ORDINARY MEANING, CONTEXT, AND TEXTUALISM IN TEXAS STATUTORY INTERPRETATION

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I. INTRODUCTION

Knowing how to properly read and argue from statutes is among the most important skills a lawyer—in Texas and elsewhere—can possess. As then-Justice Willett of the Texas Supreme Court once declared: "The lion's share of modern-day appellate judging is 'legisprudence'—interpreting statutes. Day by day, the universe of free-form, common-law judging shrinks, meaning the bulk of this Court's time is spent deciding what the Legislature's words mean."[1] Justice Willett noted that the Court "has not adopted an overarching interpretive methodology to govern all statutory-interpretation cases, but we have agreed on one elemental rule: Definitive text equals determinative text, the singular index of legislative will."[2] That statement holds true today as the Texas Supreme Court has repeatedly held: "When construing a statute, [the Court's] primary objective is to ascertain and give effect to the Legislature's intent,"[3] adding that in order to "discern that intent, [the Court] begin[s] with the statute's words."[4] Oftentimes, the analysis also

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1. Ojo v. Farmers Grp., Inc., 356 S.W.3d 421, 444 (Tex. 2011) (Willett, J., concurring).
2. *Id.* at 442.
3. TGS-NOPEC Geophysical Co. v. Combs, 340 S.W.3d 432, 439 (Tex. 2011) (citing TEX. GOV'T CODE ANN. § 312.005).
4. *Id.* (citing GOV'T § 312.003).

ends with those words.[5] In other words, Texas has adopted a textualist approach to statutory interpretation.[6] Thus, while individual justices on the Court have differed at the margins on statutory interpretation methodology, all agree that the text of the statute is the primary way to determine what the legislature meant when it passed legislation into law.[7]

While the statutory text is obviously the most important—if not the exclusive—component of Texas statutory interpretation methodology, Texas's textualist approach to statutory interpretation is not as clear-cut as it appears at first glance. In many ways, the Texas Supreme Court has been a microcosm of the debates surrounding statutory interpretation in general in the United States.[8] And the Texas Supreme Court's statutory interpretation disagreements are not even centered on the debates that most consider to be "hot topics" in statutory interpretation.[9] For example, Texas courts largely agree on the role legislative history and administrative agency positions should play in statutory analysis, although there has been some disagreement even there.[10] Rather, what this Article is mainly concerned with is how the Texas Supreme Court applies traditionally textualist principles of statutory interpretation.[11] The justices on the Texas Supreme Court, while undoubtedly textualists, apply these principles differently and some give more weight to certain principles than others.[12]

The way the Texas Supreme Court and the lower courts apply these principles has significant consequences for Texas law. First, as outlined above, statutory interpretation is now the bread and butter of appellate judging.[13] Texas courts shape law today not through revisions to the common law, but by interpreting the many statutes enacted by the legislature.[14] Second, and perhaps most obviously, how these textualist principles are

5. *See, e.g.*, Silguero v. CSL Plasma, Inc., 579 S.W.3d 53, 59–64 (Tex. 2019); *see also* State v. T.S.N., 547 S.W.3d 617, 620–22 (Tex. 2018) (stating that the Texas Supreme Court's analysis of a statute is limited to the text of the statute unless the only possible interpretation leads to absurd results).

6. *See TGS-NOPEC*, 340 S.W.3d at 439.

7. *See, e.g.*, R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future and Clean Water, 336 S.W.3d 619, 633–34 (Tex. 2011) (Jefferson, C.J., concurring) (disagreeing about whether to defer to an administrative agency's interpretation of a statute when the text appears unambiguous); *see also Ojo*, 356 S.W.3d at 439–54 (Willett, J., concurring) (disagreeing about whether to consider "legislative context" in interpreting statutes).

8. *See infra* notes 23–25 and accompanying text (explaining that until the mid-1980s, a proper framework for interpreting statutes was not given much thought).

9. *See infra* notes 20–22 and accompanying text (referencing other topics in statutory interpretation).

10. *See infra* Part IV (briefly discussing when Texas courts may look to legislative history).

11. *See infra* Part II (explaining textualist statutory interpretation).

12. *See infra* Part III (detailing the various approaches taken by the Texas Supreme Court justices in textually analyzing the *Jaster* statute).

13. *See* Ojo v. Farmers Grp., Inc., 356 S.W.3d 421, 444 (Tex. 2011) (Willett, J., concurring).

14. *See id.*

applied can determine case outcomes.[15] Finally, where the Texas Supreme Court ultimately settles on which principles win out will likely determine whether it comes to embrace new technology that allows for novel ways to interpret statutes going forward.

This Article explores how the Texas Supreme Court applies textualist principles of statutory interpretation through the lens of a 2014 Texas Supreme Court case, *Jaster v. Comet II Construction, Inc.*, and uses it as a case study to explore the differences that justices on the Texas Supreme Court have had over how to interpret the text of statutes.[16] Part II provides a background to traditional textualist principles of statutory interpretation.[17] Part III explores *Jaster*.[18] Part IV dissects *Jaster* and discusses where Texas statutory interpretation goes from here.[19]

The goal of this Article is not to focus on other disagreements in statutory interpretation, such as whether to use legislative history,[20] what weight to give the views of administrative agencies,[21] or how to apply substantive canons of interpretation.[22] Rather, this Article's goal is to examine how justices have disagreed about how to interpret the text itself, before they would ever turn to other tools of statutory interpretation. After all, if the text is clear, resort to other tools is unnecessary. In doing so, however, this Article explores issues of context and what role it plays in statutory interpretation. Thus, this Article does discuss whether the broader context in which a statute was enacted has any role in a textualist statutory interpretation methodology. This Article also explores how the ways in which the Texas Supreme Court answers these as-of-now open-ended questions about statutory interpretation may impact whether it comes to embrace technologies that allow for new ways to interpret statutes.

Ultimately, understanding the ways in which Texas courts interpret statutes impacts almost every Texas lawyer because there is now a statute for almost every area of law. Inevitably, lawyers will encounter an ambiguous statute and will have to craft arguments about what that statute means. It is also not enough to know that Texas courts are textualists and adhere to the text of the statute; that does not provide the entire picture. Thus, this Article

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15. *See* Jaster v. Comet II Constr., Inc., 438 S.W.3d 556, 575–82 (Tex. 2014) (Hecht, C.J., dissenting) (discussing how defining and applying different meanings to words and phrases can lead to a different end result).

