectly assume that statutory

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286 Nix v. Hedden, 149 U.S. 304 (1893). The Court described the statute as including "'[v]egetables, in their natural state'" and "[f]ruits, green, ripe, or dried." *Id.* at 305 (citation omitted).

287 *See* Kevin Tobia, *Ordinary Meaning and Ordinary People*, OPEN SCI. FRAMEWORK (Oct. 29, 2022, 9:40 AM), https://osf.io/jvhbr [https://perma.cc/4MNN-LNUJ] (describing the key results of Study 6).

288 Ordinary people will be in an advantageous position if they realize that a term has a technical meaning compared to a scenario where they assume that the term has only an ordinary meaning. In the first situation, ordinary people (assuming no access to legal counsel) can research the term on their own and may settle on a meaning that is closer to the actual technical meaning chosen by the court than to the term's ordinary meaning.

289 *See supra* Section I.B (describing the Court's approach to the interpretive question in *Nix v. Hedden*, 149 U.S. 304 (1893)).

290 *See* Engelhardt, *supra* note 132, at 1859 (noting that it is plausible that "paradigm applications" for the ordinary and technical meanings of "fruit" are the same).

291 The precise extensions of terms will likely be at least somewhat uncertain. Viewing most definitions as providing necessary and sufficient conditions of meaning has been questioned by

terms will be given ordinary instead of technical meanings, they will still receive notice to some degree. The same result may hold if ordinary people assume that statutory terms will be given their technical meanings but imperfectly predict what those meanings will be.[292]

The same analysis is applicable to the statute at issue in the *ZF Automotive* dispute involving the meaning of "tribunal."[293] It is likely that the extension (or range of coverage) of the ordinary and technical meanings of "tribunal" are similar.[294] Thus, even if some ordinary people make incorrect predictions about whether "tribunal" includes a private foreign arbitral tribunal, they would nevertheless have correctly predicted many (perhaps most) other potential applications of the term.

The issues raised in this section highlight the need for greater theorizing of "fair notice." The two senses of notice we describe here—methodological and application notice—regularly come apart, and it is not always clear which dimension is relevant to jurists who seek to achieve fair notice. Moreover, given empirical and linguistic realities, application notice is rarely perfectly achieved. As such, we recommend that jurists theorize application notice as a scalar notion, one that can be achieved partially. Even if law contains technical language, partial (application) notice can often be achieved.

4. Fair Notice and Textualism

We suspect that no current theory of interpretation could achieve perfect notice, given technical terms in law and people's current inability to access lawyers to elaborate on those meanings. As such, textualism cannot claim

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prototype theory. *See* LAWRENCE M. SOLAN, THE LANGUAGE OF STATUTES: LAWS AND THEIR INTERPRETATION 62-63 (2010). In particular, researchers have rejected the view that category membership involves a set of necessary attributes that are jointly sufficient to delimit the category in contrast with others. *See id.* at 63 (describing the difficulty in defining words with both necessary and sufficient conditions). Typically, words have prototypical structures that cannot be defined by means of a single set of criterial (i.e., necessary and sufficient) attributes, and blurring occurs at the edges of the category. *See id.* at 63-64 (describing how "concepts become fuzzy at the margins" of definitional categories). Category membership is thus better seen as being a matter of degree, rather than simply as a yes-or-no question. *See* Qiao Zhang, *Fuzziness—Vagueness—Generality—Ambiguity*, 29 J. PRAGMATICS 13, 16 (1998) ("[C]ategory membership is not simply a yes-or-no question, but rather, a matter of degree. Different individuals may have different category-rankings depending on their experiences, their world knowledge, and their beliefs.").

292 The result would be the same if the court gave the terms their ordinary meanings if ordinary people predicted that the court would do so but were mistaken about those meanings. It is plausible, though, that ordinary people are better at predicting ordinary meanings compared to technical meanings.

293 *See supra* subsection IV.C.1 (discussing empirical research that shows ordinary people expect the term "tribunal" to have a legal meaning).

294 *See* Coleman & Simchen, *supra* note 132, at 15 ("Some philosophers of language now assume that extension is the crucial ingredient in the overall content of a typical common noun, and that an extension-fixing criterion is no part of that overall content.").

that perfect "fair notice" uniquely supports textualism. No theory achieves that value, and so that value supports no theory. The question that textualists and others might ask is how much *partial* notice does textualism achieve? As our empirical evidence and the scalar view illustrate, notice is typically partial for ordinary people (textualism's purported constituency). Fair notice encompasses a range of judicial considerations extending beyond the choice between giving a word an ordinary or technical meaning. Some scholars have argued that language in legal texts is "technical language understood only by those steeped in the law and knowledgeable about its techniques."[295] The difficulty of fair notice for ordinary people then does not derive only from the "technical language" in legal texts but also from the "techniques" of interpretation. Issues regarding techniques of interpretation illustrate that fair notice depends on more than mere judicial citations to "ordinary meaning."

