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### Rejecting Word Worship: An Integrative Approach to Judicial Construction of Insurance Policies

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# REJECTING WORD WORSHIP: AN INTEGRATIVE APPROACH TO JUDICIAL CONSTRUCTION OF INSURANCE POLICIES

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\* Respectively, Doris S. & Theodore B. Lee Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas and Professor of Law, Queens University-Canada. Thanks to Bill Boyd, Lachlan Caunt, Jay Feinman, Dan Hamilton, the late Doris and Ted Lee, Mike Kaufman, David McClure, and Ann McGinley as well as to participants in the ALI Restatement of the Law of Liability Insurance process, particularly Reporters Tom Baker and Kyle Logue. Special thanks to Dan Schwarcz for organizing the Future of Insurance Law and Regulation Conference that prompted this paper. Thanks also to Ken Abraham, Michelle Boardman, Omri Ben-Shahar, Michelle Boardman, Jim Fischer, Chris French, Bob Jerry, Peter Kochenburger, Randy Maniloff, Leo Martinez, Doug Richmond, Adam Scales, Rick Swedloff, and Jeff Thomas for their instructive work on insurance. © 2021 Jeffrey W. Stempel and Erik S. Knutsen.

## INTRODUCTION: THE ALLURING ILLUSION OF TEXT

What do the words in an insurance policy mean? What is the legal effect of those words? These two simple inquiries drive insurance and contract law as well as the modern economy. Insurance is the financial backstop of society's losses—from automobile accidents to house fires to injuries from defective products. Answers to insurance coverage questions matter because those affected are often riding a fine line between survival and complete financial destitution.

Insurance coverage disputes that center on construing insurance policy language include such far-ranging issues as:

a) Does a clause in a liability insurance policy that purports to exclude losses from a “pollutant” catch only industrial pollution such as dumping glowing toxic liquid into a lake? Or does it also avoid payment for damages from a slip and fall on spilled bleach (a chemical “pollutant?”) in a grocery store aisle?<sup>1</sup>

b) Does the loss of both towers at the World Trade Center during the 9/11 attacks constitute one insured “occurrence” or two?<sup>2</sup>

c) Can a business' income losses resulting from a government-mandated closure order during the COVID-19 pandemic be covered if the policy requires “direct physical loss of or damage to” the policyholder's property?<sup>3</sup>

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1. Where a “pollutant” is defined in the policy as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste.” *See, e.g.* *Kent Farms, Inc. v. Zurich Ins. Co.*, 140 Wn2d 396, 998 P2d 292 (Wash. 2000); Jeffrey W. Stempel, *Reason and Pollution: Construing the “Absolute” Pollution Exclusion in Context and in Light of its Purpose and Party Expectations*, 34 TORT & INS. L.J. 1 (1998).

2. *Compare* *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Prop., LLC*, 222 F. Supp. 2d 385, 398-99 (S.D.N.Y. 2002) (holding as a matter of law that policy with language defining occurrence as “all losses or damages that are attributable directly or indirectly to one cause or to one series of similar causes” defined September 11 damage to World Trade Towers as one occurrence), *with* *SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props. LLC*, 2003 U.S. Dist. LEXIS 1103, at \*15-16 (S.D.N.Y. Jan. 29, 2003) (policy ambiguous as to meaning of occurrence when policy speaks of a “series of losses . . . arising out of one event”). “Eventually, a jury found two occurrences for insurance policies [without the] ‘batching’ language [of the Willis brokerage binder containing a broad definition of occurrence].” JEFFREY W. STEMPEL, ERIK S. KNUITSEN & PETER N. SWISHER, *PRINCIPLES OF INSURANCE LAW* 7 (5th ed. 2020). The jury verdict was upheld by the trial court and on appeal. *See Court Upholds Juries' Rulings on World Trade Center Claims*, *INS. J.* (Oct. 19, 2006), <https://perma.cc/AQ5P-X6KW>. *See also* Rodd Zolkos, *'Wilprop' case changes the industry*, *INS. J.* (Sept. 11, 2011), <https://perma.cc/7RAK-XLFU> (discussing creation and use of Willis Wilprop binder originally intended by policyholder to reduce need to pay multiple deductibles but as applied to 9/11 loss of Towers reduced available property insurance coverage by more than \$1 billion).

3. *Compare* *Studio 417, Inc. v. Cincinnati Insurance Company*, 2020 WL 4692385 (W.D. Mo.) (Aug. 12, 2020) (applying Missouri law) (possibility of coverage for COVID-19-related closure losses

Courts deciding these disputes have two possible approaches to an insurance policy construction question: (1) a strict, literalist approach to the words at issue, or (2) a more contextual, functionalist approach. The approach taken may fundamentally change the result. For instance, the characterization of a bleach spill as either a matter of standard premises liability or a pollution event illustrates the impact of the different judicial approaches. A rigidly textualist court would likely hold that household bleach could be a “pollutant” because bleach fits the broad definition of “pollutant” in the policy. Under this analysis, coverage would be denied.

Contextualist courts examine the purpose of the policy and, in the bleach example, would consider the purpose of the pollution exclusion. An examination of the insurer underwriting information about that pollution exclusion in an all-risk liability policy would reveal insurers’ intention to avoid paying for large-scale industrial “smoke-stack” type pollution, because such pollution could cause widespread losses and be mitigated through safety efforts. Insurers did not mean to target slip-and-fall injuries from household bleach spills in grocery stores. A contextualist court would conclude that reading the exclusion broadly to catch this sort of loss is inconsistent with the purpose of the exclusion: to exclude from coverage those losses arising from industrial-type pollution.

Despite the departure from strict adherence to textualism signalled in the *Restatement (Second) of Contracts*<sup>4</sup> in 1981, courts continue to embrace a textualist approach in contract interpretation<sup>5</sup> cases, including

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because use of property was restricted) *with Diesel Barbershop, LLC v. State Farm Lloyds*, 479 F. Supp. 3d 353, 360-362 (W.D. Tex. Aug. 13, 2020) (granting a motion to dismiss because the coronavirus did not cause a direct physical loss, and “the loss needs to have been a ‘distinct, demonstrable physical alteration of the property.’”). *See also* Erik S. Knutsen & Jeffrey W. Stempel, *Infected Judgment: Creating Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, 27 CONN. INS. L.J. 185 (2020) (reviewing COVID-19 coverage cases and criticizing courts taking unduly narrow construction of terms “direct physical loss or damage”).

4. *See* AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND) CONTRACTS §§ 200-229 (1981) (taking what observers have termed a “contextual” approach to determining the meaning of disputes contracts terms). *See also* JOSEPH M. PERILLO, CONTRACTS § 3.12 (7th ed. 2013) (discussing *Restatement (Second) of Contracts* approach as contextual and consistent with functional approach of Yale Professor Arthur Corbin, as contrasted with more formalist approach of Harvard Professor Herbert Williston); E. ALLAN FARNSWORTH, CONTRACTS § 1.8 (4th ed. 2004) (portraying *Restatement (Second)* approach as functional and contextual).

5. For purposes of this paper, we will generally treat the terms “interpretation” and “construction” as synonyms although we recognized the long-standing technical view of many that interpretation is the process of determining what a text means while construction is the process of the application of the text and giving it legal effect. *See* William Baude & Stephen E. Sachs, *The Law of Interpretation*, 130 HARV. L. REV. 1079 (2017) (noting the distinction and citing to sources). *See also* ARTHUR L. CORBIN, CORBIN ON CONTRACTS (1951) at section 534 (“interpretation” is about understanding what ideas the language in a contract induces in people; “construction” is the determination of the legal operation of the contract).

insurance cases.<sup>6</sup> Scholars either cheer on<sup>7</sup> or chastise courts for any perceived deviation from the textualist approach.<sup>8</sup> However, textualism

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6. See, e.g., *Deni Assocs. of Fla., Inc. v. State Farm Fire & Casualty Ins. Co.*, 711 So. 2d 1135 (Fla. 1998) (giving literal and broad application to pollution exclusion in general liability policy to preclude coverage for architecture firm sued when its spill of a blueprint machine released arsenic that emitted fumes requiring evacuation of building); *E.C. Fogg, II. v. Florida Farm Bureau Mut. Ins. Co. v. E.C. Fogg*, 711 So. 2d 1135 (1998) (same, barring coverage due to pollution exclusion when crop duster sued for accidental direct spraying on farmer and sheriff's deputy inspecting crop land); *Allen v. Prudential Prop. & Cas. Ins. Co.*, 839 P.2d 798 (Utah 1992) (giving strict enforcement to household exclusion in homeowner's policy barring coverage for intra-family claims and rejecting reasonable expectations approach in almost strident terms; also seemingly taking absolute view that because insurance policy forms must be approved by state insurance regulator, policy language cannot be regarded as unclear, unfairly surprising, unconscionable, or violative of public policy).

In *Chestnut Associates Inc. v. Assurance Co. of Am.*, 17 F. Supp. 3d 1203 (M.D. Fla. 2014), the federal trial court applying Florida law held that the pollution exclusion applied where a pool technician "sexually pleased himself" in a client's pool, causing alleged property damage to the pool. The case offers some comic relief but illustrates a jurisprudence of silly textual literalism.

7. See, e.g., ANTONIN SCALIA & BRYAN GARNER, *READING LAW* (2015) (textualist manifesto); John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419 (2005) (generally approving of textualism as preferred interpretative methodology). See also Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation – and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV., 685, 685 (2014) (noting that empirical research suggests that "judicial ideology matters more than methodology in determining interpretative outcomes" and rejecting "the frequent claim of textualists that their theory much more stringently restrains value-based decision making than does purposivism"); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1 (2006); Michael J. Gerhardt, *A Tale of Two Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25 (1994) (discussing the respective textualism of the Justices concerning constitutional text).

Although the bulk of scholarly writing regarding interpretation theory has focused on statutory interpretation, similar but less voluminous writings for and against textualism are found regarding contract law. See, e.g., David Chamy, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815 (1991) (noting importance of context but also that contextual inquiry has less readily apparent boundaries than textual inquiry); E. Allan Farnsworth, "Meaning" in the Law of Contracts, 76 YALE L.J. 939 (1967) (assessing traditional and modern approaches to interpretation, including plain meaning and parole evidence rules).

8. See, e.g., SCALIA & GARNER, *supra* note 7, at 29-41 (2015) (advocating textualism and criticizing interpretation deemed insufficiently deferential to text); FRANK H. EASTERBROOK, *Foreword to READING LAW*, at xxi-xxvi (endorsing textualism in statutory interpretation and arguing that "[l]egislative intent is a fiction."). See also Bryan Garner, *LawProse Lesson #206: Statutory and Contractual Interpretation*, <https://perma.cc/92S3-7YJU> ("all judges are textualists first ('We begin with the words' is a mantra in judicial opinions), even if they then move on to consider other matters, such as their own policy preferences. They all start with the text."). Garner argues that the most "important skill" that is "generally lacking among law-school graduates" is "[a]most certainly" the "ability to develop, hone, and deliver arguments about the interpretation of contracts and statutes."

Garner's proposed remedy, unsurprisingly, is better facility discussing the text of contracts and statutes as he endorses greater use of canons of construction addressing word meaning, particularly the ordinary-meaning canon, the "negative-implication" canon (*a/k/a expression unius est exclusion alterius*), the last-antecedent canon, the associated-words canon, and the surplusage canon. The latter posits that "[i]f possible, every word and every provision is to be given effect. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."

A full assessment of these canons and their ability to mislead is beyond the scope of this article. The primary defect of almost all canons of construction addressing word meaning is that they are often inaccurate in particular situations and arguably rest on the completely unrealistic premises about the drafting of legal documents. Canons are problematic to the extent they suggest that writers of contract

has not been displaced.<sup>9</sup> Most scholars regard that the *Restatement (Second) of Contract*'s construction methodology as fully accepted in only a minority of states.<sup>10</sup>

In short, textualism has been resilient and ascendant in the 40 years of the post-Restatement era.<sup>11</sup> One need only briefly search the case reports to find example after example of courts saying that their task is limited to reading the text of the document at issue,<sup>12</sup> or it is not the court's job to

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forms or statutes never speak redundantly, always appreciate the connotative value of words in a series, always remember to include everything that should be in a list, and know the rules of grammar cold. Canons, like policy text itself, should not be treated as talismanic but applied in conjunction with other interpretative factors.

9. A similar phenomenon followed the alleged dethroning of legal formalism by the legal realist movement. The prevailing narrative is that legal formalism dominated American law until the rise of the legal realism movement in the 1920s and 1930s which immediately destabilized the dominance of formalism and eventually dethroned it, as expressed in the oft-quoted comment that "we are all realists now." Although formalism was not eliminated or repealed in the manner of a discredited scientific theory, legal formalism was scaled back, modified, or fused with legal realist insights in what might be called the Harvard Legal Process school of thought that dominated American law at mid-Century. We would also characterize much non-formalist legal reasoning as functionalist. See STEMPEL, KNUTSEN, & SWISHER, *supra* note 2, § 2.03 (5th ed. 2020); Peter N. Swisher, *Judicial Rationales in Insurance Law: Dusting Off the Formal for the Function*, 52 OHIO ST. L.J. 1037 (1991). See also TOM BAKER & KYLE D. LOGUE, *INSURANCE LAW AND POLICY: CASES AND MATERIALS* 29 (2017) (regarding distinction as "useful" and noting applications). Others would term it instrumentalism. See, e.g., BAILEY KUKLIN & JEFFREY W. STEMPEL, *FOUNDATIONS OF THE LAW* 5-15 (1994). Or a matter of "text versus context." James M. Fischer, *Why Are Insurance Contracts Subject to Special Rules of Interpretation? Text versus Context*, 24 ARIZ. ST. L.J. 995 (1992). For contract law in particular, the prevailing view is that the more functionalist or contextualist contract construction of the 1950-1980 time period has been replaced in substantial degree by a neo-classical approach that is both more formalist and more textualist than the Second Restatement and much of the caselaw of the 1950-1980 era. Fully discussing and assessing this history is beyond the scope of this article and a project in itself. See generally CONTRACT, LAW OF, OXFORD ENCYCLOPEDIA OF AMERICAN POLITICAL AND LEGAL HISTORY (2012); (Donald T. Critchlow & Philip R. VanderMeer, eds.) at 188-92; JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* (1992); KEVIN M. TEEVEN, *A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT* (1990).

10. See PERILLO, *supra* note 4, § 3.12 at 142-43 (noting that "the Restatement (Second) is generally in accord with Corbin" but that courts have only "warily" applied the reasonable expectations aspect of the Restatement (e.g., 211), usually limiting it to "ambiguities and inconspicuous language") (citation omitted).

11. See John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869 (2002) (noting that rise in contextual or functional approach to contract construction was never as dramatic as posited by critics and counter-revolution of sorts in which courts continued or even increased emphasis on text of contract documents); Marc Galanter, *Contract in Court; or Almost Everything You May or May Not Want to Know About Contract Litigation*, 2001 WIS. L. REV. 577 (2001) (noting increase in contract litigation and its frequent disposition by motion practice based on judicial finding of sufficiently clear text); Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427 (2000) (noting dominance of objective theory and its implicit empowerment of courts to decide cases based on judges' assessment of whether contract document text admits of more than one reasonable reading). See also FARNSWORTH, *supra* note 4, § 1.7 (reviewing history of academic debate over nature of contract law, contract theory, and approaches to adjudicating contract disputes).

12. See, e.g., Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947) (also published as a monograph by Association of the Bar of the City of New York based on address of the same name) ("Read the statute. Read the statute. Read the statute"). Less often quoted

“rewrite” a contract.<sup>13</sup> As in the public debate over constitutional law, “strict constructionist” judges are celebrated,<sup>14</sup> and the legal literature teems with the view that close reading of text is required to provide the certainty and predictability required by law, commerce, and society at large.<sup>15</sup>

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and appreciated is Justice Frankfurter’s more nuanced view that “the notion that because the words of a statute are plain the meaning is also plain, is merely pernicious over-simplification.” *United States v. Monia*, 317 U.S. 424, 431 (1943) (Frankfurter, J., dissenting). *See also* Frankfurter, 47 COLUM. L. REV. at 528-35 (noting variety of means of reading and understanding statutory text).

For an interesting observation that supports the view of de-emphasizing the primacy of text, see Tobias A. Dorsey, *Some Reflections on Not Reading the Statutes*, 10 GREEN BAG 2D 283, 284 (2007) (noting potential differences between statutes as enacted and as codified and that Frankfurter read the former) (“The Code is – no disrespect intended – a Frankenstein’s Monster of session laws. The Code is made by taking the session laws, hacking them to pieces, rearranging them, and stitching them back together in a way that gives them false life. Many pieces are altered, and many others are thrown away. The result is something like a Cliffs Notes guide to the real law.”). *See also id.* at 291-92.

13. *See, e.g.*, *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 753 (Tex. 2006) (“courts must enforce the contract as made by the parties, and cannot make a new contract for them”); *HECI Exploration Co. v. Neel*, 982 S.W.2d 744, 753 (Tex. 2006) (“Our decisions have repeatedly emphasized that courts ‘cannot make contracts for [the] parties.’”) (quoting *Gulf Prod. Co. v. Kishi*, 103 S.W.2d 965, 968 (Tex. 1937), which in turn quotes *Freeport Sulphur Co. v. Am. Sulphur Royalty Co. of Tex.* 6 S.W.2d 1039, 1490; *In Re Arbitration Between Argonaut Midwest Ins. Co. v. Gen. Reinsurance Corp.*, ); *Fernandez v. Homestar at Miller Cove, Inc.*, 935 So.2d 547, 551 (Fla. App. 2006) (courts are “powerless to rewrite [a] contract to make it more reasonable or advantageous to one of the parties...or to substitute [the court’s] judgments for that of the parties to the contract in order to relieve one of the parties from the apparent hardships of an improvident bargain.” This sentiment is sufficiently strong that it also discourages courts from severing portions of a statute or contract that violates law or policy. *See* David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639 (2008); John Nagle, *Severability*, 72 N.C. L. REV. 203 (1993). *See, e.g.*, *Golden Road Motor Inn v. Islam*, 376 P.3d 151 (Nev. 2016) (court finds restrictive covenant overbroad and refuses to revise or “blue pencil” to bring covenant in compliance with public policy limits) (decision later legislatively overruled in part by Nev. Rev. Stat. § 613.195(5) requiring judicial editing of overbroad restrictive covenant to conform to legal limits).

14. In the arena of lay politics, the standard statement by politicians appointing judges or of judicial candidates is that they will apply the law as written and not engage in “judicial activism.” *See, e.g.*, DAVID MCKAY, *AMERICAN POLITICS AND SOCIETY* 293 (2009) (“One of Richard Nixon’s 1968 campaign pledges had been to replace the liberals of the Warren Court with ‘strict constructionists’, or conservatives less prone to the advancement of civil rights and liberties characteristic of the Warren era.”); Reuters Staff, *Trump to nominate ‘strict constructionist’ to Supreme Court: Pence*, Reuters (Jan 26, 2017), <https://perma.cc/U38Y-DGDY> (characterizing “strict construction” as “a manner of interpreting the U.S. Constitution using a literal and narrow definition of language in the document without regard to changes that have occurred in American society since the 18th century document was written.”); Jeffrey Rosen, *Can Bush Deliver a Conservative Court?* N.Y. TIMES (Nov. 14, 2004), available at <https://perma.cc/T39J-66XS> (noting President George W. Bush’s frequent promises to supporters to nominate strict constructionists).

15. *See* Shawn Bayern, *Contract Meta-Interpretation*, 49 UNIV. CAL.-DAVIS L. REV. 1097 (2016) (noting this claim of textualists and response of contextualists; further arguing that parties may have different preferences regarding interpretation and courts should determine and apply the preferences of particular the contracting parties before the court); Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 938-39 (2010) (endorsing textualism on the basis of both posited judicial restraint and consumption of fewer judicial resources due to reduction in need to consider extrinsic evidence); Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 61, 68 (1994) (“Intent is elusive for a natural person, fictive for a collective body”). *See, e.g.*, Maura D. Corrigan, *Textualism in Action: Judicial Restraint on the Michigan Supreme Court*, 8 TEX.

Textualism is one of the core orthodoxies of American law and dispute resolution, even though both modern cognitive science and practical experience have shown its limits. Undue reverence for text abounds even when inapt.<sup>16</sup> Deviation from textualism is minimally met with raised eyebrows and often condemned as an undue departure from settled law.

Departures from strict textualism, particularly in insurance cases, are often erroneously and unfairly treated as episodes of lawless judicial activism or policymaking by judges. This view is misplaced. A more integrative indicia of contract term meaning does not excessively empower judges relative to legislatures, executives, and private parties but instead permits courts to help ensure that statutes, contracts, and insurance policies function in a manner consistent with the intent, purpose, and operation of the assenting parties.

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REV. L. & POL. 261 (2003) (Chief Justice of Michigan Supreme Court argues for textualist approach to constrain judiciary and further democratic values); Clint Bolick, *The Case for Legal Textualism*, Hoover Institution (Feb. 27, 2018), <https://perma.cc/XCR5-JTUA> (Arizona Supreme Court Justice and former prominent lawyer for conservative causes argues that “textualist judges provide the greatest possible guarantee that the judiciary will safeguard the Constitution and the rule of law.”). For refutation of the textualist claim of stability and neutrality in the context of personal jurisdiction issues, see Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883 (2008).