16. *Id.*

17. *See infra* Part II (discussing the history of statutory interpretation and textualism).

18. *See infra* Part III (examining the seminal case in Texas statutory interpretation precedent).

19. *See infra* Part IV (analyzing *Jaster* and the future trends in statutory interpretation the Texas Supreme Court may follow).

20. Ojo v. Farmers Grp., Inc., 356 S.W.3d 421, 439–54 (Willett, J., concurring).

21. R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future and Clean Water, 336 S.W.3d 619, 633–34 (Tex. 2011) (Jefferson, C.J., concurring).

22. *See, e.g.*, Univ. of Tex. at Arlington v. Williams, 459 S.W.3d 48, 61–62 (Tex. 2015) (Boyd, J., concurring) (arguing for the application of the canon that statutes in derogation of the common law should be strictly construed).

seeks to fully examine how Texas courts interpret statutory text and what questions are still left open. Overall, the issues this Article addresses are at the forefront of Texas law and are important for all lawyers to understand.

II. PRINCIPLES OF TEXTUALIST STATUTORY INTERPRETATION GENERALLY AND IN TEXAS

Today's form of textualism began to take hold in the mid-1980s[23] and is perhaps most often associated with the late U.S. Supreme Court Justice Antonin Scalia.[24] Indeed, before Justice Scalia arrived at the Court, very few lawyers gave much thought to how to properly interpret statutes.[25] In essence, this form of textualism embraces reliance on the text of statutes first and foremost when trying to determine what an ambiguous word or phrase means in that statute.[26] Modern textualism can perhaps be best understood when compared with the two other main theories of statutory interpretation: intentionalism and purposivism.[27]

Generally speaking, intentionalism posits that a judge's job is to interpret a statute the way the enacting legislature would have interpreted it.[28] Intentionalists, however, believe that judges can divine the meaning the enacting legislature intended by referencing not just the text of the statute but also things like legislative history and the context in which the legislation was enacted.[29] Even if a judge cannot find a "golden nugget[]" in the legislative history that tells him what the legislature intended under the facts of a specific case, the judge can divine the general intent of the legislature at the time.[30]

Purposivists, on the other hand, believe "the role of the judge is to understand the fundamental purpose of the statute in question, and to interpret and apply it in particular cases in a manner that faithfully advances that purpose."[31] Thus, a judge applying a purposivist approach to statutory interpretation does not feel moored to the statute's text or what the enacting legislature meant the statute to do.[32]

Textualism is similar to intentionalism in the sense that textualists endeavor to read and apply a statute the way the enacting legislature

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23. John David Ohlendorf, *Textualism and Obstacle Preemption*, 47 GA. L. REV. 369, 371 (2013).

24. John F. Manning, Comment, *Justice Scalia and the Legislative Process*, 62 N.Y.U. ANN. SURV. AM. L. 33, 42 (2006); *see* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 51 (2012).

25. *See* Manning, *supra* note 24, at 33–34.

26. HILLEL Y. LEVIN, STATUTORY INTERPRETATION: A PRACTICAL LAWYERING COURSE 137–38 (1st ed.2014).

27. *Id.* at 137–38, 142.

28. *Id.* at 113.

29. *Id.* at 114.

30. *Id.*

31. *Id.* at 118.

32. *Id.*

intended.[33] However, unlike intentionalists, textualists believe that the best indication of legislative intent is the text of the statute itself.[34] A textualist judge may have a variety of reasons for focusing exclusively on the text of a statute. One common justification is democratic legitimacy—the words of the statute are the only thing actually voted on and passed into law by the legislature.[35] Legislative history, on the other hand, is not voted on, and legislators and staffers may have an incentive to slip clues into the legislative history about how a statute should later be interpreted without exposing the interpretation to an actual vote by putting it in the statutory text.[36] Another common justification is that textualism constrains judges.[37] After all, judges who focus merely on what the words of the statute say will not substitute their own policy justifications for what the legislature wrote.[38] And by sticking to the words, courts incentivize legislatures to draft their legislation precisely and clearly.[39]

Today, at least some form of textualism is the dominant methodological approach to statutory interpretation for the U.S. Supreme Court.[40] Indeed, courts in just about every jurisdiction in the United States now focus first and foremost on a statute's text when interpreting statutes.[41] As one scholar has put it: "We are all textualists."[42] Generally, courts will focus on the ambiguous word or phrase at issue, the words that immediately surround it, provisions that immediately surround the ambiguous word or phrase's provision, and even other statutes.[43] One scholar analogizes this process to using a microscope: zoom all the way in on the relevant words in question, then slowly zoom out to look at the immediate context in which the words appear, then zoom out again to look at the entire statute, and then zoom out even further to look at other legal texts that could help understand the meaning of the ambiguous provision in question.[44]

In practice, judges who approach statutory interpretation from a textualist perspective employ a number of tools to divine the meaning of an

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33. *Id.* at 116.
34. *Id.*
35. *Id.* at 116–17.
36. *Id.* at 117.
37. *Id.* at 116–17.
38. *Id.*
39. Abbe R. Gluck, Comment, *Imperfect Statutes, Imperfect Courts: Understanding Congress's Plan in the Era of Unorthodox Lawmaking*, 129 HARV. L. REV. 62, 107 (2015) (quoting SCALIA & GARNER, *supra* note 24, at 51).
40. *See* Ohlendorf, *supra* note 23, at 371.
41. LEVIN, *supra* note 26, at 200; *see also* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1758 (2010).
42. William N. Eskridge, Jr., *All About Words: Early Understandings of the "Judicial Power" in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1090 (2001).
43. LEVIN, *supra* note 26, at 200–01.
44. *Id.* at 201.