For instance, recall the common scenario, illustrated by the discussions of *Bostock* and *ZF Automotive*, in which textualists cited to ordinary meaning but consider technical evidence of meaning.[296] The notice gap between ordinary and judicial interpretation of a statute may increase when the Court's interpretive techniques focus on issues other than the understanding of ordinary people. In fact, there are various interpretive choices affecting notice. Some of these choices are scalar.[297] Furthermore, the ultimate interpretation, which represents the amalgamation of all of the sub-choices, is also scalar.

As an illustration, consider again *Nix v. Hedden*.[298] There might be imperfect, but potentially still significant, notice even when there is a mismatch between public expectations of ordinary meaning and judicial application of technical meaning (or vice-versa).[299] However, the conclusions about notice may change for the worse when the interpretive scenario becomes more complex and the court's other interpretive techniques are considered. Furthermore, the changes to fair notice may sometimes be due to textualism's normative commitments.

Consider interpretive originalism, according to which courts seek to ascertain the meaning of legal text at the time of its enactment, and which is

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295 *See* Schauer, *supra* note 21, at 504, 507-08 (discussing the arguments of Lon Fuller and Karl Llewellyn regarding the technical nature of legal texts).

296 For a discussion of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) and *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078 (2022), see *supra* Section IV.C.

297 For a general discussion of scalar inferences, see van Tiel et al., *supra* note 42, at 93-94.

298 *Nix v. Hedden*, 149 U.S. 304, 305 (1893); *see also supra* Section I.A (discussing *Nix v. Hedden*).

299 *See supra* subsection IV.D.3 (arguing that ordinary people often have methodological, and thus partial, notice that a court may apply a term's technical meaning).

a basic tenet of the current Court's textualism.[300] Fair notice may suffer when a court focuses on issues other than ordinary people's *contemporary* understanding of a statute's meaning. Imagine that the statute at issue was enacted in 1964 and that both the ordinary and technical meanings of "fruits" and "vegetables" have changed over time.[301] If the Court adopts an originalist view of meaning and asserts that the 1964 public meaning of the statute is determinative, it may be that notice will be hampered.[302] There will now be a bigger gap between ordinary people's interpretation of the statute and the Court's interpretation. This gap would exist even if the Court gave "fruits" and "vegetables" their ordinary meanings.[303]

Even if ordinary meaning is the standard, *how* a court determines that meaning may thus impact fair notice. Notice gaps can occur through application of empirical sources, such as corpus linguistics, that measure the language usage of some group other than ordinary people.[304] Similarly, if a court focuses formalistically on importing non-legal ordinary meanings into the statute, rather than considering more broadly how ordinary people might interpret the statute, the notice gap might increase.[305]

The scalar view is a new way to think about fair notice which illustrates that the value of "perfect notice" does not favor any current interpretive methodology, including textualism. Like other interpretive theories, textualism provides partial fair notice to ordinary people. It may be that textualism provides partial notice better than do competing methodologies. But before reaching that conclusion, textualists need to do two things: (1) explain why partial notice is still a justificatory value; and (2) explain why textualism does better on partial notice than other interpretive theories and do so using facts rather than fictions and normative arguments.

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300 *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.").

301 This is similar to the word "sex" in Title VII, which was also enacted in 1964. *See* Eskridge et al., *The Meaning of* Sex, *supra* note 15, at 1550-56 (showing through corpus linguistics how the meaning of "sex" has evolved since 1964).

302 This is true even if ordinary people assume that the 1964 meaning controls, assuming that, like technical meaning, the original meaning is not easily accessible.

303 The decision to adopt an originalist versus a dynamic approach to the meaning of a statute is thus separate from the choice between an ordinary meaning and a technical meaning. *See* Eskridge et al., *The Meaning of* Sex, *supra* note 15, at 1573-74 (contrasting dynamic and originalist approaches to ascertaining public meaning).

304 *See* Anya Bernstein, *Legal Corpus Linguistics and the Half-Empirical Attitude*, 106 CORNELL L. REV. 1397, 1413-15 (2021) (questioning whether corpus linguistics actually measures the language usage of ordinary people given its reliance on "corpora" which differ from ordinary conversation); *see also* David S. Louk, *The Audiences of Statutes*, 105 CORNELL L. REV. 137, 140-41 (2019) (explaining how the meaning of a statute can depend on the linguistic group at issue).