Although Judge Easterbrook and Justices Corrigan and Bolick were addressing constitutional and statutory interpretation, their assessments are frequently applied to contract textualism, and probably for similar reasons, which may explain why it appears that the most vigorous textualists are often political conservatives. To be sure, a political liberal may enjoy giving broad construction to language in order to aid a consumer, former employee, or policyholder seeking coverage (e.g., broad application of the “all sums” language in the standard CGL policy), but conservatives appear attracted to textualism out of concern that departure from policy or other contract document text will result in government interference (by the judiciary) somehow interfering with private bargains. Although we are sympathetic to this sentiment, we think it misplaced in many contract disputes, particularly insurance coverage matters where product-like policy text is standardized, typically unread (and not available until after sale) and does not result from specific negotiation and discussion as in the classic bargain model of contract.

16. See, e.g., *Maxine Furs, Inc. v. Auto-Owners Ins. Co.*, 426 Fed. App’x 687 (11th Cir. 2011) (applying Alabama law) (smell of Indian curry from adjacent restaurant prompts suit by fur shop where merchandised affected by aroma; restaurant not covered by CGL policy due to pollution exclusion; no application of absurd result canon); *Hirschhorn v. Auto-Owners Ins. Co.*, 809 N.W. 2d 529 (Wis. 2012) (bat guano deposited in vacation home during off-season falls within pollution exclusion of homeowners policy; no application of absurd result canon); *Owens v. Owens*, 6 S.E. 794 (N.C. 1888) (wife who is accessory to husband’s murder can nonetheless obtain distribution of property); *Dan v. Brown*, 4 Cow. 483 (N.Y. Sup. Ct. 1825) (literal language of will applied in spite of beneficiary killing testator); (same re beneficiary of life insurance policy). This view became increasingly recognized as wrong after *Riggs v. Palmer*, 22 N.E. 188, 191 (N.Y. 1889), which created a common law “slayer’s rule” (albeit over a dissent). Even after *Riggs*, enough courts were hesitant to depart from textual literalism to require legislation codifying the slayer’s rule, which is now the norm. See John W. Wade, *Acquisition of Property by Wilfully Killing Another – A Statutory Solution*, 49 HARV. L. REV. 715 (1936).

See also *Tumlinson v. Norfolk & Western Railway Co.*, 775 S.W.2d 251, 253 (Mo. Ct. App. 1989) (written term seemingly clear on its face may be deemed ambiguous if literal application renders an absurd result); Linda D. Jellum, *But That Is Absurd! Why Specific Absurdity Undermines Textualism*, 76 BROOK. L. REV. 917 (2011) (collecting examples of application of absurd result canon in context of statutory construction).



After a preliminary sketch of the preferred Integrative Approach to insurance policy construction, this Article briefly<sup>17</sup> examines textualism in the insurance context and finds it flawed. This Article then outlines the proper role of the judiciary as an institution that should assist the operation of contracts and statutes. Courts need not be cabined by textualism to “stay in their lane” relative to other branches as well as the decision-making preferences of the parties.<sup>18</sup> Rather, courts can adopt a broader, more Integrative Approach to construction without violating traditional norms of the judicial role.<sup>19</sup> Finally, this Article proposes a workable Integrative Approach to the construction of insurance policies and other contracts. This approach will enable judges to vindicate the objectives of these instruments.

The integrative solution is not radical. It attempts to draw the legal profession back to reality, where risk management principles, commerce, and social institutions all necessarily impact the construction of meaning in a policy term. Textualism’s staunch resistance to the value added by contextual information is comparatively extreme.

## I. PRECURSORS TO THE INTEGRATIVE APPROACH

### The magnetic push and pull between textual and contextual approaches

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17. The shortcomings of textualism would support a longer discussion or an entire article or book. We hope, however, that we present enough criticism to persuade readers that embracing a narrow textualism risks more erroneous contract construction than do broader approaches such as the very broad Integrative Approach we champion. *See also* Mark A. Lemley, *Chief Justice Webster*, 106 IOWA L. REV. 299 (2020) (criticizing textual literalism and reliance on dictionaries); William N. Eskridge, *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531 (2013) (reviewing SCALIA & GARNER, *supra* note 7) (criticizing hidden use of value judgments in purportedly objective textual analyses); Miranda McGowan, *Do as I Do, Not as I Say, An Empirical Investigation of Justices Scalia’s Ordinary Meaning Method of Statutory Interpretation*, 78 MISS. L.J. 129 (2008) (finding substantial use of discretion in assessing meaning despite Justice’s claim of constraint in assessing textual meaning); James Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1 (2005) (finding selective, inconsistent use of linguistic canons favored by textualists); Ellen Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275 (1998) (finding inconsistent use of dictionaries in textualist opinions).

18. The phrase “freedom of contract” has become something of a cliché but at its core contains a powerful public policy goal: allow individuals and entities to engage in transactions that are viewed as mutually beneficial without excessive government interference. But contracting parties are agreeing upon purchase of certain things, services or objectives rather than agreeing on documentary language. The language of contract documents, although important, is not all-important, particularly when such language is unlikely to be read and analyzed and when disclosures are of limited efficacy. *See generally* OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* (2014).

19. Again attacking conventional wisdom, we do not think the judiciary exceeds its role when judges do more than assess the face of the text of contract documents (or statutes for that matter). Rather, judges are more true to their proper role in a coordinate branch of government when they are more readily able to construe insurance policies and other contracts in a manner that facilitates their effective operation as envisioned by the parties and which serves the context of the transaction represented by the contract.

to insurance policy interpretation is not new. That the United States appears to have landed on the textualist side of contract interpretation questions is also not new. But that has not always been the case in all American jurisdictions. Rather, three major and influential legal episodes proposed contextualist approaches in the past and developed compelling safeguards around the trappings of textualism. However, these developments, over time, became cabined by the textualism movement. In short, contextualism did not stick. The Integrative Approach proposed in this Article builds on the solid foundations of historical, widely accepted approaches to create a modern comprehensive approach to insurance policy construction.

A. *The California Supreme Court's Pacific Gas & Electric v. Thomas Drayage Opinion*

In the 1968 decision *Pacific Gas & Electric v. G.W. Thomas Drayage & Rigging Co.*,<sup>20</sup> the California Supreme Court adopted a more lenient attitude to admitting extrinsic evidence of contractual meaning compared to the “plain meaning” practices that had come before. The *Thomas Drayage* Court signaled that context matters. Courts cannot merely look at the text of a contract to determine meaning, by imbuing whatever the judge “thought” was the “plain meaning” of the text. Though subsequent cases have been less openly contextualist and more textualist in rhetoric, the *Thomas Drayage* decision, written by celebrated jurist Justice Roger J. Traynor<sup>21</sup> remains good law in California. Although many subsequent state Supreme Court opinions have been more textualist in tone<sup>22</sup> and application,<sup>23</sup> the state’s jurisprudence as a whole has retained a relatively

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20. 442 P.2d 641 (Cal. 1968).

21. *Thomas Drayage* was authored by the celebrated jurist Justice Roger J. Traynor, a former University of California-Berkeley law professor, primarily known as a tax expert when he was appointed to the California Supreme Court in 1940. He is today largely remembered for leading tort and contract opinions written while he was on the Court as either an Associate Justice (1940-1964) or as Chief Justice (1964-1970). See, e.g., *Escola v. Coca-Cola*, 150 P.2d 436 (Cal. 1944) (urging use of strict product liability in concurring opinion); *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963) (establishing strict product liability as state law); *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968) (establishing tort of negligent infliction of emotional distress); *Drennan v. Star Paving Co.*, 333 P.2d 757 (Cal. 1958) (permitting use of promissory estoppel to create contract obligations); *Seely v. White Motor Co.*, 403 P.2d 145 (Cal. 1965) (leading opinion discussing the “economic loss” doctrine and its limitation on tort-style remedies for product failure). See also *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948) (striking down state miscegenation statute); *Bernhard v. Bank of America*, 122 P.2d 892 (Cal. 1942) (eliminating mutuality requirement for defensive use of collateral estoppel).

22. Although *Thomas Drayage* remains good law in California, its rate of invocation has declined as more recent cases have become more popular citations for summarizing state contract construction doctrine. But these cases, although perhaps not emphasizing receptivity to extrinsic evidence, have not retreated entirely from the Traynor formula.

23. See, e.g., *Dore v. Arnold Worldwide, Inc.*, 139 P.3d 56, 58-60 (Cal. 2006) (citing *Thomas*

contextualist approach in spite of reduced citation to the *Thomas Drayage* opinion.<sup>24</sup>

In *Thomas Drayage*, the parties entered a contract to replace the metal cover of the plaintiff's steam turbine. The defendant agreed to perform the work "at (its) own risk and expense" and to "indemnify" the plaintiff "against all loss, damage, expense and liability resulting from . . . injury to property, arising out of or in any way connected with the performance of this contract."<sup>25</sup> During the course of the work, the cover fell and damaged the rotor of the turbine. The plaintiff sued for the repair cost on the theory that the contract indemnified the plaintiff for damage to all property regardless of ownership. However, the defendant argued that the clause was meant only to cover injury to property of third parties and not the plaintiff's property. The defendant supported its argument with admissions from plaintiff's agents and evidence regarding the course of dealing based on its past contracting practices. The lower court refused evidence related to the intent of the contractual terms in the agreement. Instead, the lower court construed the terms based on *the court's* determination of the term's plain meaning.

The *Thomas Drayage* Court held that, by failing to admit extrinsic evidence to interpret what the parties meant by this indemnity clause, a court:

determines the meaning of the instrument in accordance with the 'extrinsic evidence of the judge's own linguistic education and experience.' (3 Corbin on Contracts (1960 ed.) (1964 Supp. s 579, p. 225, fn. 56).) The

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*Drayage*) (finding employment at will and discharge at any time language in job contract clear and not susceptible to being construed as contract requiring cause for discharge as advocated by employee plaintiff) (but see 139 P.3d at 62 (Baxter, J., joined by Moreno, J.), refusing to join majority's "general endorsement" of *Thomas Drayage*); *Bank of the West*, *infra*, note 24 at 552-53 (finding policyholder's proffered interpretation inconsistent with context of transaction and insurance product as well as precedent from other jurisdictions); *Garcia v. Truck Ins. Exchange*, 682 P.2d 1100, 1104-05 (Cal. 1984) (finding policy language not receptive to construction insured sought to place upon it through extrinsic evidence; also finding evidence unpersuasive); *Sarnecky v. D'Amato Conversano, Inc.*, 2018 Cal. App. Unpub. LEXIS 899 (Feb. 8, 2018) at \*29-\*30 (citing *Thomas Drayage*) (rejecting proffer of "parol evidence" (arguably extrinsic evidence rather than parol) on ground that text language was clear and subjective party intent insufficient to vary clear text); *Edward W. Scott Elec. Co. v. Thompson Pac. Constr., Inc.*, 2018 Cal. App. Unpub. LEXIS 768 (Jan. 30, 2018) at \*20-\*24 (citing *Thomas Drayage*) (finding text not "reasonably susceptible" to construction advocated by litigant).

24. See, e.g., *Waller v. Truck Ins. Exch. Inc.* 900 P.2d 619, 627 (Cal. 1995) (focusing on facial ambiguity of policy text and defining ambiguity as language capable of two or more reasonable constructions, a situation that justifies consideration of extrinsic evidence and application of contra proferentem doctrine in which unclear language is resolved against drafter of the language); *Bank of the West v. Superior Court*, 833 P.2d 545, 545-46 (Cal. 1992) (setting forth similar ground rules of contract construction). See also *MacKinnon v. Truck Ins. Exchange*, 31 Cal. 4th 635, 648 (2003) (discussing insurance contract interpretation norm that exclusions are narrowly construed against insurer and in favor of policyholder). The California Supreme Court last cited *Thomas Drayage* in *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Ass'n*, 291 P.3d 316, 321 (Cal. 2013).

25. *Thomas Drayage*, 442 P.2d at 643.

exclusion of testimony that might contradict the linguistic background of the judge reflects a judicial belief in the possibility of perfect verbal expression. (9 Wigmore on Evidence (3d ed. 1940) s 2461, p. 187.) This belief is a remnant of a primitive faith in the inherent potency and inherent meaning of words.<sup>26</sup>

The court held that the threshold question for admitting extrinsic evidence of word meaning should not be whether the word appears to the court to be plain and unambiguous. Instead, the test should be whether “the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.”<sup>27</sup> For the court, the relevance of the parties’ intentions are paramount because words “do not have absolute and constant referents” and have no “fixed meaning.”<sup>28</sup> Extrinsic evidence should be admitted because courts cannot “presuppose a degree of verbal precision and stability our language has not attained.”<sup>29</sup>

According to Justice Traynor, there is real danger in leaving a contractual term’s plain meaning solely to a court’s discretion, because courts could mistakenly attribute a meaning that the parties never intended.<sup>30</sup> Therefore, “rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties.”<sup>31</sup> That evidence includes testimony about the surrounding circumstances of the making of the agreement, as well as evidence of the object, nature and subject matter of the agreement.

Although the decision has its critics,<sup>32</sup> it has not created the problems of which it is sometimes accused.<sup>33</sup> Contract and insurance law function

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26. *Id.*

27. *Id.* at 644.

28. *Id.*

29. *Id.*

30. *Id.* at 645.

31. *Id.*

32. *See, e.g.,* Trident Center v. Connecticut Gen. Life Ins. Co., 847 F.2d 564 (9th Cir. 1988) (purporting to grudgingly apply California law after considerable criticism of *Thomas Drayage*). But, as discussed herein, Judge Alex Kosinski in *Trident Center* paints a misleading picture of California law as well as misapplying it.

33. For example, the *Trident Center* opinion portrayed *Thomas Drayage* as creating a body of California law that made it impossible for commercial actors to rely on contract text. *See* 847 F.2d at 569, contending that *Thomas Drayage*:

“casts a long shadow of uncertainty over all transactions negotiated and executed under the law of California.” [Agreements with] contract language that is devoid of ambiguity [are subject to] “costly and protracted litigation [that] cannot be avoided if one party has a strong enough motive for challenging the contract. While this rule creates much business for lawyers and an occasional windfall to some clients, it leads only to frustration and delay for most litigants and clogs already overburdened courts.

It also chips away at the foundation of our legal system. By giving credence to the idea that words are inadequate to express concepts, [*Thomas Drayage*] undermines the basic principle that language provides meaningful constraint on public and private conduct. If we are unwilling to say that parties, dealing face to face, can come up with language that binds them, how can we send

more than adequately in California, the nation's largest state<sup>34</sup> with the world's sixth largest economy.<sup>35</sup>

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anyone to jail for violating statutes consisting of mere words . . . How can courts ever enforce decrees . . . ?

Although impressive rhetorically, the statement was hyperbole in 1988 and looks even more ridiculous 40 years later in light of the continued economic growth and legal importance of California that seems unlikely to have occurred if the state was really saddled with unworkably unpredictable contract law.

Judge Kosinski was – by his own admission – engaging in a bit of a vanity attack on Justice Traynor. See Alex Kosinski, *Who Gives a Hoot About Legal Scholarship?*, 37 HOUS. L. REV. 295, 298-99 (2000) (“I had grown tired of law clerks who thought California Chief Justice Traynor was the cat’s pajamas because he didn’t believe that any contract could be interpreted without the use of extrinsic evidence.”).

Perhaps most disturbing about *Trident Center* is that the case is simply wrong on its own terms. One need not apply an external critique to *Trident Center*. *Trident Center* on its face is internally inconsistent. The opinion states (847 F.3d at 567) that “the clause on which Trident relies [in seeking to accelerate payment of a loan without penalty] is not on its face reasonably susceptible to Trident’s proffered interpretation.” According to the plain language of the text, “[w]hether to accelerate repayment of the loan in the event of default is entirely [the lender’s] decision. The contract [document text] makes this clear at several points.” The court found it “difficult to imagine language that could more clearly assign to [the lender] the exclusive right to decide whether to declare a default, whether and when to accelerate, and whether, having chosen to take advantage of any of its remedies, to rescind the process before its completion.”

In other words, the language of the loan agreement is not reasonably susceptible to a construction that would allow the borrower (Trident Center was a joint venture of two law firms to purchase an office building in West Los Angeles where the firms continue to operate) to accelerate repayment of the loan without penalty, an issue that arose because the loan carried a high interest rate and rates had dropped substantially within a few years of the making of the loan.

The finding of no susceptibility to permitting prepayment without penalty should have ended the case and avoided any significant detour for discussion of extrinsic evidence. *Thomas Drayage* explicitly states that, to be permitted, extrinsic evidence must advance a construction of the text at issue for which the text is reasonably susceptible. The *Trident Center* court ignores this aspect of *Thomas Drayage*, despite its finding of textual clarity in the loan agreement.

*Trident Center*, despite its strident rhetoric, fails to make the case against *Thomas Drayage*. *Trident Center* likewise fails to undermine the case for the Restatement (Second) approach to contract interpretation or this article’s proposed Integrative Approach.

34. See *California Passes France as World’s 6th-Largest Economy*, FORTUNE, June 18, 2016. But see Geoffrey Miller, *Bargains BiCoastal: New Light on Contract Theory*, 31 CARDOZO L. REV. 1475 (2010) (noting business preference for choosing New York contract law because of its perceived greater textual orientation than that of California).

35. In our view, California contract and insurance law function pretty well. At a minimum, the state’s approach to contract construction does not appear to have thwarted growth and commercial development. To be sure, one can argue that California would be even more of an economic powerhouse were it not saddled with *Thomas Drayage* and its tolerant approach to extrinsic evidence. But we are skeptical. And insurers win more than their share of coverage disputes in California. See, e.g., *PPG Industries, Inc. v. Transamerica Ins. Co.*, 975 P.2d 652 (Cal. 1999) (insurer that acted in bad faith in failing to defend is not responsible for punitive damages component of award against policy); *Buss v. Superior Court*, 939 P.2d 766 (Cal. 1997) (insurer that defended case where only one of 19 causes of action was potentially covered may seek repayment of portion of fees).

*Buss* is additionally interesting because it not only ruled for the insurer in permitting it to seek recoupment of counsel fees but in doing so rejected a strict textual analysis in favor of what the court implicitly regarded as a more equitable approach in a case such as *Buss* in which the insurer defended a case in which only one of the nineteen claims for relief was potentially covered. But the language of the policy in question, standard form CGL language, states that the insurer has a duty to defend “suits.” It

### B. *The Restatement (Second) of Contracts*

The *Restatement (Second) of Contracts*,<sup>36</sup> promulgated by the American Law Institute in 1981, took a decidedly contextualist approach to contract interpretation, tracking the same reasoning as the California Supreme Court in *Thomas Drayage*. It indicated that courts should interpret the meaning of contractual terms in light of the drafting circumstances, with the “principle purpose of the parties” given “great weight.”<sup>37</sup> An agreement should be interpreted as a whole, and the “generally prevailing meaning” of words at issue controls “unless a different intention is manifested.”<sup>38</sup> The Restatement also authorizes courts to weigh evidence regarding parties’ courses of contractual performance.<sup>39</sup> Finally, the intention of the contracting parties should be interpreted as consistent with relevant course of performance, course of dealing, or usage of trade evidence.<sup>40</sup>

The meaning, as derived from the intentions of the contracting parties, thus reigns supreme in both the Restatement approach and *Thomas Drayage*. The Restatement adopts a form of the reasonable expectations doctrine as found in insurance law.<sup>41</sup>

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does not say the duty to defend is limited to potentially covered *claims*.

36. See AMERICAN LAW INSTITUTE, RESTATEMENT (SECOND) CONTRACTS §§ 200-229 (1981).

37. *Id.* § 202(1).

38. *Id.* § 202(3) (a).

39. *Id.* § 202(4).

40. *Id.* § 202(5).

41. The reasonable expectations of contracting parties is an important tool of contract interpretation used by almost all courts in varying degrees. But under a strong form of the reasonable expectations approach (sometimes labeled a reasonable-expectations “doctrine”), policyholder expectations of coverage will be honored by the court even if policy language is clearly to the contrary, particularly where the language, even if clear, is not prominently displayed in the insurance policy or related documents. The doctrine is most associated with Harvard Law Professor Robert E. Keeton, later a federal judge – See Robert E. Keeton, *Insurance Rights At Variance With Policy Provisions – Pt. I*, 83 HARV. L. REV. 961 (1970) (focusing on coverage issues); Keeton, *Insurance Rights At Variance With Policy Provisions – Pt. II*, 83 HARV. L. REV. 1281 (1970) (focusing on claims handling and settlement) – but has spawned a large body of literature. See, e.g., Peter N. Swisher, Symposium Introduction, 5 CONN. INS. L.J. 1 (1998).