ambiguous word or phrase.[45] First, judges will often analyze the ambiguous word or phrase to determine what its ordinary meaning is.[46] A favorite way to do this is by simply looking up the word's definition in a dictionary.[47] Additionally, words that have a technical meaning or that are a term of art are viewed in accordance with those meanings.[48] Once the microscope zooms out, judges will try to determine an ambiguous word or phrase's meaning by looking to the words that immediately surround the ambiguous one.[49] Thus, for example, the principle of *noscitur a sociis* posits that an ambiguous word in a list should be interpreted in light of the other words in that list.[50] Another example is the principle of *expressio unius est exclusio alterius*: When the legislature said one thing somewhere else in the statute, it could not have meant that same thing when it wrote the ambiguous word or phrase because the legislature is presumed not to have been redundant.[51] Textualists will then zoom out even further, looking at the statute as a whole.[52] At this stage, judges can see how the word or phrase is used throughout the statute, operating under the assumption that the legislature endeavored to use that word or phrase consistently throughout the statute.[53] They may also glean meaning from titles and headings used throughout the statute and prefatory materials such as a statute's preamble.[54]

In Texas, as in most other jurisdictions, courts have largely adopted a textualist approach to statutory interpretation.[55] Even though the Code Construction Act[56]—a state statute first codified in the 1960s that instructs courts how to interpret statutes—says that courts may consider a wide variety of factors when interpreting statutes, including "the object sought to be attained," "legislative history," and "the consequences of a particular construction,"[57] the Texas Supreme Court has repeatedly held that it will not take into account such factors even though it may be permitted to do so.[58]

Texas courts begin with a word's "plain and common meaning" and go no further if the text is unambiguous.[59] Of course, "[i]f a statute uses a term with a particular meaning or assigns a particular meaning to a term, [courts]

45. *Id.* at 200.
46. *Id.* at 201.
47. *Id.* at 202.
48. *Id.* at 203.
49. *Id.* at 201.
50. *Id.* at 205.
51. *Id.* at 207.
52. *Id.* at 209.
53. *Id.*
54. *Id.*
55. *See, e.g.*, City of Houston v. Bates, 406 S.W.3d 539, 544 (Tex. 2013) (applying the plain meaning of the statute's language).
56. TEX. GOV'T CODE ANN. § 311.001.
57. *Id.* § 311.023(1), (3), (5).
58. *See, e.g.*, Jaster v. Comet II Constr. Inc., 438 S.W.3d 556, 563 (Tex. 2014).
59. *See, e.g.*, *Bates*, 406 S.W.3d at 543–44.

are bound by the statutory usage."[60] And if the plain meaning of the text leads to absurd results, the court may cast aside the plain meaning.[61] Typically though, an ambiguous word or phrase in a statute will be undefined, and it will be up to the court to decide what to make of it.[62] In Texas, an undefined word or phrase in a statute is given its "plain,"[63] "common,"[64] and "ordinary"[65] meaning, the three of which are largely treated as synonymous. Texas courts use a variety of textual canons and tools to divine an ambiguous word's ordinary meaning.[66] Of course, "if a different or more precise definition is apparent from the term's use in the context of the statute, [Texas courts] apply that meaning."[67]

Thus, on its face, Texas's textualist statutory interpretation methodology is not much different than that of federal courts or courts in other states.[68] Texas courts look askance at legislative history and try to hew closely to what the enacting legislature meant by looking just at the words of the statute.[69] But such seeming consensus on the Texas Supreme Court belies some stark differences that exist.[70] No one doubts that the Texas Supreme Court has wholeheartedly adopted a textualist approach to statutory interpretation.[71] But while that may be true, the justices on the Texas Supreme Court have had real disagreements about how to apply textualist principles of statutory interpretation.[72] And *Jaster v. Comet II Construction, Inc.* is a perfect case study for exploring some of those disagreements and what they mean going forward.[73]

III. *JASTER V. COMET II CONSTRUCTION, INC.*: TEXAS TEXTUALISM IN PRACTICE

Jaster is a relatively straightforward statutory interpretation case that the Texas Supreme Court decided in 2014; although the facts are simple, the

60. TGS-NOPEC Geophyiscal Co. v. Combs, 340 S.W.3d 432, 439 (Tex. 2011) (citing Tex. Dep't of Transp. v. Needham, 82 S.W.3d 314, 318 (Tex. 2002)).

61. *Id.*

62. *See supra* notes 43–44 and accompanying text (noting how courts discern the meaning of an ambiguous word).

63. *Bates*, 406 S.W.3d at 543–44.

64. *Id.*

65. *TGS-NOPEC*, 340 S.W.3d at 439.

66. *See supra* notes 45–60 and accompanying text (explaining a textualist's process in interpreting the meaning of an ambiguous word).

67. *See TGS-NOPEC*, 340 S.W.3d at 439.

68. *See supra* notes 55–67 and accompanying text (noting that many courts use textualism and how textualism works).

69. *See TGS-NOPEC*, 340 S.W.3d at 438–39.

70. *See id.*

71. *See supra* note 55 and accompanying text (explaining that Texas is a textualist state).

72. *See, e.g.*, Jaster v. Comet II Constr., Inc., 438 S.W.3d 556, 575–82 (Tex. 2014) (Hecht, C.J., Green, Guzman & Brown, JJ., dissenting).

73. *Id.* (plurality opinion).

case produced three separate opinions.[74] In *Jaster*, Mahmoud Dawoud purchased a home from Comet II Construction, Inc.[75] Later, Dawoud sued Comet under various theories of liability and alleged that Comet defectively designed and constructed the home's foundation.[76] The Court summarized the procedural background as follows:

> Comet denied any liability and asserted third-party claims against Austin Design Group, from whom Comet had purchased the foundation plans, and against . . . Jaster, the licensed professional engineer who had prepared the plans. Comet sought contribution and indemnity . . . . Austin Design Group filed a counterclaim against Comet and a cross-claim against Jaster, seeking contribution and indemnity . . . .
>
> Jaster filed a motion to dismiss Comet's third-party claim and Austin Design Group's cross-claim, arguing that they were each "the plaintiff" as to those claims, that he was a licensed professional engineer, and that they had failed to file an expert affidavit (which the statute refers to as a "certificate of merit") as chapter 150 requires. In response, Comet filed an amended third-party petition, this time attaching a certificate of merit. Jaster then filed an amended motion to dismiss, arguing that Comet did not comply with the statute because it did not file the certificate . . . with the original third-party petition and thus did not file it "with the complaint."[77]

The entire case turned on the correct interpretation of a previous version of § 150.002 of the Texas Civil Practice and Remedies Code, which at the time read as follows:

> In any *action* or arbitration proceeding for damages arising out of the provision of professional services by a licensed or registered professional, *the plaintiff* shall be required to file with the complaint an affidavit of a third-party licensed architect, registered professional land surveyor, or licensed professional engineer competent to testify, holding the same professional license as, and practicing in the same area of practice as the defendant, which affidavit shall set forth specifically at least one negligent act, error, or omission claimed to exist and the factual basis for each such a claim.[78]

Section 150.002(e) further provided that "[t]he plaintiff's failure to file the affidavit in accordance with this section shall result in dismissal of the

74. *Id.* at 558, 571, 575 (plurality opinion, Willett, J., concurring, Hecht, C.J., Green, Guzman & Brown, JJ., dissenting).