305 *See* Eskridge et al., *The Meaning of* Sex, *supra* note 15, at 1521-22 (discussing a common approach to ordinary meaning where the court formalistically adopts dictionary definitions without considering the broader context of the statute).

The specifics of fair notice require future research, but the scalar view provides a framework for such work. The conclusions thus far may seem surprising to some but should influence how the goals of statutory interpretation are conceived. For instance, the choice to give an ambiguous statutory term its technical meaning does not create as much of a notice gap as some might expect because ordinary people can still often predict many of the applications of the statute. In addition, even when all statutory terms are given their ordinary meanings, how courts determine those meanings may create issues of fair notice. Furthermore, other factors should also be considered, such as the possibility that demographic disparities may create greater notice gaps for some groups compared to others.

CONCLUSION

Textualists have long appealed to "the ordinary reader" as a heuristic to ascertain the objective or fair meaning of a law's text.[306] Recent textualists have given the "ordinary" reader a more central role, claiming interpretive fidelity to the ordinary public.[307] Alongside appeals to the ordinary reader sit appeals to ordinary meaning.[308] Yet, legal texts contain language that is clearly "specialized and technical."[309] This creates a tension for textualists, particularly those who rely (more than ever) on "ordinary meaning" but also regularly depend on legal dictionaries and other evidence of technical meaning. The leading theoretical solution appeals to a division of linguistic labor: ordinary people understand some terms in law to be technical, and they defer to expert authority about those technical meanings.

This Article's empirical studies support this solution. Original empirical studies of over 4,000 people reveal that ordinary people understand legal texts to contain technical terms and are generally able to distinguish ordinary from technical terms, deferring to expert authority regarding the meanings of technical terms. Moreover, people assume that even ambiguous terms in law will be given legal meanings.

Some readers may find this all unsurprising, but it is important to assess important empirical claims (like the textualist's appeal to a division of linguistic labor) with empirical evidence. Moreover, the studies help explain current textualist practice. For example, they provide an explanation of

306 *See* Thomas W. Merrill, *Textualism and the Future of the* Chevron *Doctrine*, 72 WASH. U. L.Q. 351, 352 (1994) ("The critical assumption is that interpretation should be objective rather than subjective; that is, the judge should ask what the ordinary reader of a statute would have understood the words to mean at the time of enactment, not what the intentions of the enacting legislators were.").

307 *See* Barrett, *Congressional Insiders and Outsiders*, *supra* note 2, at 2208-11 (describing textualism's faithful agency to the people).

308 *See supra* notes 66–73 and accompanying text.

309 *See* Barrett, *Congressional Insiders and Outsiders*, *supra* note 2, at 2209.

Justice Gorsuch's seemingly contradictory statements in the *Bostock* decision, which seems to fuse "ordinary" meaning analysis with a reliance on evidence of technical legal meaning.

A second set of implications supports more provocative conclusions. The evidence suggests that, for textualists and other interpreters seeking to ground interpretation in ordinary understanding, a universal presumption of ordinary meaning is overstated. To the contrary, ordinary people seem to understand law as regularly including both legal and ordinary terms.

We propose that "contrastive presumptions" better track lay understanding of law. There is not a *universal* presumption of ordinary meaning, but there is a strong contrastive presumption of ordinary meaning over other technical types of meaning in law (e.g., ordinary over religious meaning). Similarly, there is a strong contrastive presumption of legal meaning over some other technical meanings. However, the evidence is less determinate with respect to ordinary versus legal meaning, and there is certainly not strong support for a broad presumption of ordinary over legal meaning.

More broadly, textualists who claim to track what law communicates to the "ordinary" or "reasonable" reader, or who claim support from values like fair notice, or who claim faithful agency to the people should shift their practice in a more legal and deferential direction. The current Court's textualists are committed to "ordinary meaning,"[310] and this manifests in their practice—with frequent appeals to ordinary dictionaries,[311] ordinary linguistic intuitions and "homey examples,"[312] language canons,[313] and corpus linguistics of ordinary usage.[314] Insofar as these practices' justification has anything to do with what law communicates to the ordinary reader, textualists should consider that ordinary readers understand law to communicate many legal meanings. As

310 *See supra* notes 14, 62–67 and accompanying text.

311 *See infra* Appendix; *see also* 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, 483 (2013) (describing the dramatic increase of the Supreme Court's use of dictionaries).

312 *See* William N. Eskridge, Jr. & Victoria F. Nourse, *Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism*, 96 N.Y.U. L. REV. 1718, 1728 (2021) ("To be sure, Justice Scalia punctuated his opinions with homey examples designed to demonstrate his populist bona fides, a practice other Justices have mimicked.").

