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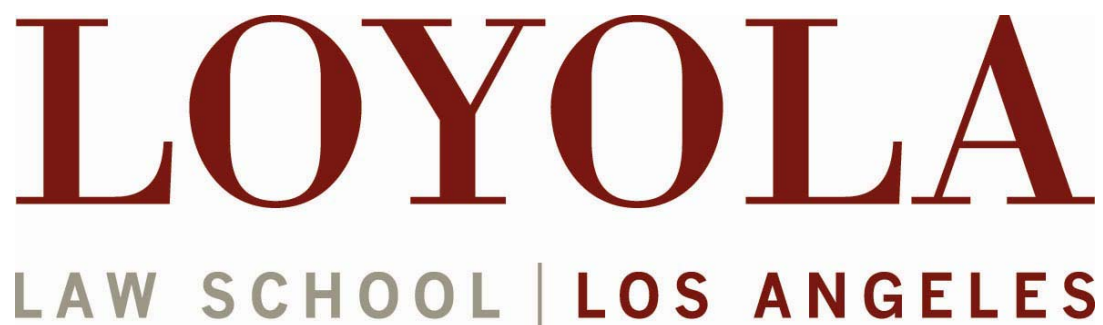
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**The Law of the Word:
Dictionary Shopping in the Supreme Court**

Professor Ellen P. Aprill

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THE LAW OF THE WORD: Dictionary Shopping in the Supreme Court

Ellen P. Aprill*

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All of us, including the Justices of the Supreme Court, have used dictionaries uncritically, without asking or understanding what purposes they are intended to serve. We take their accuracy for granted. In fact “[a]uthors and publishers have found that if they call a reference book a dictionary it tends to sell better than it would if called by another name because the word suggests authority, scholarship, and precision.”¹ This Article undertakes a critical evaluation of the Supreme Court’s use of dictionaries. It does so by describing and applying principles of lexicography to show that dictionaries are not as authoritative, precise, or scholarly as we and the Justices often assume.

I. INTRODUCTION

The Supreme Court’s use of dictionaries appears to be increasing and becoming more prominent. A thoughtful student note in the *Harvard Law Review* (“*Harvard Note*”) has documented a “dramatic, sustained increase in citations to dictionaries.”² Professor Thomas Merrill has shown how the Supreme Court in recent terms has come more and more to rely on dictionaries rather than legislative history in opinions involving statutory interpretation.³ Writing about the 1989 Term, Frederick Schauer observed that the Justices, despite the importuning of legal scholars, had failed to read their Derrida or Foucault, but had “been spending their time reading (Noah) Webster, relying, both in fact and in articulated justification, on notions of plain meaning.”⁴ Professor Zeppos sees “an almost fanatical movement . . . to have dictionary definitions control the meaning of statutes.”⁵

1. SIDNEY I. LANDAU, *DICTIONARIES: THE ART & CRAFT OF LEXICOGRAPHY* 5 (1984). As will be obvious from frequent citation to it, I am deeply indebted to this work. See generally RONALD A. WELLS, *DICTIONARIES AND THE AUTHORITARIAN TRADITION* (1973).

2. Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1440 (1994) [hereinafter *Looking It Up*]. For example, the 1992 Term had a fourteen-fold increase in citations to dictionary definitions over the 1981 Term. See *id.* at 1438. The Note includes a Table listing dictionary usage by Justice from the 1988 Term to the 1992 Term. See *id.* at 1439 n.14. The appendix to this Article contains a chart updating this information by listing dictionary usage by Justice from the 1988 Term to the 1995 Term. The percentages show considerable consistency, although the statistics require some caution. Justices may cite dictionaries only to reject their authority.

3. See Thomas W. Merrill, *Textualism and the Future of the Chevron Doctrine*, 72 WASH. U. L.Q. 351, 355 (1994). He found that in the 1988 term, 13% of the Court’s statutory interpretation opinions referred to dictionaries, while 33% did so in the 1992 term. See *id.*

4. Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231, 231.

5. Nicholas S. Zeppos, *Judicial Review of Agency Action: The Problems of Commitment, Non-Contractability and the Proper Incentives*, 44 DUKE L.J. 1133, 1143 (1995).

As the *Harvard Note* observed, “[t]he Court’s growing faith in dictionaries is tied to a broader methodological shift toward textualism in statutory interpretation.”⁶ As its name implies, textualism gives particular attention to the statutory language. Professor Pierce has defined “textualism” succinctly as the judicial interpretation of statutes that seeks the meaning of statutory language by using a “set of tools, including dictionary definitions, rules of grammar, and canons of construction, in an effort to derive the putatively objective meaning of the statutory word or phrase.”⁷ While textualists do not ignore context in interpreting statutory language, they prefer to limit context to “internal context, that is, how a term is used within the text.”⁸ Textualism avoids external sources and glosses, such as legislative history, that are often used by those judges who interpret statutes by searching for legislative intent or purpose.

While all textualists rely primarily on the text of the statute to support their conclusions, textualism takes various forms. As Professor Rasmussen has explained, practitioners of textualism differ in the extent to which they consult legislative history. Some textualists use legislative history, so long as its use is “only to confirm the Court’s reading of the text. The key is that legislative history is not consulted to clarify any ambiguity, let alone used to overturn the statute’s plain meaning.”⁹ In contrast, strict textualists, such as Justice Scalia, “allow the judge to rely only on statutory language; she cannot confirm her reading of the text by an examination of legislative history or other nonstatutory materials.”¹⁰ Because Justice Scalia is the most ardent supporter of and the most closely associated with textualism, this Article pays particular attention to his practice, but does not limit its discussion to his opinions.

Like its practices, the justifications for textualism differ. Professor Schauer sees it as a “second-best coordinating device” that permits the Justices to decide and dispose easily of technical cases that they and their clerks find uninteresting as well as to reach “some methodological

6. *Looking It Up*, *supra* note 2, at 1440.

7. Richard J. Pierce, Jr., *The Supreme Court’s New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 750 (1995); see also Bradley C. Karkkainen, “Plain Meaning:” *Justice Scalia’s Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL’Y 401 (1994); William D. Popkin, *An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133 (1992); Nicholas S. Zeppos, *Justice Scalia’s Textualism: The “New” New Legal Process*, 12 CARDOZO L. REV. 1597 (1991); William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990).

8. Karkkainen, *supra* note 7, at 407.

9. Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court’s Bankruptcy Cases*, 71 WASH. U. L.Q. 535, 541 (1993).

10. *Id.* at 540.

consensus, in the face of substantive disagreements among them.”¹¹ He predicts that plain meaning is most likely to be used for “issues of great complexity and relative political and moral equipoise” and for cases in which neither the Justices nor their clerks have “had much context-sensitive expertise.”¹² Accordingly, he views the textualist choice as a pragmatic one. This “pragmatic textualism” is not a strict textualism; it may consult legislative history for confirmation. For pragmatic textualists, limited reliance on legislative history is a matter of convenience rather than principle. Such pragmatic textualism sometimes gives statutory language a broad interpretation, sometimes a narrow one.

Justice Scalia’s strict textualism has a different source. His embrace of textualism follows from his aversion to the search for legislative intent based on legislative history.¹³ Much of Justice Scalia’s stated objection to legislative history centers on the process by which it is produced—without satisfying the constitutional requirements of bicameralism and presentment,¹⁴ by legislative staffers under the influence of lobbyists after the congressional vote, and without being read by the members of Congress who pass the legislation.¹⁵ Avoiding legislative history and returning to the text, he asserts, constrains judges from policymaking and returns legislating to the democratically elected Congress.¹⁶ Thus, as he articulates his rationale, strict textualism serves the purpose of deference, and I will label it “deferential textualism.” We would expect deferential textualism to defer to statutory language that asserts broad congressional power.

Some critics of deferential textualism, however, assert that textualists, including Justice Scalia, do not use the method to defer to Congress.¹⁷ They find strict textualists selective and inconsistent in choosing

11. Schauer, *supra* note 4, at 232, 253.

12. *Id.* at 249, 253. Schauer explains, “[c]ontext is not for dabblers.” *Id.* at 253.

13. See Merrill, *supra* note 3, at 371; Karkkainen, *supra* note 7, at 413-29; Nicholas S. Zeppos, *The Use of Authority in Statutory Interpretation: An Empirical Analysis*, 70 TEX. L. REV. 1073, 1080-81 (1992).

14. See *Wisconsin Pub. Intervener v. Mortier*, 501 U.S. 597, 621 (1991) (Scalia, J., concurring in the judgment); *Chisom v. Roemer*, 501 U.S. 380, 405 (1991) (Scalia, J., dissenting); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29-30 (1989) (Scalia, J., concurring in part and dissenting in part). See also *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution or Laws*, in A MATTER OF INTERPRETATION 29-37 (Antonin Scalia ed., 1997).

15. See *Blanchard v. Bergeron*, 489 U.S. 87, 98-99 (1989) (Scalia, J., concurring in part and concurring in judgment).

16. See Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact-Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1300-04 (1990).

17. See Merrill, *supra* note 3, at 372; Karkkainen, *supra* note 7, at 424.

and applying textualist tools.¹⁸ According to such critics, these textualists do not defer to broad assertions of congressional power, but avoid textualism itself or particular textualist tools if their application to statutory language would result in either a broad assertion of governmental powers, or an ambiguity requiring deference to governmental power.¹⁹ These commentators suggest that textualist methods do not in fact advance the self-proclaimed textualist agenda of deferring to the branches of government with greater democratic pedigrees, but instead are used to construe statutory meaning so as to limit the role of the legislature or administrative agencies.²⁰ To these critics, strict textualism is instrumental.

This Article studies only one of the arsenal of textualist tools, the use of dictionaries. Dictionary definition plays a key role for textualism.²¹ Both deferential and pragmatic textualists frequently describe their endeavor as the search for “ordinary” or “plain” meaning. For ordinary meaning, they often resort to dictionary meanings, and treat the dictionary definition as dispositive. In so doing, they treat dictionary definitions as an inherent part of determining the meaning of the text, and not as an impermissible external source. In these opinions, dictionary definitions often serve to defeat arguments that the statute is ambiguous.²² As a strict textualist, Justice Scalia assigns a particularly important role to dictionaries as part of his campaign against the use of legislative history, and in favor of textualism in statutory interpretation.²³ Other times, when the Justices see the statutory language as unambiguous, textualist opinions, particularly ones in which the motivation seems pragmatic, refer to “plain meaning,”²⁴ sometimes citing to dictionaries to show the meaning is plain, and sometimes simply asserting it as such.

Of course, non-textualists, at least those referred to as intentionalists because they construe statutes by seeking the intent of Congress,²⁵ also cite

18. See Zeppos, *supra* note 7, at 1640.

19. Under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Court is to defer to the interpretations of an administrative agency if the statutory language is ambiguous. See *id.* at 843. For discussions of *Chevron*, see Merrill, *supra* note 3, at 352-53 & n.8.

20. See generally Karkkainen, *supra* note 7; Merrill, *supra* note 3; Zeppos, *supra* note 5; Zeppos, *supra* note 16.

21. See Merrill, *supra* note 3, at 357.

22. See, e.g., *Chisom v. Roemer*, 501 U.S. 380 (1991), discussed *infra* at notes 208-22; *Smith v. United States*, 508 U.S. 223 (1993), discussed *infra* at notes 229-37.

23. See *Looking It Up*, *supra* note 2, at 1439 (“Justice Scalia has been the most willing to employ dictionaries.”); Karkkainen, *supra* note 7, at 441-45.

24. See Schauer, *supra* note 4, at 231-32, 234 n.6; sources cited *supra* note 7.

25. See, e.g., Merrill, *supra* note 3. Another categorization of theory of statutory interpretation, particularly espoused by academics, is “dynamic statutory interpretation.” See

dictionaries. Intentionalists, however, give plain meaning “presumptive, but not conclusive effect.”²⁶ For intentionalists, the evidence of meaning supplied by dictionary definition is not conclusive. If intentionalists consult a dictionary definition, they will go on to consider sources other than the dictionary. These sources include not only the text of the statute itself, but sources external to the text. Legislative history is the most likely external source, but other possibilities include administrative interpretations and uses of the word at issue in other legal documents. Intentionalists’ use of dictionaries can thus be called “exploratory.”

This Article examines the use of dictionary definition in recent Supreme Court opinions under all of these categories. Thus, it is in part, descriptive. It considers how frequently the Court uses dictionaries and which dictionaries the Court uses. It is also critical. It questions inconsistency in the use of dictionary definitions and inconsistency in the choice of dictionaries cited. It supports those who find textualism instrumental. That is, this Article agrees with the critics of textualism who argue that textualists are selective and inconsistent in when and how they use dictionary definitions. Dictionary definitions are more likely to be relied upon when they give the impression of objectivity and consensus for narrowing governmental power, than when they would have the opposite impact.

In particular, this Article questions judicial use of dictionary definitions as a method of controlling statutory meaning. It does so by explaining and applying principles of lexicography. It answers Justice Scalia on his own terms, by describing, in the words of the subtitle to *Dictionaries: The Art & Craft of Lexicography* by Sidney I. Landau, “what dictionaries are,” “how they are produced,” and how we—and in this case judges in particular—“can use them best.”²⁷

Others have argued against judicial reliance on dictionary meaning. Supreme Court opinions, especially dissents, urge care in use of dictionaries. As one recent dissent asserts, “[d]ictionaries can be useful aids in statutory interpretation, but they are no substitute for close analysis of what words

William N. Eskridge, Jr., *Gadamer/Statutory Interpretation*, 90 COLUM. L. REV. 609 (1990); William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1482-84 (1987); Rasmussen, *supra* note 9, at 540-43. Dynamic statutory interpretation not only considers legislative intent, but also urges courts to address policy choices explicitly. *See id.*

26. Rasmussen, *supra* note 9, at 542.

27. LANDAU, *supra* note 1. Landau has worked in lexicography for more than 20 years and has been editor-in-chief of six standard dictionaries for Funk & Wagnalls, as well as editor-in-chief of the largest medical dictionary in English. *See id.* at book jacket. He is currently editor-in-chief of the Cambridge Dictionary of American English.

mean as used in a particular statutory context.”²⁸ The *Harvard Note* cautions that “dictionaries should occupy a space at the beginning rather than at the end of the interpretive process.”²⁹ Another student note declares, “[j]udges should admit that dictionaries provide possible meanings, not dispositive resolutions.”³⁰ Judge A. Raymond Randolph of the D.C. Circuit believes that “citing to dictionaries creates a sort of optical illusion, conveying the existence of certainty—or ‘plainness’—when appearance may be all there is.”³¹ These and other commentators place such discussions in the context of linguistics or philosophy of language or theories of statutory interpretation. While these contexts are useful and illuminating,³² they do not examine in any detail lexicographic principles or place their criticisms in a lexicographic context.³³ Such a context provides necessary background and gives additional force and weight to such concerns. An understanding of lexicography is crucial to any informed evaluation of the Supreme Court’s use of dictionaries.