75. *Id.* at 559 (plurality opinion).

76. *Id.*

77. *Id.* (footnote omitted).

78. *Id.* at 560 (emphasis added) (citing TEX. CIV. PRAC. & REM. CODE ANN. § 150.002).

complaint against the defendant" and "[t]his dismissal may be with prejudice."[79]

Jaster argued that § 150.002 required dismissal of the claims Comet and Austin Design Group brought against him because they did not attach a certificate of merit (i.e., expert affidavit) with their original third-party claim and cross-claim, respectively.[80] Specifically, Jaster argued that:

> (1) . . . "there is no meaningful distinction" between an original "plaintiff" and a third-party plaintiff or a cross-claimant because they all assert affirmative claims for relief and are subject to the same pleading requirements; (2) third-party claims and cross-claims are "actions," and thus must comply with the statute's requirements for "any action"; and (3) not applying the requirement to third-party plaintiffs and cross-claimants thwarts "the statute's purpose to protect licensed professionals from unmeritorious or frivolous claims."[81]

On the other hand, Comet and Austin Design Group argued that:

> (1) [B]ecause the statute use[d] the word "plaintiff" rather than the more inclusive term "claimant," the certificate-of-merit requirement applie[d] only to a party that initiate[d] [the] lawsuit; (2) requiring a defendant who denies the plaintiff's allegations to file a certificate of merit that supports the plaintiff's claims would be "absurd," "unfair," and "unreasonable"; and (3) if applying the requirement only to "the plaintiff" undermine[d] the statute's purpose, the Legislature should address that problem, not the courts.[82]

In the end, a four-justice plurality held that Jaster was wrong; § 150.002 did not require Comet and Austin Design Group to attach certificates of merit with their pleadings.[83] In deciding the case though, the Court left exposed disagreement between its members as how to best divine "ordinary meaning" and what role context plays in that determination.[84] The plurality began its statutory analysis by noting that: "Chapter 150 does not define the terms 'plaintiff' or 'action,' so we must give them their common, ordinary meaning unless the statute clearly indicates a different result."[85] The plurality continued with the uncontroversial statement that: "We thus begin our analysis with the statute's words and then consider the apparent meaning of those words within their context."[86]

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79. CIV. PRAC. & REM. § 150.002(e).
80. *Jaster*, 438 S.W.3d at 559–60 (plurality opinion).
81. *Id.* at 560.
82. *Id.* at 560–61.
83. *Id.* at 571.
84. *Id.* at 570.
85. *Id.* at 563.
86. *Id.* at 562.

The plurality, however, then made a novel claim:

> To determine [a word's] *common*, *ordinary* meaning, we look to a wide variety of sources, including dictionary definitions, treatises and commentaries, our own prior constructions of the word in other contexts, the use and definitions of the word in other statutes and ordinances, and the use of the words in our rules of evidence and procedure.[87]

With this statement, the plurality stated that not only can courts draw on more traditional tools to help shed light on ordinary meaning—such as dictionaries and legal treatises—but also other sources.[88] Indeed, the plurality examined the common, ordinary meaning of plaintiff and action by looking at how those words have been defined in dictionaries and Texas case law.[89] The plurality cited three dictionaries for the proposition that "[d]ictionaries consistently define a 'plaintiff' as a party or person who brings or files a 'civil suit' or 'legal action.'"[90] Similarly, the plurality cited Black's Law Dictionary and case law for the proposition that: "The common meaning of the term 'action' refers to an entire lawsuit or cause or proceeding, not to discrete 'claims' or 'causes of action' asserted within a suit, cause, or proceeding."[91] The plurality concluded "that, under the common, ordinary meaning of the terms, Comet and Austin Design Group are not 'the plaintiffs' in this 'action,' because they are not the parties who initiated the suit."[92]

After examining the common, ordinary meaning of the words *plaintiff* and *action*, the plurality further examined the context in which the words *plaintiff* and *action* "appear within section 150.002 and the statute as a whole."[93] The plurality noted that: "By using the terms 'action' and 'arbitration proceeding' together with the conjunction 'or,' the statute treats the two terms as having a similar meaning."[94] Therefore, the plurality concluded that: "in both terms the statute refers to a legal proceeding in which a plaintiff asserts a claim or cause of action," and that "if the term 'action' referred to a claim or cause of action rather than a lawsuit or legal proceeding, there would be no reason for the statute to refer to an 'arbitration proceeding' at all, because parties resolve claims and causes of action in both types of legal proceedings."[95] The plurality went on to note that "the statute requires the plaintiff to file a certificate of merit '*in*' an action or arbitration proceeding," and that it would be strange "to say that a plaintiff is 'required

87. *Id.* at 563.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.* at 563–64.
92. *Id.* at 565.
93. *Id.*
94. *Id.* at 566.
95. *Id.*

to file' something 'in' a 'claim' or 'in' a 'cause of action'"—it makes more sense that a plaintiff would be required to file something in a lawsuit or action.[96] The plurality concluded its contextual reading of *action* by noting that "the statute requires the certificate of merit to 'set forth specifically' the defendant's conduct giving rise to liability 'for *each theory of recovery*' and 'the factual basis for *each such claim*.'"[97] The plurality drew the conclusion that "this language demonstrates the statute's recognition of the difference between a 'claim' and an 'action.'"[98]