313 *See* Ryan D. Doerfler, *Late-Stage Textualism*, 2022 SUP. CT. L. REV. (forthcoming 2022) (manuscript at 1) (describing the "embarrassing" use of linguistic canons).

314 These trends are not limited to the Supreme Court. Corpus linguistics has been used primarily by lower courts. But in some cases, it has been used in decisions with national consequences. *See, e.g.*, Stefan Th. Gries, Michael Kranzlein, Nathan Schneider, Brian Slocum & Kevin Tobia, *Unmasking Textualism: Linguistic Misunderstanding in the Transit Mask Order Case and Beyond*, 123 COLUM. L. REV. (forthcoming 2022) (manuscript at 6-8), https://ssrn.com/abstract=4097679 [https://perma.cc/9ME4-H8NS] (describing the use of corpus linguistics in Health Freedom Defense Fund, Inc. v. Biden, No. 21-CV-1693, 2022 WL 1134138 (M.D. Fla. Apr. 18, 2022), which entered a nationwide injunction against the CDC's transit mask order).

such, textualists should not begin (and often end) their interpretive inquiry with consideration of ordinary sources. Rather, they should attend to sources of legal meaning.

Ordinary people do not understand law to consist of only "ordinary meanings." Instead, they operate with a sophisticated understanding, recognizing law's language as a partly ordinary and partly technical. We hope that interpreters whose practice claims commitment or fidelity to ordinary people take note.

APPENDIX. SUPREME COURT DICTIONARY CITATIONS

The coding process was preregistered at Open Science.[315] Three law students were recruited to read and code cases. The case sample was created by searching Supreme Court cases with the string: "law dictionary" or "law dict." or "legal dictionary" or "legal dict." or "Dictionary of Law" or "Black's Law" or "Black's Dictionary." The search was conducted on June 7, 2021 and resulted in 483 cases. The coders were provided with the written instructions, which are copied below at the end of this Appendix.

A. *Reliability and Key Findings*

The three coders' reliability was calculated by assigning each coder ten cases that were assigned to another coder and comparing that subset of cases.

Table 5: Inter-Rater Agreement, By Question

Question	Agreement
Case Citation	96.7%
Date Decided	100.0%
Terms Defined	93.5%
Majority/Concurrence/Dissent	93.5%
Author	90.3%
Party	96.8%
Meaning	80.6%
Ordinary Meaning	83.9%
Public Meaning	93.5%
Plain Meaning	90.3%
Black's Dictionary	96.8%
Other Law Dictionaries	100.0%
Multiple Definitions	93.5%
Law Dictionary Date	100.0%
Ordinary Dictionary	80.6%
Ordinary Dictionary Date	87.1%
Stipulated Definition	58.1%

On average, the coders agreed in 89.6% of their coding decisions. Because the coding agreement for the "stipulated definition" question was unusually low, we concluded that the question coding was particularly unreliable and

315 For the preregistered study and full dataset, see Kevin Tobia, *Supreme Court Use of Legal Dictionaries*, OPEN SCI. FRAMEWORK (Oct. 29, 2022, 9:40 AM), https://osf.io/hc9sd [https://perma.cc/4MNN-LNUJ].

the question may have been ambiguous or confusing; as such, we ignore that question in our analyses.

The citation analysis reveals several findings:

1. Supreme Court opinions cite to legal dictionaries; in the majority of citations (84%), the legal dictionary is cited in interpretation, i.e., as evidence of a legal text's meaning.

2. Supreme Court opinions cite legal dictionary definitions of a wide range of terms. Some are uniquely legal (e.g., "cy pres," "nunc pro tunc"), others are ambiguous between legal and ordinary meanings (e.g., "discrimination," "marriage"), while others might seem to have only ordinary meanings (e.g., "any," "so").

3. There are examples of legal dictionary definitions offered as evidence of "ordinary," "public," and "plain" meaning.

4. In 45% of opinions citing a legal dictionary, an ordinary dictionary is also cited for the meaning of the same term defined by the legal dictionary.