To summarize at the risk of over-simplifying, there is a “strong” form of the reasonable expectations approach, that occasionally appears in judicial decisions. See, e.g., *Atwater Creamery Co. v. Western National Mut. Ins. Co.*, 366 N.W.2d 271 (Minn. 1985) (refusing to enforce theft provisions requiring “visible marks of forced entry” for coverage despite clarity of language). But this is not the norm. See Mark C. Rahdert, *Reasonable Expectations Reconsidered*, 18 CONN. L. REV. 323 (1986) (noting initial enthusiasm for doctrine in wake of Keeton article but subsequent decline in use). Rather, policyholder reasonable expectations are often only considered if policy language is ambiguous. See JEFFREY W. STEMPEL & ERIK S. KNUTSEN, *STEMPEL & KNUTSEN ON INSURANCE COVERAGE* § 4.08 (4th ed. 2016); BARRY R. OSTRAGER & THOMAS R. NEWMAN, *HANDBOOK ON INSURANCE COVERAGE DISPUTES* § 2.04 (16th ed. 2016); Jeffrey W. Stempel, *Unmet Expectations: Undue Restriction of the Reasonable Expectations Approach and the Misleading Mythology of the Judicial Role*, 5 CONN. INS. L.J. 181 (1998) (noting use of modest form of reasonable expectations analysis across spectrum of contracts and arguing for greater willingness to use strong form of approach for insurance disputes).

*C. The Pre-2018 Drafts of the Restatement of the Law of Liability Insurance*

Prior to its passage by the American Law Institute in 2019, the *Restatement of the Law of Liability Insurance* (“RLLI”)<sup>42</sup> went through numerous revisions. In the early pre-2018 drafts, the RLLI conveyed a more lenient attitude toward extrinsic evidence on issues of insurance policy construction than that of many courts and commentators. The pre-2018 RLLI position mirrored the California Supreme Court’s decision in *Thomas Drayage*.<sup>43</sup> Notwithstanding that the RLLI was merely endorsing a contract construction approach long used by California, which was consistent with the ALI’s own *Contracts Restatement*, RLLI critics opined that its contract construction sections were an invitation to anarchy that would irreparably destabilize not only insurance law but American commerce in general.<sup>44</sup> The draft RLLI proposal, though quite deferential to text (arguably more than the *Restatement (Second) of Contracts*), was attacked for paying insufficient homage to the words of an insurance policy.

The December 2017 RLLI draft stopped short of embracing the contextual approach of the *Restatement (Second) of Contracts*. Instead, it attempted to affirm deference to text but permit judicial consideration of sufficiently instructive non-textual information about the meaning of a disputed term. § 3 of the December 2017 RLLI draft became a lightning rod for textualist rancor, despite its innocuous title, “The Presumption in Favor of the Plain Meaning of Standard Form Insurance Policy Terms.”<sup>45</sup>

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42. AMERICAN LAW INSTITUTE, *RESTATEMENT OF THE LAW, LIABILITY INSURANCE* (2019) (“RLLI”).

43. *Pacific Gas & Electric v. Thomas Drayage*, 442 P.2d 641 (Cal. 1968).

44. Outside the context of the RLLI, deviations from textualism are often attacked by legal formalists and political conservatives, although we do not think the Integrative Approach to contract construction proposed in this article is inherently politically liberal . . . or even anti-establishment. In our view, it is textualism that is more easily open to manipulation by judges than are the broader approaches to contract construction such as the Integrative Approach.

Simply put, it is easier to twist (consciously or unconsciously) words than it is to twist a variety of facts. A more comprehensive inquiry into contract meaning is often bounded by empirical data (e.g., evidence of party intent or purpose; information about background, history, or impact). This may be what has made textualism popular with conservatives who want to read text narrowly to limit the reach of legislation. *See, e.g., General Electric v. Gilbert*, 429 U.S. 125 (1976) (Supreme Court in opinion by Chief Justice William Rehnquist finds that pregnancy discrimination does not violate Title VII in that it is not disparate treatment in that only one sex can become pregnant; justifies ruling on textual and formalist grounds).

45. Of the roughly 200 comments posted to the section of the ALI website devoted to the RLLI, more than 150 were from insurers or insurer counsel. Many insurer comments attacked § 3. The common thread of the criticism was that the § 3 methodology was not sufficiently deferential to plain meaning. Beyond this, a number of the comments posited – apparently in all seriousness – that the § 3 methodology undermined the very fabric of American contract law. As discussed below, we are tempted to say such criticism borders on the ridiculous – except that it crosses the border into the ridiculous.

It put forth the following approach to insurance policy construction:

(1) The plain meaning of an insurance policy term is the single meaning, if any to which the language of the term is reasonably susceptible when applied to the claim at issue, in the context of the insurance policy as a whole, without reference to extrinsic evidence regarding the meaning of the term. If the term does not have a plain meaning, it is interpreted under the rules stated in §4 [regarding treatment of ambiguous terms].

(2) An insurance-policy term is interpreted according to its plain meaning as defined in subsection (1), unless extrinsic evidence demonstrates to the court that a reasonable person in the policyholder's position would give the term a different meaning. That different meaning must be one to which the language of the term is reasonably susceptible in light of the circumstances.<sup>46</sup>

§ 4 of the December 2017 RLLI regarding "Ambiguous Terms" generated similar heat:<sup>47</sup>

(1) An insurance-policy term is ambiguous if there is more than one meaning to which the language of the term is reasonably susceptible when applied to the claim in question, without reference to extrinsic evidence regarding the meaning of the term.

(2) When an insurance-policy term is ambiguous, the term is interpreted in favor of the party that did not supply the term, unless the other party persuaded that court that this interpretation is unreasonable in light of extrinsic evidence.

(3) A standard-form insurance-policy term is interpreted as if it were supplied by the insurer, without regard to which party actually supplied the term, unless the policyholder has agreed in writing to a contrary interpretative rule, in which case any term actually supplied by the policyholder will be interpreted using that contrary interpretative rule.<sup>48</sup>

Adverse insurer reactions to the contract construction provisions of the December 2017 RLLI were ill-taken and a bit puzzling. December 2017 RLLI § 3 raised the most concern among insurers not only because it goes more directly to the interpretative enterprise but also because it did not embrace the textual jurisprudence favored by many insurers. However, §

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46. RESTATEMENT OF THE LAW, LIABILITY INSURANCE § 3 (AM. L. INST. Proposed Official Draft 2017).

47. The gist of the criticism of the pre-2018 RLLI contract construction proposal argued that these provisions adopted an unduly favorable attitude toward extrinsic evidence and made for too powerful a version of the traditional *contra proferentem* rule. The criticism is ill-taken. The § 4 approach to ambiguity is consistent with mainstream contract jurisprudence. See PERILLO, *supra* note 4, at § 3.10; FARNSWORTH, *supra* note 4, at §§ 7.7-7.14.

48. RESTATEMENT OF THE LAW, LIABILITY INSURANCE, *supra* note 46, at § 4.



3 neither adopted a strong form of the reasonable expectations doctrine nor supported characterizations of the insurance policy that departed from the contract model. Rather, § 3 adopted—without expressly saying so—the approach taken by the California Supreme Court in *Pacific Gas & Electric Co. v. G.W. Thomas Drayage Co.*,<sup>49</sup> in which the Court declared:

The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.

A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained.<sup>50</sup>

The pre-2018 version of RLLI § 3(2) did not openly advertise its embrace of *Thomas Drayage* and characterized the decision as one following what the RLLI termed the “contextual” approach.<sup>51</sup> But it is difficult to see much distinction between the two formulations. Although the similarity may be lost on many readers, insurers and other textualists understood that RLLI § 3(2) opened the door to more judicial consideration of extrinsic evidence than they preferred. Consequently, they attacked this portion with considerable intensity.

But the similarity, if not outright congruence, between *Thomas Drayage* and the December 2017 RLLI § 3(2) logically should be seen as a plus rather than a minus for the provision. Not only is the *Thomas Drayage* approach reasonable and preferable to rigid textualism, but it has also proven workable for fifty years in a large jurisdiction. *Thomas Drayage* has been cited more than 1,000 times in subsequent cases. Just

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49. 442 P.2d 641 (Cal. 1968).

50. 442 P.2d at 644 (citations omitted).

51. See RESTATEMENT OF THE LAW, LIABILITY INSURANCE § 3, Reporters’ Note a. (AM. L. INST. 2017) (“The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether it appears to the court to be plain and unambiguous on its fact, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.”)(quoting *Thomas Drayage*).

By early 2018, the adverse reactions by powerful ALI constituencies resulted in the RLLI moving toward a more traditionally textual black letter § 3. Insurer opposition to the Section and to the RLLI generally spiked when it became known that the undertaking was changing from a Principles Project to a Restatement. As the ALI explains well in its description of Restatements approved by the ALI Council in January 2015 (reprinted at pp. x-xi of the RLLI), Restatements are not limited to endorsing the majority rule but may favor a better rule of law so long as the proposal enjoys some judicial support. And pre-2018 § 3(b) enjoyed substantial judicial support. But § 3 nonetheless triggered substantial insurer and corporate opposition.

as important, its enunciation of the treatment of text and receptiveness to extrinsic information continues to be cited.

The RLLI has been changed from a document supporting California's *Thomas Drayage* approach to one adopting a neoclassical deference to the text of the insurance policy and presumably related contract documents as well. Although this is not complete retrogression, neither is it progress.<sup>52</sup> More importantly, it does not provide the optimal methodology for construing insurance policies or resolving coverage disputes. Of the available choices before it, the ALI Council opted for the worst contract construction methodology. The December 2017 RLLI § 3, the *Restatement (Second) of Contract's* contextual approach, and the *Thomas Drayage* approach to extrinsic evidence are all superior methodologies to the simplistic and unrealistic textualist approach to plain meaning. Each is a precursor to the Integrative Approach to insurance policy construction. Unfortunately, these more promising approaches were arguably abandoned in the later stages of the RLLI process.

## II. THE INTEGRATIVE APPROACH: A PREVIEW

Insurance policy construction would benefit from an approach that begins with an anchoring inquiry into the purpose of the policy: the context of the policy and its sale as well as the underwriting and risk management intent of the product as understood by insurer and policyholder. At the outset, an interpreter should understand what the transaction memorialized on the paper was designed to accomplish in terms of risk management objectives, response to litigation, anticipated scenarios, distribution of the risk of uncertainty, scope of contractual commitment, and limitations.<sup>53</sup>

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52. See RESTATEMENT OF THE LAW OF LIABILITY INSURANCE, *supra* note 51, at Note a.

53. For insurance policy sales, particularly to consumers, there is relatively little bargaining over terms and little discussion of specific policy language. Consequently, it will often be particularly inappropriate to focus on policy text alone. See Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489 (2010) (advocating consideration of socioeconomic function of insurance policy at issue as interpretative tool in addition to text or other indicia of meaning); Jeffrey W. Stempel, *The Insurance Policy as Statute*, 41 MCGEORGE L. REV. 203 (2010) (noting degree to which standardized insurance policies function as a form of private legislation and suggesting more express use of statutory construction methodology in resolution of insurance coverage disputes); Jeffrey W. Stempel, *The Insurance Policy as Thing*, 44 TRIAL & INS. L.J. 813 (2009) (noting that typical insurance policies are purchased by most policyholders as a product intended for a specific purpose of risk management and protection which enhances case for reasonable expectations analysis); Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389 (2007) (noting product-like characteristics of insurance policies and arguing that that supports more express economic analysis as interpretative tool).

This understanding includes some appreciation of the market from which the purchase of insurance emerged as well as the overall setting of the transaction and the purpose of the agreement. For example, a particular type of risk, such as liquor liability, may be well-established as its own market with its own product, which supports application of the liquor liability exclusion found in a standard commercial general liability (CGL) policy despite arguments that this may run counter to the expectations of the policyholder.<sup>54</sup>

Reading the policy terms in light of this background information, and in the context of the whole policy at issue, is key to informing the interpretive exercise. This lays the backdrop for the larger context of the parties' transaction. The internal policy definition of a term is itself given great weight, but an Integrative Approach would allow courts to deploy several legal canons (many specific to insurance) in a quest for equitable meaning of a disputed term. Following the approach, a court would:

- a) construe the agreement broadly with an eye to the policy's risk management objectives (the context of the agreement, the parties' intentions, etc.);
- b) read and assess the text of the policy in light of this background context, and in light of the policy as a whole;
- c) apply standard insurance canons of construction to terms under review;
  - i. coverage grants should be construed broadly (and burden of persuasion on the policyholder)
  - ii. construe exclusions from coverage strictly and narrowly
  - iii. policy provisions that operate in the nature of exclusions should thus be treated like exclusions;
  - iv. insurers bear the burden of proving the applicability of an exclusion;<sup>55</sup>
  - v. exclusions should be subject to the reasonable rules of contra

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54. See Jeffrey W. Stempel, *Making Liquor Immunity Worse: Nevada's Undue Protection of Commercial Hosts Evicting Vulnerable and Dangerous Patrons*, 14 NEV. L.J. 866, 867-75 (2014) (describing history and development of dram shop liability; an insurance market exists for alcohol-serving establishments but is relatively "thin" in terms of participants and consumer choice of insurers); Randy Maniloff, *Broad Interpretation Given to Liquor Liability Exclusion: New ISO Exclusion Not Needed*, COVERAGE OPINIONS, Vol. 4, Issue 10 (Oct. 28, 2015) (noting consistency of judicial enforcement of liquor liability exclusion). See, e.g., *Capital Specialty Ins. Corp. v. PJD Entertainment of Worcester*, 126 F. Supp. 3d 176 (D. Mass. 2015).

55. Broad construction of insuring agreements and narrow construction of exclusions is hornbook law as expressed in treatises written by insurer counsel as well as policyholder counsel and law professors. See BARRY R. OSTRAGER & THOMAS R. NEWMAN, *HANDBOOK ON INSURANCE DISPUTES* § 2.02 (19th ed. 2019); ROBERT H. JERRY, II & DOUGLAS R. RICHMOND, *UNDERSTANDING INSURANCE LAW* § 14 (6th ed. 2018); EUGENE ANDERSON, JORDAN STANZLER, AND LORELIE MASTERS, *INSURANCE COVERAGE LITIGATION* § 2.02 at p. 2-23 (2d ed. 2004) (citing cases); PETER KALIS ET AL., *THE POLICYHOLDER'S GUIDE TO INSURANCE COVERAGE* §§ 10.01, 20.04 (2004) (citing cases); STEMPEL & KNUTSEN, *supra* note 41, § 2.06.

- proferentem,<sup>56</sup> if such terms are ambiguous;
- d) consider the following additional evidence of party intent, understanding, objectives<sup>57</sup> (not conditional on facial ambiguity of policy text):
- i. trade usage, technical manuals, industry materials, drafting history;<sup>58</sup>
  - ii. evidence of specific intent of the parties, if available;
  - iii. an established course of performance or course of dealing of the parties regarding administration of the insurance policy or program in question.<sup>59</sup>
  - iv. decisions of other courts construing the same or similar language;
  - v. treatises, law review articles and other secondary sources that may shed light on meaning;
- e) consider the identity of the policy as something other than a contract (a product, private legislation, social instrument or institution and outputs of a regulated industry);<sup>60</sup>

56. By “reasonable” rules of contra proferentem, we mean – consistent with the Integrative Approach we espouse – use of contra proferentem as a tiebreaker when other indicia of meaning do not resolve linguistic uncertainty or establish the proper application of an insurance policy. See STEMPEL, KNUTSEN & SWISHER, *supra* note 2, at § 2.05; STEMPEL & KNUTSEN, *supra* note 41, § 4.08 (4th ed. 2016). Contra proferentem should in our view be a last resort rather than a first resort.

57. We wish to distinguish, as we think do most observers, between “intent” and “purpose” of an insurance policy (or contract or statute generally). Intent refers to particular evidence of a party’s goal, objective, or expectation regarding the transaction. For example, there may be correspondence between the parties that specifically states whether the Pollution Point Power Plant or an uncharted island is within or outside the scope of coverage. Purpose refers to a less specific and more generalized objective of the transaction. For example, a general liability policy is designed to provide a defense claims of policyholder negligence during ordinary operations that caused injury to the claimant while product recall insurance is a separate product covering not the risk of inflicted injury but the need to remove product from the shelves in response to discovery of contamination or related problems. See, e.g., *McNeilab, Inc. v. North River Ins. Co.*, 645 F. Supp. 525 (D.N.J. 1986), *aff’d*, 831 F.2d 287 (3d Cir. 1987) (CGL policy does not cover recall expenses of Tylenol manufacturer’s removal of product from stores in wake of poisoning/tampering problems; court influenced not only by exclusionary language in CGL policy but market practice of selling recall insurance as separate product at separate premium).

58. Custom, practice, and trade usage are well-established as appropriate tools for contract construction. See RESTATEMENT (SECOND) CONTRACTS §§ 219-222; PERILLO, *supra* note 4, § 3.17; FARNSWORTH, *supra* note 4, § 7.13.

59. These interpretative tools are well-established in law. RESTATEMENT (SECOND) CONTRACTS § 223; PERILLO, *supra* note 4, § 3.17; FARNSWORTH, *supra* note 4, §§ 3.28, 7.13. Course of performance and course of dealing are often distinguished in that the former tends to refer to conduct in connection with a single contract performed over time or a series of closely related contracts while the latter tends to refer to a longer and broader range of conduct by the parties in their contractual relations with one another.

60. Consideration of insurance as a product, private legislation, a regulated industry, or a socioeconomic instrument has been advanced at some length in academic literature. See, e.g., Daniel Schwarcz, *A Product Liability Theory for the Judicial Regulation of Insurance Coverage*, 48 WM. & MARY L. REV. 1389 (2007); Jeffrey W. Stempel, *The Insurance Policy as Thing*, 44 TORT, TRIAL & INS. PRAC. L.J. (2008-2009); Jeffrey W. Stempel, *The Insurance Policy as Statute*, 41 MCGEORGE L. REV. 203 (2009-2010); Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653 (2013) (identifying conceptions of contract, public utility/regulated industry, product, and governance); Jeffrey W. Stempel, *The Insurance Policy as Social Instrument and Social Institution*, 51 WM. & MARY L. REV. 1489 (2010); Erik S. Knutsen, *Auto Insurance as Social Contract: Solving Automobile Insurance*

- f) if necessary, consider additional canons of construction or rules of grammar;<sup>61</sup>
- g) if necessary, consider contractual principles such as unconscionability, illegality, or public policy;<sup>62</sup>
- h) to the extent evidence regarding the contextual factors of intent, purpose, custom, practice, course of dealing, business practices and the like conflicts and has material relevance to the meaning of the policy, make apt use of

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*Coverage Disputes Through a Public Regulatory Framework*, 48 ALBERTA L. REV. 715 (2011) (arguing that the regulated and mandatory nature of Canadian automobile liability insurance is akin to a ‘social contract’ with society over compensatory rights); Christopher French, *Understanding Insurance Policies as Non-Contracts: An Alternative Approach to Drafting and Construing These Unique Financial Instruments*, 89 TEMP. L. REV. 535 (2017). But courts have been reluctant to openly use these alternative or supplemental characterizations of insurance policies as a means of assessing policy meaning. They are on occasion, however, applied as part of a reasonable expectations approach to construing policies. See, e.g., *C&J Fertilizer, Inc. v. Allied Mutual Ins. Co.*, 227 N.W.2d 169 (Iowa 1975) (finding property policy that purportedly covered theft but not where thief was slick enough to leave no visible marks was not adequate insurance product).

61. Canons of construction, although criticized with some frequency, are well established as tools for interpretation of contracts and statutes. The canons tend to divide into canons of word meaning (e.g., absent special circumstances, words are to be given the meaning attached by laypersons rather than specialists; each term in a contract should be given meaning and not treated as redundant of other terms in the contract document) and substantive canons (e.g., contracts should be construed insofar as possible to comply with the law). See WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON STATUTORY INTERPRETATION* ch. 6 and Appendix B (6th ed. 2020) (dividing canons according to “textual” and “substantive” canons). For a compilation of canons (which are often apply to contracts and statutes), see SCALIA & GARNER, *supra* note 5, ch. II (2012) (applying categories of “semantic” canons, “syntactic” canons, “contextual” canons, “expected-meaning” canons, “government-structuring” canons, “private-right” canons and “stabilizing” canons); ESKRIDGE, ET AL., *supra*, at 581-89, 595-597, Appendix B, Edwin Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 852-55 (1964) (identifying ten well-established canons of contract interpretation). For criticisms of canons generally or of particular canons, see ESKRIDGE, ET AL., *supra*, at 426-442; Richard A. Posner, *Statutory Interpretation – In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806-07 (1983); 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. 396, 401-06 (1950) (classic article juxtaposing contradictory but equally accepted canons of construction). For defense of canons, see SCALIA & GARNER, *supra*, note 7.

For an empirical examination of the U.S. Supreme Court’s use of canons that buttresses our view that textualism can be at least as malleable and result-oriented as consideration of non-textual factors, see James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 53-69 (2005) (finding that Justices vary in reliance on canons as contrasted with legislative history and that “canon usage by justices identified as liberals tends to be linked to liberal outcomes, and canon reliance by conservative justices to be associated with conservative outcomes.”). *Accord*, James J. Brudney & Corey Ditslear, *Liberal Justices’ Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117 (2008) (finding ideological differences in rulings of liberal and conservative Justices associated with differential use of canons).