The plurality then turned to the context in which *plaintiff* appears in the statute.[99] The plurality looked throughout the Civil Practice and Remedies Code to see how *plaintiff* is used and how the legislature used *claimant* to refer to different things.[100] The plurality concluded that: "These provisions demonstrate that when the Legislature wants to use a single term that encompasses third-party plaintiffs, cross-claimants, and counter-claimants along with plaintiffs, it uses the term 'claimant,' and defines that term accordingly."[101] The plurality further noted: "By contrast, the Code repeatedly uses the word 'plaintiff' to refer to a party who initiates the suit, rather than to every party who asserts a claim for relief within a suit."[102] Importantly, the plurality ended its contextual analysis by stating that "this Court's practice in the Texas Rules of Civil Procedure is also consistent with the common meanings and the statutory usage of the terms 'plaintiff' and 'third-party plaintiff' to refer to distinct types of parties in a suit."[103] Note that the plurality is not referring to the Rules of Civil Procedure and other statutes' definitions of plaintiff to determine ordinary meaning; the plurality had already determined the ordinary meaning of *plaintiff* and instead used those other definitions as contextual support for what it had already determined the ordinary meaning to be.[104] The approach was slightly different than using other definitions to determine ordinary meaning—as the plurality said it could do toward the beginning of its opinion—and also slightly different than zooming out the microscope to support its interpretation of ordinary meaning by showing how it makes sense in context.[105] There, the plurality instead said the ordinary meaning of *plaintiff* was correct because the interpretation was commonly used in other contexts,

96. *Id.* at 566–67.
97. *Id.* at 567.
98. *Id.*
99. *Id.*
100. *Id.* at 567–68.
101. *Id.* at 567.
102. *Id.*
103. *Id.* at 568.
104. *Id.* at 567–68.
105. *Id.* at 563–67.

the context meaning how the broader legal world in Texas—and perhaps just society in general—defines plaintiff.[106]

Justice Willett, joined by Justice Devine, and Justice Lehrmann in part, concurred.[107] Justice Willett agreed with the plurality's ultimate interpretation of *plaintiff* and *action*, but emphasized that "the plurality opinion's analysis of the context does not just support its analysis of isolated words—it forms an essential foundation for understanding those words."[108] In addition to adding contextual support for the plurality's analysis, Justice Willett also critiqued the plurality's use of dictionaries, other statutory provisions, and case law, arguing that: "These are helpful tools but often insufficient."[109] He then quoted Judge Easterbrook of the U.S. Court of Appeals for the Seventh Circuit for the proposition that: "[T]he choice among meanings must have a footing more solid than a dictionary—which is a museum of words, an historical catalog rather than a means to decode the work of legislatures."[110] Justice Willett also criticized reliance on case law definitions, arguing that "the words are not considered in the context of their use in the statute before us."[111] Additionally, with respect to case law, "the problem is exacerbated because entirely different circumstances may have animated our former interpretation of a particular word."[112] Justice Willett also thought looking to other statutes' definitions of a particular word was also problematic; he said that "this can be tricky, as words in statutes may take on unique or varying shades of meaning depending on the context and the purpose for which they are used."[113] Thus, he concluded: "[C]ontext becomes essential to clarity."[114]

Chief Justice Hecht dissented, along with Justices Green, Guzman, and Brown, in part.[115] The dissent largely agreed with the plurality's approach—at least as far as the textual analysis goes—but rather, disagreed on the outcome.[116] Chief Justice Hecht simply believed that the plurality's reasoning was "picky and detached from reality."[117] For example, Chief Justice Hecht took issue with the plurality's statements that: "When the Legislature says

106. *Id.* at 565–68.

107. *Id.* at 571–75 (Willett, Devine & Lehrmann, JJ., concurring).

108. *Id.* at 572.

109. *Id.* at 573.

110. *Id.* (quoting Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 67 (1994)).

111. *Id.* at 573.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 575–82 (Hecht, C.J., Green, Guzman & Brown, JJ., dissenting).

116. *Id.* Indeed, about the plurality's reasoning, Chief Justice Hecht said: "It is masterful. I would not challenge a word, and there is certainly nothing left to add. All I can do of any use is to summarize the plurality opinion's analysis and then offer a few reflections." *Id.* at 577.

117. *Id.* at 575. Chief Justice Hecht added that: "Intending to be careful, the Court risks being viewed as conducting a contest among the Pharisees in the Temple of Textualism over who is the most devout." *Id.*

'plaintiff', it means the person initiating suit, and when it says 'claimant', it means 'plaintiffs' and others who assert 'causes of action,'"[118] and "'[t]hroughout the Civil Practices and Remedies Code,' that is the way those words are defined and used."[119] Chief Justice Hecht goes on: "Actually, that is not quite right. Chapter 74 uses the terms 'plaintiff' and 'claimant' interchangeably in the very same sentence."[120] Chief Justice Hecht's dissent, worth reading in its entirety (as are all three opinions), agreed that "[t]he starting point of textual analysis must be the words chosen."[121] He also believed, though, that "it cannot be the ending point."[122]

However, as far as the textual analysis goes, Chief Justice Hecht did not take much issue with the analytical approach of the plurality; namely, looking to the ordinary meaning of the ambiguous word or words at issue along with the context in which those words appear.[123] For purposes of this Article, Chief Justice Hecht's dissent can be boiled down to a couple of key points.

First, Chief Justice Hecht took issue with the "benign fiction"[124] that underlies the other two opinions; namely, "[j]udicial interpretation should not imagine a Legislature that does not exist."[125] He believed the plurality's opinion of a rational legislature was an assumption that is not based in reality, hence the inconsistent use of words in statutes.[126] Simply put: "When lawyers and judges have put words to various, inconsistent uses over time, legislators simply cannot be presumed, alone of all creatures, to be precise . . . ."[127] Thus, the idea that "trudging through dictionaries, cases, and statutes, parsing and explaining, and finally discarding . . . misuses of the words" to get to what the legislature intended when they themselves did not do that is somewhat of a fool's errand.[128]

Second, and what is probably the main thrust behind the dissent, is that while context is important, context cannot be limited to the statutory text that surrounds ambiguous words whether in the same sentence, statute, or other statutes.[129] And the context Chief Justice Hecht believed was so important to take into account is the statute's objective.[130] The chief justice quoted the

118. *Id.* at 577.
119. *Id.*
120. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 74.351(c)).
121. *Id.* at 582.
122. *Id.*
123. *Id.* at 579.
124. *See* Green v. Bock Laundry Mach. Co., 490 U.S. 504, 527–28 (1989) (Scalia, J., concurring).
125. *Jaster*, 438 S.W.3d at 578 (Hecht, C.J., dissenting).
126. *Id.* at 578–79.
127. *Id.* at 578.
128. *Id.*
129. *Id.* at 579. In the Chief Justice's words: "The plurality opinion demonstrates that judicial interpretation of statutes cannot focus on text alone; it must examine the text in context. The plurality and concurring opinions profess agreement that context is important, but by context, both mean only surrounding words, not the reality they are intended to affect." *Id.*
130. *Id.* at 575–76.