5. There are a variety of legal, ordinary, and other technical (e.g., scientific) dictionaries cited.

B. *Supreme Court Usage of Terms Defined by Dictionaries*

Table 6: Terms Defined by Legal Dictionaries
Supreme Court, 2010-Present

Terms		
accrue	discriminatory	property interest
accused	disgorgement	proportional quorum
act	disposition	prosecution
action	document	public accommodation
actual	domestic violence	punishable
actual damages	duty	pursuant
actual knowledge	elements	question
actual possession	elements of the offense	quiet title
administration	employ	quorum
administrative	employee	rate
age of consent	employment	record
aggravated	entitle	regulate
aggravated felony	entitled	relate to
allision	entity	relief
always	expenses	repo men
amending	expenses of the proceeding	report
any	expiration	reside
appeal	facts	residence
arm's length transaction	falsely represents	restrain
attest	falsify	review
authorize	force	right
available	good faith	right-of-way
award	habitual	rule of the last antecedent
bailment	imprison	safe
base	imprisonment	sale
basis	incurred by the estate	sanction
bona fide error	independent	satisfy
breaking	independent contractor	scienter
brought	insane	scope of employment
capacity	interpret	scrip
cause	interpreter	search
certified mail	interpreting	send
certify	jail	series-qualifier canon
challenge	judgment	service

Terms (Continued)

civil action	land	services
claim	law enforcement agency	similarly situated
collateral attack	law enforcement officer	so
collection	levy	statute
compensatory damages	liability	statute of limitations
concrete	mainprise	substance
confidential	marriage	substantive law
confinement	matter	such
confirm	merely colorable	suit
consolidate the action	mistake	surcharge
constructive possession	money	suspension
consummate	necessary	suspicion
contract	neurotoxicity	tangible object
contributing caser	noscitur a sociis	taxable
controversy	notwithstanding	testimonial
coram non judice	nunc pro tunc	threat
corruptly	obstruct	threaten
court of competent jurisdiction	obtain	to define
credibility	occupy	to liquidate
cy pres	offense	to procure
debentures	on the merits	tolled
decision	order	tort
decree	physical force	trafficking
deemed	plaintiff	transaction
defalcation	portion	transferred-intent doctrine
defendant	precedent	under
describe	price	use
described in	principle	violence
detain	prison	violent
detention	procedure	violent felony
discrimination	property	void

Table 7: Terms Defined by Legal Dictionaries
Supreme Court, 2000-2009

Terms		
a true 'direct action'	elect	occur
accident	election	owner
action	element	pander(ing)
actual notice	enact	participate
affidavit	enjoin	party
aid and abet	enjoin	party aggrieved
alien	enterprise	percentile
alienate	enterprise	person
also	event	political subdivision
animadvert	facilitation	potential
any	fail(ure)	presentment
appearance	felonious	prevail
arise	felony	prevailing party
arms	filed	prima facie evidence
arrest	firearms	proceeding
assess	fraud	process
assessment	garnishment	property
assign	gerrymander	provisional attachment
assist	habeas corpus	real party in interest
association	impede	record
at issue	incumbrance	recovery
bailment	indictment	redistrict
business	inference	relief
case	injunction	remedy
charge	insure	renvoi
citizen	intent	right of action
civil conspiracy	intervene	risk
cognizable by	intervention	shall
complaint	jurisdiction	sovereign
conflict of interest	knowingly	sovereignty
contrary to	knowledge	stay
contribution	launder	stay
corporation	legislate	structure
corrupt(ly)	legislation	subject

Terms (Continued)

damages	levy	subject matter jurisdiction
decision	lien	substantial
delivery	low-water-mark	suit
delivery	maintain	traffic
design	malice	treaty
detention	mens rea	until
disclosure	money laundering	use
discovery	mutatis mutandis	valuation
discretion	necessary parties	visitation
dismissed without prejudice	noscitur a sociis	witness
ejusdem generis	now	

Table 8: Terms Defined by Legal Dictionaries
Supreme Court, 1900-1999

Terms		
act	fine(s)	procedure
act of bankruptcy	file(d)	profane
activity	firm	prospectus
action	fix	provide
administer	forge(d)	proximate
affiant	forthwith	public domain
aid and abet	garnishment	punishment
amicus curiae	gift enterprise	punitive damages
amortization plan	goodwill	purpose
appeal	granting of a pardon	purportedly
application	hawkers and peddlers	reckless
assignee	impair	redeem
assignment	implied in fact	reform
association	impost	relate
attorney	impound	relate to
authorize(d)	in	relating to
avoid	injury	remain(ing)
base(d) (upon)	in limine	remedial action
banishment	in pari delicto potior est conditio defendentis	remedy
blasphemy	in relation to	return
bodies of politic and corporate	incident	request
boycott	incompetency	require
carry	inference	restitution
carry arms or weapons	insanity	right
child support	institute	robbery
civil action	instrumentality	sacrilegious
civil dictionary	insurance	sanction
claim	intangible assets	scienter
clear error	intent	seaworthiness
cognizable	interest	seek
cold-blooded	interested	seizure
collateral attack	jurisdiction	seniority