62. These doctrines are not favored in that when invoked to countermand a clear agreement (or, more specifically, purportedly clear text in a document memorializing the agreement), they are perceived as countermanding the “bargain” struck by the parties. Nonetheless, these doctrines have substantial support in mainstream contract law, particularly when used sparingly and judiciously. RESTATEMENT (SECOND) CONTRACTS, *supra* note 4, §§ 178-196; PERILLO, *supra* note 2, § 3.7(e); FARNSWORTH, *supra* note 2, ch. 5.

the trial process to resolve disputed issues of fact.<sup>63</sup>

No single component of the Integrative Approach is novel. In fact, each pays homage to the law of many states, most predominantly to California law,<sup>64</sup> the *Restatement (Second) of Contracts*,<sup>65</sup> and the pre-2018 drafts of the RLLI. The Integrative Approach is not merely an academic exercise but a methodology that should be *used* by lawyers, insurers, and courts. It is an answer to the trappings of textualism that will produce more reliable and just coverage determinations than alternative interpretive approaches, in particular pure textualism. Its use will reduce the incidence of litigation in the medium to long run. Over time, the Integrative Approach will reduce the conflicting discrepancies that plague insurance coverage jurisprudence and propel unnecessary litigation.

The Integrative Approach can accomplish these objectives using currently established interpretive tools anchored by a purposive initial inquiry which simply “peeks” at extra-contractual indicia as a guiding hand. Indeed, much of the evidence courts consider does not even run afoul of the parol evidence rule or constitute remotely novel categories of extrinsic evidence.

### III. THE DISTORTION OF THE TEXTUALIST MIRAGE

Several rationales are advanced in support of textualism. However, all of these rationales are wanting, deceptive, or incorrect. One rationale, like the rationale for the statute of frauds, is that focusing on text is more likely to result in accurate contract determinations. Like textualism, this rationale falls short conceptually by treating the text of a memorialized agreement as the agreement itself. As stated by a leading contracts

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63. Because contract construction is a “matter of law,” courts tend to seek to decide contract construction cases on motion so long as there are not factual disputes about the content of the contract document (e.g., assertion of scrivener’s error, missing endorsement, fraud, mutual mistake). Although this is fine in apt cases, overly textualist courts may be unduly resistant to recognizing that a full consideration of interpretative factors suggests the need for fact finding and determination, whether by jury or bench trial. In apt cases, this is not a derogation of the prevailing rule that contract meaning is a matter of law but merely a realistic recognition that in some cases, the meaning and legal consequences of a transaction can only be assessed with the benefit of a fuller understanding of facts.

64. And especially *Thomas Drayage* and its progeny, discussed at TAN 20-36, *supra*.

65. RESTATEMENT (SECOND) CONTRACTS, *supra* note 4, §§ 200-229 (setting forth approach to contract interpretation). The Integrative Approach also shares substantial kinship with more comprehensive approaches to statutory constructions urged by prominent legislation and legal process scholars. See, e.g., HENRY HART JR. & ALBERT SACHS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374-80 (William N. Eskridge Jr. & Philip P. Frickey eds., 1994) (advocating approach to statutory interpretation that gives substantial consideration to purpose underlying statute and policies sought to be advanced as well as to the text of the law); William N. Eskridge Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321 (1990) (advocating multi-faceted approach to construction of statutes that considers precedent, legislative history, statutory purpose, developments since enactment, and public values and norms as well as statutory text).

casebook:

[T]he piece of paper is not a “contract.” . . . At most, the piece of paper is a memorialization of the contract . . . [A] contract is a promise or set of promises that the law will enforce.

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[T]here is a tendency to confuse the written paper signed by the parties with the contract that binds them. It is an easy mistake to make; everyone calls the signed paper “the contract.” But that paper is, at best, only evidence of the contract. That is, the contract is represented by that paper; it is not that paper. Otherwise, if you tore the paper up (or spilled coffee on it) you would also tear up or water down the parties’ obligations. While this may be the case with some types of obligations (such as checks or other negotiable instruments,), that is not the case with regular, everyday contracts.

Where do we find the promises collectively recognized as the contract? There are many sources. The most important, but not exclusive, source of contract terms is the words of the parties, be they written words or oral words.<sup>66</sup>

This is the conceptually correct characterization. The contract is not the text on paper, it is the deal, transaction, or objective memorialized on paper.<sup>67</sup> Parties can easily make a “scrivener’s error” and incorrectly memorialize an agreement.<sup>68</sup> In such cases, strict textualism barring consideration of extrinsic evidence is ludicrous. Contract law avoids this in part through doctrine permitting “reformation” of the memorialization (erroneously characterized as reformation of “the contract”)<sup>69</sup> or the

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66. DAVID G. EPSTEIN, BRUCE A. MARKELL & LAWRENCE PONOROFF, *CASES AND MATERIALS ON CONTRACTS: MAKING AND DOING DEALS* 12, 483-84 (4th ed. 2014). We find this characterization additionally weighty not because it is the casebook used in author Stempel’s Contracts class but because the authors are not only prominent scholars and teachers but have substantial real world experience as law school deans, consultants, and expert witnesses and as a federal bankruptcy judge.

67. To those who say that the writing (and not the agreement or undertaking) is the important thing, we say: “Fine. But then why not jettison the contract model altogether and treat insurance policies entirely as products subject to minimum standards of product quality with an implied warranty of merchantability and express or implied warranties of fitness for a particular purpose (e.g., general liability coverage, auto coverage). Such an approach would be conceptually cleaner than fussing over fine print and probably would not unduly favor either policyholders or insurers. See Stempel, *The Insurance Policy as Thing*, *supra* note 53. But the same traditionalists who advocate word worship are unlikely to be willing to depart from the contract model.

68. See FARNSWORTH, *supra* note 4, § 7.5; PERILLO, *supra* note 4, §§ 9.31-9.35.

69. See FARNSWORTH *supra* note 4, § 7.5; PERILLO, *supra* note 4, §§ 9.31-9.35. See, e.g., *Bd. of Trs. of Univ. of Ill. v. Ins. Corp. of Ir., Ltd.* 969 F.2d 329 (7th Cir. 1992) (based on evidence of party intent, court reforms insurance policy with language court read as providing for \$5 million per occurrence policy limits for annual period and four-month “stub” period into one providing \$5 million limit for year and separate \$5 million limit for occurrences taking place during stub period).

“absurd result” canon of construction.<sup>70</sup> The corrective power of these doctrines is limited in the hands of a raging textualist judge, particularly one aggressively invoking the parol evidence rule.<sup>71</sup> If the written memorialization is clear but inaccurate, it controls, which is silly. Such blind textualism elevates an erroneous writing above the actual agreement or transaction.<sup>72</sup> The objective of contract law is to enforce the promises actually made, not to enforce promises never made or different than made but contained in a writing. By definition, a contract is the agreement made, not the memorialization of the agreement.<sup>73</sup> But one might not understand this from reading the court opinions, which routinely refer to the memorialization as “the contract” without any distinction between agreement and written memorialization of the agreement.

When an agreement does not result from full-throated bargaining and relies on a standardized form, as is the case with most consumer contracts and insurance policies, one can argue that what takes place is not so much an agreement confirmed by a writing but the purchase of contractual rights, with adherence to the terms of the form. In these cases, the idea of “the contract” as text on paper may be more accurate. Contracts involving an insurance policy, a lease, cellphone service, or a credit card account are often *fait accompli* contracts where the document is not so much a memorialization but a declaration of respective rights and duties. In such cases, viewing the insurance policy as a consumer good or a factor sold

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70. See FARNSWORTH, *supra* note 4, §§ 7.10; PERILLO, *supra* note 4, §§ 3.10-3.13. See, e.g., ExxonMobil Oil Corp. v. TIG Ins. Co., 2020 U.S. Dist. LEXIS 87407 \*28 (S.D.N.Y. May 18, 2020) (acknowledging absurd result principle but finding it inapplicable to insurer’s challenge to arbitration award in favor of policyholder); Bice v. Petro-Hunt, L.L.C., 768 N.W.2d 496, 504 (N.D. 2009) (applying absurd result principle to reject proffered construction of gas lease); Reno Club v. Young Inv. Co., 182 P.2d 1011 (Nev. 1947) (contracts should not be construed so as to lead to an absurd result). See also TIBCO Software, Inc. v. Thrive Revenue Sys., LLC, 2019 Del. Super. LEXIS 595 \*15-16 (Del. Super. Ct., Nov. 21, 2019) (defining absurd result as “one that no reasonable person would have accepted when entering the contract”).

71. See FARNSWORTH *supra* note 4, §§ 7.2-7.6; PERILLO, *supra* note 4, ch.3 at 119-21.

Properly understood, the parol evidence rule should not be a barrier to just results in which the contract is given a meaning consistent with that intended, the purpose of the transaction, or the goals and role of the transaction in the larger commercial or consumer context. The proper view of the parol evidence rule is that it precludes consideration of prior agreements to vary the language of the contract document memorializing the actual, final agreement of the parties – provided the contract document is really the final agreement of the parties and was intended to be a fully integrated instrument containing all of the terms and conditions of the agreement. Consequently, background information regarding the parties, their relationship, the purpose of the transaction, the industry in question, and other contextual factors should not be barred by the parol evidence rule. See FARNSWORTH *supra* note 2, § 7.3; PERILLO, *supra* note 2, at §§ 3.2-3.4; RESTATEMENT (SECOND) CONTRACTS, *supra* note 4 § 213.

72. We continue to frequently use the term “agreement or transaction” because in many cases, a party contracts without really “agreeing” to any particular contract terms – and may even dislike the terms of the written document – but is voluntarily engaging in the transaction memorialized in the written contract documents.

73. See note 67, *supra*.



to a business makes more sense than continuing to cleave to the contract model.

But the product-like traits of an insurance policy does not make myopic examination of text (rather than a broader, more contextual approach) any more just. It does, however, support utilization of a strong form of the reasonable expectations approach or judicial willingness to assess contract meaning by noting the similarity of contracts to products, private legislation, or the activities of a regulated industry. This is particularly the case with insurance. But despite these considerations, courts continue to embrace a narrow textualism while failing to utilize these other conduits of meaning.

If the written “contract document” (a technically more accurate term than “contract”) is one where most of the contents were never discussed by the parties, it would seem more apt to treat such transactions like the sale of a product or give preference to the objectively reasonable expectations of the parties when construing such instruments. However, the same courts that cling so tenaciously to the inaccurate textual model are resistant to the more representative product and reasonable expectations models.

The accuracy justification for textualism is more of an anti-fraud justification, positing that consideration of information other than the text of the contract document opens the door to fabrication and deception as well as more benign error. The argument is that memories fade or become distorted. Therefore, a court should rely on text alone to the extent possible rather than extrinsic evidence of intent or purpose. Related is the argument that an unscrupulous or opportunistic party, or one with buyer’s remorse, may simply fabricate a side agreement or understanding not found in the text of the instrument.<sup>74</sup>

Though these arguments are not meritless, they are not persuasive—particularly so 400 years after the statute of frauds was enacted in England<sup>75</sup> and 150 years after the parol evidence rule took root in the United States.<sup>76</sup> Prior to the mid-twentieth century, sources of recollection and verification were limited. However, since the development of photocopies, phone and wire records, and electronic data, the quantity of memorialized extrinsic evidence has exploded. This explosion serves as a check on faulty memory and forgetfulness and makes fabrication much harder. This type of recorded information provides a more accurate depiction of the intent, purpose, and function of the contract than merely the contract itself.

Further, the purported accuracy rationale for strict textualism rests on

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74. See FARNSWORTH, *supra* note 4, at § 7.2; PERILLO, *supra* note 4, §§ 3.1, 3.2.

75. See FARNSWORTH, *supra* note 4, § 6.1; PERILLO, *supra* note 4, at 677-81.

76. See FARNSWORTH, *supra* note 4, at § 7.2; PERILLO, *supra* note 4, §§ 3.1, 3.11-3.14.

a shaky premise of institutional competence. The rationale posits that judges are exceedingly skilled at construing language but suspect in their ability to assess information regarding the background, intent, purpose, and context of an agreement. As one scholar put it, “judges are not investigative reporters.”<sup>77</sup> Justice William Brennan similarly asserted the historical prong of the Seventh Amendment right to a jury trial analysis should be retired because judges were not trained historians.<sup>78</sup>

But these criticisms of judicial competence regarding investigation and historical analysis fail to appreciate that judges are neither linguists nor trained in hermeneutics. While judges may have had competent English teachers in high school, discovered Strunk & White<sup>79</sup> during college or law school, and subscribe to Bryan Garner’s “word of the day” emails,<sup>80</sup> they typically lack training in word meaning or language use.<sup>81</sup> Judges also commonly lack formal training in psychology beyond the introductory courses of undergraduate days.<sup>82</sup>

Despite all their perceived deficiencies, judges make inferences about what contract draftspersons, legislative staff, and ISO<sup>83</sup> personnel are thinking when selecting policy language and drafting contracts and statutes. The canons of construction—at least those regarding word meaning—implicitly adopt an external view of the intent behind certain language.<sup>84</sup> These assumptions may be totally inaccurate if the drafting is done by someone with a different educational, vocational, or professional background.<sup>85</sup> The assumptions may have been inaccurate

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77. Jonathan Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 239 (1986) (“Judges interpret statutes; they are not investigative reporters. The idea that Congress passes statutes “with a wink,” and that courts should dig behind the scenes to find out the “real story,” is both unwarranted and dangerous.”).

78. *Teamsters Local No. 391 v. Terry*, 494 U.S. 558, 533 (1990) (Brennan, J., concurring).

79. WILLIAM STRUNK & E.B. WHITE, *THE ELEMENTS OF STYLE* (4th ed. 1999).

80. University of Texas law professor and linguistic entrepreneur Bryan Garner issues daily emails addressing questions of word meaning and language use. See, e.g., Bryan Garner’s Usage Tip: launch (April 20, 2018), available at [www.lawprose.org](http://www.lawprose.org).

81. See LAWRENCE M. SOLAN, *THE LANGUAGE OF JUDGES* (1993); Jill C. Anderson, *Misreading Like a Lawyer*, 127 HARV. L. REV. 1521 (2014); Jill C. Anderson, *Just Semantics, The Lost Readings of the Americans with Disabilities Act*, 117 YALE L.J. 992 (2008).

82. See JEAN STERNLIGHT & JENNIFER ROBBENOLT, *PSYCHOLOGY FOR LAWYERS* (2012).

83. ISO is the Insurance Services Office, an organization supporting the insurance industry through data collection and promulgation of insurance forms and endorsements for property and casualty insurers.

84. See ESKRIDGE, ET AL., *supra* note 61, Appendix B, (identifying canons of word meaning and canons reflecting substantive policy).

85. Although it may be a useful legal fiction to assume that every insurance policy or other contract document is written by people who received the same English grammar instruction and reacted to it in the same way, this is unrealistic to the point of absurdity. Some drafters were drilled with traditional rules and diagrammed sentences. Others attended open schools where rules of grammar (and perhaps rules generally) were not emphasized. And drafters vary in terms of whether they adhere to rules or rebel against them. If George Bernard Shaw or James Joyce writes the statute, one might take a different

even as applied to the educated professionals viewed as the typical drafters of contracts or statutes.

In short, although judges may be more sophisticated than the average person, they are not experts in hermeneutics. The same may be said about a judge's knowledge of politics, sociology, economics, statistics, business, or other industries involved in the cases, contracts, and statutes before judges. And yet the picture painted by textualists is that judges are masters in deciphering language but clueless about the history, psychology, sociology, public policy, or nature of the transactions involved in the statutes and contracts before the courts.<sup>86</sup>

Poppycock. The average judge is likely to understand manufacturing, retailing, sports, entertainment, investment, or construction at least as well as she understands the linguistic meaning of the text used in contract documents involving these activities. Further, in the American adversary system, one can reasonably expect that counsel for the litigants will provide ample contextual information to the court, just as advocates provide information and argument as to word meaning. There is no reason to think that judges are more accurate at reading text than understanding the extrinsic evidence of a dispute. The textualist narrative

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approach to its text than if it is written by a career bureaucrat.

Further, cheap shots at bureaucracy aside, there may be specific protocols governing particular drafters. For example, in the recently infamous "Oxford comma" case, the court was aware that the State of Maine's drafting manual for staff followed a style in which there was not a final ("serial" or "English" or "Oxford") comma before the conjunction and final term in a series of terms. In spite of this, the court took a highly textualist approach and regarded the absence of the comma as significant enough to combine rather than separate two categories in a list. See *O'Connor v. Oakhurst Dairy*, 851 F.3d 69 (1st Cir. 2017). The court's hyper-textual focus appears to be clearly at odds with the intended purpose and operation of the statute, which was amended to constructively overrule the *Oakhurst Dairy* result.

86. Economics has been the most successful extra-textual discipline to impact adjudication. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (8th ed. 2011); A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* (4th ed. 2011); ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* (5th ed. 2008). But even here, the impact is largely tacit rather than expressly based on economic analysis. *But see Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (Court finds predatory pricing so unlikely as a matter of economic theory that it insists on direct evidence of conspiracy if summary judgment is to be avoided. As much as we advocate judicial consideration of material other than documentary text, we acknowledge that *Matsushita's* excessively credulous embrace of a particular brand of economic theory as a matter of law may make a strong case for limiting judicial resort to social science theory. See Michael J. Kaufman, *Summary Pre-Judgment: The Supreme Court's Profound, Pervasive, and Problematic Presumption about Human Behavior*, 43 *LOYOLA U. CHI. L.J.* 592 (2012)) (withering criticism of *Matsushita*, attributing considerable ensuing doctrinal damage from the decision); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 *OHIO ST. L.J.* 95 (1988) (criticizing *Matsushita* but viewing its impact as more limited and isolated).

Our response is simply to note that mistakes will be made when pursuing even the most valuable of methodologies. A court taking the integrative and comprehensive approach to contract meaning can still make mistakes. We believe, however, that over sufficient time with a sufficiently large number of cases, courts will render better interpretative opinions if they regularly consider a broad range of interpretative factors in addition to text.

posits that judges have the linguistic skill of Harold Bloom<sup>87</sup> but process contextual evidence about as well as a fourth grader.

Another frequently advanced rationale for textualism is that a focus on text constrains courts from rendering decisions based on personal policy preferences.<sup>88</sup> However, this rationale incorrectly assumes that neutral readers of the text of a contract document can readily agree on its meaning. It assumes a false clarity of language that has been refuted by research and ignores the well-established vulnerability of humans to false consensus bias—the view that others interpret a writing the same way as the reader—when, in actuality, there is often substantial variance and difference of opinion.<sup>89</sup> Though this trait may be reduced or even controlled in the deliberative setting of appellate review, a single trial judge’s reading of a contract document is highly vulnerable to this trait. Fewer than half of a trial judge’s dispositive decisions are appealed,<sup>90</sup> which likely stems from the high cost of appeal at least as much as any substantive acceptance of the trial judge’s rulings.<sup>91</sup>

Also, the view that text constrains the results-oriented “activist” judge suffers from both a lack of clarity as to what constitutes impermissible result-orientation and naivety as to the potential for a result-oriented judge to flourish under a text-centric system. The judge wishing to advance personal policy preferences without regard to what the parties actually intended can easily do so by advancing an interpretation of text designed to achieve that result. By contrast, forcing this same result-oriented judge to address the context of the contract does more to restrain such a judge.

A third rationale posits that confining the judicial inquiry<sup>92</sup> to text

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87. Harold Bloom, Sterling Professor of Humanities at Yale University, is considered a leading scholar of literature and literary critic who is perhaps best known to the general public for *THE WESTERN CANON: THE BOOKS AND SCHOOL OF THE AGES* (1994) and *THE BOOK OF J* (2004). See also *HOW TO READ AND WHY* (2000). See James Shapiro, *The Soul of the Age*, N.Y. TIMES (Nov. 1, 1998), <https://perma.cc/6PVW-MFKF> (Bloom is “one of the most gifted of contemporary critics”).

88. See e.g., Paul Killebrew, Note, *Where Are All the Left-Wing Textualists?*, 82 N.Y.U. L. REV. 1895, 1918 (2007) (“By making judges stick to statutory text and refrain from making unbounded inquiries into legislative intent, textualism gives judges fewer materials on which to base interpretations chosen primarily because they further the judges’ own preferred outcomes.”).

89. See Lawrence Solan, *False Consensus Bias in Contract Interpretation*, 108 COLUM L. REV. 1268 (2008).

90. See Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Outcomes*, 1 J. EMP. LEG. STUDIES 659 (2004) (appeals filed in only 10-20 percent of cases, with appeal rate of less than 40 percent in cases with full trial).

91. See Donna Bader, *An Appeal to Reason* (2011), advertised at <https://www.anappealtoreason.com/faq> (cost of appeal ranges from \$20,000 to \$50,000); Sylvia H. Walbolt, *The Art of Evaluating an Appeal: 10 Hard-Learned Tips*, Carlton Fields (Aug. 23, 2016), <https://www.carletonfields.com> (prominent appellate lawyer notes that although appeals can be effective in changing adverse result or providing settlement leverage, they are also often costly and appellant is at a disadvantage in challenging trial court result).

92. See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION*:

conserves judicial resources and enhances judicial efficiency. This rationale appears the most accurate of the three. Logically, at least, it seems that a court can resolve contract disputes faster if it is required only to read and interpret text rather than to consider extrinsic evidence that emerges only after the court has presided over the resolution of discovery disputes.