black letter rule: "[A] statute is to be construed with reference to its manifest object, and if the language is susceptible of two constructions, one of which will carry out and the other defeat such manifest object, it should receive the former construction."[131] Again, while he did not take issue with the plurality opinion's textual analysis per se—"[t]he plurality opinion's impressive analysis may be correct *in the abstract*"[132]—Chief Justice Hecht simply thought that, at least in this case, the words of the statute are not enough.[133] And while he thought the concurring opinion was correct about the important of context, he believed Justice Willett's approach—"staring at little clumps of trees [and] losing sight of the forest for the groves—is no more fertile an approach."[134]

IV. WHERE DOES TEXAS STATUTORY INTERPRETATION GO FROM HERE?

Jaster raises a number of interesting issues for statutory interpretation in Texas that have yet to be resolved.[135] Most immediately, Chief Justice Hecht's dissent raises the question of whether judges can or should look outside the text of the statute to determine legislative intent, at least in certain circumstances.[136] Indeed in *Ojo v. Farmers Group, Inc.*, a 2011 Texas Supreme Court case, former Chief Justice Wallace Jefferson, in a concurrence, gave his blessing to courts sometimes looking at something akin to legislative context when interpreting statutes but not so much "legislative history" as we maybe traditionally think of it.[137] His argument was that while it may be inappropriate to use legislative history to *construe* a statutory provision, it is not inappropriate in order to provide context for why the statute was passed.[138] Chief Justice Jefferson wrote:

> When used in [a] contextual manner, there is little reason to think legislative history [is] inappropriate for citation. An exhortation that extrinsic sources *never* be cited for *any* purpose gives such sources too much power and judges too little credit. A legislative report, for example, frequently will provide useful information about the period in which the statute was enacted. It can give the reader some indication of *why* an issue was before the Legislature, and this information is useful as context even where it is irrelevant to the specific act of interpretation. This "why" may not be

131. *Id.* at 579 (quoting Citizens Bank of Bryan v. First State Bank, Hearne, 580 S.W.2d 344, 348 (Tex. 1979)); *see also supra* notes 3–4 and accompanying text (providing for a more modern statement of the rule from *TGS-NOPEC*: In interpreting a statute, it is a court's job to interpret the intention behind the statute, and this begins with the statute's language).

132. *Id.*

133. *Id.* at 582.

134. *Id.* at 579.

135. *Id.* at 556 (plurality opinion).

136. *Id.* at 575–76 (Hecht, C.J., dissenting).

137. Ojo v. Farmers Grp., Inc., 356 S.W.3d 421, 435–40 (Tex. 2011) (Jefferson, C.J., concurring).

138. *Id.*

> important to the result, but it is important to readers—both lay and expert—and the Legislature, all of whom look to our opinions as a complete and fair recording of the case's circumstances. Nothing we do is in a vacuum, and our readers care about more than mere results—background is given not because it controls, but because it contextualizes.[139]

Chief Justice Jefferson's concurrence is interesting not just because it approves of legislative history for the purpose of providing context, but also because it emphasizes the constant dialogue in which courts are engaged with the legislature when they decide statutory interpretation cases.[140] This is, of course, one of the core tenets of textualism—that the legislature pays attention to how courts interpret its statutes and reacts accordingly if it does not like the way a court interpreted a given statute in a particular case.[141] Hence the justification for textualism that strict adherence to the statute's text will encourage better and more careful drafting of legislation on the part of a legislature.[142] This benign fiction, however, is in conflict with Chief Justice Hecht's belief that it is wrong to rely on such a justification.[143]

As Justice Willett noted in his own concurrence, though, it can be difficult, if not impossible, to divorce legislative context from legislative history that courts use to construe particular provisions of a statute.[144] And he noted, not only does legislative history suffer from the drawbacks that make textualists wary of it in the first place, but Texas lacks an equivalent to the conference committee reports that exist at the federal level which are often seen as the most reliable form of legislative history.[145] This debate, however, seems largely moot as the Texas Supreme Court rarely, if ever, feels the need to go outside of the statutory text to cite any legislative history when interpreting a statute's ambiguous word or phrase.[146]

The more important takeaway from *Jaster* is its illumination of how the justices of the Texas Supreme Court disagree on strictly textualist principles. For one, how do we determine the ordinary meaning of an ambiguous word or phrase? What tools are appropriate? Second, what weight should we place on the ordinary meaning of a word at the most "zoomed-in" level of the microscope versus at other levels where the microscope is "zoomed out" and the word or phrase can be viewed within more context? Justice Willett's concurrence advocated for a more bird's-eye view approach and seemed to advocate for a methodology that does not rely too heavily on just a word's

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139. *Id.* at 437–38 (footnotes omitted).
140. *Id.* at 435–40.
141. *See* Gluck, *supra* note 39, at 105–07.
142. *See id.* (quoting SCALIA & GARNER, *supra* note 24, at 51).
143. Jaster v. Comet II Constr., Inc., 438 S.W.3d 556, 578 (Tex. 2014) (Hecht, C.J., dissenting).
144. *Ojo*, 356 S.W.3d at 440 (Willett, J. concurring).
145. *Id.* at 444 n.30.
146. *See, e.g.*, City of Houston v. Bates, 406 S.W.3d 539, 543–44 (Tex. 2013).

ordinary meaning, but rather views an ambiguous word or phrase within its textual context.[147]

Jaster also demonstrates how a pure, ordinary-meaning analysis of an ambiguous word cannot be divorced from its context more generally.[148] Context can be reading the word in the context of the statutory text that surrounds the word, as Justice Willett's concurrence emphasizes.[149] Context can also be mining other sources' definitions of an ambiguous word, i.e., the broader context in which that word is used in various ways in society, as the plurality opinion emphasizes.[150] Context could also be something more akin to legislative context, which Chief Justice Hecht's dissent includes as a permissible contextual clue.[151] One takeaway is that while everyone on the Court seems to agree that context is important, they disagree about *what* context is important.[152]