Part II describes several modern lexicographic considerations that bear on the use of general dictionaries. The first two sections of Part II discuss, respectively, the source for and constraints on definitions in such dictionaries. In both of these sections, as elsewhere in this Article, dictionaries cited by the Supreme Court form the basis of discussion. These two aspects of lexicography provide the framework for understanding why the particular meanings listed in a dictionary definition and the particular phrasing of the definitions form questionable bases for determining the meaning of a word in a statute. By describing differences in various dictionaries and outlining the Court’s use of different kinds of dictionaries, the third section of Part II not only criticizes use of dictionary definition to control statutory meaning, but also begins the criticism of the Court’s “dictionary shopping.”

28. *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 240 (1994) (Stevens, J., dissenting).

29. *Looking It Up*, *supra* note 2, at 1437.

30. James L. Weis, Comment, *Jurisprudence by Webster’s: The Role of the Dictionary in Legal Thought*, 39 MERCER L. REV. 961, 963 (1988).

31. A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 71, 72 (1994).

32. See, for example, Lawrence M. Solan, *Learning Our Limits: The Decline of Textualism in Statutory Cases*, 2 WIS. L. REV. 235 (1997), which discusses several of the same Supreme Court cases as discussed *infra* in Part IV and reaches similar conclusions, but on the basis of linguistics and the psychology of language.

33. See *Looking It Up*, *supra* note 2; Clark D. Cunningham et al., *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561 (1994) (book review); Lawrence Solan, *When Judges Use the Dictionary*, 68 AM. SPEECH 50, 50 (1993). All mention briefly some lexicographic principles discussed in more detail *infra*, but emphasize linguistic principles.

Part III focuses consideration of lexicographic principles on specialized vocabularies and dictionaries. The first section discusses both the place of technical vocabularies in general dictionaries and the use of both general and technical language in legal dictionaries. Additionally, the first section emphasizes how the absence of legal texts as a source for citations in general dictionaries affects their use for construing both specialized and general vocabulary in statutes. The second section rehearses the themes of Part II. It asks how legal definitions have been collected and written in the legal dictionaries cited by the Court. The third section of Part III, which continues the theme of questioning the use of dictionary definition as determinative, gives prominence to the Court's inconsistency in its choice of dictionaries.

Part IV applies the principles established in Parts II and III to a series of individual Supreme Court decisions. After a brief description of some early uses of dictionary definitions, Part IV considers seven recent Supreme Court opinions. These opinions were chosen because in each, dictionary definition could or did play a pivotal role. Moreover, the series of opinions illustrates the differences in judicial approaches to dictionary definitions.

Application of the lexicographic principles developed in Parts II and III to these cases exposes the inconsistencies and problems in the various versions of textualism. Part IV demonstrates that, ironically, exploratory intentionalism is more consistent with lexicographic principles than textualist approaches that champion the use of dictionaries. Part IV also supports the criticism of textualism as instrumental. This Article concludes by considering the implications of lexicography for textualism, by applying some of the criticisms made by textualists to textualism itself, and by urging respect for dictionaries as more properly understood.

II. LEXICOGRAPHIC PRINCIPLES OF MODERN GENERAL DICTIONARIES

Modern lexicographers see their task as describing how speakers of English use words. They do not seek or claim to prescribe how language should be used. For example, one prominent dictionary defines "marriage" as "the state of being united to a person of the opposite sex."³⁴ This definition, however, does not forbid or prevent "marriage" from applying to same-sex couples. It does not render the phrase "same-sex marriage" a contradiction in terms. It simply reflects the common current usage of the

34. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1384 (photo. reprint 1986) (3d ed. 1961) [hereinafter WNID3].

word. If same-sex marriages became common, lexicographers would revise the dictionary definition to reflect the new usage of the word.

Lexicographers did not always prefer description to prescription. Like modern lexicographers, Dr. Johnson, in writing his famous dictionary, undertook a "wide ranging program of reading in diverse sources" and "recording from his reading particular instances of usage" in order to "proceed by induction to a general definition of meaning."³⁵ At the same time, he sought to provide an authoritative standard. "[O]ne great end of this undertaking," he wrote, "is to fix the English language," and its "chief intent" to "preserve the purity" of the "English idiom."³⁶ To accomplish this goal, he chose "writers of the first reputation" for his sources.³⁷ One historian of lexicographers explains that for both Dr. Johnson and Noah Webster "their role was not simply to select a word list, define it, and make it available to the reading public; in addition they took on the priestly task of revealing a truth, in this case a linguistic one, to those who, like lay parishioners, were less than perfectly versed in its subtleties."³⁸

In contrast, modern lexicographers try to describe how words are being used in context by considering a wide variety of sources and not just "writers of the first reputation." *Webster's Third New International Dictionary* ("*Webster's Third*") is the largest unabridged English dictionary.³⁹ The preface to its third edition, which has 450,000 entries, explains that a "definition, to be adequate, must be written only after an analysis of usage."⁴⁰ Similarly, as Kemp Malone tells us in a classic article, "[t]he meaning or meanings of a word are determined by usage. That is to say, if we want to know what a word means, we must find out by studying concrete cases in which the word is actually used by speakers and writers."⁴¹

35. WELLS, *supra* note 1, at 21.

36. SAMUEL JOHNSON, *The Plan of a Dictionary of the English Language*, in PROSE AND POETRY 119, 123-27 (Mona Wilson ed., 1951).

37. *Id.* at 137.

38. JONATHON GREEN, CHASING THE SUN: DICTIONARY MAKERS AND THE DICTIONARIES THEY MADE 16 (1996).

39. See LANDAU, *supra* note 1, at 18. Landau defines an unabridged dictionary as one that attempts to give "full coverage to the lexicon in general use at a particular time in the history of a language and substantial coverage to specialized lexicons . . . , such as those of law, medicine, or the physical sciences. It does not include all words in the language." *Id.* As explained *infra*, the Supreme Court frequently cites *Webster's Third*.

40. WNID3, *supra* note 34, at 4a.

41. Kemp Malone, *On Defining Mahogany*, 16 LANGUAGE 308, 308 (1940). Landau makes the point even more strongly:

[D]efining is not a process of value judgment. If one started to make value judgments, one would find oneself contradicting or ignoring the evidence at hand a hundred times a day, and one might as well discard all citations of

The role of context is crucial for modern lexicographers. Like many modern philosophers and psychologists of language,⁴² they do not view the meaning of a word as an absolute or existing in isolation. A famous, if apocryphal example, illustrates the point. An early computer program, working word by word, is said to have translated the Biblical phrase "the spirit is willing, but the flesh is weak" from English into Russian and then back again into English. This series of computer translations produced "the vodka is fine but the meat is rotten."⁴³ Modern lexicographers have learned the lesson taught by the computer program. They do not expect their definition to give the absolute meaning of the word. As Landau explained, a dictionary definition has as "its basic purpose . . . giving the reader enough immediate information [about a word] to enable him to surmise, at least approximately, its meaning in context," but "[d]efinition never determines correctness."⁴⁴ General English dictionaries assume that their users, although they may have encountered an unfamiliar word or usage of a word, know a great deal about the English language. "One gets nothing from even the best dictionary unless he brings a good deal to it."⁴⁵

The approach of modern lexicography bears importantly upon using definitions from general dictionaries for statutory interpretation.⁴⁶ First, it affects the sources for definitions and, second, the constraints on definitions. As this Article shows, because dictionaries are compiled to be descriptive, but are inevitably incomplete and subject to severe constraints on length, they are not properly used to dictate the meaning of a particular word in a particular statute.

actual usage and fabricate a metaphysical universe of correct speech forms that would be of interest only to oneself.

LANDAU, *supra* note 1, at 32.

42. See generally J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962); GEORGE A. MILLER, *LANGUAGE AND COMMUNICATION* (1951); ULRIC NEISSER, *COGNITIVE PSYCHOLOGY* (1967); C.K. OGDEN & I.A. RICHARDS, *THE MEANING OF MEANING* (1923); ROSEMARY J. STEVENSON, *LANGUAGE, THOUGHT AND REPRESENTATION* (1993); LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 181e-83e (G.E.M. Anscombe trans., 4th ed. 1976) (1953); *Looking It Up*, *supra* note 2; Douglas L. Medin, *Concepts and Conceptual Structure*, 44 AM. PSYCHOL. 1469 (1989).

43. Harvey P. Newquist, *Lost in the Translation*, 4 AI EXPERT 63 (1989).

44. LANDAU, *supra* note 1, at 131, 148.

45. James Sledd, *Dollars and Dictionaries: The Limits of Commercial Lexicography*, in *NEW ASPECTS OF LEXICOGRAPHY: LITERARY CRITICISM, INTELLECTUAL HISTORY, AND SOCIAL CHANGE* 119, 123 (Howard D. Weinbrot ed., 1972).

46. This Article, however, in no way attempts to survey all the many considerations and principles that go into designing, writing, and publishing a dictionary.

A. *The Source for Definitions*

For everyday vocabulary, modern general dictionaries rely on two sources to discover usages: other dictionaries' definitions and ongoing citation files. Commercial dictionaries build on the work of their predecessors.

For commercial reasons it is natural that customarily dictionaries should minimise or even deny their use of competing books. . . . Whether . . . explicit acknowledgment is made or not, anyone who consults a dictionary can be sure that its editor has considered what appears in preceding books of the kind and in his competitors, and used as much of it as seemed to him desirable for his own book.⁴⁷

Reliance on other dictionaries is a practical necessity, although not without its dangers.⁴⁸

All reputable general dictionaries also develop an ongoing citation file, which is a collection of potential dictionary entries based on a variety of written sources and a few spoken sources.⁴⁹ Citations generally come from one of three sources: an internal reading program undertaken by the dictionary's editors; an external reading program done by part-time paid readers; and unsolicited contributions from readers of the dictionary.⁵⁰ These citation files distinguish "reputable general dictionaries from purely derivative works" and are "vital not just for determining what new words and new senses mean, but for providing evidence that they exist in sufficient numbers to warrant inclusion in a dictionary."⁵¹

Citation files are necessary because language constantly changes and grows. The first edition of the *Oxford English Dictionary*, which the Supreme Court has cited in forty opinions in the past fifty years,⁵² aimed at "exhibiting the history and signification of the English words now in use, or known to have been in use since the middle of the twelfth century."⁵³ Its

47. JAMES R. HULBERT, *DICTIONARIES: BRITISH AND AMERICAN* 47-48 (1968).

48. See GREEN, *supra* note 38, at 27-30 (discussing plagiarism).

49. See Laurence Urdang, *The Art and Technique of Citation Reading*, 2 VERBATIM 81 (1975).

50. See John Willinsky, *Cutting English on the Bias: Five Lexicographers in Pursuit of the New*, 63 AM. SPEECH 44, 46 (1988).

51. LANDAU, *supra* note 1, at 161.

52. Based on a LEXIS search of "Oxford English Dictionary" or "OED" in the Genfed US file on August 13, 1997. See, e.g., *Rutledge v. United States*, 116 S. Ct. 1241, 1246 n.10 (1996); *United States v. Aguiler*, 115 S. Ct. 2357, 2367 (1995) (Scalia, J., concurring in part and dissenting in part); *Victor v. Nebraska*, 511 U.S. 1, 14 (1994).

53. General Explanation, *OXFORD ENGLISH DICTIONARY* (1st ed. 1933) [hereinafter OED FIRST], reprinted in 1 *OXFORD ENGLISH DICTIONARY* at xxv (2d ed. 1989) [hereinafter OED SECOND].

General Explanation justified the use of citations for a historical dictionary: "The vocabulary of a widely diffused and highly cultivated living language is not a fixed quantity circumscribed by definite limits."⁵⁴ Moreover,

[s]ome words have only one invariable signification; but most words that have been used for any length of time in a language have acquired a long and sometimes intricate series of significations, as the primitive sense has been gradually extended to include allied or associate ideas, or transferred boldly to figurative and analogical uses.⁵⁵

As a result of constant change and growth in language, dictionaries are out of date by the time they are published. College dictionaries are thoroughly revised only every ten years or so, although they are generally updated every year in order to ensure an "up-to-date copyright date."⁵⁶ Almost thirty years passed between the second and third editions of *Webster's Third*, with the second edition published in 1934, and the third in 1961. There is not yet a fourth edition. Reprints of the third edition now include an addendum of some fifty-five pages of new words and new meanings.⁵⁷ The gap between the first and second editions of the *OED* is even longer. The first edition of the *OED* was published as a series of volumes between 1882 and 1928, and then published as a twelve-volume set in 1933. The second edition was published in 1989.⁵⁸

Because of the inevitable time delay between collection of citations and publication of a dictionary, dictionaries must lag behind current use of the language. A dictionary with a 1996 publication date will not describe completely how language is being used in 1996.⁵⁹ New words and new meanings will have gained acceptance. These new meanings and words will have begun to make their way into citation files, but will not be found in the dictionary dated the same year as the usage.⁶⁰

54. *Id.* at xxiv.

55. *Id.* at xxviii.