But this argument overstates the time savings of a relentlessly textual approach. Unless obviously clear and apt for the circumstances, some nontrivial judicial resources will be required to read, understand, and reflect upon the language of statutes and contract documents and assess the arguments of counsel. By looking at text alone and purporting to understand it, the court will be tempted to resolve the interpretative dispute as a matter of law via a motion to dismiss or for summary judgment. This approach likely leads to appeal and reversal more frequently than a summary judgment decision as to meaning supported by extrinsic evidence. To the extent that extrinsic evidence shows a genuine issue of material fact precluding summary judgment, the case marches toward trial, probably to be settled without the expenditure of substantially more judicial resources.

In short, textualism does not save courts much time. Any time saved is likely at the cost of accuracy and justice. If judicial decisions as to the meaning of a writing are made with the benefit of additional information regarding meaning, those decisions are likely to be more accurate than decisions based on text alone. Even if this accuracy comes at significant administrative cost, it is a trade-off worth making. Reduced accuracy of contract construction decisions resulting from the rigid application of textualism should be acceptable only if limiting the inquiry to text saves vast amounts of judicial and legal resources. However, there is insufficient evidence of such efficiency to justify use of the limited, contextually impoverished inquiry of textualism, rather than the richer examination of the Integrative Approach.

A fourth rationale for textualism posits that it is an interpretative approach better suited to the limited authority of courts. The argument runs something like this: courts should avoid intruding on the other branches of government and agreements of private parties; when asked to

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FEDERAL COURTS AND THE LAW 36 (Amy Gutmann ed., 1997) ("The most immediate and tangible change the abandonment of legislative history would effect is this: Judges, lawyers, and clients will be saved an enormous amount of time and expense."); James P. Nehf, *Textualism in the Lower Courts: Lessons from Judges Interpreting Consumer Legislation*, 26 RUTGERS L. J. 1, 83 (1994) ("At bottom, one practical advantage of textualism is its comparative ease of application with little investment of judicial and litigant resources. Cases can be decided without extensive investigation of legislative histories or discussion of competing policy implications, tasks judges and litigants in the lower courts may find difficult to undertake."). Even strong supporters of textualism concede that this cannot be done in each case because of ambiguity of text. We are not trying to cartoon textualism.

construe a statute or contract, courts should limit their activity to classic judicial activity, such as reading and construing contract text, and avoid activity that could be construed as “rewriting” a contract or “legislating from the bench.”<sup>93</sup>

This argument and rationale rests on an infirm foundation. Although courts lack legislative and executive policymaking authority, legal rulings ultimately have policy implications. Even in the private law realm of contract, it has long been accepted that courts will not enforce illegal contracts, contracts made by minors, unconscionable contracts, or contracts that violate public policy. Thus, there is nothing “wrong” with courts making decisions based on public policy factors.

More importantly, like the adjudication of negligence claims, the resolution of contract disputes is a core judicial function. Contract dispute resolution by reference to material other than the text of contract documents does not offend other branches of government. In the realm of statutory interpretation, consideration of legislative history, executive orders, and presidential signing statements, there is more judicial deference to the coordinate branches than reliance on statutory text alone. The “judicial restraint” argument of strict textualism is just as weak as the other rationales discussed.

#### IV. COURTS AS HELPFUL AGENTS RATHER THAN LIMITED UMPIRES

The umpire metaphor of judging has a dominant place in American thinking about the judicial process, as perhaps most famously illustrated through its use by Chief Justice John Roberts to support his nomination. Justice Roberts successfully allayed concerns that his apparent history of conservative ideology and past political activity was inconsistent with the judiciary as comprised of judges functioning as mere neutral umpires who simply “call balls and strikes” without partisanship.<sup>94</sup> Although several commentators, correctly in our view, including Judge Richard Posner, pointed out flaws in the metaphor,<sup>95</sup> it resonated well with the lay public

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93. See sources cited in note 88, *supra* (arguing that textualism curbs judicial activism).

94. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing before the Committee on the Judiciary, S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of John G. Roberts, Jr., Nominee to be Chief J. of the United States) (“Judges are like umpires. Umpires don’t make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules, but it is a limited role. Nobody ever went to a ball game to see the umpire.”); MARK TUSHNET, *IN THE BALANCE: LAW AND POLITICS ON THE ROBERTS COURT* ix (2013) (noting success of Roberts umpire metaphor but finding it to mask Court with active conservative agenda). And Justice Roberts was hardly the first to invoke the umpire metaphor, although he may be the poster child of its success. See Symposium, *Alternative Visions of the Judicial Role* 32 SEATTLE U. L. REV. 511(2009).

95. See RICHARD A. POSNER, *HOW JUDGES THINK* 78 (2010) (criticizing umpire metaphor as both simplistic and affirmatively misleading).

and the body politic.<sup>96</sup>

To the extent that the umpire metaphor simply stands for the proposition that judges should not be biased for or prejudiced against the individual litigants or those clearly impacted by a decision, we have no quarrel with it. An umpire who takes a bribe, bets against the point spread, or even secretly has favorites or roots for one team is not a proper adjudicator. But even if not personally invested in the game, umpires differ regarding their views of the strike zone, reasonable time to allow a pitcher's set-up, out and safe calls at first base, what constitutes interference with a base runner, and the like.

Differential exercise of discretion abounds not only in the umpire analogy but throughout officiating. A football referee could call holding, illegal use of the hands or pass interference on nearly every play but does not. Basketball referees vary in the amount of body contact permitted under the basket, but "calling it close" could turn a game into a constant parade between the foul lines. Hockey officials display discretion in determining when a scrum for the puck in the corner becomes a boarding or cross-checking penalty. Just as some officials are known to call it close while others "let them play," judges vary in their approach to text.

To determine the relative merits of a strictly textual approach versus a broader approach to contract and statutory construction, one question to ask is whether strict textualism leads to more or less variance of interpretation compared to when judges consider text along with other indicia of meaning. More important still is the question of whether construction confined to text gives more or less accurate assessments than a broader approach. Also obviously important is the question of whether decisions rendered pursuant to a strictly textual examination yield more just outcomes than decisions made using a broader approach.<sup>97</sup>

Like the umpire analogy, a focus on text or even text alone is thought to constrain the judge from interjecting the court's own opinions, based on the view that language is almost always clear and can only be stretched so far when the interpreter is both confined to text and also unable to consider information beyond the text.<sup>98</sup> But this view is incorrect and not only ignores the great flexibility interpreters have regarding reading of text (similar to that of umpires and other officials) but also unduly

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96. John Roberts was confirmed as Chief Justice by a 78-22 vote on September 29, 2005. His performance at his confirmation hearings was generally praised in the media. See Charles Babington & Peter Baker, *Roberts Confirmed as 17th Chief Justice*, WASH. POST (Sept. 30, 2005), <https://perma.cc/7ANM-EHTN> (Roberts "drew rave reviews from many senators for his encyclopedic knowledge of constitutional law and his smooth answers during two days of Senate hearings").

97. Although some may view this inquiry as less important of a view that courts are primarily dispute resolvers and only secondarily articulators of norms.

98. See sources cited in note 88, *supra* (supporting textualism as cabinining judicial discretion/more consistent with judicial role).

minimizes the constraints adjudicators face when viewing information extrinsic to text.

Particularly important, and seemingly overlooked by advocates of the traditional umpire analogy, is the degree to which officiating discretion is exercised not in a textualist vacuum, such as what “the rule” says, but in a contextual manner. The “rule” contained in the text of the rulebook is that basketball is a non-contact sport, but in the area near the basket, players are always jostling for position, just as they are constantly setting screens. Referees may or may not let roughhousing go without penalty depending not only on the extremity but also the effect of the conduct. Pushing or grabbing the opponent when play is at the other end of the floor goes uncalled, while the same conduct when the opponent is attempting to receive a pass or tap in a rebound results in a foul call. A slap on the shooter’s forearm when launching a shot is called a foul in the middle of the second half in a close game. It goes uncalled in the last minute of a blowout.

Sports referees, like laypersons, instinctively use a broad, contextual approach to interpretation of text and application of rules. And insofar as we have been able to discover, nothing is said about this in the text of the rulebooks.<sup>99</sup> It is part of the “common sense” that law is supposed to celebrate but that somehow has been shunted aside by textual fundamentalists. The judiciary should openly harness the same common sense in matters of interpretation and formally disavow the excessively textualist interpretation. Courts already do this to a large extent even when purporting to be confined to the text of a contract document.<sup>100</sup>

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99. For example, the 66-page Rulebook of the National Basketball Association says nothing about whether officials are supposed to enforce the rules formally or functionally and says nothing about the degree of discretion, if any, official have in applying the Rules. See NAT’L BASKETBALL ASS’N, OFFICIAL RULES OF THE NATIONAL BASKETBALL ASSOCIATION (2016) (the most updated version of the Rulebook is available at <https://official.nba.com>); NAT’L BASKETBALL ASS’N, NBA CASE BOOK 2016-2017: QUESTIONS & ANSWERS TO NBA RULES (2016) (setting forth many hypothetical situations and providing model answers as to characterization as foul and enforcement).

One could read the Rules in isolation and conclude that officials should call every single violation seen, no matter how slight. However, Section IV (“Decisions by Different Officials,” dealing with conferences regarding different views of a foul or out-of-bounds call) and Section V (“Time and Place for Decisions,” setting forth protocol for communicating decisions and allowing officials to “suspend play for any unusual circumstance” suggests some level of discretion for the official. Referees are implicitly authorized to use their discretion, but the scope of the discretion and its application are part of the context and “common law” of the League.

The rulebooks of other major sports are similarly vague as to how official should apply the Rules. See, e.g., NAT’L HOCKEY LEAGUE, NATIONAL HOCKEY LEAGUE OFFICIAL RULES 2017-2018 (2017), <http://www.nhl.com/nhl/en/v3/ext/rules/2017-2018-NHL-rulebook.pdf> (no discussion of referee discretion or protocols of enforcement), NAT’L FOOTBALL LEAGUE, 2017 OFFICIAL PLAYING RULES OF THE NATIONAL FOOTBALL LEAGUE (2017), <https://operations.nfl.com/media/2646/2017-playing-rules.pdf> (most updated version available at nfl.com).

100. See RESTATEMENT OF THE LAW OF LIABILITY INSURANCE, *supra* note 51, § 3 cmt. b (noting that even courts embracing a strict plain-meaning textual approach often do look outside the insurance



We are not advocating total eradication of the umpire metaphor. Notwithstanding its flaws, it captures more than a kernel of the judicial role. Similarly, consideration of text is, of course, a core element of the interpretative role of the judiciary. However, just as the umpire metaphor should not be simplistically and inflexibly imposed on the nuanced activity of adjudication, the courts should similarly not view text only in isolation. At a minimum, courts should not be overly literal when reading text.

Rather than worrying about limitations on judicial role and the dangers of interpretation that enlists material other than documentary text, courts would be more helpful to disputants, the judicial system, the economy, society, and the business of insurance, if they openly embraced the role of helpful arbiters of disputes willing to examine all potential indicators of meaning.

The judicial role should be one of seeking to determine the actual meaning of a disputed term in light of all relevant factors, in a manner that vindicates the intent of the parties, the purpose of the contract, the function of the transaction, and where not inconsistent with these other factors, public policy. In short, courts should worry less about the precise meaning of textual memorialization of a transaction and worry more about giving contract document text a construction that fairly resolves the dispute.

The Integrative Approach is perhaps both radical and pedestrian. It is radical in that it challenges, or perhaps rejects altogether, conventional wisdoms regarding the supposedly constrained umpire role and the clarity and constraining power of text. But it is pedestrian in that many courts already take something akin to the Integrative Approach. However, courts that take the Integrative Approach often do so under cover of distinctly unhelpful textualist rhetoric.

The Integrative Approach, at the risk of being pedestrian, simply implores courts to be helpful and useful, to lend a hand in the purposive enterprise of accomplishing a transaction, rather than acting as formalist gatekeepers who deny purchased contract benefits or award windfalls based on a reading of words in isolation. Courts should also obviously attempt to be helpful to private parties and other governmental actors. And most judges, even the most formalist or textualist, would undoubtedly argue that this is what they do, justifying their judicial philosophy in terms similar to the rationales used to support rigid

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policy for evidence of meaning, examining dictionaries, decisions from other courts, and secondary legal authority that provides information about the history and context of insurance-policy forms and insurance practices.).

application of the statute of limitations,<sup>101</sup> *res judicata*,<sup>102</sup> an arbitration provision included with the packing material of a computer,<sup>103</sup> a definition of protected species,<sup>104</sup> calculation of statutory compensation,<sup>105</sup> or refusal to uphold a seeming agreement because it is not sufficiently specific on the face of the contract documents.<sup>106</sup> In the insurance context, this judicial textual formalism is reflected in cases giving strict application to a policy's text, such as imposing strict deadlines for giving notice, submitting claims, defining causation, and the like.<sup>107</sup>

To this segment of the bench, being helpful means rigidly applying the rules and what is seen as the clear meaning of text. There is ample judicial rhetoric supporting their textual literalism. Ironically, however, even as textualist rhetoric abounds, some of the most revered judges are those

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101. *See, e.g.*, *United States v. Locke*, 471 U.S. 84, (1985) (giving literal and strict enforcement to provision requiring renewal of lease “before December 31” under circumstances strongly suggesting language resulting from scrivener’s error and that intent was to state “on or before December 31,” resulting in forfeiture of rights).

102. *See, e.g.* *Federated Dep’t Stores, Inc. v. Moitie*, 452 U.S. 1 (1981) (talking strict view of claim preclusion/*res judicata*).

103. *See, e.g.*, *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir.), (arbitration clause contained in package slip inside box of delivered computer is enforceable and accepted by purchaser’s continued use of computer after unpacking even though arbitration was never discussed as part of the sale); *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 998 P.2d 305 (Wash. 2000) (same approach enforcing arbitration clause in software disk “shrinkwrap”). *Accord*, *Hancock v. Am. Tel. & Telegraph Co.*, 701 F.3d 1248 (10th Cir. 2012) (applying Florida and Oklahoma law) (enforcing forum selection provisions contained in “clickwrap” to which customer ostensibly assents via internet; reviewing caselaw generally enforcing such provisions in accord with their text). Further reflecting the perils of textualism the *Hill v. Gateway* reading of the text of the package “terms in a box” is regarded by many as incorrect. *See, e.g.*, *Klocek v. Gateway*, 104 F. Supp. 2d 1332, n. 9 (D. Kan. 2000) (subsequently vacated for lack of subject matter jurisdiction) (noting scholarly criticism of *Hill v. Gateway* analysis and rejecting it in favor of view that arbitration agreement was not made simply because portion of contract shipping documents contained arbitration clause).

104. *See, e.g.*, *TVA v. Hill*, 437 U.S. 153 (1978) (construing Endangered Species Act of 1973, 16 U.S.C. 1531 to protect the snail darter and preclude operation of dam that would disturb its last remaining natural habitat).

105. *See, e.g.*, *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) (taking literal view of Jones Act remedies provision to provide plaintiff seaman with double wages for each day payment of “full” wage was delayed, 46 U.S.C. § 4529, resulting in \$302,000 award where defendant had wrongfully retained \$412.50 of wages from period of January 1, 1976, when plaintiff was injured until time of trial years later). To be fair to Justice Rehnquist and the Griffin majority, they did consider legislative history, including amendments to the statute, that was enacted in 1790. *But see* 458 U.S. at 577 (Stevens, J., dissenting) (taking issue with majority’s reading of legislative history as well as strict textualism).

106. *See, e.g.*, *Walker v. Keith*, 382 S.W.2d 198 (Ky. 1964) (finding lease term too indefinite because a specific option price for renewal not stated; court unwilling to determine reasonable price by reference to custom, practice, or other extrinsic or contextual information).

107. *See, e.g.*, *Sec. Mut. Ins. Co. v. Acker-Fitzsimons Sec. Corp.*, 293 N.E.2d 76 (N.Y. 1972) (giving strict enforcement of requirement that notice be timely even in the absence of any showing of prejudice to the insurer); *Kirk v. Fin. Sec. Life Ins. Co.*, 389 N.E.2d 144 (Ill. 1978) (enforcing provision requiring that limb be amputated within 90 days to be considered caused by accident and eligible for enhanced benefits.). More recently, see *Keyspan Gas E. Corp. v. Munich Reins. Am., Inc.*, 96 N.E.3d 209 (N.Y. 2018) (requiring pro-rata allocation of coverage responsibility across years during which injury took place even if policyholder was unable to obtain insurance during certain years).

rejecting literalism.<sup>108</sup> As compared to the prevailing formal or textual approaches, the role of the judge as the helpful purveyor of purposive information, based on the consideration of multiple factors, has been unduly overlooked because it might wrongly be labeled partisan judicial activism and, in regard to statutory construction, out of a misplaced view of the role of courts as a check on other branches of government.

Applied to the construction of insurance policies, the helpful judicial role means courts not only reading policy text realistically but also reading language in context, considering other indicia of meaning, even when the isolated text is seemingly clear on its face. Text standing alone can be misleading without context. Reasonable readers may derive quite different meanings from the same text. Further, text is only the contract document and not the contract. The court's preferred reading of text should always be weighed against these other considerations. The judicial role should not be to serve as a grammar arbiter or literary critic but to decide disputes of interpretation as accurately as feasible based on available information.

Although advocating any deviation from textualism seems to draw criticism, the Integrative Approach should also be unobjectionable in that it will probably not alter the results obtained by textualism in many, perhaps most, cases. A judge's interpretation of the text will usually be vindicated rather than changed by examination of other interpretative factors. Although text is imperfect and textualism opens itself to manipulation far more than its defenders admit, we acknowledge that most contract documents accurately reflect the understanding of the parties and aim of the transaction at issue.

This raises the question of whether the additional time considering extrinsic evidence is worth the effort. To us, the clear answer is "yes." Achieving optimal, accurate, and just construction of text is worth the extra effort and cost, unless the cost is shown to be sufficiently high to imperil other goals of the adjudicatory system.

Proponents of textualism can undoubtedly trot out testimonials—perhaps even from judges themselves—about the burdens and costs of processing extrinsic evidence. But this is insufficient support for textualism, particularly where the testimonials are anecdotal rather than based on a sufficiently large empirical examination of whether textualism actually achieves its purported benefits.

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108. See, e.g., *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889 (N.Y. 1921) (Judge Benjamin Cardozo rejects view that specification of a particular brand of pipe must be literally enforced so as to require replacing plumbing system in custom-build home); *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917) (Cardozo implies term not on the face of written instrument to find agreement sufficiently definite to merit enforcement). See generally RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* (1990) (noting great esteem in which Cardozo is held by lawyers and attributing much of it to his pragmatist approach to deciding cases, which considered a range of contextual factors).

The incremental cost of considering the relatively small *relevant* amount of extrinsic contextual information surrounding a written instrument is not particularly large when added to the base cost of adjudicating the dispute in the first place. In an adversary system, the judge does not need to engage in extensive research and sweeping consideration of vast fields of contextual evidence to decide a dispute. Counsel for the parties should frame both the textual and contextual aspects of the case and develop extrinsic information relevant to the dispute.

Absent a great imbalance of resources or incompetent counsel, the adversary system should provide the neutral judge with a database of information to accompany the textual term in dispute. Our view is that this greater quantum of information will not be that expensive to develop,<sup>109</sup> and its consideration by courts will improve the adjudicatory interpretative process.

Although fans of textualism, including many judges, can be expected to complain about the burden of “sifting through” extrinsic information, we think such protests are excessive. Unlike their civil law counterparts, American judges are not burdened by the inquisitorial model of developing a case. They can, thanks in part to the umpire metaphor, wait to see what the advocates working in an adversarial system put before them in terms of highlighted contract document text, correspondence, meeting minutes, drafting history, custom, practice, usage in trade, course of dealing, or expert information regarding an industry or field.

The list of considerations under our Integrative Approach looks daunting in general but in specific cases will be much shorter according to the facts of the dispute. Effective counsel, particularly if challenging an opponent’s reading of documentary text to which the court may be receptive, do not throw the proverbial kitchen sink of extrinsic information at the judge. Rather, counsel selects the most relevant information with which he or she hopes to persuade the court that his or her proffered meaning is the correct construction of the disputed text. Opposing counsel responds in kind.

If the adversary system is working as it should, the parties and counsel have done the sifting for the court. The judge need only review this streamlined material alongside the text and make a decision. This does not strike us as an undue burden waiting for ‘something’ to happen; this strikes us as likely to bring more just results than staring at the text alone.<sup>110</sup>

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109. In practice, this contextual information may be being developed and presented in the majority of contract construction cases but simply go unnoticed because it is not openly discussed by courts interpreting disputed text in insurance policies or other contract documents.

110. At the margin, a more comprehensive approach will result in some cases in which there is at

## V. DE-EMPHASIZING THE DICTIONARY

If strict textualism allows any sort of extrinsic evidence beyond the text to deduce meaning of contract terms at issue, a small nudge will typically prompt most strict textualists to permit consideration of one singular extrinsic source of word meaning: the dictionary. The dictionary is ubiquitous in insurance coverage interpretation disputes. For some reason, using a dictionary to consider insurance policy word meaning is seen as less heretic a move than considering the underwriting evidence from the employee who drafted the insurance policy. This, to us, is a puzzle.