The context issue becomes even more important when one looks at some of the open-ended methodological questions raised by the three opinions in *Jaster*.[153] For example, the plurality in *Jaster* provided a number of sources one may consult to determine a word's common or ordinary meaning in a statute, including dictionaries.[154] Dictionaries appear to be the favorite tool among Texas courts for divining ordinary meaning.[155] For whatever reason, Texas courts seem more willing to cite dictionary definitions for a word's ordinary meaning rather than other statutes' definitions or definitions from case law.[156] This raises an obvious question: When can a lawyer allude to definitions of an ambiguous word in other statutes or case law? Since *Jaster*, the plurality's pronouncement that courts were free to look at how words are used in other statutes, case law, and the rules of evidence and procedure, courts have almost exclusively turned to dictionaries to interpret an ambiguous word in a statute[157] with some minor exceptions.[158]

But that raises another related question: If dictionaries are the preferred method to find definitions of words, what dictionaries should we be using? Texas courts have never definitively answered this question; indeed, the *Jaster* plurality itself cites two different dictionaries to support its contention of what *plaintiff* and *action* mean: Black's Law Dictionary and

147. *See Jaster*, 438 S.W.3d at 571–75 (Willett, J., concurring).
148. *See id.*
149. *See id.*
150. *See id.* at 558–72 (plurality opinion).
151. *See id.* at 575–82 (Hecht, C.J., dissenting).
152. *See id.* at 556–82 (plurality opinion, Willett, J., concurring, Hecht, C.J., dissenting) (advancing multiple different opinions about the context that should be used).
153. *See id.*
154. *Id.* at 563 (plurality opinion).
155. *See* Silguero v. CSL Plasma, Inc., 579 S.W.3d 53, 60 (Tex. 2019).
156. *See, e.g.*, *id.*; *see also* Fort Worth Transp. Auth. v. Rodriguez, 547 S.W.3d 830, 838 (Tex. 2018).
157. *See, e.g.*, *Rodriguez*, 547 S.W.3d at 838.
158. *See, e.g.*, Mitchell v. State, 473 S.W.3d 503, 515 (Tex. App.—El Paso 2015, no pet.).

Merriam-Webster's.[159] More broadly, other courts outside Texas also usually do not cite one specific dictionary.[160] Black's Law Dictionary seems to be a favorite in Texas, but Texas courts use ordinary dictionaries as well.[161] This raises the question of whether there is one particular dictionary Texas courts deem more authoritative than all others. Are some dictionaries acceptable to cite to, but not others? Additionally, what edition of these dictionaries should we be using? Current dictionaries? Dictionaries that were printed contemporaneously with the passage of the legislation at issue? Again, Texas courts have not answered these questions.

The question of whether to consult extra-textual sources, if any, raises other questions about the proper context within which we analyze ambiguous statutory text. Are we looking at how the legislature uses a particular word? If so, are we looking at: (1) how the legislature that originally enacted the text meant for the definition of the word; (2) how subsequent legislatures which may have amended the legislation meant for the definition of the word when it changed the words immediately surrounding it; or (3) how the legislature over time has meant the definition of the word by looking to other Texas statutes?

If we want to know, however, how society at large uses a particular word, so that "everyday Texans [can] order their affairs with certainty,"[162] are dictionaries the best source to provide context? If so, which ones? Black's Law Dictionary, after all, seems mostly aimed at lawyers, not ordinary people. Should we examine the dictionaries printed around the time the legislation at issue was enacted? Current dictionaries? Even if we could agree on that, does that dictionary necessarily reflect how *Texans* use that word?

All of this boils down to a basic, yet complicated question: What context should we examine when we try to determine an ambiguous word's meaning?[163] The answer to that question has broader implications about how

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159. *Jaster*, 438 S.W.3d at 563.

160. LEVIN, *supra* note 26, at 227–28.

161. *See, e.g.*, Cadena Commercial USA Corp. v. Tex. Alcoholic Beverage Comm'n, 518 S.W.3d 318, 327 (Tex. 2017); Transformative Learning Sys. v. Tex. Educ. Agency, 572 S.W.3d 281, 288–89 (Tex. App.—Austin 2018, no pet.).

162. Ojo v. Farmers Grp., Inc., 356 S.W.3d 421, 443 (Tex. 2011) (Willett, J., concurring).

163. *Id.* Interestingly, in his 2011 concurrence in *Ojo*, Justice Willett recognized the importance of context in statutory interpretation methodology, anticipated how different judges could disagree about what context meant, and laid out his own view more clearly in an extended discussion on the topic:

> Granted, jurists of divergent philosophical stripes might disagree on the best *elements* of context and where they lead, but modern textualists agree that language cannot be isolated from its surrounding context. Indeed, even the word "context" must be read in context. It means one thing when detailing a case's background facts and how it came before us, but something else when ascertaining textual meaning and explaining to readers how we reasoned our way to a conclusion. When construing even a facially clear statute that seems intuitively obvious, we may well look to related legislation plus other extra-statutory contextual cues to glean the text's accepted semantic import (grammatical conventions, treatises, dictionaries, specialized legal or technical usage, colloquial nuances, judicial interpretations from other jurisdictions, and so forth). In other words, we tackle it much like the Court does today, minus the jolting digression

courts think about statutory interpretation. And Texas courts may have to directly wrestle with that issue sooner rather than later, as new technologies add new dimensions to how we might divine ordinary meaning.[164]

For example, in 2012 Judge Richard Posner, then of the U.S. Court of Appeals for the Seventh Circuit, used the internet to help him determine the ordinary meaning of an ambiguous word in a statute.[165] In that case, *United States v. Costello*, the Seventh Circuit had to decide whether a woman violated a statute that criminalized "harboring" immigrants who entered the country illegally when she helped her boyfriend enter the country illegally.[166] Judge Posner, writing for the court, held that *harboring* implies protection from something or someone.[167] One way Judge Posner reached that conclusion was by doing a Google search; the top three results were "harboring fugitives," "harboring enemies," and "harboring refugees."[168] Using Google to divine ordinary meaning is novel, but has some potential issues, including the ability, or lack thereof, to replicate searches at any given time.[169] It does, though, provide more context for how society at large (at least the part of society that Googles things) defines words. However, Judge Posner's approach has not been replicated much by other judges.[170]

One novel and more accepted approach that has gained some momentum recently is one taken by Associate Chief Justice Thomas Lee of the Utah Supreme Court.[171] In 2015, he wrote a potentially groundbreaking concurrence in a statutory interpretation case.[172] In *State v. Rasabout*,[173] the criminal defendant had been tried under a statute stating: "A person may not discharge any kind of dangerous weapon or firearm."[174] The defendant, Rasabout, had fired twelve shots from a Glock 9mm semiautomatic pistol, and the Utah Supreme Court had to decide whether Rasabout violated the statute twelve separate times or just once.[175] The court determined that he

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> into legislative history. That is, we seek *interpretive* context, a reading rooted in textual and structural evidence. So when we are construing statutes . . . we give precedence to semantic context (how a skilled user of words would read the statute); we do not consider or second-guess policy context (how well those words achieve the statute's apparent policy goals).