56. See LANDAU, *supra* note 1, at 267.

57. See WNID3, *supra* note 34, at 55a-110a (1989). For a time, Merriam-Webster published a separate supplement to the third edition. See 6,000 WORDS: A SUPPLEMENT TO WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976). Note that the second and third editions have both been reprinted several times. The date of publication is the date of the reprint and of the copyright. Later reprints do not represent new editions.

58. Prior to publication of the second edition, a four volume supplement to the *OED* was published between 1957 and 1986. The third edition is in preparation. See GREEN, *supra* note 38, at 400.

59. See discussion *infra* Part III.A.

60. For example, the second edition of the *OED*, which was published in 1989, includes a number of definitions that rely on quotations from 1928, the year the first edition was completed.

Consider the word “computer.” The second edition of the *OED* defines it as “[a] calculating-machine; especially an automatic electronic device for performing mathematical or logical operations.”⁶¹ *Webster’s Third* also emphasizes the numerical, defining the term as “a calculator, esp[ecially] designed for the solution of complex mathematical problems; specif[ically], a programmable electronic device that can store, retrieve, and process data”⁶² Only when we look at a recent and smaller dictionary does the definition begin to accord with our current uses of a computer for word processing and research. The *American Heritage Dictionary of the English Language*, for example, defines “computer” as “[a] device that computes, especially a programmable electronic machine that performs high-speed mathematical or logical operations or that assembles, stores, correlates, or otherwise processes information.”⁶³ And even this definition fails to capture the current use of “computer” as an electronic machine that not only manipulates and organizes the data provided to it, but also provides access to the plethora of communication and information available on-line through the World Wide Web. A court relying on a definition from even a recent dictionary to understand “computer” in legislation regulating computer use would go far astray.

This example also cautions that, when reading an old text, we must take great care not only in using current dictionaries, but also in using dictionaries contemporaneous to the text. It further suggests that we can easily err in assuming we know the meaning of a word as used in an older document, whether the document dates back 100 or far fewer years. Given the limited meaning of “computer” not so very long ago, we might argue that a thirty-year-old statute regulating “computers” should not apply to today’s computer, because the meaning of the term has undergone so great a change that today’s computer is not within the scope of the old law.⁶⁴

See “careen,” meaning “to rush headlong, to hurtle,” 2 *OED SECOND*, *supra* note 53, at 895; “key,” meaning “dominant, controlling or chief,” 8 *id.* at 406.

61. *Id.* at 640.

62. *WNID3*, *supra* note 34, at 468.

63. *AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* 389 (3d ed. 1992). It has a lexicon of 200,000 entries. *See id.* at vi. Although never for the word “computer,” the Supreme Court has cited the *American Heritage Dictionary* 17 times, and *Webster’s Third* more than 90 times. Search of LEXIS, Genfed Library, US File (Aug. 13, 1997).

64. Demonstrating that we err in assuming that we know the meaning of words used not only in the Constitution, but also in common discourse today, such as “among” or “commerce,” was, of course, the purpose of WILLIAM WINSLOW CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953). He believed that “the complications that characterize our American system are, in very considerable degree, quite unnecessary; for they grow, in instance after instance, out of a great mass of misconceptions that has slowly accumulated as to the true nature and meaning of the Constitution.” *Id.* at 3. He ascribed this misunderstanding in large part

Quite apart from constant change, citation files, although crucial, are flawed. Of course, "no one's file is perfectly comprehensive; many usages will be missed."⁶⁵ Usages will be missed because citation files are limited in their sources. The *OED* offers a particularly informative case study in this regard. It is recognized as "the world's greatest repository of the English language."⁶⁶ All subsequent English dictionaries are indebted to it.⁶⁷ Moreover, it is "the only English dictionary ever created wholly on the basis of citations"⁶⁸ and its sources have been the subject of a careful examination.⁶⁹ Definitions in the first edition of the *OED* were based on "a collection of some five million excerpts from English literature of every period amassed by an army of voluntary readers and the editorial staff."⁷⁰ The first edition includes one-third of the five million citations collected.⁷¹ The second edition, published in 1989, contains 320,000 entries in twenty volumes.

The 1897 directions to the voluntary readers for the first edition helps to explain how citation files operate. The voluntary readers were directed to do the following for the texts they had agreed to read:

Make a quotation for every word that strikes you as rare, obsolete, old-fashioned, new, peculiar, or used in a peculiar way.

Take special note of passages which show or imply that a word is either new and tentative, or needing explanation as obsolete or archaic, and which thus help to fix the date of its introduction or disuse.

to "the radically changed usage, at the present day, of certain words that constitute the key . . . to the meaning of important provisions of the Constitution." *Id.* at 4. He sought to "provide the reader . . . with a specialized dictionary of the eighteenth-century word-usages, and political and legal ideas, which are needed for a true understanding of the Constitution," to be "drawn . . . from sources not connected with the Constitution," and especially not from Madison, including the *Federalist* papers. *Id.* at 5, 7-8.

65. LANDAU, *supra* note 1, at 162.

66. GREEN, *supra* note 38, at 326. See also JOHN WILLINSKY, *EMPIRE OF WORDS: THE REIGN OF THE OED* 13 (1964) (referring to the *OED* as "the most comprehensive dictionary in the world").

67. See LANDAU, *supra* note 1, at 348.

68. *Id.* at 152.

69. See WILLINSKY, *supra* note 66.

70. *History of OED*, *OED FIRST*, reprinted in, *OED SECOND*, *supra* note 53, at xii. The voluntary readers numbered upwards of 800. See *id.*

71. See WILLINSKY, *supra* note 66, at 3-4.

Make as many quotations as you can for ordinary words, especially when they are used significantly, and tend by the context to explain or suggest their own meaning.⁷²

Despite this mammoth undertaking and enormous contribution, the first edition of the *OED* is not without deficiencies. John Willinsky analyzed its citations and discovered that it "turned to literary heroes, the respectable press, and the reference trade as its primary sources of authority."⁷³ He found that it favors literary treatments, especially Shakespeare, despite problems in using poetry as a reliable guide to common meanings and possible misunderstanding of Shakespeare's irony and wordplay.⁷⁴ He concluded that it gives less than adequate coverage to "women, Commonwealth and working class writers from all levels of literate activity otherwise covered by the citations."⁷⁵ For a dictionary focused on the historical origins of English words, he was struck in particular by oversight shown toward the "highly influential Chancery courts of the fifteenth century, which made a substantial contribution to the standardization of English."⁷⁶

Unlike the first edition of the *OED*, American dictionaries prefer "expository texts in which the language can be said to be more prosaically at work."⁷⁷ The preface to *Webster's Third*, a favorite dictionary of Supreme Court Justices,⁷⁸ states, "[m]embers of the editorial staff began in 1936 a

72. *History of OED*, OED FIRST, reprinted in, OED SECOND, *supra* note 53, at xii (emphasis in original omitted).

73. WILLINSKY, *supra* note 66, at 58. He attributes these preferences to the "Victorian interest in the integration of theology and science, nation and empire," *id.* at 5, and the desire of the editors to create a "Whig history of English that demonstrated the devolution of a superior language," *id.* at 40.

74. *See id.* at 58-59.

75. *Id.* at 11.

76. *Id.* at 177. He also quotes John Fisher, *Chaucer and the Emergence of Standard Written English in the Fifteenth Century*, SPECULUM 52, 870-99 (1977):

Historians of the English language are agreed that the genesis of the standard language is not literary, even though our predilections as literary scholars lead us to study most closely and to take example largely from "literary" material. The truth of the matter is that *written* language (poems, plays, tales, sermons, treatises) bulked as small in the lives of most people in the fifteenth century as they do now. . . . The sort of writing most likely to carry a sense of national authority would be bureaucratic (licenses, records, etc.), legal (inheritance, transfer of property), or business (bill, agreements, instructions).

Nor do general dictionaries pay much attention to current legal sources. *See infra* text accompanying note 86.

77. WILLINSKY, *supra* note 66, at 6.

78. According to a LEXIS search in the GENFED library, US file on August 13, 1997, the Court has cited *Webster's Third* in more than 90 opinions.

systematic reading of books, magazines, newspapers, pamphlets, catalogs, and learned journals.”⁷⁹ Professor Willinsky, in a survey of the senior lexicographic staff at five publishing houses,⁸⁰ found that Merriam-Webster, the publisher of *Webster’s Third*, differed from the other publishers he studied in that Merriam-Webster did not employ an external program of readers and “appeared to be less inclined to consult outside authorities on the regular basis which other houses suggested they maintained as part of their editorial practice.”⁸¹ He also concluded that for this editorial staff “[t]he contribution of the book in this search of the language is considerably less than that of the periodical.”⁸² For example, the Merriam-Webster editors require that there be a good reason for including poetry and drama.⁸³

Excluding literary sources excludes particular meanings of words. For example, the second edition of the *OED* includes among the meanings of “compute” not only “[t]o estimate or determine by arithmetical or mathematical reckoning; to calculate,” but also “[i]n wider sense to estimate, ‘reckon,’ take account of, take into consideration.” For this wider, more metaphorical sense, it cites three literary sources, Crashaw (1647), Earl Orrery (1654), and Burns (1786).⁸⁴ *Webster’s Third*, in contrast, defines “compute” as “to determine or ascertain, esp[ecially] by mathematical means. Arrive at an answer to or sum for.”⁸⁵ Thus, *Webster’s Third*, while broader than the parallel definition in the *OED* of “to calculate,” does not also include the literary, less mathematical use of the word. Moreover, just as American dictionaries tend to exclude literary sources, general dictionaries exclude legal sources and thus will exclude any special legal meanings of common words.⁸⁶

For the staffs of all of the current dictionaries he studied, Willinsky concludes that

the “polite press,” with *The New York Times* at its pinnacle . . . is currently the single most powerful influence in constituting the record of the English lexicon. That the handful of people, though a

79. WNID3, *supra* note 34, at 5a.

80. See Willinsky, *supra* note 50, at 44. Willinsky surveyed the lexicographic staff of the following publishers: Houghton Mifflin, Merriam-Webster, Random House, Oxford University Press, and Gage. See *id.*

81. *Id.* at 51.

82. *Id.*

83. He notes, “[o]ne inadvertent result of this policy of preference is to set the book reviews of John Updike above his fiction.” *Id.* at 52.

84. 3 *OED SECOND*, *supra* note 53, at 640. The quotation from Burns helps illustrate this meaning: “What’s done we partly may compute, but know not what’s resisted.” *Id.*

85. WNID3, *supra* note 34, at 468.

86. See *infra* Part III for further discussion.

large one at that, who contribute to the *Times* plays this powerful role in the language may well be a surprise to them.⁸⁷

It may also be a surprise to the Supreme Court Justices who look to dictionaries as authorities in construing statutes, that in good measure they are interpreting law according to the *New York Times*.

Dictionary definitions tend to reflect a class bias. Dictionaries "speak only for some people, and their authority is political, not grammatical."⁸⁸ For example, while newspapers represent an important source for modern dictionaries, the newspapers are those such as the *New York Times* and *Wall Street Journal* and not the *National Enquirer*. "Dictionaries act as a conservative force on the language because they tend to overrepresent the volume of conservative speech and writing, which is that of the educated classes, and underrepresent the speech and writing by and for people who are relatively uneducated."⁸⁹ Spoken usage of all classes gets short shrift. Although the availability of on-line services with transcriptions of television talk shows and other forms of spoken speech is beginning to have an influence,⁹⁰ the dictionaries currently available continue to rely primarily on written sources even though the great bulk of English is spoken. "The objective scientific investigator of the meaning of a word must, in practice, depend chiefly on written material,"⁹¹ and written dictionaries can "only 'dodder along behind [spoken] language.'"⁹²

Dictionaries, then, depend on written sources, generally from the upper classes, and choose among the written sources on which they base their definitions. Thus, we cannot say that dictionaries present ordinary language. Because of limitations on citation files, neither can we say that any dictionary or any definition is authoritative and comprehensive. In addition, because dictionaries differ in their citation sources, the definitions they do include will differ as well.

87. Willinsky, *supra* note 50, at 61. Words in the second edition of the *OED* that cite to the *New York Times* include "corral" in the sense of seize or capture, 3 *OED SECOND*, *supra* note 53, at 960, and "hold" in the sense of detain or delay, 7 *OED SECOND*, *supra* note 53, at 295.

88. DEBORAH CAMERON, *FEMINISM AND LINGUISTIC THEORY* 29 (1985).

89. LANDAU, *supra* note 1, at 164.

90. Use of on-line services to use spoken sources as citation sources is still in its infancy, but is likely to increase. See Willinsky, *supra* note 50, at 63; GREEN, *supra* note 38, at 400.

91. Malone, *supra* note 41, at 308.

92. GREEN, *supra* note 38, at 24 (quoting JEAN AITCHISON, *WORDS IN THE MIND* 11 (1987)).

B. Constraints on Definitions

Whatever the sources of citations, a dictionary's citation file is only the first step in writing a definition. Definers must sort the citations for each word into various categories and then begin to abstract the definitions from the survey of usages. Such abstraction imposes a cost. "In a general dictionary, specificity is less important than breadth of coverage, but usefulness demands that the definition be as specific as possible consistent with a realistically broad compass of meaning. . . . All definitions of things are compromises between specific accuracy and breadth of inclusiveness."⁹³ The need for such breadth and the necessity for compromise further undermines any confidence in dictionary definitions as a source for specific meanings in a particular statute.

The process by which definitions are written reinforces abstraction and breadth. Those who write the definitions are not those who collect the citations. Writing definitions is a specialized and relatively uncommon skill. Landau estimates that there are "fewer than a hundred experienced general definers in the whole of the United States."⁹⁴ While, as discussed in the next section, general dictionaries use specialists for technical vocabulary, the best definers for a general dictionary are themselves generalists who "must have a broad, but not necessarily deep, fund of information."⁹⁵ These general definers must work quickly.

The commonplace idea that dictionary definitions are discussed leisurely by groups of scholars puffing pipes could hardly be more mistaken. Definitions are composed by definers working alone under the pressure of time to meet daily quotas. Every definition calls for scores of small decisions that the definer has little time to ponder but must make promptly.⁹⁶

Furthermore, these definers do only the first stage of word definition. Senior definers then review and generally redefine the word for consistency and clarity,⁹⁷ thus reinforcing abstraction.