While our Integrative Approach does not revolt entirely from using a dictionary to assist in the interpretive analysis, there should be a very limited and conscribed use for the dictionary in legal construction instances. The dictionary is merely one indicia of possible word meaning in a contract and one entirely unrelated to the actual drafting process.

Indeed, on the continuum of what could be “extrinsic” evidence, such as evidence beyond the four corners of the document, the dictionary is more “extrinsic” than a host of other extrinsic evidence, like past performance, course of dealing, trade usage, contemporaneous notes, oral evidence of the negotiation, or even third-party witnesses to the negotiation. In fact, the dictionary might be about as “extrinsic” as one can get. No insurance policy has stapled to it a standard college dictionary—the policy does not direct one to consult a dictionary for any additional information—yet the high church of textualism reveres the dictionary.<sup>111</sup>

There are serious interpretive dangers to using solely a dictionary to construe word meaning in a contractual dispute. Judge Learned Hand’s observation about not making a “fortress out of the dictionary”<sup>112</sup> was

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least a marginal uptick in the material that must be considered by courts and hence create somewhat more work for courts. But unless it can be shown that the extra work is unduly burdensome, it should be regarded as worthwhile in order to achieve better results. It must also be noted, as stated in RLLI § 3, comment a. that even courts purporting to be strictly textualist routinely do take on the burden of analyzing “dictionaries, decisions from other courts, and secondary legal authority that provides information about the history and context of insurance-policy forms and insurance practice.” See RLLI, *supra* note 42, at 18. In most cases, this takes at least as much or more time and effort as the consideration of other indicia of meaning advocated by the Integrative Approach.

111. See Mark A. Lemley, *Chief Justice Webster*, 106 IOWA L. REV. 299, 299 (“The Supreme Court has a love affair with the dictionary. Half of its decisions in the 2018 Term cited a dictionary, often as the primary or exclusive means of defining a statutory term. The Court regularly upends decades of precedent and ignores congressional intent (and sometimes common sense) in favor of a chosen dictionary definition.”).

112. See *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945) (“It is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.”).

excellent advice seventy-five years ago and remains so today, albeit unfortunately forgotten by many modern courts and commentators.<sup>113</sup> The fact that dictionary usage has been settled upon as some sort of compromised middle ground for textualists is downright spooky.

It may be that looking up the meaning of a disputed word in a dictionary is seen as a neutral, policy-free action that could not possibly taint the purely textual inquiry into the “plain meaning” of a disputed term. It is not. It cannot be. The dictionary, as an extra-legal text, is a resource for something other than what it is being used for in that context. The dictionary is not a legal treatise. It is not referred to in insurance policies. It is a separate historical encyclopedia of past and present possible meanings for individual words. Each entry can have many possible meanings. Each version of the dictionary, whether Oxford or Merriam-Webster, can have different meanings.<sup>114</sup> There are many examples in insurance law where a single term at issue can have multiple possible meanings cited in dictionaries, some favouring a coverage result, and others not.

Furthermore, the order in which words appear in the dictionary may not be what the court expects. Typically, words are defined in a dictionary from earliest use to most recent use.<sup>115</sup> The order is not from most to least popular use. There is also something highly problematic about parsing out individual words in an insurance policy and looking up each word separately from the other, devoid of any basic context, including how each word is placed related to the other in the policy. A disambiguated meaning of a word, or words strung together, is just that. It is an extra-legal, extra-contractual descriptor of a single word. How that word operates in the phrase it sits, or in the document, may have a profound effect on what it means. Whether the word sits in a coverage or exclusion clause is the most obvious example. Coverage clauses in insurance are to be construed

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113. The shocking frequency of the modern Supreme Court’s dictionary use is well encapsulated in Adam Liptak, *Justices Turning More Frequently to Dictionary, and Not Just for Big Words*, N.Y. TIMES (June 13, 2011) (noting 10-fold upsurge in dictionary consultation in 21st Century Court as compared to 1960s Court and that “Justices Oliver Wendell Holmes, Jr., Benjamin N. Cardozo and Louis D. Brandeis managed to make it through distinguished careers on the Supreme Court without citing dictionaries.”). Further, “The justices cited more than 120 dictionaries, which is suggestive of cherry picking.” *Id.* Not even the editor of the Oxford English Dictionary was happy about the Court’s affinity for dictionaries, noting: “It’s easy to stack the deck by finding a definition that does or does not highlight a nuance that you’re interested in” and “[d]ictionary definitions are written with a lot of things in mind, but rigorously circumscribing the exact meaning and connotations of terms is not usually one of them” (comments of Jesse Sheidlower). *Id.*

114. See, e.g., the varying definitions in the key words in the coverage clause for standard property insurance: “direct physical loss of or damage to property.” Erik S. Knutsen & Jeffrey W. Stempel, *Infected Judgment: Creating Conventional Wisdom and Insurance Coverage Denial in a Pandemic*, 27 CONN INS. L.J. 185 (cataloguing the multitude of different dictionary entries for each operative word in the clause).

115. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 19 (9th ed. 1984) (the “[o]rder of senses [in the dictionary] is historical.”).

broadly, and exclusion clauses are to be construed narrowly. And most important, the document's intended function in the commercial marketplace matters. Is it a policy for disability insurance or is it a cell phone plan contract?

The act of choosing a definition out of a listing found in a dictionary is not without problems either. Such a choice is subject to false consensus bias,<sup>116</sup> meaning one chooses the definition one wants to choose and “thinks” it is the one everybody else will also choose.<sup>117</sup> As D.C. Circuit Judge Harold Leventhal apparently observed when discussing court use of legislative history, choosing “the” definition out of a dictionary is like “looking out over a crowd and spotting your friends.”<sup>118</sup> But the same, of course, is true regarding selection of a preferred dictionary definition. Insurers, and, of course, policyholders as well, know the answer they want and will naturally be drawn, at least subconsciously, to the definition that best meets their needs. In addition, dictionary use may mislead through simple happenstance when a judge, or law clerk or counsel writing a brief that influences the judge, reaches for the dictionary on the closest shelf or reads only the first dictionary entry resulting from a browser search.

There is something facially odd about using the dictionary to discern word meaning in insurance policies when the goal is to understand the “plain meaning” as understood by everyday people. People do not talk like the dictionary. People do not think like the dictionary. In fact, the aim of the dictionary is not to make it a catalogue of how reasonable people would grasp a word. It is to define the word as a referent in the English language to other words. And in many dictionary definitions, the word being defined is included in the definition!

Why then do so many courts, when construing contractual language, reach for the dictionary over some other form of extrinsic evidence? The answer is simple—simplicity. Most judges have near-instant access to a dictionary. Just looking up a word, stating “that must be the meaning,” and moving on to some other dispute makes the job easy. It may be wrong, but it was easy. It felt “safe.” The dictionary feels like an apolitical reference. We happen to think blind reliance on dictionary usage is a

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116. See Linda Babcock & George Lowenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSPECTIVES 109 (1997) (describing phenomenon and its impact in prompting disputants or negotiating parties to overvalue their own skills, conduct, and position in transactions or litigation).

117. See Lawrence Solan, et al., *supra* note 89.

118. See, e.g. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) (citing a conversation with Judge Leventhal), quoted in *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005); *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (paraphrasing Leventhal); Abner J. Mikva, *Statutory Interpretation: Getting the Law to Be Less Common*, 50 OHIO ST. L.J. 979, 981–82 (1989); Adam M. Samaha, *Looking Over a Crowd – Do More Interpretive Sources Mean More Discretion?*, 92 NYU L. REV. 554 (2017) (discussing the genealogy and meaning of the quote attributed to Judge Leventhal).

deplorable way to administer justice. We do not roll dice to determine damages. Why would we unflinchingly grab a text that is entirely unrelated to the contract at issue, pick out an entry that matches a word at issue in the contract, and say “the dictionary says this, the word means that . . . therefore the legal result in this context must be so.” This is not the court as a helpful agent. This is not even the court as an umpire. This is something else entirely. Dictionaries are not written to help determine legal disputes. Yet, American judicial practice would appear to indicate otherwise. So, when a strict textualist approach to contract construction breaks rank and reaches for the dictionary, such is not to be seen as a move to a more reasonable approach. It is no less contextual. In fact, it is probably less so because now some totally unrelated source of meaning is inserted into the process.

A classic example of the horrors of blind dictionary usage in insurance law comes from the infamous string of cases about theft insurance. The definition of “theft” in the policy required “external violence” to the lockset for coverage of theft to attach.<sup>119</sup> The reason behind using that phrase was to indicate that the insurer did not want to insure against inside theft jobs where the policyholder “misplaced” its own goods and claimed insurance proceeds. If the lock appeared smashed or otherwise tampered with, there was easy evidence that some miscreant broke in and stole the insured goods. However, there were many cases where a skilled lockpick entered insured premises and pilfered valuable goods. When the policyholder came to claim for the loss, the insurers denied coverage because there was no evidence of “external violence” on the locksets. The policyholder was no less robbed; it was just unlucky enough to have been robbed by a skilled robber.

Courts frequently used dictionary definitions for the singularly operative words “external” and “violence” to hold that, for coverage to attach, the policy demanded there must be some physical change to the locks that was visible outside the locks. Using a dictionary to buttress such a textualist response only makes the result go from bad to worse. Saying the policyholders had no coverage for theft in the context of a theft policy, because the theft policy they bought demanded visibly physical changes to the locks, makes theft coverage a nullity for losses from all but the clumsiest of thieves. That surely could not be the intent of the insurer and most certainly is not the intent of the policyholder. But holding up the dictionary definitions of “external” and “violence” as “the” reasons for the loss of coverage simply strikes as baffling. These are cases where the dictionary is used to buttress an extreme version of textualism.

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119. See notes 41, 60, *supra* and note 122, *infra* (discussing caselaw regarding theft insurance requirement of visible marks of forced entry).



So, when *is* a dictionary definition helpful in the inquiry into word meaning? In our Integrative Approach to interpretation, a dictionary definition can be helpful as one source of extrinsic evidence, not to say, “this is the meaning” but to say, “wow, there are a lot of meanings for this term.” Rather, a dictionary could be one source, external to the agreement, that can indicate there may be a range of understandings of a certain term. Sometimes meanings change over time and a dictionary can be a helpful tool for knowing that, too. But certainly, a dictionary should never trump those extrinsic sources of context that are closer to the agreement itself, such as direct evidence from the drafters themselves, course of dealing, course of performance, standard industry term usage, marketing literature, or in the case of insurance policies, underwriting documents. In short, a dictionary should not be treated as a representation of “how people talk” or how reasonable people view the plain meaning of terms. It is not the “plain meaning manual” for judges. It is a disambiguated catalogue of historical word meanings that can be equally obtusely worded as the other document being construed.

We think that, by following our Integrative Approach to insurance policy interpretation, courts will fall victim far less often to the duplicitous use of the dictionary. Using other indicia of word meaning that gets closer to a contextual analysis of the words at issue quickly protects courts from the dangers of incorrect dictionary usage.

## VI. MAKING COURTS MORE USEFUL: AN INTEGRATIVE APPROACH TO INTERPRETATION

### *A. The Philosophy of the Approach*

Although the tenacity of textualism may prove too great a barrier to change, American law and adjudication would be better off abandoning its textual religion in favor of a more Integrative Approach. Our aspiration is that judicial contract construction should be as useful as feasible to commerce and society. A narrowly textualist, strict plain meaning approach to deciding contract disputes and insurance policy construction unduly limits the ability of courts to be helpful to the enterprise of enforcing transactions, both consumer and commercial. It only stands to reason that a court equipped with more intellectual tools for determining meaning will be better able to accurately determine meaning as well as when meaning may need to yield to considerations of public policy.

We understand the textualist argument to the contrary. It essentially posits that consideration of anything but the words of a contract document fail to sufficiently constrain judges from interjecting personal preferences. For the reasons set forth above, we reject this argument.

Words are sufficiently malleable, such that a judge wishing, either consciously or unconsciously, to impose personal preferences upon a decision can easily do so through the textualist approach. By contrast, contextual factors are likely to be at least as constraining as words. One may, for example, quarrel about whether the word “sudden” connotes an abrupt development or merely one that is unexpected.<sup>120</sup> It is more difficult to argue over the meaning of sales or underwriting notes reflecting an agreement that environmental liabilities would be covered unless resulting from expected or intended injury.

One may, for example, argue about whether the word “suit” includes administrative proceedings from which liability may result, which in turn affects whether a liability insurer must defend the action.<sup>121</sup> It is considerably more difficult to misread underwriting documents indicating the policy would cover administrative proceedings or the testimony of the broker that potential administrative actions were expressly discussed and anticipated by the parties at the time the policy was purchased.

For example, in a case where a master thief was able to pull off theft without leaving a trace, such as picking the lock, one may take a hyper-literal approach to a burglary policy and deny coverage for “theft” because the policy stipulates that “theft” coverage requires evidence of “external violence to the lock.”<sup>122</sup> Yet, a denial of coverage would be extremely hard if not impossible to justify if one also read the underwriting notes instead of part of the policy, which indicated that the twin purposes of requiring evidence of “external violence to the lock” are to corroborate that the theft was not an inside job, leaving aside, of course, that the very point of the policy is to cover for “theft” and prompt policyholders to reasonably secure premises.

The Integrative Approach to construing disputed insurance policy terms and resolving insurance coverage questions presents a path to improved insurance policy interpretation. The contract and statutory

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120. See RANDY MANILOFF & JEFFREY STEMPEL, GENERAL LIABILITY INSURANCE COVERAGE: KEY ISSUES IN EVERY STATE Ch. 14 (4th ed. 2018) (noting split in caselaw regarding qualified pollution exclusion in operation during 1970-1986 time period, which barred pollution coverage unless the release of the pollutant was “sudden and accidental”); STEMPEL & KNUTSEN, *supra* note 41, § 14.11 (same re qualified pollution exclusion; also discussion of disputes over application of absolute pollution exclusion that replaced the former).

121. Compare *Foster-Gardner, Inc. v. National Union Fire Ins. Co.*, 959 P.2d 265 (Cal. 1998) (notice of possible liability from environmental regulator not a “suit” within the meaning of CGL policy duty to defend obligations) with *Hazen Paper Co. v. U.S. Fid. & Guar. Co.*, 555 N.E.2d 576 (Mass. 1990) (finding such regulatory proceedings constitute “suit” under CGL policy).

122. See, e.g., *Atwater Creamery Co. v. Western National Mutual Ins. Co.*, 366 N.W.2d 271 (Minn. 1985) (“burglary” defined as “[T]he felonious abstraction of insured property (1) from within the premises by a person making felonious entry therein by actual force and violence, of which force and violence there are visible marks made by tools, explosives, electricity or chemicals upon, or physical damage to, the exterior of the premises at the place of such entry”); court held that reasonable expectations of policyholder applied, as this policy was to cover “burglary.”).

construction considerations listed at the outset of this Article and discussed in this Part are of necessity presented in rough sequential order as we see the process unfolding in the typical case. However, the order in which courts may consider interpretative factors is not fixed, save for the need to first appreciate the overall context and purpose of the insurance policy in question or any non-insurance transaction at issue. We contend it is vital to anchor the initial inquiry in that first step.

There is a kinship among the *Restatement (Second) of Contract's* contextual approach, *Thomas Drayage*, and the pre-2018 versions of RLLI § 3.<sup>123</sup> Like these approaches, the Integrative Approach does not ignore the text of insurance policies and other contract documents.<sup>124</sup> To the contrary, document text remains an important marker of meaning. But when assessed through the Integrative Approach, document text—or, more precisely, an individual judge's reading of the text in isolation—is not all-powerful.

### *B. Application of the Approach*

The court faced with a coverage dispute should obtain a rough understanding of the context and chronology of the sale, underwriting, and placement of the insurance policy in question. In short, what is the objective of the document? Why does it exist and what is it supposed to do? Who buys it and for what reasons? Then, the court should read the term or terms in dispute considering this background information, the policy as a whole, the type of policy at issue, the larger context of the parties' transaction, the actions of the parties, and the nature of the transaction in general.

Where the insurance policy defines a term, this of course is entitled to great weight, as it is a strong “internal” aid to interpretation. But the definition itself may need interpretation in which case the court can utilize the tools of the Integrative Approach to clarify any definitions contained in the policy. In addition to canons of word meaning, a court using the Integrative Approach may apply canons of substantive law or policy.

Several canons specific to insurance are of particular importance. First,

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123. Prior to the revisions resulting in the April 2018 RLLI, its section on insurance policy interpretation was less textual and more expressly contextual.

124. Nor do we ban references to dictionaries. We simply prefer that they not be treated as conclusive religious pronouncements that brook no dissent, particularly in view of the discretion courts have in selecting particular dictionaries and listed meanings. Dictionaries are simply another form of extrinsic evidence, perhaps even very good extrinsic evidence. But they are not a substitute for a broader analysis of a disputed term in light of the transaction under review. Regarding judicial deployment of dictionaries, see generally Stephen C. Mouritsen, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 BYUL REV. 1915 (2010); Kevin Werbach, Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994).

insurance agreements should generally be broadly construed to affect the risk management objective, unless there is convincing evidence to suggest the parties intended a narrower goal and narrower reading of the agreement. Second, exclusions in an insurance policy should be strictly and narrowly construed. Third, the insurer asserting applicability of an exclusion should bear the burden of proof to demonstrate the applicability of the exclusion. Fourth, provisions of a policy that operate in an exclusion, such as definitions and conditions tending to defeat the coverage promised in the insuring agreement, should be treated like exclusions. Such provisions are those which remove coverage from the initial grant of coverage. Like all contract provisions, exclusions should be subjected to the reasonable rules of *contra proferentem*.

Exclusions deserve this less hospitable reception (as compared to insuring agreements), because they tend to defeat coverage and can disturb eminently reasonable expectations of coverage (particularly when the circumstances of the transaction make close study of policy text unlikely). The insurer's role as the drafter of unclear policy text, with risk-spreading as its core business function, makes it fairer to impose the costs of uncertainty upon the insurer rather than the policyholder in close cases. This may seem to some like an unduly pro-policyholder rule. We note, however, that insurers have an advantage in that they can avoid unwanted liability through better drafting of policies and, as repeat players in coverage litigation, return to the drafting table if initially chosen language creates unwanted coverage obligations. Policyholders lack that recourse.

In addition, even an insurer with ambiguous policy language should ordinarily have nothing to fear. If the insurer's interpretation of the unclear language accords with the extrinsic information and transaction context, such as party understanding, underwriting, and risk management purpose, the insurer should prevail despite sub-optimal drafting. Ambiguous language should be construed against the insurer only as a tiebreaker of last resort.

Regarding context and chronology, the court should be aware of what the parties were trying to accomplish with the transaction. When insurance is purchased, the purpose is obvious in one respect, that being to obtain insurance. We are suggesting something a little deeper, however, including a look at the risk management goals of the parties and the type of insurance product, such as general liability, professional liability, product recall insurance, and business interruption coverage, obtained through prevailing risk management concerns and practices.

It may be the case, for example, that a subcontractor was required by the owner or general contractor to have insurance in place as a condition of obtaining the subcontract. In such a case, the specifications of a job proposal may provide valuable information about what the insurance

policy was designed to accomplish—information that will inform the reading of policy text. Or, for example, if a policyholder purchases both an auto and homeowners' policy to cover legal liability, and the loss appears to lie somewhere in between the two policies' grants of coverage,<sup>125</sup> the court should assume it likely that one or both policies cover the loss and particularly focus on avoiding gaps in coverage for the consumer who tried to buy every kind of liability insurance and somehow got caught between the definitional cracks in the boards. Of course, there may well be gaps in coverage, but such gaps need to be discerned with reference to the entire risk-management scheme and not some artificial isolation where a court is almost wilfully blind to how concomitant insurance sources operate together. Courts thus need to be mindful of insurer efforts to design the scope of a policy's coverage for a particular market niche. For example, an automobile liability policy is not designed to cover the general liability risks of unsafe premises or defective products.<sup>126</sup>

Reading the contract holistically reduces the risk of vocabulary myopia, wherein a court may attach what seems to be the “right” meaning to an isolated word in the policy where consideration of the policy suggests a different meaning for the word at issue. For example, the parties may dispute the meaning of a word such as “accident” standing alone. However, other provisions of the policy may make it obvious that liability stemming from the policyholder's regular business activity can be “accidents” even though the policyholder intentionally engaged in the business activity.

The type of policy at issue will inform construction of policy terms. Although this will often merely confirm the court's initial reading of policy text, it can provide greater certainty to the interpreting court as well as a window on the impact the decision may have. For example, an upscale steakhouse restaurant may purchase a general liability policy. The restaurant serves alcohol. Is it covered for dram shop liability? Commercial general liability (“CGL”) policies typically contain an exclusion for claims arising under or related to the sale of alcohol. However, because the policy was purchased by an upscale steakhouse restaurant, such restaurants usually serve alcohol, which supports the policyholder's claim of an objectively reasonable expectation of coverage. However, because general liability and liquor liability risks have long been considered different and thus segmented in the insurance

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125. As is the case in many liability cases involving concurrent causation. *See generally* Erik S. Knutsen, *Confusion About Causation in Insurance: Solutions for Catastrophic Losses*, 61 ALA. L. REV. 957 (2010); Peter Nash Swisher, *Insurance Causation Issues: The Legacy of Bird v. St. Paul Fire & Marine Ins. Co.*, 2 NEV. L.J. 351 (2002).