Terms (Continued)

collect a debt	keep and bear arms	sentence
color	legislative officers	service of process
commercial	lesser offense	shall
common law	magistrate	sheriff
condition precedent	malice	solicitation
condition subsequent	market value	specifically
conduct	maturity	speedy
context	maximum	stare decisis
contract	mines	statute
conviction	mitigate	steal
copyright	mobilia sequuntur personam	stolen
corporation	modification	subject
counterfeit	modify	system
court	monopoly	termination
curriculum	motion	testimony
damage(s)	necessary	testimony
debt for	noscitur a sociis	theft
derivative action	note	tidelands
discharge	officer(s)	to cane
disclaimer	operation	to defraud
discretion	open court	tort
doctrine of laches	organize	transportation
efficient	original	turpitude
embargo	owner(ship)	under
employed	pardon	use
employee	parens patriae	usufructuary rights
encumbrance	participate	veto
endeavor	per curiam	veto
entitle	personal injuries	violation
excusable neglect	personal injury	visitation
exempt	pitiless	willful
exile	plain	willful
false making	poverty	witness
finding of fact		

Table 9: Terms Defined by Legal Dictionaries Supreme Court, Pre-1900

Terms		
alluvion	execution	pound troy
appurtenance	executor	privies
appurtenances	foreign	proclamation
arbitrator	freight	proviso
assignment	gift inter vivos	quit claim
attainder	hearing	relevancy
bank	hereditament	repeal
banker	implied in fact	res adjudicata
capitation tax	information	res judicata
chattels	insolvency	reversion
color	inspection	sale
compromise	irregularity	security
conspiracy	license	seized
continuance	limitation	seizin
court martial	mispleading	smuggle
crime	misprison	smuggling
debt	month	suit
deviation	ne exeat	toll
discount	negotiable	tonnage
Egyptians	peddler	unconscionable bargain
estate	pilots	vacation
ex post facto	police	

C. *Supreme Court Dictionary Usage*

Dictionaries Cited by the Supreme Court, 2010-Present
(Sample Citing Legal Dictionaries)

Legal Dictionaries:

1. A Dictionary of Law (W. Anderson, 1889)
2. A New and Complete Law Dictionary
3. A New Law Dictionary (multiple editions)
4. Ballentine's Law Dictionary (multiple editions)
5. Black's Law Dictionary (multiple editions)
6. Bouvier's Law Dictionary (multiple editions)
7. Burrill's A Law Dictionary and Glossary (1850)
8. Crime Dictionary (R. De Sol)
9. Dictionary of Terms and Phrases Used in American or English Jurisprudence (B. Abbott)
10. Holthouse New Law Dictionary
11. Judicial Dictionary (F. Stroud, 2d ed. 1903)
12. Merriam-Webster's Dictionary of Law
13. New and Complete Law Dictionary (Cunningham)

Ordinary Dictionaries:

1. A Complete Dictionary of the English Language
2. A Dictionary of Modern Legal Usage (multiple editions)
3. A Dictionary of the English Language
4. A New General English Language
5. A Universal Etymological English Dictionary (2d ed. 1770)
6. American Heritage Dictionary (multiple editions)
7. An American Dictionary of the English Language (Webster)
8. An Universal Etymological English Dictionary
9. Cassell's English Dictionary
10. Chambers Twentieth Century Dictionary
11. Concise Oxford Dictionary of Current English
12. Dictionary of the English Language
13. New Comprehensive International Dictionary of the English Language (Funk & Wagnalls)
14. Merriam-Webster's Collegiate Dictionary
15. New & Complete Dictionary of the English Language
16. New Century Dictionary of the English Language (1933)
17. Oxford English Dictionary (multiple editions)
18. Oxford Universal Dictionary Illustrated (3d ed. 1961)
19. Random House Dictionary of the English Language
20. Scribner-Bantam English Dictionary
21. The New and Complete Dictionary of the English Language
22. The Universal English Dictionary

23. Webster's New Collegiate Dictionary (multiple editions)
24. Webster's New International Dictionary (multiple editions)
25. Webster's New World Dictionary (multiple editions)
26. World Book Dictionary

Other Dictionaries:

1. Dictionary of Business Terms (C. Alsager 1932)
2. Sloane-Dorland Annotated Medical-Legal Dictionary

Dictionaries Cited by the Supreme Court, 1900-1999
(Sample Citing Legal Dictionaries)

Legal Dictionaries:

1. Abbott, Dictionary of Terms and Phrases Used in American or English Jurisprudence (1879)
2. American and English Encyclopedia of Law
3. Anderson, A Dictionary of Law (1893)
4. Ballentine's Law Dictionary
5. Bell, A Dictionary & Digest of the Law of Scotland
6. Black's Law Dictionary
7. Blount, A Law Dictionary (1670)
8. Bouvier, A Law Dictionary Adapted to the Constitution and Laws of the United States of America
9. Bouvier, A Law Dictionary Adapted to the Constitution and Laws of the United States of America
10. Brown, A Law Dictionary
11. Burn, A New Law Dictionary
12. Burrill, A Law Dictionary and Glossary
13. Cunningham, New and Complete Law Dictionary (multiple editions)
14. Garner, A Dictionary of Modern Legal Usage
15. Jacob, The Law–Dictionary: Explaining the Rise, Progress, and Present State, of the English Law
16. Judicial and Statutory Definitions of Words and Phrases (West 1905)
17. Mellinkoff's Dictionary of American Legal Usage (1992)
18. Rapalje, Law Dictionary
19. Rastelli, Law Terms
20. Shumaker & Longsdork, Cyclopedic Dictionary of Law
21. Stroud's Judicial Dictionary
22. Tomlins, Law–Dictionary 796–799 (1836)
23. Wharton, Law Lexicon or Dictionary of Jurisprudence

Ordinary Dictionaries:

1. A General Dictionary of the English Language
2. American Heritage Dictionary (multiple editions)
3. An American Dictionary of the English Language
4. Ash, The New & Complete Dictionary of the English Language
5. Bailey, An Universal Etymological English Dictionary (1789)
6. Barclay, A Complete and Universal English Dictionary
7. Barclay's Universal English Dictionary (1782)
8. Barnhart Dictionary
9. Blount, Glossographia
10. Buchanan, A New English Dictionary
11. Bullokar, The English Expositor
12. Century Dictionary

13. Cocker, English Dictionary
14. Cockeram, English Dictionary
15. Coles, An English Dictionary
16. Compact Edition of the Oxford English Dictionary (1981 ed.)
17. Cowel, The Interpreter of Words & Terms
18. Defoe, A Compleat English Dictionary
19. Dyche, A New General English Dictionary
20. Entick, New Spelling Dictionary
21. Funk & Wagnalls New International Dictionary of the English Language
22. Gordon & Marchant, A New English Complete English Dictionary
23. Johnson, A Dictionary of the English Language (multiple editions)
24. Kenrick, A New Dictionary of the English Language
25. Lemon, English Etymology
26. Martin, A New Universal English Dictionary
27. New Shorter Oxford English Dictionary
28. Oxford English Dictionary
29. Oxford English Dictionary of English Etymology
30. Phillips, The New World of Words
31. Random House Dictionary of the English Language (multiple editions)
32. Richardson, A New Dictionary of the English Language
33. Rider, A New Universal English Dictionary
34. Scott, Dictionary of the English Language
35. Sheridan, A Complete Dictionary of the English Language (multiple editions)
36. Stormonth's English Dictionary (1884)
37. Universal Etymological English Dictionary
38. Walker, A Critical Pronouncing Dictionary
39. Webster's (New) Collegiate Dictionary (multiple editions)
40. Webster's American Dictionary (1828)
41. Webster's Compendious Dictionary of the English Language
42. Webster's Dictionary of Synonyms
43. Webster's New International Dictionary (multiple editions)
44. Worcester's Dictionary (1860)
45. Words and Phrases (multiple editions)

Other Dictionaries:

1. Crowell's Dictionary of Business & Finance
2. Dictionary of Business & Finance
3. Dictionary of Foreign Trade
4. The Modern American Business Dictionary
5. Roberts' Dictionary of Industrial Relations

Dictionaries Cited by the Supreme Court, Pre-1900
(Sample Citing Legal Dictionaries)

Legal Dictionaries:

1. Abbott's Law Dictionary
2. Amer. & Eng. Enc. Law
3. Anderson's Law Dictionary
4. Bouvier's Law Dictionary (multiple editions)
5. Brown's Law Dictionary (1874)
6. Burn's Law Dictionary (1792)
7. Burrill's Law Dictionary
8. Cowel's Law Dictionary
9. Cunningham's Law Dictionary.
10. Jacob's Law Dictionary (multiple editions)
11. Kin. Law Dictionary & Glossary
12. Montefiore's Commercial & Law Dictionary
13. Rap. & L. Law Dictionary
14. Sweet, Law Dictionary
15. Tomlin's Law Dictionary

Ordinary Dictionaries:

1. Ainsworth's Dictionary
2. Central Dictionary
3. Croker's Dictionary
4. Imperial Dictionary
5. Johnson's Dictionary
6. Nouveau Dictionnaire de Brillon
7. Webster's Dictionary
8. Worcester's Dictionary

Other Dictionaries:

1. Dictionary of Business Terms (C. Alsager)
2. M'Culloch's Commercial Dictionary
3. Postlehwait's Universal Dictionary of Trade & Commerce

D. *Case Coding Project Instructions*

The coders were provided with the following Case Selection Instructions: For each case, enter one row in an excel sheet, and answer the following questions. The list below contains the questions and a sample coding for *Taniguchi v. Kan Pacific, Saipan, Ltd.*

1. Copy the case citation from Westlaw (including only U.S. and/or S. Ct. reporters).

   Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560, 132 S. Ct. 1997 (2012).