Moreover, different dictionaries have different approaches to definition. *Webster's Third*, for example, aims for precision rather than a definition comprehensible by the generalist.⁹⁸ To achieve this precision, its editor-in-chief established a method for definition that called for "completely

93. LANDAU, *supra* note 1, at 148.

94. *Id.* at 235.

95. *Id.*

96. *Id.* at 231.

97. *See id.* at 255.

98. *See id.* at 137.

analytical one-phrase definitions . . . modified only by structural elements restrictive in some degree and essential to each other [with minimum] use of commas either to separate or to group.”⁹⁹ In contrast, the *OED* directs “its definitions always to the generalist.”¹⁰⁰

Webster's Third's style of definition met with mixed reviews. It was praised by lexicographers, but criticized by many general reviewers of the dictionary.¹⁰¹ General reviewers of the dictionary, however, saved their harshest criticism for *Webster's Third's* treatment of standards for usage. Its decision to label only a very few words as “slang” or “nonstandard” and to omit the label “informal” generated a storm of protest.¹⁰² The public reaction to both the method of definition and the absence of usage labels reflected the conflict between the public's belief that dictionaries are to be prescriptive—to tell its users how language should be used—and the editors' belief, guided by the insights of linguistics as to the relativity of correctness, that the purpose of a modern dictionary is to be descriptive—to survey how language is in fact being used.¹⁰³

Whatever a dictionary's philosophy regarding method of definition or attitude toward standards, its editors are subject to stringent constraints of length. “Considerations of available space always place practical limits on the number of entries that can be accommodated, especially in a one-volume dictionary.”¹⁰⁴ College dictionaries, the most popular dictionaries in the United States, generally contain only 130,000 to 160,000 entries.¹⁰⁵ Even

99. WNID3, *supra* note 34, at 4a.

100. LANDAU, *supra* note 1, at 137. Thus, 10 OED SECOND, *supra* note 53, at 967, defines osmosis as “osmose,” but defines “osmose” as “the tendency of fluids separated by porous septa to pass through these and mix with each other; the action of this passage and intermixture; diffusion through a porous septum or membrane.” *Webster's Third's* definition of osmosis reads,

the flow or diffusion that takes place through a semipermeable membrane (as of a living cell) typically separating either a solvent (as water) and a solution or a dilute solution and a concentrated solution and thus bringing about conditions for equalizing the concentrations of the components on the two sides of the membrane because of the unequal rates of passage in the two directions until equilibrium is reached.

WNID3, *supra* note 34, at 1596. Dictionaries also differ in how they organize their multiple definitions of a single word. Some order chronologically, some by frequency, some logically. See Cunningham et al., *supra* note 33, at 1615 n.203.

101. See Clarence L. Barnhart, *American Lexicography, 1945-1973*, 2 AM. SPEECH 83, 103-04 (1978).

102. See DICTIONARIES AND THAT DICTIONARY (James Sledd & Wilma R. Ebbitt eds., 1962).

103. See GREEN, *supra* note 38, at 454-57.

104. LANDAU, *supra* note 1, at 238.

105. See *id.* at 74.

unabridged dictionaries,¹⁰⁶ which contain not all the words in the language, but between 400,000 and 600,000 words, are subject to space limits. *Webster's Second New International Dictionary*, published in 1934, had a lexicon of 600,000 words, the largest of any English dictionary. When *Webster's Third* was published in 1961, it contained only 450,000 entries. Since 100,000 of these were new words, approximately 250,000 words were dropped from one edition of this unabridged dictionary to the next. Landau explains one of the reasons why:

One of the compelling reasons for the limitation in size of the third edition was the staggering cost of hand-bound books. . . . [B]y trimming the number of entries substantially, [W]NID3's bulk was reduced to less than four inches, and the books could be bound largely by machine, at great savings in cost.¹⁰⁷

Thus, commercial dictionaries do not operate free from considerations of profit and loss.

Space constraints affect not only the number of entries, but also the number of definitions for each entry and the length of each definition. Again, Landau explains the realities:

[T]he space allotted to individual entries must be watched closely to see that no space is wasted, and to make sure that the expected ratio of lines per entry is maintained. When a definer is assigned a block of terms, he is not only given a deadline but is allotted a certain number of column-lines in which to produce the requisite definitions.¹⁰⁸

In college dictionaries, which the Supreme Court cites regularly,¹⁰⁹ a bit less than two column-lines is allotted to each entry (not each definition under the entry).¹¹⁰ Such brevity inevitably sacrifices meanings. For example, unlike the *OED* or *Webster's Third*, the definitions listed for "exercise" in the

106. See *supra* note 39.

107. LANDAU, *supra* note 1, at 64.

108. *Id.* at 248.

109. See, e.g., *Pioneer Inv. Servs. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380, 388 (1993) (citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 791 (1983)); *Kay v. Ehrler*, 499 U.S. 432, 436 n.6 (1991) (citing THE AMERICAN HERITAGE DICTIONARY 140 (2d College ed. 1982)); *John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989) (citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 268 (1983)); *Meese v. Keene*, 481 U.S. 465, 478 n.11 (1987) (citing WEBSTER'S NEW WORLD DICTIONARY, COLLEGE EDITION 1167 (1968)).

110. See LANDAU, *supra* note 1, at 121.

college edition of *Webster's New World Dictionary of the American Language* do not include any reference to the practice of religion.¹¹¹

Even for longer and larger dictionaries, the requirement of brevity strongly reinforces a preference for breadth of coverage over specificity and precision. As Lawrence Solan has written,

The business of the lexicographer is to try, in a few lines, to do what . . . cannot be done: to describe the necessary and sufficient conditions for membership in a conceptual category based on examples of the word's usage in the past. . . . Inevitably, the lexicographer's success will only be partial, even in the best dictionaries.¹¹²

As a result of the need for abstraction, breadth, and brevity, dictionaries leave out certain uses of words. For example, one dictionary defines "representative," the key word in an important Supreme Court case interpreting the Voting Rights Act,¹¹³ clearly to include elected judges; others do not.¹¹⁴ Another Supreme Court case turned on the meaning of "modify."¹¹⁵ Some definitions of modify limit the meaning to only small changes; other definitions define it to include more substantial changes.¹¹⁶

Solan further observed that "we commonly ignore the fact that someone sat there and wrote the dictionary which is on our desk, and we speak as though there were only one dictionary, whose lexicographer got all the definitions 'right' in some sense that defies analysis."¹¹⁷ In fact, dictionaries differ in their definitions. Consider again "exercise" of "religion." Among its many definitions of "exercise," the *OED Second* gives "practice and performance of rites and ceremonies, worship, etc.; the right or permission to celebrate the observances (of a religion)" or "[a] religious observance," or "act of public worship," or "[a]n act of private worship."¹¹⁸ The parallel definition in *Webster's Third* suggests a broader application: "[A]n act of religious practice, esp[ecially] in worship (as of

111. See WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 490 (2d College ed. 1970).

112. Solan, *supra* note 33, at 53.

113. See *Chisom v. Roemer*, 501 U.S. 380 (1991), discussed *infra* in text accompanying notes 208-222.

114. See *id.*

115. See *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 225 (1994), discussed *infra* in text accompanying notes 280-301.

116. See *id.*

117. Solan, *supra* note 33, at 50.

118. 5 OED SECOND, *supra* note 53, at 529.

preaching, expounding, or praying)."¹¹⁹ That is, for *Webster's Third*, exercise of religion need not take place as part of a ritual. Similarly, *Webster's Third* includes a broad definition for "religion." While one of the definitions it lists is conventional and relatively narrow—"one of the systems of faith and worship: a religious faith," another extends to "a cause, principle, system of tenets held with ardor, devotion, conscientiousness, and faith: a value held to be of supreme importance."¹²⁰ In contrast, while the *OED Second* includes as one definition of religion "[d]evotion to some principle; strict fidelity or faithfulness; conscientiousness; pious affection or attachment," it labels that definition as obsolete.¹²¹ If one set of definitions is deemed controlling, striking differences in understanding the First Amendment, as well as statutes and regulations involving religion, result.¹²²

In sum, no dictionary has a monopoly on the truth. Dictionaries include common meanings of words. They do not, however, include all meanings. They may well exclude meanings that are quite ordinary although less common. Furthermore, dictionary definitions may fail to include a particular definition of a word either because the meaning was not among those included in the citation file or because the meaning was sacrificed to constraints of abstraction and of space. As one group of linguists has commented, "if a particular actual usage does not conform with a dictionary's description, it does not follow that the usage is therefore incorrect."¹²³ Moreover, dictionaries differ in the words they use for definitions because of differences in citation files, differences in the style of the dictionary, and differences in the style of the individual definer. Dictionary definitions are only generalizations, summaries, and approximations. Their definitions are not right or wrong in any absolute, objective sense.

C. Implications for Judicial Interpretation

As the preceding discussion has shown, definitions in different dictionaries vary considerably because of the sources for citations, the meanings listed, and the wording of definitions. All of these differences have important implications for reliance on dictionary definitions in statutory

119. WNID3, *supra* note 34, at 795.

120. *Id.* at 1918.

121. 13 OED SECOND, *supra* note 53, at 569.

122. See Allan Ides, *The Text of the Free Exercise Clause as a Measure of Employment Division v. Smith and the Religious Freedom Restoration Act*, 51 WASH. & LEE L. REV. 135, 140 (1994) (considering the implications of various dictionary definitions).

123. Cunningham et al., *supra* note 33, at 1614.

construction. This section will begin to sketch out some of these implications in preparation for their application to particular Supreme Court decisions in Part IV.

If a dictionary includes a definition, that definition is certainly a possible meaning for a statutory term. Because of the use of citation sources as the basis for inclusion, modern dictionaries seldom include meanings not actually found in use. But the meaning of a word as used in a particular statute will not necessarily be included among the listed definitions. Lexicographers cannot avoid excluding ordinary meanings of words. Accordingly, the meaning of a word used in a particular statute may not be among those found in the citations sources or included among the definitions. Dictionaries will differ in the definitions they include for a single word. Furthermore, general dictionaries do not include legal sources among their citations sources, although the very reason for collecting citations is the lexicographic principle that the meaning of a word varies depending on where it is used. Thus, the legal sense of ordinary words may be absent from general dictionaries.

Even when several dictionaries include one particular meaning for a word, they will offer a range of meanings. In *Smith v. United States*,¹²⁴ for example, the Supreme Court denied recovery for the death of a man who fell into a crevasse while working for the federal government in Antarctica on the grounds that the "foreign country" exception to the Federal Tort Claims Act applied, even though Antarctica has no recognized government. In reaching this decision, Justice Rehnquist, for a majority of eight Justices, began by looking to "[t]he first dictionary definition of 'country'" as "[a] region or tract of land."¹²⁵ The majority opinion did not discuss or consider the implications of using instead the second definition listed in the same dictionary, "a political state or nation,"¹²⁶ although the second definition seemed far more appropriate to the subject matter of the statute.

The range of one word's possible meanings also figured in *Nixon v. United States*.¹²⁷ Rather than ignore a possible meaning, the Court concluded that the wide variety of meanings of "try" made judicial interpretation impossible. In that case, an impeached former judge sought a declaratory judgment that the Senate violated its constitutional duty to "try" impeachments by failing to provide a full evidentiary hearing before the entire Senate. Justice Rehnquist, writing for the Court, held the claim

124. 507 U.S. 197 (1993).

125. *Id.* (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 609 (2d ed. 1945)).

126. WEBSTER'S NEW INTERNATIONAL DICTIONARY 609 (2d ed. 1945).

127. 506 U.S. 224 (1993).

nonjusticiable, in part on the basis that the word “try” both in older and newer dictionaries had such a range of meanings, including not only “to conduct the trial of,” but also “to put to the test by experiment,” that it lacked “sufficient precision to afford any judicially manageable standard of review.”¹²⁸ Justice White, concurring in the judgment, noted that the constitutional clause could not “seriously be read to mean that the Senate shall ‘attempt’ or ‘experiment with’ impeachments.”¹²⁹ That is, context rules out some possible meanings. Justice White continued, “[t]o begin with, one would intuitively expect that, in defining the power of a political body to conduct an inquiry into official wrongdoing, the Framers used ‘try’ in its legal sense.”¹³⁰ Justice White sought the meaning of the legal sense of the word in impeachment practices familiar to the Framers.¹³¹

Dictionaries also differ in the wording of even quite similar definitions. For example, the definitions for the word “harm,” crucial to the decision in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,¹³² range from “to cause injury” to “to do hurt or damage.” Likewise, in *Chisom v. Roemer*, one dictionary defines “representative” as a member of a “governing body,” another as a member of a “governmental body.”¹³³ Judges need to resist basing statutory interpretation on the precise words a particular dictionary uses for one meaning of a word.

Legislators do not consult dictionaries or incorporate by reference dictionary definitions in drafting statutes. As Professor Zeppos has written:

[T]here is no general statute passed by Congress which provides that all of its words are to be construed according to their strict dictionary definitions. Nor is there any evidence anywhere else (e.g., in the legislative history) demonstrating that Congress has generally incorporated a dictionary as the source for interpreting its work product.¹³⁴

128. *Id.* at 230.

129. *Id.* at 246 (White, J., concurring in the judgment).

130. *Id.* (White, J., concurring in the judgment).

131. *See id.* at 248-50 (White, J., concurring in the judgment).

132. 115 S. Ct. 2407 (1995), discussed *infra* in text accompanying notes 302-16.

133. *See infra* notes 208-22 and accompanying text.

134. Zeppos, *supra* note 16, at 1320-21. Although the United States Code begins with codification of the so-called Dictionary Act, that short section does no more than provide “a few general rules for the construction of statutes.” CONG. GLOBE, 41st Cong., 3d Sess. 1474 (1871) (remarks of Rep. Poland). It specifies, for example, that “words importing the plural include the singular; words importing the masculine gender include the feminine as well” and “the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” 1 U.S.C. § 1 (1994).