126. TOM BAKER & KYLE LOGUE, *INSURANCE LAW AND POLICY* (3d ed. 2013) at 417.

market as two different products, the court can be comfortable applying the language of the liquor liability exclusion quite literally.

Unless there were representations made that would support waiver or estoppel, longstanding custom and practice, as well as the insuring environment, support application of the liquor liability exclusion that is broadly but clearly written. Consequently, in this type of dispute, the regime of narrow construction of exclusionary language is of no help to the policyholder who bought general liability insurance and not liquor liability insurance. The policyholder may, however, have a claim against the agent or broker who failed to recommend liquor liability insurance. The agent or broker may in turn have a claim against its errors and omissions insurer.

The larger context of an insurance policy purchase includes the history of the parties' contracting relations, specifically whether the parties were engaged in a one-time contract, recently started transacting business, or were involved in a longer pattern of a relational contract or series of relational contracts. This can include a course of dealing or course of performance regarding application of similar contracts. For example, the parties may have exhibited a longstanding pattern regarding treatment of claims.

After having made this initial assessment of the meaning of disputed policy language, the court then considers where any relevant usage in trade is applicable as well as course of dealing and course of performance. With such background understanding to contextualize policy terms, the court may then consult what might be termed "internal" aids to interpretation as necessary. Some may be imbedded in the contract, statute, or insurance policy at issue. For example, the writing under review may contain specifically defined terms.

Judicial consultation may then be necessary to interpret "external" aids, such as technical manuals, industry materials, common statutory definitions of terms, or other evidence of popular usage. If the contract in question has a drafting history, which standardized insurance policies usually include, this can also be consulted by the court.

If there is specific information about the parties' specific intent regarding a policy term, evidence of this intent may be considered by the court. Examples are correspondence or other communications of the parties reflecting specific understanding or intent.

In many cases, background or contextual information will be essentially uncontested, without disputes regarding whether a letter is genuine, a meeting was held, contents of an explanatory brochure mean this or that, and so on. However, in some cases there may be genuine disputes regarding the "who, what, when, where, and how" questions surrounding a transaction. In addition to disputes regarding the facts

surrounding entry into a contract or purchase of an insurance policy, there may also be disputes regarding past practices of the parties, industry custom, claims adjusting conduct, or the like.

In these situations, determining policy meaning via pretrial motion would seem inapt. If documentary language is clear, and contrary extrinsic information is refuted, suspect, or inadmissible, then a trial may be unnecessary. However, in at least a significant subset of cases, a trial or hearing may be required. This is not to suggest that contract construction ceases being a matter of law in such cases. Rather, when there are genuine factual disputes bearing on interpretation of the contract, those facts must be resolved as a prerequisite to interpretation.

Even in the aggressive post-*Twigbal* and Trilogy world,<sup>127</sup> this will likely require *some* modest increase in bench or jury trials. Textualists and judicial imperialists will regard this as a drawback of the Integrative Approach. We disagree. Greater use of the trial mechanism for fact-finding is part of what the judicial system is supposed to deliver. The settlement norms and tendencies of disputants are already well-established and unlikely to change even for disputes that survive motions to dismiss and for summary judgment. Consequently, greater willingness to consider and determine facts bearing on contract meaning will not impose an unduly high price on the judicial system.

Further, when conducting cost-benefit analyses of trials, some perspective is in order. Avoidance of a trial does not mean avoidance of adjudication through other means, such as pre-trial motion. This type of adjudication “on the papers” or in chambers (which usually includes oral argument prior to decision) may seem streamlined as compared to trial, but it is not free. It may consume more judicial resources issuing written opinions on motions than would be expended on a hearing or trial

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127. Although there may be legitimate debate about whether the development is wise or foolish (we think the latter), there is really no dispute that the past 40 years have witnessed both a reduction in trials and doctrine more receptive to pretrial disposition of matters by judges. See Stephen N. Subrin & Thomas O. Main, *The Fourth Era of American Civil Procedure*, 162 U. PA. L. REV. 1839 (2014); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003).

“*Twigbal*” refers to the cases of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), which empowered judges to grant dismissal for failure to state a claim via Fed. R. Civ. P. 12(b) (6) if the trial judge found the claim sufficiently “implausible” based on the judge’s “experience and common sense” (but without much deference to Seventh Amendment rights to jury trial). See Suja A. Thomas, *Why the Motion to Dismiss is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008); Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. J. L. & POL’Y 61 (2007).

The “Trilogy” refers to three important 1986 U.S. Supreme Court decisions that facilitated increased use of summary judgment: *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

addressing fact questions bearing on contract meaning.<sup>128</sup> Further, the existence of fact questions may not require trial of an entire matter but only a hearing to resolve disputed facts, provided this can be done consistent with Seventh Amendment concerns or with party consent to a bench trial of the issue.

Perhaps the primary external aid to construing contract and insurance policy language is the other court decisions construing the same or similar language. Courts consult other judicial opinions, particularly those with precedential value in the jurisdiction as a matter of course regarding the construction to be given terms. Such consultation may be for learning from other courts' readings of the text or for acquiring additional knowledge that may be gleaned from the opinion concerning the type of text, business, or activity under review. In similar fashion, courts may consider treatises, law review articles, or other secondary sources that may shed light on word meaning or the business or activity involved in connection with the coverage claim.

If this array of tools is insufficiently conclusive or appears to lead to a problematic result, the court can consider where apt the identity of the document as something other than a contract. For insurance, this can be particularly useful because of the multiple identities of insurance policies as not only contracts but also products,<sup>129</sup> private legislation,<sup>130</sup> social instruments or institutions,<sup>131</sup> and outputs of a regulated industry.<sup>132</sup>

During this process, courts should consider whether any applicable legislation bears on the interpretative process. For example, many states have statutes setting forth ground rules and methodologies for statutory construction.<sup>133</sup> Although such statutes may have separation of powers implications,<sup>134</sup> they at least require consideration. Statutes

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128. See Jeffrey W. Stempel, *Taking Cognitive Illiberalism Seriously: Judicial Humility, Aggregate Efficiency, and Acceptable Justice*, 43 LOYOLA L.J. 627 (2012) (also noting that roughly a third of summary judgments appealed result in partial reversal or remand, undermining the efficiency claims of summary judgment).

129. See Stempel, *The Insurance Policy as Thing*, *supra* note 53; Schwarcz, *Products Liability*, *supra* note 53.

130. See Stempel, *The Insurance Policy as Statute*, *supra* note 53.

131. See Stempel, *The Insurance Policy as Social Instrument*, *supra* note 53.

132. See Kenneth S. Abraham, *Four Conceptions of Insurance*, 161 U. PA. L. REV. 653 (2013), sources cited in note 53, *supra*.

133. See Kevin Doty, *My Hero Zero: The Forgotten NRS Chapter*, NEV. LAWYER, Feb. 2007, at 28 (describing Nevada statute directing statutory construction); Alan R. Romero, Note, *Interpretive Directions in Statutes*, 31 HARV. J. ON LEGIS. 211, 217 (1994) (surveying statutes setting forth ground rules for construction).

134. To the extent a statute purports to direct the judicial process itself, it presents separation of powers concerns. A legislative body is of course completely free (subject to constitutional constraints) to enact the positive law it wishes and to define the terms used in a statute. But where the legislature sets forth a methodology for statutory interpretation, one may legitimately wonder whether this constitutes an excessive effort to administer the judiciary and control adjudicative outcomes. But legislation has



choreographing contract construction appear considerably less common but may raise even more serious separation of powers concerns.<sup>135</sup>

A court construing an insurance policy, or other contract or statute, may at any time apply protocols of textual interpretation such as grammar rules and canons of word meaning to the extent that these are apt in light of the background and context of the disputed document under review. However, if this is done at the outset of the interpretive process, it may distort the process by saddling the court with unrealistic assumptions regarding the actual drafting of the language under consideration.

Textual canons of construction can be helpful to the extent that they shed light on the apt meaning of the word, but they can also be contradictory and misleading, particularly if applied outside the contexts that gave rise to the canons. Some canons seem simply wrong in terms of modern speech patterns or customary communication prevailing in a particular field.<sup>136</sup> A court is likely to better appreciate the aptness of a particular canon of construction for use in the case at hand if the court first has an adequate understanding of the background, context, and function of the contract or insurance policy at issue.

Canons of substantive law may be apt, provided they are correct statements of substantive law or policy that do not contradict statutes, caselaw, or aspects of the insurance policy or contract under review. Care should be taken so that invocation of a substantive canon does not become imposition of judicial personal preferences under the guise of legal process neutrality. That said, neutral application of substantive policy canons of contract construction should not be problematic.

For example, canons against enforcement of illegal or unconscionable

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nonetheless long set forth norms such as liberal or strict construction of particular legislation and this has not seemed to bother courts.

135. Where the legislature's own products – statutes – are concerned, we think the legislature logically has more leeway in setting forth not only what it means to achieve via a statute but also should to a degree be able to indicate the scope of the statute and whether a liberal or strict construction is intended or envisioned. But contract law has historically been the domain of common law that has shaped contract doctrine. To be sure, legislatures can enact contract rules such as the Uniform Commercial Code. But this is different than instructing courts as to how to go about common law decision-making.

136. For example, one textual canon posits that word in a contract or other document has its own meaning and that writings should not be construed to be repetitive or redundant. *See* SCALIA & GARNER, *supra* note 5, at 174 (setting forth “Surplusage Canon” holding that “[i]f possible, every word and every provision [of a statute or contract] is to be given effect. None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence.”).

But this canon simply seems wrong, at least in many cases involving legal issues. One need not look far, for example, to find a will in which the testator states that she will “give, bequeath and devise” (three repetitive redundancies) or a discovery request for any documents “depicting, describing, addressing, summarizing, discussing, or relating to” a topic. Redundancy is an occupational hazard of legal documents, prompted by a drafter's fear that expressing a concept in a single word may lead to misunderstanding (so much for the benefits of a purely textual approach). As a result, drafters repeat themselves. Consider, for example, the pollution exclusion found in a standard form CGL insurance policy, which uses roughly twenty words to convey the concept of an unwanted substance or waste matter.

terms appear justified, provided they are not broadly applied to nullify agreements that are not blatantly unfair or likely to encourage socioeconomic mischief. Greater use of some currently under-applied substantive canons of contract construction seem apt. For example, one substantive canon is that “law abhors a forfeiture,” something worth remembering when addressing defenses to coverage that, if successful, preclude indemnity for which years of premiums may have been paid. Canons favoring broad construction of insuring agreements and narrow construction of exclusionary language are in the same vein in that they encourage different approaches to words based on their location in the insurance policy and whether the words seek to establish or restrict coverage.<sup>137</sup> Another is the canon favoring construction in furtherance of the public interest.<sup>138</sup>

After consideration of the foregoing factors, the entire list of which would often be inapplicable to a particular dispute, the court has likely determined the correct reading of the disputed term. To be more of a legal realist about it, the judge has likely assigned the term a particular meaning based on applying policy language as well as considering extrinsic evidence and contextual factors. If the meaning of the disputed term remains unclear, the *contra proferentem* principle is applied as a tiebreaker of last resort to determine the meaning the court will assign.

Before turning the assigned meaning of a term into an adjudicative ruling on contract meaning, the court needs to first consider whether the contract as so construed would be void for illegality,<sup>139</sup> unconscionability,<sup>140</sup> or inconsistency with public policy considerations.<sup>141</sup> For example, a given jurisdiction may view punitive damages as uninsurable under state public policy trumping typical liability language, committing the insurer to pay damages without regard to the categorization of the damages.<sup>142</sup>

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137. See TAN 40, *supra* (discussing treatment of exclusionary provisions in insurance policies).

138. See Patterson, *supra* note 61, at 854 (“If a public interest is affected by a contract, that interpretation or construction is preferred which favors the public interest.”).

139. See PERILLO, *supra* note 4, § 3.7(e), ch. 22 (illegal contracts, even if clear, are not enforceable); FARNSWORTH, *supra* note 4, § 5.1 (same).

140. See PERILLO, *supra* note 4, § 3.7(e) (unconscionable contract terms, even if clear, are not enforceable; unconscionability defined as combination of bargaining defect and pronounced substantive unfairness); FARNSWORTH, *supra* note 4, § 4.28 (same). See, e.g., Gonski v. Dist. Ct., 245 P.3d 1164 (Nev. 2010) (adopting “sliding scale” approach to unconscionability in which varying amounts of “procedural” and “substantive” unconscionability in combination may make contract provision unenforceable). See also Arthur A. Leff, *Unconscionability and the Code: The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 487 (1967) (coining terms “procedural” and “substantive” unconscionability).

141. See PERILLO, *supra* note 4, ch. 22, § 22.11 (contract terms that violate public policy will not be enforced or may be modified to comply with public policy); FARNSWORTH, *supra* note 2, Ch. 5.

142. MANILOFF & STEMPER, *supra* note 120, Ch. 20 (noting state divergence in treatment of punitive damages).

These backstops of contract construction constitute the standard conception of judicial “policing” of insurance policies or other contracts.<sup>143</sup> This remains a valuable role for this sort of traditional supervision by courts, particularly the use of the unconscionability doctrine in consumer cases should an insurance policy provision be oppressive in application. We also find no barrier to such judicial activity on “freedom of contract” grounds. We term this type of judicial activity “Type I Policing” of contracts in which the court declines to give full enforcement to the interpretation that has been reached regarding meaning of a contract. An example from insurance law is the refusal of most courts to require a policyholder to undergo a medical procedure that an insurer believes will reduce its coverage liability.<sup>144</sup>

In addition, there is another, softer variety of “Type II Policing” of contracts in which courts construe provisions in a manner consistent with at least one interpretation of the agreement, although not necessarily the literal or most natural reading, in order to avoid disproportionate forfeiture or other adverse impacts on either the parties or society. Examples from insurance law include requiring the insurer to demonstrate prejudice from late notice of a claim or loss by the policyholder<sup>145</sup> and refusal to enforce an anti-assignment clause where assignment post-dates the loss and did not increase the risk borne by the insurer.<sup>146</sup>

A more comprehensive and Integrative Approach to contract construction can, in apt cases, operate as Type II policing of contracts by the judiciary and correspondingly reduce the need for Type I policing because of better judicial construction of disputed contract terms. The improvement will only increase over time, as the body of jurisprudence construing standard policy terms will grow and become self-referential in a cohesive fashion that is currently not the case.

The comprehensive template of the Integrative Approach has a length that makes it look daunting and burdensome. However, in the concrete setting of a particular dispute, the list will almost always shrink based on what is applicable to the particular case. More importantly, courts that apply the proposed Integrative Approach can largely rely on counsel to

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143. See Perillo, *supra* note 4, ch. 3 (discussing judicial unwillingness to enforce problematic text); FARNSWORTH, *supra* note 4, chs. 4, 5 (discussing “policing the agreement” and “unenforceability on grounds of public policy and unconscionability”).

144. See, e.g., *Heller v. Equitable Life Assur. Soc.*, 833 F.2d 1253 (7th Cir. 1987) (applying Illinois law and refusing to require policyholder receiving disability benefits to undergo surgery for carpal tunnel syndrome that insurer believed would permit physician policyholder to return to work).

145. This “notice-prejudice” rule is the norm in all but a few states, with most all notice-prejudice states requiring the insurer to prove prejudice from late notice rather than requiring the insurer to prove lack of prejudice. See MANILOFF & STEMPEL, *supra* note 120, ch. 4.

146. See *Fluor Corp. v. Superior Court*, 354 P.3d 302 (Cal. 2015) (overruling *Henkel Corp. v. Hartford Acc. & Indem. Ins. Co.*, 62 P.3d 69 (Cal. 2003)); *Ocean Accident & Guarantee Corp. v. Southwestern Bell Telephone Co.*, 100 F.2d 441 (8th Cir. 1939) (applying Minnesota law).

present, in digestible form, the information falling within the categories of this list.

If counsel is not forthcoming with such information regarding uncertain or difficult text in a contract document, the court faced with such challenging language may request briefing that includes contextual information or even schedule a “show cause” order demanding information regarding industry standards, usage in trade, course of dealing, or communications pertaining to the parties’ understanding of a dispute term or expectations regarding a transaction.

Counsel who wants to prevail will bring this information to the court. If they refrain, because this information undermines their textual argument, opposing counsel is highly likely to place this information before the court. Courts need to do “heavy lifting” to discern extra-textual information only where sufficiently interested or if they deem it necessary to avert grave injustice due to lack of competent counsel or severe imbalance of resources.

### *C. Distinguishing the Integrative Approach From Alternative Methods*

At this point, one might ask what is different about our proposed Integrative Approach, as compared to the contextual approach of the *Restatement (Second) of Contracts* or the pre-January 2018 RLLI approach, at least as we construe the former RLLI Approach as largely following *Pacific Gas & Electric v. Thomas Drayage*. The short, but perhaps humbling, answer is “not all that much.” We freely concede that our proposed Integrated Approach to construing document text of insurance policies, contracts generally, and statutes, as well as compacts, treaties, and constitutions, has considerable kinship with both approaches.

Although such kinship may deem our proposal not particularly innovative, it also means our proposal is not radical, untested, or unworkable. The *Restatement (Second) of Contracts* was published 40 years ago. Although it did not obtain complete acceptance in the courts, it has enjoyed substantial favor and is the expressed law of many jurisdictions. The *Restatement (Second) of Contracts* has been very influential, even if unable to displace the hegemony of textualism. We regard the Restatement’s approach to contract construction as dramatically superior to a confined textual inquiry. Our goal is to convince readers across the profession that a refined, updated, slightly expanded version of the Restatement approach fused with the *Thomas Drayage* receptiveness to extrinsic evidence deserves wider acceptance, particularly regarding construction of insurance policies.

*Thomas Drayage* was decided 50 years ago and, although perhaps constrained in its scope by subsequent California cases, establishes a

receptive approach to textual interpretation that appears to have worked well for a half-century. To state the obvious, California is the largest state in the union not only in population but also economically and legally. It has thrived during this period. Would this really happen if California's contract law was bad or even subpar? Either in the abstract or as compared to textualism? We think not. Contract law is considered perhaps the most important part of law regarding business operations. By comparison, jurisdictions generally viewed as more textualist, such as New York, have lost ground economically to California during this same period.

Frankly, any approach to construction is superior to "High-Church" textualism that refuses to consider indicia of meaning other than policy text or the text of other standardized contract forms. Although similar to the *Restatement (Second) of Contracts*, *Thomas Drayage*, and pre-2018 RLLI § 3, the Integrative Approach differs from these other defensible approaches and improves upon them in several respects.

First, under the Integrative Approach, before even beginning to assess the text of the contract document or statute, the court surveys the background history that brought the document into being. We have long been puzzled at the legal orthodoxy of beginning to examine disputed document language, with the language before first becoming at least a little bit familiar with the events giving rise to the dispute—in particular, the transaction that is subject of the document under review. To us, it is like beginning to read and understand a book without some inkling of whether it is a mystery, science textbook, travel journal, gardening manual, or pornography. Consider how the words "hot," "pot," "fast," "cool," and "jerk" all can have quite different meanings in these various genres.

In the realm of contract and insurance disputes, it similarly makes sense to know what business or consumer activity initiated a transaction as well as something about the relationship of the parties and genesis of the dispute before reading the disputed text. It is curiously bizarre in insurance that courts regularly do not make a practice of familiarizing themselves with the subject of the insurance policy in the commercial marketplace. If the court were similarly construing terms in a cell phone contract, for example, the words in that document would be informed by that context, instead of the words appearing in a house mortgage agreement. This is by no means extrinsic evidence. It is evidence of what the "thing" is to be construed. How can one make an informed decision about word meaning without at least knowing what kind of document "the thing" happens to be?

Second, the Integrative Approach is arguably even less text-dependent than the *Restatement (Second) of Contracts* or pre-2018 RLLI approaches in that the party seeking to introduce extrinsic evidence in contradiction

of the prevailing view of the meaning of the text is not required to set forth an alternative meaning to which the contested text is susceptible. It is sufficient for the party to argue that the challenged text is not properly part of the agreement or is an inaccurate memorialization of the agreement. What is generally but perhaps misleadingly referred to as contract reformation<sup>147</sup> is part of the Integrative Approach.

Modern contract law in most jurisdictions permits such challenges pursuant to doctrines of mistake, fraud, or reformation.<sup>148</sup> We would prefer that this concept be incorporated into core contract construction doctrine and used at the outset of the analysis. It becomes misleading otherwise to go through the exercise of formulating a meaning of a term devoid of its context to then back out of that meaning for some other, unrelated reason. The text of a document may be completely in error or in contradiction to the promises made and transaction entered into by the parties. When this occurs, the party aggrieved should not need to offer a plausible alternative reading of language that never should have been in memorialization of the agreement at all. The aggrieved party should also be able to make this argument without the need to satisfy the elements of the mistake, reformation, or fraud escape hatches.