2. What is the "Decided date"? (Month, Day, Year).

   May 21, 2012

3. Record the term or terms defined by a legal dictionary. (Enter semicolon-separated terms).

   interpreter; interpret

4. Is the law dictionary cited in a majority, concurring, or dissenting opinion? (If a law dictionary is cited in multiple opinion related to the same case, enter a separate row for each).

   Majority

5. Who wrote the opinion? (Enter last name).

   Alito

6. What is the party of the appointing President? (e.g., Republican, Democratic).

   Republican

7. Is a law dictionary offered as evidence of "meaning"? (Yes, No, or Unclear).

   Yes

8. Is a law dictionary offered as evidence of "ordinary" meaning? (Yes, No, or Unclear). For this question, a mixed phrase like "ordinary public meaning" counts as Yes.

   Yes

9. Is a law dictionary offered as evidence of "public" meaning? (Yes, No, or Unclear). For this question, a mixed phrase like "ordinary public meaning" counts as Yes.

   No

10. Is a law dictionary offered as evidence of "plain" meaning? (Yes, No, or Unclear). For this question, a mixed phrase like "plain and ordinary meaning" counts as Yes.

No

11. If relevant, record a brief quote (or brief quotes) clarifying how the opinion frames the question concerning meaning and/or interpretation of the term defined by a legal dictionary.

"The question here is: What is the ordinary meaning of "interpreter"?" *Taniguchi v. Kan Pacific, Saipan, Ltd.*, 566 U.S. 560, 566, 132 S. Ct. 1997, 2002 (2012)

12. Does the opinion cite Black's Law Dictionary? (Yes or No).

Yes

13. Which other law dictionaries does the opinion cite? (None or list).

Abbott, Anderson, Ballentine

14. Does the opinion note or cite more than one definition of a particular term from any single law dictionary? (Yes or No).

No

[Explanation: Taniguchi refers to both "interpret" and "interpreter" in Black's Law Dictionary, but offers only one definition for each term from Black's; so the answer here is "no". If the opinion cited two definitions of the same term, e.g., "interpret", from Black's Law Dictionary, the answer would be "yes."]

15. Does the opinion note the date of any law dictionary? (No, Yes: noted but not discussed, Yes; noted and discussed).

Yes: noted and discussed

[Explanation: This is a more subtle question. If the dictionary date is recorded in the main text or footnote of the opinion (e.g., "1968" for Black's Law Dictionary), that counts as "*noted*." If the opinion contains language suggesting the relevance of a particular time (e.g., 1978) and the dictionary is noted as being from before or around that time, this counts as the date being "discussed." Thus, for *Taniguchi,* enter "Yes: noted and discussed", given the language about "Pre-1978 legal dictionaries."]

16a. Is an ordinary dictionary also cited for the same term? (Yes or No).

Yes

16b. If yes, which dictionary (dictionaries)?

> Webster's Third New International Dictionary; Oxford English Dictionary; American Heritage Dictionary; Scribner-Bantam English Dictionary; Random House Dictionary; Concise Oxford Dictionary of Current English; Chambers Twentieth Century Dictionary

16c. If yes, does the opinion note the date of any ordinary dictionary? (No, Yes: noted but not discussed, Yes: noted and discussed).

> Yes: noted and discussed
>
> [Explanation: This is similar to question 15. For *Taniguchi*, key "discussion" language includes, "Many dictionaries in use when Congress enacted the Court Interpreters Act in 1978 defined "interpreter" as one who translates spoken, as opposed to written, language."]

17. Does the opinion describe any of the terms or phrases that are interpreted as ones that are part of a *statutory definition*? (No or Yes).

18. Other notes or quotations from the opinion about dictionaries, ordinary/public meaning, and/or technical/legal meaning.

> "In sum, both the ordinary and technical meanings of 'interpreter,' as well as the statutory context in which the word is found, lead to the conclusion that § 1920(6) does not apply to translators of written materials." *Taniguchi v. Kan Pacific, Saipan, Ltd.*, 566 U.S. 560, 572, 132 S. Ct. 1997, 2005 (2012).