Dictionary definitions do not create the law of the English language or of a particular word. "[T]he lexicographer is a historian, not a lawgiver."¹³⁵ Dictionary definitions are not themselves statutes in which the precise words chosen and those omitted have binding legal effect. When the Justices of the Supreme Court, in construing statutes, read dictionary definitions as if they were statutes, they understandably apply a method of exegesis to which they have become accustomed. But they apply a method of precision to a text that was not intended to and cannot support the approach.

Dictionaries, as we have seen, differ in their definitions. Nonetheless, the Justices of the Supreme Court look to large numbers and kinds of dictionaries, including the *OED*, *Webster's* unabridged dictionaries, abridged versions of *Webster's* and college dictionaries, old dictionaries and new dictionaries, general dictionaries and legal dictionaries. As Part III will show, opinions often cite or rely on only one definition in only one dictionary, despite other definitions for the word at issue in that or other dictionaries. For the most part, opinions fail to explain or justify the basis for their choice. "[T]here has been no apparent pattern to (or discussion of) the Justices' choice of volume or vintage [of dictionary]. . . . Individual judges must make subjective decisions about which dictionary and which definition to use,"¹³⁶ and this very subjectivity in choice undermines any assertion that use of dictionaries produces an objective meaning.

III. SPECIALIZED LANGUAGE AND SPECIALIZED DICTIONARIES

As noted above, the Justices of the Supreme Court use both legal and general dictionaries, often, but not always, treating the two as interchangeable. Yet, significant differences exist between legal and general dictionaries. Moreover, even when the Justices use general dictionaries, they are construing language in the specialized field of law.¹³⁷ This Part examines implications of specialization for the Court's use of dictionaries. It argues that the absence of legal texts in the citation sources for general dictionaries, and the heavy use of judicial opinions as the most important citation source for the legal dictionaries on which the Court relies, undermines the authority of both kinds of dictionaries for controlling statutory meaning. Moreover, the differences between legal dictionaries and

135. GREEN, *supra* note 38, at 468. Indeed, "[u]se of a dictionary by a jury technically constitutes misconduct." Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37, 49-50 n.60 (1993). See also other authorities cited in *id.*

136. *Looking It Up*, *supra* note 2, at 1446-47.

137. For a discussion of law as technical language, see Mary Jane Morrison, *Excursions into the Nature of Legal Language*, 37 CLEV. ST. L. REV. 271 (1989).

general dictionaries again raise questions about definition shopping—the choice of which dictionary and which definition to use.

A. *Specialized Vocabulary and General Dictionaries*

Technical vocabulary poses a particular challenge for all modern lexicographers. The first edition of the *OED*, for example, sought to “include all the ‘common words’ of literature and conversation, and such of the scientific, technical, slang, dialectal, and foreign words as are passing into common use.”¹³⁸ It explicitly and intentionally excluded scientific and technical vocabulary.¹³⁹ The second edition of the *OED* tried to rectify this omission. The introduction to the second edition states, “[t]he vocabularies of modern computer technology, medicine, politics, economics, and popular culture are well represented, though not at the cost of terms from less obtrusive realms.”¹⁴⁰ Willinsky sees specialized vocabularies as now so prominent that their emphasis has transformed the nature of the *OED*: “[T]he editors no longer hold the common reader as the ideal target of their work. . . . The master-narrative of a common tongue seems to have been subsumed by the professionals’ specialized language communities.”¹⁴¹

Problems with technical language are not limited to the *OED*. Again, Landau serves as our guide to the lexicographic problem: “We must face the fact that citation files are flawed, particularly in their representation of technical words in widespread popular use. . . . Citation files cannot be relied on to turn up new scientific and technical terms in any systematic way.”¹⁴² For example, the editors at Merriam-Webster read only *Nature* and *Science* regularly.¹⁴³ Lexicographers, therefore, approach technical and general vocabularies differently.

General words are defined on the basis of citations illustrating actual usage: the meanings are EXTRACTED from a body of evidence. . . . The meaning of scientific entries, on the other hand, are IMPOSED on the basis of expert advice. The experts may have sources apart from their own knowledge and experience, but their sources are informative or encyclopedic rather than lexical, that is, they are likely to consist of authoritative definitions composed by other experts whose concern is maintaining the

138. *General Explanation*, OED FIRST, reprinted in 1 OED SECOND, *supra* note 53, at xxiv.

139. See LANDAU, *supra* note 1, at 71.

140. *Introduction*, 1 OED SECOND, *supra* note 53, at xxii.

141. Willinsky, *supra* note 50, at 167.

142. LANDAU, *supra* note 1, at 164, 171.

143. See Willinsky, *supra* note 50, at 51.

internal coherence of their discipline rather than faithfully recording how terms are used.¹⁴⁴

Technical vocabulary in general dictionaries thus does not have the same empirical foundations as general vocabulary. Definitions will tend to reflect the particular point of view of the experts. Other points of view may well be excluded.

For specialized subjects, including law, a list of the specialized words in the subject is sent to a specialist along with the old edition's definitions. The specialist reviews these words, deletes obsolete terms, and proposes new ones for inclusion.¹⁴⁵ Dictionaries often employ specialist editors as well. The preface to *Webster's Third*, for example, states that "over two hundred . . . scholars and specialists have served as outside consultants in supplementary reviewing, revising, and submitting new definitions in subjects in which they are authorities."¹⁴⁶ Despite such efforts, David Mellinkoff, a noted scholar of legal language, has criticized legal definitions in dictionaries of general usage: "Unfortunately, ordinary English language dictionaries are not dependable for the general sense of those words that are peculiar to the law. . . . [N]o general dictionary has space enough to concentrate on the details of a specialty, even one as important as law."¹⁴⁷

In addition, as noted earlier, general dictionaries do not include legal texts among their citation sources. Thus, if words found in the general vocabulary have a particular meaning when used in legal texts, general dictionaries will not include that meaning. This specialized usage will come to the attention of neither the general reader nor the specialist consultant. That is, any special, but still ordinary, meaning in a legal context that does not rise to the level of a technical meaning will have no place in a general dictionary because of the citation sources on one hand and the limited role of specialist consultants on the other. Consider the meaning of "reasonable," as in the "reasonable person" of the tort standard. The closest definition for

144. Sidney I. Landau, *Of Matters Lexicographical: Scientific and Technical Entries in American Dictionaries*, 49 AM. SPEECH 241, 242 (1974).

145. See LANDAU, *supra* note 1, at 171. Landau, however, seems to have experienced difficulties in dealing with these specialists: He finds that "[t]he lack of humility of contributing specialists in a technical dictionary can be an acute problem," and that "[a] dictionary composed entirely by specialists is often a collection of special points of view with no unity of approach." *Id.* at 236, 254.

146. WNID3, *supra* note 34, at 4a. It lists two legal specialists. See *id.* at 10a, 12a.

147. David Mellinkoff, *The Myth of Precision and the Law Dictionary*, 31 UCLA L. REV. 434, 437-38 (1983). When it comes to legal definitions, Professor Mellinkoff finds *Webster's Third* "plain wrong" in some instances, such as in the case of "community property," and "sloppy and misleading" in others, such as "mortgage." *Id.* at 438.

such a use in the *OED* is “[h]aving sound judgment; sensible, sane [a]lso, not asking for too much.”¹⁴⁸ In *Webster’s Third*, the closest definition for such a use is “possessing good sound judgment; well balanced: sensible.”¹⁴⁹ In contrast, the specialized *Black’s Law Dictionary* begins its definition of reasonable as “[f]air, proper, just, moderate, suitable under the circumstances.”¹⁵⁰ It also has an entry for the “reasonable man doctrine or standard.”¹⁵¹

In sum, general dictionaries exhibit serious deficiencies not only for technical legal terms, but also for the use of common words in a legal context. From the point of view of lexicography, context matters. There is not a single ordinary meaning of a word; meaning varies depending on how and where it is used. Thus, the absence of legal texts as citation sources in general dictionaries, although a practical necessity, makes them unreliable for construing legal language.

B. General and Technical Vocabulary in Legal Dictionaries

As the example of the word “reasonable” shows, legal dictionaries can help to fill the gap in general dictionaries regarding specialized use of common terms, and Supreme Court opinions cite law dictionaries, primarily *Black’s*, but also others, such as *Bouvier’s* and *Ballentine’s*, frequently.¹⁵² From a lexicographic point of view, use of legal dictionaries may further supplement general dictionaries because the general dictionaries do not use legal sources for their citation files. In order to evaluate the use of legal dictionaries, we must ask of them, as we did for general dictionaries, how they formulate their definitions and on what the definitions are based.

Legal dictionaries differ from general dictionaries in ways important for their use by judges. The legal dictionaries cited by the Supreme Court are not governed by modern lexicographic principles to the same extent as the general dictionaries the Court cites. Clinging to their historical roots, these legal dictionaries, whether giving general or technical vocabulary, are less empirically-based than modern general dictionaries. Their new editions do not reflect changes as extensive as do the new editions of general

148. 13 OED SECOND, *supra* note 53, at 291.

149. WNID3, *supra* note 34, at 1892.

150. BLACK’S LAW DICTIONARY 1265 (6th ed. 1990).

151. *Id.* at 266. It explains, “The standard which one must observe to avoid liability for negligence is the standard of the reasonable man under all the circumstances, including the foreseeability of harm to one such as the plaintiff.” *Id.*

152. A LEXIS search of “(law or legal) w/5 dictionary” in the Genfed Library, US File (Aug. 12, 1997), disclosed 255 Supreme Court opinions citing law dictionaries.

dictionaries. Moreover, the extent to which *Black's Law Dictionary* in particular uses judicial opinions as its primary citation source raises questions about Supreme Court reliance on its definitions. At the same time, qualities that legal dictionaries share with other dictionaries—the need for breadth and brevity—undermine their authority to control statutory meaning.

The first American law dictionary was published in 1839 by John Bouvier, a Philadelphia lawyer born in France.¹⁵³ It was begun, according to the preface to the first edition (1839), because of the difficulties he experienced on his admission to the bar, when he found the law dictionaries he consulted were written for another country with different, feudal laws.¹⁵⁴ He decided to undertake himself a law dictionary “written entirely anew.”¹⁵⁵ Bouvier was nothing if not ambitious. He undertook to explain

such technical expressions as relate to the legislative, executive, or judicial departments of the government; the political and the civil rights and duties of the citizens; the rights and duties of persons, particularly such as are peculiar to our institutions, as, the rights of descent and administration; of the mode of acquiring and transferring property; to the criminal law, and its administration.¹⁵⁶

He consulted “the constitution and laws of the United States, and of the several states” and “such decisions of the courts as appeared to him to be important.”¹⁵⁷ He drew heavily upon civil law, which he regarded as a “fountain of wisdom.”¹⁵⁸ He did not profess to have examined or even referred to all the American cases, but to authorities that would lead students to cases. He claimed to have defined words “by giving their most enlarged meaning, and then all the shades of signification of which they are susceptible.”¹⁵⁹ He admitted that the citations he listed were “not . . . always exactly in point,” but were perhaps only a “distant . . . connection with the subject” intended “to lead the student to matter of which he may possibly be in pursuit.”¹⁶⁰

Professor Mellinkoff believes that “Bouvier was writing not so much a dictionary of legal language as a short encyclopedia, but designed for use in America. Like the English dictionaries, Bouvier’s dictionary was offering

153. See *Review of Bouvier's Law Dictionary and Institutes of American Law*, reprinted in *BOUVIER'S LAW DICTIONARY* at xii (8th ed. 1914).

154. *BOUVIER'S LAW DICTIONARY* at vii (8th ed. 1914).

155. *Id.* at viii.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

a legal education.”¹⁶¹ Bouvier made an enormous and learned contribution to American law. He consulted a wide variety and large number of sources. Following the lexicographic practice of the time, however, he frequently borrowed his definitions verbatim from other dictionaries, rather than checking those definitions against current legal sources.¹⁶²

Nonetheless, the Supreme Court has cited the first and later editions of *Bouvier's Law Dictionary* in ninety opinions.¹⁶³ *Black's Law Dictionary* is even more frequently cited.¹⁶⁴ Like *Bouvier's*, *Black's Law Dictionary* was first published as the work of a single individual, Henry Campbell Black. In the preface to the first edition, Black stated that the dictionary represented his attempt to “prepare a concise and yet comprehensive book of definition of the terms, phrases, and maxims used in American and English law and necessary to be understood by the working lawyer and judge.”¹⁶⁵ Black supported his claim to comprehension by explaining that the dictionary included “numerous titles of the old English law and words used in Old European and feudal law, and the principal terminology of the Roman law.”¹⁶⁶ Black further included “considerable vocabulary from the civil, canon, French, Spanish, Scotch, and Mexican law and other foreign systems,” not to mention “many terms of political or public law . . . such as are employed in trade, banking, and commerce, as also the principal phraseology of international and maritime law and forensic medicine.”¹⁶⁷ Finally, Black sought words taken from the vernacular, which “have acquired a quasi-technical meaning.”¹⁶⁸

Black explained that in searching for definitions, he had “carefully examined the codes, and the compiled or revised statutes of the various states,” and that he had given “[d]ue prominence to the definitions formulated by the appellate courts and embodied in the reports.”¹⁶⁹ Nonetheless, he did not feel bound to copy the language of the courts in any

161. Mellinkoff, *supra* note 147, at 430.

162. See BLACK'S LAW DICTIONARY: NEW POCKET EDITION at iv (Bryan A. Garner ed., 1996). As Mr. Garner notes, Samuel Johnson and Noah Webster followed the same practice. See *id.*

163. Based on a LEXIS search of “Bouvier” in the Genfed Library, US File (Aug. 13, 1997). See, e.g., *California v. Hodari*, 499 U.S. 621, 624 (1991); *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 78 (1989) (Brennan, J., dissenting).

164. The Supreme Court has cited *Black's Law Dictionary* in 140 opinions according to a LEXIS search in the Genfed library, US file of “Black! w/5 Dictionary” on August 13, 1997.