Similarly, the Integrative Approach rejects the minority view of the parol evidence rule preventing extrinsic evidence regarding lack of full integration of a contract document. Pursuant to the majority approach to parol evidence, a contract document's recitation that it is integrated, and thus permits no consideration of evidence outside the four corners of the document, may be challenged through introduction of evidence showing that the recitation is inaccurate.<sup>149</sup>

Although one can make a good case for eliminating the parol evidence rule entirely, as most European countries have done,<sup>150</sup> the Integrative Approach does not go to such lengths. It does, however, take a narrower

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147. See, e.g., *Bd. of Trs., U. of Ill. v. Ins. Corp. of Ir., Ltd.*, 969 F.2d 4329 (7th Cir. 1992) (applying Illinois law. The court "reforms" policy to make it clear that full policy limits apply to stub policy period of less than a year but in essence is not reforming or changing the policy but merely revising language to reflect the meaning always attached to the policy).

148. See PERILLO, *supra* note 4, §§ 3.7, 9.25-9.40 (discussing doctrines of fraud, mistake, and reformation); FARNSWORTH, *supra* note 4, §§ 4.10, 7.5, 9.2-9.3 (same).

149. See PERILLO, *supra* note 4, Ch. 3 (discussing parol evidence rule and jurisdictional differences regarding admissibility of evidence bearing on the question of whether document is fully integrated); FARNSWORTH, *supra* note 4, §§ 7.2-7.6 (same).

150. The pre-EU law of most European nations and the EU's Principles of International Commercial Contracts ("PICC") as well as the Convention on the International Sale of Goods ("CISG") lack the parol evidence rule and appear to have functioned well. See *U.N. COMM'N ON INT'L TRADE LAW, U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS*, Art. 6, U.N. Sales No. E.10.V.14 (2010). See, e.g., *MCC-Marble Ceramic Center, Inc. v. Ceramica Nuova D'Agostino, S.p.A.* 144 F.3d 1384 (11th Cir. 1998) (permitting buyer in case governed by CISG to introduce extrinsic evidence disputing writing containing a limitation on remedies where contract stated it was fully integrated).

view of what constitutes parol evidence than do many courts. Often, parol evidence and extrinsic evidence are treated as synonyms. This is akin to decisions that speak of “jurisdiction” without regard to whether the term means power to hear a matter (subject matter jurisdiction), power over a party (personal jurisdiction), inability to extend a deadline (a “jurisdictional” limitation), or the doctrine of primary jurisdiction in administrative law.

We consider parol evidence to be solely evidence of pre-contract negotiations offered to contradict clear terminology in a contract document memorializing an agreement. Pursuant to the parol evidence rule in the United States, such evidence may not be received. However, extrinsic evidence about the background and setting of a transaction, the nature of the businesses and business relations, industry custom and practice, and surrounding circumstances, such as a war or natural disaster, may properly be considered without violating the parol evidence rule.

The Integrative Approach also embraces a view of a reasonable expectations analysis closer to the strong Keeton form than is otherwise found in most cases.<sup>151</sup> Recall that pursuant to the strongest form of reasonable expectations analysis, a policyholder’s *objectively* reasonable expectations may trump even clear policy language. The Integrative Approach does not support automatic displacement or de facto revision of policy text *solely* based on policyholder expectations, but it does permit expectations to overcome text when such expectations are sufficiently supported by additional factors, such as the evidence of policy purpose and function at odds with the language of the policy.

We realize this suggestion is guaranteed to raise the hackles of insurers, who can be expected to argue that the policy language reflects policy intent and purpose. If they are correct, they will prevail. However, where insurers sell policies that are inapt to serve the intended market function for the policyholder, the insurer should not be able to escape coverage based on a literalist application of language that usually was not even provided to the policyholder until after purchase of the insurance, and for that matter, was probably never even read by the policyholder.

Unfortunately, the adage that the “large print giveth” while the “small print taketh away” has reflected too much of the practice of modern contracting, including insurance contracting. This approach should be eradicated and replaced by a rule of interpretation that requires contract designers, and those documenting contracts, to sell products consistent with the purchaser’s purpose or take sufficient steps to prevent policyholders from forming reasonable conceptions of coverage inconsistent with the policy form.

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151. See TAN 41 addressing the reasonable expectation approach and its variants.

The same holds true for contract documents in other contexts. This may require an expansion of some insurance products or other contractually-based services, under which insurers and other vendors are entitled to charge correspondingly higher premiums and prices. Alternatively, insurers and other vendors must take steps to prevent purchasers from getting the “wrong” view from the insurer/vendor perspective but nonetheless the “reasonable” view. This is not as difficult as it seems.

Recall that a policyholder’s subjective or idiosyncratic view of coverage is entitled to essentially no weight, the exception being situations where the subjective or idiosyncratic view represents a specific contracting intent of the parties. Consequently, all an insurer must do is something sufficiently informative to prevent the mythical “reasonable” policyholder from believing there is coverage for categories of loss or claim the insurer does not wish to cover. Rather than “hiding” limitations on coverage in a lengthy list of exclusions, conditions, or definitions, the insurer probably need only use a summary brochure to which the purchaser’s attention is directed, perhaps with some commentary of the sales agent walking the purchaser through the checklist of the policy’s scope and limitations. Specifically, for internet purchases of insurance, this could be done by requiring the purchaser to check off a disclaimer list item by item.

This sort of practice has remarkable potential to broaden the insurer’s tools in marketing and selling policies. It may also drastically reduce litigation costs, as the insurer would not be limited to one “true” source of meaning: the policy. Thus far, insurers are often reluctant to provide such information to policyholders for fear of conflicting a favorable reading of policy terms. However, if such documents regularly become part of the Interpretive Approach, insurers may well be more ready to invest in such documents, thus decreasing litigation overall because terms will cease to be legalistic anachronisms, and policyholders will be more informed regarding their coverage rights.

This type of activity would go a long way toward prompting greater flow of coverage information to policyholders at a more relevant time than post-loss.<sup>152</sup> If a policyholder has greater information about coverage when that information is relevant to the policyholder, there is a far greater potential for the policyholder to control her behavior with an eye to avoiding insurance moral hazard concerns. Frankly, courts too need to know about coverage information when promulgating judicial rules about insurance policy interpretation.<sup>153</sup>

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152. Daniel Schwarcz, *Coverage Information in Insurance Law*, 101 MINN. L. REV. 1457, 1507 (2017).

153. *Id.*



Perhaps the most significant difference between the proposed Integrative Approach and its *Restatement (Second) of Contracts* and pre-2018 RLLI § 3 allies is that the Integrative Approach not only permits consideration of a broad range of contextual factors and information at variance with the preferred meaning of text but also permits assessment of document text through prisms other than contract.

Regarding insurance policies, courts using the Integrative Approach may consider alternative characterizations of insurance policies as products, private legislation, social instruments, or a regulated industry.<sup>154</sup> This is not to suggest that insurance policies do not remain contracts for purposes of legal analysis but is a means of providing additional context and understanding about the contractual arrangement under review.

For example, recognizing that insurance policies, particularly standard form policies and especially those purchased by consumers, often operate more like a purchased product rather than a negotiated deal, can assist the court in better determining the purpose and function of the policy and intent of the “contracting” parties. This understanding is likely to lead to improved interpretation of policy language. Knowing something about the insurance “product” under review can also assist the court in determining what objectively reasonable expectations might be held by policyholders, insurers, and others relying on the policy. This in turn can, at a minimum, inform the interpretation of policy language and be used if the court is inclined to apply a strong Keeton-esque version of the reasonable expectations approach.

Likewise, the wide use of ISO insurance policy forms promulgated for the property or casualty industry has aspects of private legislation, industry standards akin to construction safety protocols or Generally Accepted Accounting Principles (GAAP), and other professional trade or guild standards. Appreciating these observations provide additional contextual background for assessing the meaning of policy text. Like the product analogy, the insurance-policy-as-statute approach can also illuminate party expectations and understandings of the operation and purpose of the insurance in question.

Similarly, viewing insurance policies in their role as social instruments or socioeconomic institutions assists interpretation by noting the function of the insurance policy in question. Presumptively, policy text should be consistent with the ordinary functioning of the insurance under review in the larger scheme of risk management.<sup>155</sup> Knowing something about that

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154. See notes 53, 60, 129-32, *supra*, citing publications arguing for consideration of insurance policies as products, private legislation, social institutions, social instruments, and the activity of a regulated industry.

155. We say “presumptively” because the parties are of course free to depart from conventional understanding through customized provisions of the policy. For example, an insurer may specifically

larger scheme of things and ordinary function of the insurance assists a court in construing policy language.

The view of insurance as a regulated industry akin to a utility can also be illuminating in that it, like the other characterizations discussed above, can increase a court's contextual understanding of the insurance in question and its relation to the activity of the disputing parties. For example, some kinds of insurance, such as auto insurance, may be mandatory to purchase to perform a certain act, such as driving a motor vehicle. Most financial institutions that are regulated industries require the purchase of insurance before issuing a home mortgage. Accounting for these regulated responses may counsel in favor of invalidating a policy provision inconsistent with the regulatory scheme or mandating coverage consistent with regulatory minimums or objectives. It may also negate proffered public policy arguments in favor of coverage where prevailing regulation does not align with or support the suggested public policy. Further, it may even provide a safe harbor on the ground that a policy form approved by regulators cannot be illegal, facially unconscionable, or in violation of state public policy.

Although our thinking in this area is most developed regarding insurance, we believe that many types of contracts are susceptible to what might be termed "heuristic re-characterization" which views the instrument or transaction under review not only as a contract but also appreciates alternative conceptions of the transaction. Almost all widely-used standardized contracts, particularly those marketed to consumers, can be seen as products as well as contracts, such as a lease, provider agreement, repair or service agreement, and club membership.

Like the contextual and California approaches, the Integrative Approach is receptive to specific information about party intent, such as pre-dispute correspondence regarding the meaning of policy text. Likewise, the Integrative Approach is receptive to information regarding usage in trade, course of dealing, course of performance, the relational nature of a contract, and party history and conventions. The Integrative Approach is also receptive to the extra-textual tools routinely used by even the most textual courts, such as dictionaries (though with caution about their inherent limitations, as noted in Part IV), canons of word meaning, treatises, precedent, drafting history, and other industry materials. This includes not only other court decisions construing the same or similar language but also precedent that does not address the same language but otherwise illuminates the interpretative issues before

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exclude a risk ordinarily covered under a general liability policy because of the particular policyholder's exposure to such risk (or, alternatively, use a sublimit or special endorsement regarding the risk or charge additional premium). Such deviations from the normal scope of coverage should be sufficiently consensual and clear before a court deprives a policyholder of ordinarily expected coverage.

the court. For example, there may be an opinion providing background on the development of a type of insurance policy, discussing industry custom and practice, or examining the type of business or personal activity involved in the dispute.

## VII. THE FEASIBILITY AND FLEXIBILITY OF THE INTEGRATIVE APPROACH

The Integrative Approach has a distinct advantage to prior approaches, especially a textual purist approach: the Integrative Approach does not have to be applied in baroque fashion in every case. In fact, it may well be reserved for only the “hard cases,” where actual meaning of a term is a palpable issue. In many, perhaps even most cases, a simple peek at the policy language leads a court to the inevitably reasonable conclusion of whether there is coverage. Therefore, there would be no need to resort to an Integrative Approach which prompts a court to consider purpose in a detailed fashion.

For example, if a policyholder is arguing that she should have general liability coverage when she is sued for prematurely terminating a contract, a court can quickly rule that there is no coverage and probably no potential for coverage, because there would be no “physical injury to tangible property”. This sort of finding is one that can be derived from the language of the policy alone or the language assessed with a “quick look” at the context, circumstances, custom, and practice. Both methods would arrive at the same just result.

The Integrative Approach thus does not require a “deep dive” into non-textual or extra-textual factors in the ordinary case and will therefore not add much adjudicative burden. Its application can exist on a continuum. For the close case, where the meaning of a term is at issue, the Integrative Approach will of course require more heavy lifting by counsel and courts, although these cases always take longer under a textual approach as well. This, however, is justified by the need to achieve more just results and confident rulings in tricky cases.

The Integrative Approach also holds potential for implications beyond insurance policy construction alone. Armed with the Integrative Approach, a court is in a far better position to make important determinations about insurer and policyholder conduct. We can foresee the advantage of the Integrative Approach in court inquiries into policyholder misrepresentation or fraud, and even into insurer bad faith. An inquiry into whether the insurer has acted unreasonably or failed to give equal consideration to the interests of the policyholder can be more appropriately conducted by a court taking an Integrative Approach, because that court is then able to uncover unreasonable assertions of non-coverage by the insurer, such as a flat-out refusal to defend in the face of

clear coverage—to name a particularly egregious example. Thus, courts may be less willing to grant summary judgment to an insurer on grounds that a claim was “fairly debatable” because the Integrative Approach may well show that such is not the case.

In addition to being flexible enough to operate on a continuum as needed, the Integrative Approach provides a better solution for producing more just interpretive results than those approaches that, as a major component in the interpretive exercise, purport to rely on disambiguated consumer survey evidence of a target population’s lay understanding of a policy term. Indeed, we think that type of evidence ranges from unhelpful at best to misleading at worst, because it is simply an extreme form of hyper-textualism in different clothing.

An example may be instructive as to how seamlessly the Integrative Approach would operate with a recent case. The recent COVID-19 pandemic has produced an explosion of insurance coverage litigation, particularly in the realm of business interruption coverage for pandemic-related losses.<sup>156</sup> Many businesses in America suffered significant financial losses because of government lockdowns aimed at curbing the spread of the COVID-19 virus. A high proportion of those businesses were insured by standard all-risks commercial property policies, many of which had additional coverage for business interruption losses. The business interruption coverage insured the business’ income stream in the event the business suffered a covered loss under the property policy. The coverage clause in the standard all-risks commercial property policy provides coverage for “direct physical loss of or damage to property.”<sup>157</sup> So, to claim for business interruption losses, a business would have to prove it suffered a covered “direct physical loss of or damage to property.”

Imagine a nail salon was deemed a non-essential business and forced to close for three weeks due to a government-ordered shutdown during the COVID-19 pandemic. Did the nail salon suffer a “direct physical loss of or damage to property” such that it could claim business interruption losses from its insurance policy? The coverage clause is not defined in the policy, nor are any of the individual terms in the clause.

The Integrative Approach would prompt a broad construction of the clause with an eye to the policy’s risk management objectives. Here, all-risks commercial property insurance is sold to protect the property interests of commercial policyholders. If something happens to their property, policyholders expect to be able to turn to their property insurance. The business interruption portion of that insurance would

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156. See, e.g., Knutsen & Stempel, *Infected Judgment*, *supra* note 3.

157. See STEMPEL & KNUTSEN, ON INSURANCE COVERAGE, *supra* note 41, § 15.01[D].

insure the income stream connected with that property. If something happens to the property such that that loss is covered, the interrupted income stream resulting from that loss should be replaced by the insurance.

By reading the policy, and keeping that context in mind, one would then turn to what “direct physical loss of or damage to property” means in the context of business interruption insurance as contained in all-risks commercial property insurance. Because the clause is a coverage clause, it should be construed broadly. While the property likely did not suffer “damage” as is ordinarily understood, did the policyholder suffer a “direct physical loss” because of the COVID-19-related order shutting down the business? “Loss” is mentioned separately from “damage.” The policyholder effectively had a “physical loss” during closure—it could not open, no one could work, and no customers could come to the store. It lost the use of the store. The clause does not appear to require any physical alteration to property, as the clause does not say so, and reading that limitation in would run contrary to reading a coverage clause broadly.

If one turned to caselaw examining this coverage clause, there are many instances of courts granting coverage for loss of use of property when the premises in question is contaminated by some ephemeral things like smoke,<sup>158</sup> mold,<sup>159</sup> carbon monoxide,<sup>160</sup> radiation,<sup>161</sup> or gas.<sup>162</sup> One could certainly make an analogy that a dangerous virus operates like those contaminants. However, some cases hold that the clause requires there to be actual physical alteration of the property for coverage to attach.<sup>163</sup> As noted above, the clause does not demand that as a requirement for coverage.

If courts are construing this clause in different ways, requiring different expectations for coverage to attach, and not agreeing that loss of use equates to a covered “loss,” then this is strong evidence that the clause is ambiguous. It is subject to two or more reasonable meanings, although we may quibble that the reading which reads in a requirement for tangible physical alteration may be on the fringes of reasonable. In that case, if a term is ambiguous, it is to be construed *contra proferentem*, as against the

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158. Oregon Shakespeare Festival Ass’n v. Great Am. Ins. Co., 2016 WL 3267247 (D. Or. June 7, 2016).

159. Sullivan v. Standard Fire Ins. Co., 956 A.2d 643 (Del. 2008); Prudential Prop. & Cas. Ins. Co. v. Lillard-Roberts, No. CV-01-1362-ST, 2002 WL 31495830, at \*8-\*9 (D. Or. June 18, 2002) (applying Oregon law).

160. Matzner v. Seaco Ins. Co., 1998 WL 566658 (Mass. Super. Aug. 12, 1998).

161. Am. All. Ins. Co. v. Keleket X-Ray Corp., 248 F.2d 920, 925 (6th Cir. 1957).

162. TRAVCO Ins. Co. v. Ward, 715 F.Supp.216 699 (E.D. Va. 2010).

163. See, e.g., Source Food Technology, Inc. v. United States Fidelity and Guaranty Co., 465 F.3d 834 (8th Cir. 2006) (applying Minnesota law); Mama Jo’s, Inc. v. Sparta Ins. Co., 823 F. App’x 868, 870 (11th Cir.) (applying Florida law).

drafter. Therefore, insurance coverage would attach in this scenario.

The Integrative Approach leads to this coverage result without the use of dictionaries. But, if one takes a purely textualist approach alone, one must struggle with the words “direct,” “physical,” “loss,” and “damage,” without reference to what each means and for what purpose. The result is likely a reductionist conclusion that “physical” means “something you can touch,” “loss” means “to lose something,” and “damage” means that “something came to harm.” That parse-out of the words approach still leaves one wondering what the phrase together means. To get to the phrase requiring actual tangible alteration to property for coverage to attach, one must emphasize the word “physical” above the other words. And one must ignore the legion of cases where invisible contamination resulted in insurance coverage being triggered for very similar kinds of losses.

The accuracy of a purely textual approach may be improved through use of text-based inquiry that is not limited to dictionaries such as corpus linguistics, a process in which a large data base is scanned to examine the way words are used in a variety of writings. Although this approach to discerning meaning holds promise and will often constitute an improvement over dictionary use alone, like any excessively textualist approach, it may be insufficient to resolve an interpretative dispute and even have potential to mislead. Corpus linguistics holds substantial promise for improving interpretation of insurance policies and other documents, but in our view should not be the sole or perhaps not even the primary determinant of documentary meaning.<sup>164</sup>

The Integrative Approach arrives at a contextual, considered response to coverage that is closer to the commercial expectations of this all-risks commercial property policy, both from the perspective of the insurer and the policyholder. To the policyholder who cannot use its nail salon due to the government order banning occupancy, it has physically lost that

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164. See Jeffrey W. Stempel, *Adding Context and Constraint to Corpus Linguistics*, 86 BROOK. L. REV. 389 (2021). For description, analysis, support and criticism of corpus linguistics, see Mouritsen, *supra* note 124 (criticizing isolated dictionary use and urging greater use of corpus linguistics for textual interpretation); Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the Critics*, 88 U. CHI. L. REV. 275 (2021) (arguing that although corpus linguistics focuses on textual meaning, the process inherently involves context as reflected in use of terms contained in wide range of writings and accepting that corpus linguistics analysis is not sole determinant of word meaning); Kevin Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726 (2020); Lawrence Solan & Tammy Gales, *Corpus Linguistics as a Tool in Legal Interpretation*, 2017 BYU L. REV. 1311 (2017) (summarizing and critiquing corpus linguistics). Several databases have been assembled containing millions or even billions of entries from newspaper, books, periodicals, broadcast transcripts and the like. See e.g., *Corpus of Historical American English*, ENGLISH-CORPORA, <https://www.english-corpora.org/coha/> [<https://perma.cc/2CAU-U9N5>]; *Corpus of Contemporary American English*, ENGLISH-CORPORA, <https://www.english-corpora.org/cocac/> [<https://perma.cc/99B2-4X4Z>]. See generally Symposium, *Data-Driven Interpretation*, 86 BROOK. L. REV. (2021) (forthcoming); Symposium, 2017 BYU L. REV. 1297 (2017).

property. It cannot earn income. Coverage should be triggered. Its property interest in the property has effectively been harmed by a cause that is not excluded under the policy. To the insurer, it underwrote all-risks property insurance that had a business interruption component to it. If something happened to result in interference with the policyholder's property rights to such a degree that it could not operate its business, the policy should be triggered.

#### CONCLUSION

In contrast to rigid and restrictive textualism, a more Integrative Approach that sets a place at the table for an array of extrinsic and contextual evidence is likely to provide more accurate and just adjudication consistent with the intended meaning, purpose, and function of both statutes and contracts, particularly insurance policies. States construing insurance policies would get closer to justice by rejecting word worship and embracing the predecessor provision of the RLLI, the *Restatement (Second) of Contract's* true interpretive spirit, the *Thomas Drayage* line of California cases, the reasonable expectations principle, and a contextual approach to determining the meaning of contracts, all of which are underpinnings to the Integrative Approach.