Id. at 452 (footnotes omitted).

164. *See id.* at 421–35 (majority opinion).

165. *See* United States v. Costello, 666 F.3d 1040 (7th Cir. 2012).

166. *Id.* at 1041–42.

167. *Id.* at 1048.

168. *Id.* at 1044–45.

169. *See* State v. Rasabout, 356 P.3d 1258, 1280 (Utah 2015) (Lee, A.C.J., concurring).

170. *But see* State v. Canton, 308 P.3d 517, 523 (Utah 2013) (citing Judge Posner's approach in *Costello* approvingly).

171. *See Rasabout*, 356 P.3d at 1280 (Lee, A.C.J., concurring).

172. *Id.*

173. *Id.* at 1261 (majority opinion).

174. *Id.* (quoting UTAH CODE ANN. § 76-10-508 (West, Westlaw through ch. 1 of the 2020 Gen. Sess.))

175. *Id.* at 1262–69.

violated the statute twelve separate times, and reached that conclusion using traditional methods of statutory interpretation.[176] Justice Lee, however, bolstered his statutory analysis by using internet tools.[177] First, Justice Lee used a Google News search to determine how the ambiguous phrase at issue is typically used in news articles,[178] similar to something Justice Breyer had done many years earlier.[179] Justice Lee's search produced numerous news articles that used the word *discharge* to refer to each separate shot.[180] However, Justice Lee acknowledged that there were drawbacks to using Google News searches and Google searches—like those used by Judge Posner—more generally: Arbitrariness based on one's search terms and the fact Google's algorithm is secret so that conducting "different searches at different times on different computers may reveal very different results."[181]

To counteract those drawbacks, Justice Lee took his internet research one step further to search an internet database known as the Corpus of Contemporary American English (COCA).[182] As Justice Lee noted in his concurrence, the "COCA is 'the largest freely-available corpus of English, and the only large and balanced corpus of American English . . . . The corpus contains more than 410 million words of text and is equally divided among spoken, fiction, popular magazines, newspapers, and academic texts.'"[183] In essence, the COCA allows a user to search a word and see the different ways that word is used and how frequently each variation is used in society.[184] Justice Lee argued that the COCA has benefits similar to those of a traditional Google search, but without many of the drawbacks.[185] These benefits include less arbitrariness because one need not come up with search terms, as well as more transparency and accessibility for later use because users can save their searches.[186]

Indeed, support for Justice Lee's approach to divining ordinary meaning is growing. For example, Judge Thapar of the Sixth Circuit recently argued that "[c]ourts should consider adding this tool to their belts."[187] Other courts are also adopting this approach.[188] This approach allows for a much more

176. *Id.*
177. *Id.* at 1271–90 (Lee, A.C.J., concurring).
178. *Id.* at 1278.
179. *See* Muscarello v. United States, 524 U.S. 125, 129 (1998).
180. *Rasabout*, 356 P.3d at 1278 (Lee, A.C.J., concurring).
181. *Id.* at 1281.
182. CORPUS OF CONTEMPORARY AMERICAN ENGLISH, https://corpus.byu.edu/coca/ (last visited Mar. 23, 2020).
183. *Rasabout*, 356 P.3d at 1281 (Lee, A.C.J., concurring) (alteration in original).
184. *Id.*
185. *Id.*
186. *Id.*
187. Wilson v. Safelite Grp., Inc., 930 F.3d 429, 439 (6th Cir. 2019) (Thapar, J., concurring).
188. *See, e.g.*, State v. Lantis, 447 P.3d 875, 879–81 (Idaho 2019); People v. Harris, 885 N.W.2d 832, 839 (Mich. 2016).

nuanced understanding of how words are ordinarily used.[189] More than likely, lawyers in Texas will begin to make statutory interpretation arguments using these methods when it suits their interests. Will Texas courts embrace these tools? They would seem to answer Justice Willett's critiques of the other sources of ordinary meaning the *Jaster* plurality cites, including dictionaries.[190] Unlike dictionaries, Google and COCA are not "museum[s] of words" because they are constantly changing with society.[191] But then again, the context in which we want to view a word or phrase matters: Are we looking at how the current society at large uses a given word? How society at large when the legislation was passed used that word? The current legislature? The legislature that passed the legislation? The society at large when the legislation was passed? Does it address concerns about legislative context? Does any of it even matter if the only context that matters is the words in the statute? These questions may need to be answered before Texas courts can decide whether to adopt these new tools.

V. CONCLUSION

Texas courts are undoubtedly textualists when it comes to statutory interpretation. However, it is not enough merely to say that they are textualists because Texas judges, following in the path of the Texas Supreme Court, do not all apply textualist principles the same way. Understanding how the Texas Supreme Court applies these textualist principles is essential for Texas lawyers in understanding how to make a good statutory interpretation argument. For example, what sources do we use to determine ordinary meaning? What weight do we place on a word's ordinary meaning versus the context in which the word is used? What context is most important when it comes to statutory interpretation? Is it ever appropriate to go outside the statutory text? All of these questions are important, and the answers to them have deep implications for whether Texas courts will come to embrace technologies that allow for new approaches to statutory interpretation. Most importantly, though, the answers will determine how Texas courts interpret statutes, which affects most legal disputes today.

189. *See* Daniel Ortner, *The Merciful Corpus: The Rule of Lenity, Ambiguity and Corpus Linguistics*, 25 B.U. PUB. INT. L.J. 101, 122–24 (2016).

190. Jaster v. Comet II Constr., Inc., 438 S.W.3d 556, 568 (Tex. 2014).

191. *Id.* at 573 (Willett, J., concurring).