165. HENRY C. BLACK, *Preface*, BLACK'S LAW DICTIONARY at iii (1st ed. 1891).

166. *Id.* at iv.

167. *Id.*

168. *Id.*

169. *Id.*

instance where, in his judgment, a better definition could be found “in treatises of acknowledged authority or could be framed by adaptation or re-arrangement.”¹⁷⁰ His sources in that regard, he explained, were other dictionaries, commentaries, textbooks on special topics, and general commentaries such as Blackstone, Kent and Bouvier.

Later editions of *Black's Law Dictionary* made changes to earlier versions, rather than starting afresh. The current edition of *Black's Law Dictionary* is, as Professor Mellinkoff points out, a hodgepodge of old and new, current and obsolete, without indication of their current status.¹⁷¹ It includes hundreds of Latin and French maxims, “claptrap from the feudal system,” “common words of ordinary English,” and “scraps of what is said to be law—Anglo-Saxon law, Hindu, Japanese, Jewish, Greek, Spanish, French, Roman, canon.”¹⁷²

Similarly, the new pocket edition of *Black's Law Dictionary* admits that:

As the legal language has grown, law dictionaries have generally strayed further and further afield from actual legal usage. Instead of monitoring legal language for new entries—words that emerge in a given practice area, legal slang that crops up in a certain context, words that take on meanings different from their traditional ones—compilers of law dictionaries have tended to look too much at their forerunners.¹⁷³

For example, the sixth edition of *Black's Law Dictionary*, although published as recently as 1990, clings to the “reasonable man” standard, rather than a “reasonable person” standard and has no entry for the “reasonable woman” standard used for sexual harassment cases.¹⁷⁴

170. *Id.*

171. Not content merely to criticize others, Professor Mellinkoff has published his own dictionary, *MELLINKOFF'S DICTIONARY OF AMERICAN LEGAL USAGE* (1992). Brian Raphael praises it, particularly for including context, giving illustrations and “real-world” concrete examples for its definitions, and for its insights regarding style and tone. See Linda Karr O'Connor, compiler, *Best Legal Reference Books of 1993*, 86 L. LIBR. J. 219, 240-42 (1994).

172. Mellinkoff, *supra* note 147, at 433-35. As noted earlier, however, inclusion of ordinary words of English may be useful if the words have particular meanings in legal contexts. See *supra* text accompanying notes 148-51.

173. *BLACK'S LAW DICTIONARY: NEW POCKET EDITION*, *supra* note 162, at iv. Mr. Garner describes his new pocket edition as a “stem-to-stern (very stern) reconsideration of legal terms” and “an entirely fresh edition of *Black's Law Dictionary* compiled on modern lexicographic methods,” including, for example, using WESTLAW and other sources to decide which of two competing forms now predominates in legal usage. *Id.* at v. The unabridged edition of *Black's*, however, has not yet made these changes.

174. *BLACK'S LAW DICTIONARY*, *supra* note 150, at 1266. Cf. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (applying the reasonable person standard for constitutional torts); Argus

Legal dictionaries are just beginning to make the changes in approach and procedures that general dictionaries did some time ago. Unlike modern general dictionaries, *Black's Law Dictionary* has no internal professional staff engaged in a regular and ongoing reading program of representative legal texts for purposes of the dictionary.¹⁷⁵ It has a single lexicographer on its staff. Only when a new edition of *Black's Law Dictionary* is to be prepared¹⁷⁶ does the staff at West Publishing Company undertake new research. To discover new words or words with new meanings, they rely primarily on the fifty-plus volume published by West Publishing Company entitled *Words and Phrases*. This publication, drawing on West's reporting of judicial decisions and its key system, gathers in alphabetical order thousands of judicial definitions of words and phrases.¹⁷⁷ As much as possible, *Words and Phrases* supplies these judicial definitions "in the *exact language of the court* so as to be instantly available for use as primary authority."¹⁷⁸ Moreover, the quotations in *Words and Phrases* make clear the statute and the factual context involved in the case.

The editors of *Black's Law Dictionary* treat these words and phrases much like the citations used by general dictionaries.¹⁷⁹ They summarize pages of judicial quotations into a few lines of definitions.¹⁸⁰ The entries in *Words and Phrases* for the word "representative," for example, run to more than a dozen pages. They are divided into subcategories including employer, labor unions, judges, corporations, and trustees. One 1931 New York case included in the "general" category defines "representative" as those "who represent a people or community in its legislative or governing capacity."¹⁸¹ The entries under the category of "judges" cite to both the

Chem. Corp. v. Fibre Glass-Evercoat Co., 812 F.2d 1381, 1382 (Fed. Cir. 1987) (allowing the trial court's reasonable person standard for patent infringement); Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987) (holding the "reasonable woman" standard applies for sexual harassment where the plaintiff is female). The pocket edition of *Black's*, however, includes "reasonable person" rather than "reasonable man." BLACK'S LAW DICTIONARY: NEW POCKET EDITION, *supra* note 162, at 524.

175. Information in this paragraph is based on the author's telephone conversation with Kenneth Heinbach, Senior Editor of *Black's Law Dictionary* at West Publishing Co., on September 17, 1996.

176. The most recent edition is the sixth edition, published in 1990. The edition preceding it was published in 1979.

177. Similarly, BALLENTINE'S LAW DICTIONARY at iii (3d ed. 1969), explains that its definitions are "largely based on the actual construction of those terms by courts of last resort, with each case cited to the page on which the definition appears."

178. WORDS AND PHRASES at iii (1964).

179. See *supra* note 175 and accompanying text.

180. See *id.*

181. 37 WORDS AND PHRASES, *supra* note 178, at 58 (citing *Macrum v. Board of Supervisors*, 252 N.Y.S. 546 (Sup. Ct. 1931)).

District Court case that held “representative” in the Voting Rights Act included elected judges and to the case that held it did not.¹⁸² Yet, the word “representative” gets only one-half of a column in *Black’s Law Dictionary* and the meaning related to government limits “representative” to those serving in a legislative body.¹⁸³

As Professor Mellinkoff suggests, legal dictionaries “avoid discrimination by adopting an all-purpose solution.”¹⁸⁴ That is, law dictionaries, like other dictionaries, choose breadth over precision. Their use in determining the particular meaning of a particular word in a particular statute is thus subject to the same reservations discussed above for general dictionaries—their definitions are summaries and approximations; their citation sources are limited; their definitions are not precise.

Like general dictionaries, law dictionaries do not rely solely on their citation sources. Lawyers send in words and definitions on their own. Specialists in areas such as taxation are consulted.¹⁸⁵ The editors check the glossaries of West’s law school publications. Other legal sources, such as other publishers, law school publications, hornbooks, professional publications, and, of particular importance for the subject of this piece, legislation and legislative history, however, are not systematically searched.¹⁸⁶ Thus, the sources for legal citations are limited. The staff of *Black’s Law Dictionary* is beginning to take advantage of its on-line database WESTLAW, but the most recent unabridged version of the dictionary did not make extensive use of this rich source. The limited citation base means that the definitions exclude some meanings.

Of course, the Supreme Court’s use of *Black’s Law Dictionary* for the meaning of ordinary words complements the use of general dictionaries. By using *Words and Phrases* as its key citation source, *Black’s Law Dictionary* includes legal uses of ordinary words and may thus reveal a specialized or unusual meaning or significance of a common word when used in a legal context. However, *Black’s Law Dictionary* bases the legal meanings of ordinary words largely on judicial sources. By using judicial opinions as its primary citation sources, *Black’s Law Dictionary* not only limits the meanings included, but also operates in a way very different from general dictionaries using modern lexicographic principles. A collection of

182. See *id.* at 35-36 (Supp. 1997) (citing *Martin v. Allain*, 658 F. Supp. 1183, 1200 (S.D. Miss. 1987) and *Chisom v. Edwards*, 659 F. Supp. 183, 186 (E.D. La. 1988)).

183. BLACK’S LAW DICTIONARY, *supra* note 150, at 1302.

184. Mellinkoff, *supra* note 147, at 436.

185. The cover page of *Black’s* sixth edition, for example, lists Martina N. Alibrandi, Certified Public Accountant, as a contributing author. See BLACK’S LAW DICTIONARY, *supra* note 150.

186. See *supra* note 175 and accompanying text.

judicial citations is not a collection of usages; it is a collection of interpretations. That is, these citations are self-conscious efforts to decree the meaning of words as used in a text, rather than examples of word usage by a writer employing the word to communicate. Judicial interpretations already operate at the “secondary” level of “utterances about language or those made in a dictionary” rather than at the “primary” level of “the natural act of language itself, spontaneously expressing the full range of human needs and desires.”¹⁸⁷ They are themselves definitions. In collecting and abstracting these definitions, *Black’s Law Dictionary* is acting more like a general dictionary looking at other dictionaries than a general dictionary looking at its own citation file. Editors of general dictionaries, however, assume that the other dictionaries they consult have produced their definitions from a citation file with a variety of sources. In contrast, the judicial definitions that *Black’s Law Dictionary* uses as its source themselves derive from a single source, the particular facts and law involved in the case being quoted, and that source is self-consciously interpreting rather than using the language.

Moreover, modern legal dictionaries, like modern general dictionaries, do not—and were not intended to—dictate meaning. While consensus among courts in different jurisdictions interpreting words in different contexts is strong evidence that the words in the federal statute may well have that meaning, it is also possible that the words have a meaning in a particular legal context not listed in the legal dictionary’s brief, summary definitions of the most prevalent uses.

The most recent edition of *Black’s Law Dictionary* tries valiantly not to perpetuate the myth of authority and precision. The preface to the sixth edition concludes with “A Final Word of Caution:”

The language of the law is ever-changing as the courts, Congress, state legislatures, and administrative agencies continue to define, redefine and expand legal words and terms. Furthermore, many legal terms are subject to variations from state to state and again can differ under federal laws. Also, the type of legal issue, dispute, or transaction involved can affect a given definition usage. Accordingly, a legal dictionary should only be used as a “starting point” for definitions.¹⁸⁸

Thus, many of the caveats that apply to the use of definitions in general dictionaries apply equally to the use of definitions in legal

187. WELLS, *supra* note 1, at 74 (citing Leonard Bloomfield, *Secondary and Tertiary Responses to Language*, XX LANGUAGE (1949)).

188. BLACK’S LAW DICTIONARY, *supra* note 150, at iv.

dictionaries. Legal definitions, like general definitions, must opt for breadth and abstraction. The listed definitions do not include all ordinary uses. Citation sources are limited. In the case of legal dictionaries, however, some additional cautions are in order. Obsolete definitions of words frequently appear without being so identified. Modern usages may well be absent. The heavy use of court opinions as the citation sources for modern usages makes the dictionary more a dictionary of definitions than a dictionary of usages.

C. Implications for Judicial Interpretation

Both the similarities and the differences between general and legal dictionaries have implications for their use in judicial interpretation. On one hand, general dictionaries and specialized dictionaries have different audiences, purposes, and methods of production. On the other hand, legal dictionaries, like general dictionaries, are limited in their sources, are subject to space constraints, and must choose breadth of coverage in wording their definitions. The Supreme Court, however, is inconsistent in the way it treats legal dictionaries and general dictionaries and the relationship between them. Sometimes the Court cites them as very different kinds of references; other times as if they were interchangeable.¹⁸⁹

No apparent pattern exists to the Court's citation of general and legal dictionaries. For technical legal definitions, Supreme Court opinions—whether textualist or intentionalist—often turn to legal dictionaries, especially *Bouvier's* or *Black's Law Dictionary*,¹⁹⁰ or other specialized reference

189. See *infra* notes 192-94.

190. See, e.g., *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (citing *Black's* for the meaning of "prospectus" at the time of the 1933 Act); *Kansas v. Colorado*, 514 U.S. 673, 687 (1995) (citing *Black's* for the meaning of "laches"); *Deal v. United States*, 508 U.S. 129, 132 (1993) (citing *Black's* for the meaning of "judgment of conviction"); *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990) (citing *Black's* for definition of "child support"); *United States v. James*, 478 U.S. 597, 616 (1986) (Stevens, J., dissenting) (citing *Black's* for the definition of "damage"). The Court quite regularly uses *Bouvier's* as a historical source, citing its earlier editions along with other dictionaries, legal encyclopedias, and additional authorities to show contemporaneous usage of a word at issue in an older statute. See, e.g., *Smiley v. Citibank*, 517 U.S. 735, 740 (1996) (citing the 1856 edition of *Bouvier's* along with legal dictionaries and encyclopedia for the meaning of "interest" at the time of the National Bank Act); *Ngiraingas v. Sanchez*, 495 U.S. 182, 201 n.8 (1990) (Brennan, J., dissenting) (citing the 1866 edition of *Bouvier's* for the meaning of "corporation" as including sovereign and territories); *James*, 478 U.S. at 615 (Stevens, J., dissenting) (looking to 1914 edition of *Bouvier's* along with a 1938 edition of *American Jurisprudence* for definition of "damage" at time of the Mississippi Flood Control Act). At other times, however, the Court simply cites *Bouvier's* as it does other legal dictionaries for the current meaning of a word. See, e.g., *United States v. Dixon*, 509 U.S. 688, 705-06 n.10 (1992) (citing

works.¹⁹¹ Sometimes, however, they cite a general dictionary and a legal dictionary in defining a technical term.¹⁹² The Justices cite law dictionaries not only for technical legal terms, but also for the most common of words found in the general vocabulary.¹⁹³ Opinions will cite both law dictionaries and general dictionaries for definitions of quite common words.¹⁹⁴

For both general and specialized vocabulary, using law dictionaries based on legal citation sources fills a gap in the citation sources of general dictionaries. To the extent a law dictionary is used for common words, however, it tends to undermine the textualists' claim that they seek to find the meaning of ordinary language for the ordinary speaker. In fact, the opinions, whether textualist or not, give no indication whether citation of both legal and general dictionaries is intended to show consensus among different dictionaries or among different kinds of dictionaries. The Court's basis for citing general dictionaries, legal dictionaries, or both, goes unremarked and probably unnoticed.

1883 edition of *Bouvier's* for the definition of "incident," and the 1990 edition of *Black's* for the meaning of "incidents of ownership"); *United States v. Louisiana*, 466 U.S. 253, 264 (1980) (citing 1914 edition of *Bouvier's* and 1979 edition of *Black's* for meaning of "impound"); *United States v. Cook*, 384 U.S. 257, 261 n.5 (1966) (citing the 1914 edition of *Bouvier's*, the 1948 edition of *Ballentine's*, and the 1951 edition of *Black's*, as well as a financial dictionary and encyclopedia for meaning of "firm").

191. See, e.g., *United States v. Winstar Corp.*, 116 S. Ct. 2432, 2444 (1996) (citing *Dictionary of Banking and Financial Services* as well as *Dictionary of Accounting*); *United States v. An Article of Drug*, 394 U.S. 784, 800 n.20 (1969) (citing *Dorland's Illustrated Medical Dictionary*).

192. See, e.g., *Melendez v. United States*, 116 S. Ct. 2057, 2061 & n.4 (1996) (citing both *Black's* and the *Random House Dictionary of the English Language* for the legal meaning of "motion"); *Babbitt v. Sweet Home Chapter of Communities*, 515 U.S. 687, 732-33 (1995) (Scalia, J., dissenting) (citing both *Black's Law Dictionary* and *Webster's Second New International Dictionary* for "proximate" in "proximate causation"); *Arave v. Creech*, 507 U.S. 463, 484 & n.13 (1993) (Blackmun, J., dissenting) (citing *Black's Law Dictionary* for the legal meaning of "cold blood" and noting that "the line between the 'ordinary' and the 'legal' meaning . . . is not always obvious").

193. See, e.g., *Nationsbank v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 264 (1995) (citing *Black's* for definition of "insurance"); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Savings Bank*, 510 U.S. 86, 112 (1993) (Thomas, J., dissenting) (citing *Black's* for definition of "provide"); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (citing *Black's* for the meaning of "relating to"); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 n.16 (1983) (citing *Black's* for the meaning of "relate").

194. See, e.g., *United States v. Granderson*, 511 U.S. 39, 71 (1994) (Rehnquist, C.J., dissenting) (citing *Black's* and *Webster's Third New International Dictionary* for "original" and for "sentence"); *Smith v. United States*, 508 U.S. 223, 228-29 (1993) (citing *Black's* and *Webster's Second New International Dictionary* for the meaning of "to use"); *Looking It Up*, *supra* note 2, at 1439 n.12, observes that although "[s]ome distinction could be made between general-use dictionaries and specialized volumes such as *Black's Law Dictionary*," the Supreme Court "has not limited itself to either type of work"

Even if legal dictionaries supplement general dictionaries by examining legal sources, the most important citation source for legal dictionaries is lower court opinions, and such a source puts an ironic spin on any citation of legal dictionaries by the Supreme Court. To the extent that the dictionary definitions are based on U.S. Supreme Court opinions, the Court is in fact citing to itself rather than to some external, neutral source.¹⁹⁵ To the extent that the citations come from lower federal courts, the lower courts are dictating to the Supreme Court. Most of the courts cited in *Words and Phrases*, however, are state courts. To the extent that the definitions in *Black's Law Dictionary* derive from state court decisions, the U.S. Supreme Court may well be permitting these state courts to shape federal law, although the legal holdings of the state courts have no precedential effect for the meaning of federal statutes. Perhaps most importantly, to the extent that strict textualism is motivated by a desire to limit judicial activism by identifying binding authorities external to the opinions of judges,¹⁹⁶ legal dictionaries are a particularly poor choice because of their dependence on judicial opinions for their definitions.¹⁹⁷

While legal dictionaries differ from general dictionaries in their sources, the similarities between general and legal dictionaries also have important consequences for judicial use of legal dictionaries. As noted earlier, legal dictionaries, like general dictionaries, should not be used to dictate meaning. Thus, Justice O'Connor erred when she wrote in a recent dissent that, while the Supreme Court is "not bound to accept Black's Law Dictionary as the authoritative expositor of American law," if Congress "had intended to depart from the accepted meaning [as shown in Black's], . . . surely it would have so indicated."¹⁹⁸ She attributed more weight to the

195. Words that the most recent edition of *Black's Law Dictionary* defines by reference to Supreme Court opinions include "affiliation," BLACK'S LAW DICTIONARY, *supra* note 150, at 58; "device," *id.* at 452; and "export," *id.* at 579.

196. In his recent book, Justice Scalia reiterates that he rejects the search for legislative intent because of the danger that "under the guise or even the self-delusion of pursuing unexpressed legislative intents, common-law judges will in fact pursue their own objectives and desires." A MATTER OF INTERPRETATION, *supra* note 14, at 17-18.

197. Of course, a textualist may well argue that, as in the rules of common, the aggregation of individual judicial preferences regarding definitions creates a sufficiently objective and external standard for limiting the discretion of an individual judge.

198. *Pioneer Inv. Servs. v. Brunswick Assocs. Ltd.*, 507 U.S. 380, 403 (1993) (O'Connor, J., dissenting). The case involved the meaning of "excusable neglect" for late filing under the Bankruptcy Code. The majority, citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 791 (1983), as well as the provision's history and court precedent, interpreted the word broadly to include late filings caused by "inadvertence, mistake, or carelessness." *Pioneer Inv. Servs.*, 507 U.S. at 388. It went on to endorse a multifactor balancing test involving a variety of equitable considerations. Justice O'Connor rejected the majority's balancing test in favor of the "plain

definitions in *Black's Law Dictionary* than they were intended to or can properly bear. As the editors tried to make clear in the "Final Word of Caution" to the sixth edition's preface, *Black's Law Dictionary* lists some accepted meanings, but not necessarily the meaning of the word at issue in a particular statute.

In sum, lexicographic considerations argue against judges using dictionary definitions to dictate statutory meaning, whether they come from general or legal dictionaries. Dictionaries list some of the common meanings of words. They do not decree the single ordinary meaning. That is, dictionary definitions can be a beginning point for determining the meaning of a word in a statute, but should not be an end point. As lexicography teaches, relevant context should be brought to bear to interpretation. The language of the dictionary definition should not dictate statutory meaning. Dictionary definitions are not appropriate for resolving definitively a question of a word's meaning in statutory interpretation. To so use them is to misuse them. It gives a false sense of authority, precision, neutrality, objectivity, and certainty.

IV. DICTIONARIES AND THEIR ABSENCE IN RECENT SUPREME COURT OPINIONS

Although Chief Justice Marshall rejected Noah Webster's attempt to have his dictionary endorsed by the Supreme Court in 1831,¹⁹⁹ citation of dictionaries by the Supreme Court is not a new phenomenon. The Court notes counsel's use of a dictionary as early as 1785.²⁰⁰ Many nineteenth century cases deciding whether tariff provisions should apply to particular kinds of merchandise involved dictionaries.²⁰¹ The most famous of these tariff cases, *Nix v. Hedden*,²⁰² asked whether a tomato was a fruit or a

language" of the text. *See id.* at 399. She found in *Black's Law Dictionary* a "second and dispositive guidepost," for a narrow definition. *Id.* at 402.

199. *See Looking It Up*, *supra* note 2, at 1438 n.6 (citing Juan F. Perea, *Demography and Distrust: An Essay on American Languages, Cultural Pluralism, and Official English*, 77 MINN. L. REV. 269, 298 & n.131 (1992)); Shirley Brice Heath, *National Language Academy? Debate in a New Nation*, 189 LINGUISTICS 33 (1977). Somewhat like Dr. Johnson, Noah Webster sought to establish a "national language" and to give it "uniformity and perspicuity." NOAH WEBSTER, DISSERTATIONS ON THE ENGLISH LANGUAGE 36 (1789), *reprinted in* ENGLISH LINGUISTICS 1500-1800: A COLLECTION OF FACSIMILE REPRINTS (R. C. Alston ed., 1967).

200. *See* *Respublica v. Steele*, 2 U.S. (2 Dall.) 92, 92 (1785).

201. *See, e.g., United States v. Klumpp*, 169 U.S. 209, 212 (1898) (citing the *Century Dictionary* for the definition of "worsted" in terms of wool); *Seeberger v. Wright & Lawther Oil & Lead Mfg. Co.*, 157 U.S. 183, 185 (1895) (citing *Webster's Dictionary* of 1890 for definition of "draught").

202. 149 U.S. 304 (1893).

vegetable within the meaning of the Tariff Act of 1883. In the Court's opinion, Justice Gray explained that "dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court."²⁰³ The opinion went on to reject the dictionary definition of a tomato as a fruit on the grounds that "in the common language of the people," tomatoes would be "vegetables, which are grown in kitchen gardens, and . . . usually served at dinner . . . and not, like fruits generally, as dessert."²⁰⁴ Thus, in *Nix v. Hedden*, as in the other tariff cases, there is no slavish dependence on dictionary meaning. These cases do not equate ordinary and dictionary meaning. In this case, quite to the contrary, the two are in direct opposition, with the dictionary using a technical rather than a common meaning.

Over the years, the Court has used dictionaries—sometimes appropriately, sometimes not.²⁰⁵ The prominence of dictionaries in statutory interpretation, however, has increased as the Court has responded to Justice Scalia's advocacy of textualism and plain meaning instead of a resort to legislative purpose and history.²⁰⁶ In various textualist opinions, dictionaries have become a key tool in discerning statutory meaning.²⁰⁷ In so using dictionary definitions, these opinions give their conclusions regarding statutory interpretation the aura of objectivity, precision, and certainty. As the earlier discussion of lexicographic principles shows, however, dictionaries in fact do not represent certainty and precision. Their citation gives a false sense of certainty. In other cases, where dictionary definitions would introduce ambiguity, they are not cited. Their absence gives a false sense of certainty. In still other opinions, Justices closely allied with textualism offer dictionary definitions as only a preliminary, tentative step, and go on to consider use of the word at issue in other analogous contexts. That is, at times, textualists treat dictionary definitions in the same way as would an intentionalist. Textualists, however, choose the tentative approach when it is necessary to narrow the reach of the statutory language.

The following analysis of several Supreme Court cases illustrates these points. Each case was chosen for discussion because of the key role dictionary definitions played—or could have played—in the decision. Moreover, these cases demonstrate all the approaches to judicial use of dictionary definitions discussed in Part I. Through use of the lexicographic principles described in Parts II and III, Part IV reveals problems inherent in

203. *Id.* at 307 (citations omitted).

204. *Id.*

205. See generally James L. Weis, *supra* note 30.

206. See Merrill, *supra* note 3, at 363-66; *Looking It Up*, *supra* note 2, at 1448 (observing that citation to dictionaries also increased in the *Lochner* era).

207. See Merrill, *supra* note 3, at 356.

pragmatic textualism and provides support for viewing deferential textualism as, in fact, instrumental. The analysis shows that the intentionalists' exploratory use of dictionary definitions is more consistent with lexicographic principles than is the textualist theory that touts the importance of dictionary definition.

A. *Chisom v. Roemer*—Justice Scalia's *Manifesto of Ordinary Meaning*

In *Chisom v. Roemer*,²⁰⁸ Justice Scalia announced his theory of ordinary meaning and its connection to dictionary definition. In that case, the Court decided whether the word "representative" in section 2 of the Voting Rights Act, as amended in 1982, applied to elected judges.²⁰⁹ The majority concluded that it did. In reaching this conclusion, the Court looked to the purpose and legislative history of the amendment.²¹⁰ The majority saw the purpose of the amendment as expanding the scope of section 2 to apply to violations without proof of intentional discrimination.²¹¹ Writing for the Court, Justice Stevens explained that when section 2 was amended to protect those who have less opportunity "to participate in the political process and to elect representatives of [their] choice," Congress borrowed the phrase from *White v. Regester*,²¹² replacing "legislator" with "representative."²¹³ "This substitution," Justice Stevens continued, "indicates, at the very least, that Congress intended the amendment to cover more than legislative elections."²¹⁴ His opinion concluded that, given the purpose of the amendment, "the better reading of the word 'representatives' describes the winners of representative, popular elections," including judges, and he found nothing in the legislative history to indicate otherwise.²¹⁵ The opinion did not cite any dictionaries to support its conclusion.

In his well-known dissent, Justice Scalia objected to the majority's use of legislative history to conclude that "representative" in the Voting Rights Act includes elected judges.²¹⁶ He offered, in its stead, his theory of ordinary meaning as revealed in dictionary definitions. He explained,

208. 501 U.S. 380 (1991).

209. *See id.* at 398-402.

210. *See id.*

211. *See id.* at 402.

212. 412 U.S. 755 (1973).

213. *Chisom*, 501 U.S. at 398.

214. *Id.* at 398-99.

215. *Id.* at 399.

216. *See id.* at 405 (Scalia, J., dissenting).

I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies. If not—and especially if a good reason for the ordinary meaning appears plain—we apply that ordinary meaning.²¹⁷

He tied this theory of ordinary meaning to the need to defer to Congress. Quoting Holmes, he suggested that “[w]e are to read the words of that text as any ordinary Member of Congress would have read them.”²¹⁸ Justice Scalia did not explain how an ordinary member of Congress reads or what makes a member of Congress ordinary.

Later, he rejected the majority’s discussion of possible meanings for the word “representative” that would apply to elected judges. He asserted that “our job is not to scavenge the world of English usage to discover whether there is any possible meaning of ‘representatives’ which suits our preconception that the statute includes judges; our job is to determine whether the *ordinary* meaning includes them.”²¹⁹ He then cited, without quoting, the definition in the second edition of *Webster’s New International Dictionary* (“*Webster’s Second*”) as his only support for the proposition that “[t]here is little doubt that the ordinary meaning of ‘representatives’ does not include judges” and that “the ordinary speaker in 1982 [the date the Voting Rights Act was amended] would not have applied the word to judges.”²²⁰ He treated this definition as controlling and determinative of statutory meaning. The majority’s recourse to presumed legislative intent and purpose, he insists, will “poison the well of future legislation, depriving legislators of the assurance that ordinary terms, used in an ordinary context, will be given a predictable meaning.”²²¹ The Court’s “highest responsibility in the field of statutory construction,” he declared, “is to read the laws in a consistent way, giving Congress a sure means by which it may work the people’s will.”²²²

Application of the lexicographic principles discussed earlier exposes a variety of weaknesses in Justice Scalia’s argument. He does not explain what he means by “ordinary language,” much less why it should govern statutory interpretation. As lexicographers have come to understand, the

217. *Id.* at 404.

218. *Id.* at 405.

219. *Id.* at 410.

220. *Id.* at 411.

221. *Id.* at 417.

222. *Id.*

great variety of meanings for individual English words, particularly in this age of increased specialization, undermines any claim that there is one ordinary meaning of a word. There are many common, and therefore many ordinary, meanings.

Lexicography also teaches that context is crucial to understanding the meaning of a word. Justice Scalia, however, moves his focus from an ordinary member of Congress to an ordinary speaker and then back again, without asking whether the word "representative" might have very different meanings to the two groups. He refuses to look at legislative history to determine what the word might have meant to the members of Congress that passed the legislation, but asserts that what it meant to such a member should control interpretation and context. He assumes that a dictionary definition is not simply an ordinary meaning, but "the" ordinary meaning. Justice Scalia accepts as uncontroversial the underlying proposition that dictionaries precisely capture the ordinary meaning of terms.²²³ But, as we have seen, dictionaries frequently omit ordinary meanings and cannot be precise. That is, even if we were to agree with Justice Scalia that ordinary meaning is to control interpretation, we would not rely solely on dictionaries to establish ordinary meanings.

If, however, we accept as well Justice Scalia's equating ordinary language with dictionary definition, we would need to question his reliance on the single dictionary definition. He cites a 1934 edition of a dictionary to rule out a 1982 usage, despite changes in meaning over time.²²⁴ He ignores dictionaries that define "representative" in a way that clearly includes elected judges.²²⁵ In particular, he does not justify his choice of the *Webster's Second* over other dictionaries, including the more recent *Webster's Third* and, even if we accept the authority of *Webster's Second*, it does not dispose of the question as thoroughly as Justice Scalia asserts, which may explain his failure to quote it. The definition reads, "[o]ne who represents others or another in a special capacity, as agent, deputy or substitute; esp: . . . [o]ne

223. See *Looking It Up*, *supra* note 2, at 1452.

224. His citation is to a 1950 reprint of *Webster's Second*. The second edition, however, was published in 1934.

225. See *Looking It Up*, *supra* note 2, at 1442 n.37 (citing AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1532 (3d ed. 1992)). The *American Heritage Dictionary* includes among its definitions of "representative" the following: "A member of a governmental body, usually legislative, chosen by popular vote." Although the third edition of the *American Heritage Dictionary* was published after the date of the amendment to the Voting Rights Act, it could well reflect usage at the time of the amendment, as explained earlier. Since it was not published until after the date of the opinion, however, Justice Scalia could not cite it. Nonetheless, earlier editions of the *American Heritage Dictionary* also included the quoted definition. See AMERICAN HERITAGE DICTIONARY 1049 (2d College ed. 1985).

who represents a people or community in its legislative or governing capacity.”²²⁶ This definition does not require that a representative be one who serves in a legislative body. It simply asserts that such is usually the case.

The argument for including “judge” within the definition of “representative” is stronger yet in *Webster’s Third*, which also has a publication date far closer to the date of the amendment of the Voting Rights Act. In *Webster’s Third*, both the introductory and the following phrase of the applicable definition for “representative” could include elected judges. The definition reads, “one that represents another or others in a special capacity: as . . . one that represents a constituency as a member of legislative or *other* governing body.”²²⁷ A court is not a legislative body, but it might qualify as some other kind of governing body, depending on one’s view of the role of the judiciary.

Furthermore, while *Webster’s New International Dictionary* is the only unabridged English dictionary and a well-respected one, it lays its own claim to authority on the breadth of its scavenger hunt to discover the many uses of a word. Justice Scalia, however, by criticizing the majority for what he characterizes as a scavenger hunt of the world of English usage to discover possible meanings,²²⁸ seems to reject scavenging as a basis for authority. In fact, additional evidence scavenged from contemporary sources makes his conclusion about the meaning of “representative” far more convincing.

In short, here, where the dictionary definitions can be read to narrow the governmental power, Justice Scalia treats the dictionary definition as if it revealed the one ordinary meaning. He treats dictionary definition as if it authoritatively prescribed the single meaning of a word rather than describing some of the usages its editors have gathered from its limited set of citation sources. Despite his call to consistency in the Court’s method of statutory interpretation, Justice Scalia rejects dictionary definitions in other opinions, at least when they produce a statutory meaning broadening the power of government.

226. WEBSTER’S NEW INTERNATIONAL DICTIONARY 2114 (photo. reprint 2d ed. 1941) (1934).

227. WNID3, *supra* note 34, at 1926 (emphasis added). It defines “represent” as “to serve (as in a legislative body) by delegated or deputed authority, usu. resulting from election.” *Id.*

228. See *Chisom v. Roemer*, 501 U.S. 380, 410 (1991).

B. Moskal and Smith—*Pragmatic Versus Instrumental Textualism*

In both *Smith v. United States*²²⁹ and *Moskal v. United States*,²³⁰ Justice Scalia dissents from pragmatic textualist opinions that give statutory language a broad meaning based on dictionary definitions. In these dissents, Justice Scalia uses dictionary definitions as a beginning but not an end point. His method cannot be faulted from a lexicographic viewpoint. This approach to dictionary definition, however, differs greatly from that which he set forth in *Chisom v. Roemer*.²³¹

In *Smith*, the Court decided that someone who exchanged a gun for narcotics could be sentenced under a statute that enhances penalties for “use of a firearm.”²³² Justice O’Connor, writing for the majority, cited both *Webster’s Third* and *Black’s Law Dictionary* to define “use” broadly as meaning “[t]o convert to one’s service’ or ‘to employ.’”²³³ The majority disposes of the case pragmatically by relying on a broad dictionary definition to uphold the conviction.

Justice Scalia’s dissent cautioned against too great a reliance on dictionary definition. He observed that “how a word *can be* used” is not necessarily “how it *ordinarily is* used.”²³⁴ He stressed that words must be understood in context, particularly when the word is one such as “use” with a broad range of dictionary meanings.²³⁵ In *Smith*, he relied on the *United States Sentencing Guidelines* as evidence of the “ordinary meaning” of this particular statute.²³⁶ Here, where reliance on dictionary definition broadened the reach of the statute, Justice Scalia did not treat the dictionary definition as controlling. He was willing to depart from dictionary evidence and go to other external sources in order to narrow the statutory meaning.²³⁷

229. 508 U.S. 223 (1993). For other discussions of this case, see Solan, *supra* note 32, at 270-75 and the articles cited therein at n.133.

230. 498 U.S. 103 (1990).

231. 501 U.S. 380 (1991).

232. *Smith*, 508 U.S. at 228-32.

233. *Id.* at 229. The opinion does not make clear the relationship between the two dictionaries—whether they are being cited as two parallel and interchangeable authorities or two different but complementary sources whose agreement gives the conclusion particular weight.

234. *Id.* at 242 (Scalia, J., dissenting).

235. *See id.*

236. *See id.* at 243-44.

237. Recently, Justice Scalia endorsed the method he used in *Smith* and again criticized the majority. “Textualism,” he wrote, “should not be confused with so-called strict constructionism, a degraded form of textualism that brings the whole philosophy into disrepute.” A MATTER OF INTERPRETATION, *supra* note 14, at 23. He cites the majority in *Smith* as a likely example of strict constructionism. He asserts that “a proper textualist, which is to say my kind of textualist, would surely have voted to acquit.” *Id.* at 24. He explains, “[t]he phrase ‘uses a gun’ fairly connoted use of a gun for what guns are normally used for, that is, as a weapon.” *Id.*

Justice Scalia also rejected dictionary definition in *Moskal*.²³⁸ Moskal had been convicted for receiving “washed” titles under a statute that imposed fines or imprisonment on anyone who knowingly transported in interstate commerce any “falsely made” document.²³⁹ “Moskal’s confederates purchased used cars in Pennsylvania, rolled back the cars’ odometers, and altered their titles” to fit the lower numbers.²⁴⁰ They then sent the altered titles to Virginia so that the Virginia authorities would issue Virginia titles with the false, lower mileage figures.²⁴¹ The washed titles were finally sent back to Moskal in Pennsylvania.²⁴²

Justice Marshall, writing for the majority, upheld the conviction.²⁴³ His opinion interpreted “falsely made” as “made to contain false, or incorrect information.”²⁴⁴ The majority opinion did not cite any dictionary in support of its conclusion. It read the words of the statute as broad enough on its face to support this interpretation and viewed the interpretation as “perfectly consistent with ordinary usage” thereto.²⁴⁵ The opinion also concluded that the legislative history supported its interpretation of the word.²⁴⁶ It found “ample reason to apply the law to a fraudulent scheme for washing vehicle titles” in both the “plain meaning of [the] words and in the legislative purpose underlying them.”²⁴⁷ Thus, the majority opinion exhibited a pragmatic textualism. Unlike stricter versions of textualism, this textualism construed the statutory language broadly and cited legislative history as further support for the plain meaning.

In dissent, Justice Scalia disputed the majority’s conclusion that “falsely made” means “made to contain false, or incorrect, information” and thus encompassed genuine documents containing false information.²⁴⁸ The ordinary meaning, he insisted, for “falsely made” is limited to “forged” or “counterfeited.”²⁴⁹ As evidence, he first cited both the second and third editions of *Webster’s New International Dictionary*.²⁵⁰ He went on to question reliance on the layman’s understanding, which supported the

238. See *Moskal v. United States*, 498 U.S. 103, 119-32 (1990) (Scalia, J., dissenting).

239. See *id.* at 106.

240. *Id.* at 105.

241. See *id.* at 105-06.

242. See *id.* at 106.

243. See *id.* at 105.

244. *Id.* at 106.

245. *Id.* at 108-09.

246. See *id.* at 114.

247. *Id.*

248. *Id.* at 119-32 (Scalia, J., dissenting).

249. *Id.* at 120 (Scalia, J., dissenting).

250. See *id.* at 119 (Scalia, J., dissenting).

majority opinion. He called instead for a “specialized legal meaning,” based on the meaning in common law, and, for evidence of the legal meaning, began by citing two legal dictionaries as sources for specialized, rather than ordinary, meaning.²⁵¹ Justice Scalia then turned to citations from Blackstone’s commentaries, a nineteenth century treatise on criminal law, state statutes, federal and state court decisions, and more than a dozen 1939 commentators.²⁵²

Justice Scalia has received praise for the way he uses dictionaries in both of these opinions. Solan believes that in *Moskal*, Scalia appropriately uses the dictionary “to give the reader a general sense of the word”; the *Harvard Note* calls Justice Scalia’s use of dictionary in these cases “sensitive.”²⁵³ Indeed, these dissents provide a model for explaining why dictionary definitions should not dictate statutory interpretation. But the inconsistency in Justice Scalia’s reliance on dictionaries gives pause. To Justice Scalia, dictionary definitions are objective and dispositive only when they narrow the power of the federal government.²⁵⁴ However, when dictionaries support a broad reading, Justice Scalia claims they fail to evidence ordinary meaning. If dictionaries support a broad assertion of power, Justice Scalia turns to other sources, sources external to the statutory text, for his preferred specialized meaning of the word. He chooses even external sources very far removed from the statute rather than using legislative history that would place the statutory word in its immediate verbal and historical context. Thus, Justice Scalia’s use of dictionaries as a tool of textualism appears instrumental indeed, invoked only when it produces the desired result.

C. National Organization for Women and Travelers Insurance—*The Limits of Pragmatic Textualism*

In *Smith* and *Moskal*, the strict textualist Justice Scalia, in order to dispute the conclusions of pragmatic textualists giving statutory language a broad meaning, abandons textualist methods and rejects the use of dictionary definition as controlling. But pragmatists themselves exhibit inconsistency in their use of dictionaries, as shown by *National Organization for Women, Inc.*

251. *Id.* at 121 (Scalia, J., dissenting).

252. *See id.* at 122-25 (Scalia, J., dissenting).

253. Solan, *supra* note 33, at 55; *Looking It Up*, *supra* note 2, at 1442 n.38, 1443 n.46, 1453 & n.108.

254. As Professor Karkkainen writes, Justice Scalia often “appeals to a narrow dictionary definition of a crucial word or phrase to reach what he claims is the definitive plain meaning of the larger text.” Karkkainen, *supra* note 7, at 440.

(“NOW”) v. *Scheidler*.²⁵⁵ Furthermore, as *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*²⁵⁶ demonstrates, the burdens imposed on lower courts by pragmatic textualism can sometimes exceed the benefit of permitting the Supreme Court to dispose of cases quickly. Pragmatic textualism can be too easy.

In *NOW*, the Court, in an opinion written by Chief Justice Rehnquist,²⁵⁷ declined the invitation of the parties to engage in a battle of dictionaries. Petitioner NOW had filed a suit under the Racketeer Influence and Corrupt Organizations (“RICO”) provision of the Organized Crime Control Act of 1987 against the Pro-Life Action Network (“PLAN”) as well as a number of anti-abortion groups and individuals alleging that PLAN constituted a racketeering “enterprise.” The Court granted review to resolve a conflict among the circuits as to whether RICO requires proof that either the racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose.²⁵⁸

Both petitioners and respondents relied in part on dictionary definitions to support their positions. In its brief, NOW cited from *Webster’s Third* for the meaning of enterprise as “any venture undertaking, project [or] any systematic purposeful activity or type of activity.”²⁵⁹ One group of respondents cited another definition from the same dictionary: “The first concrete definition given for an enterprise is as follows: ‘a unit of economic organization or activity (as a factory, a farm, a mine); *esp.* a business organization; FIRM, COMPANY.’”²⁶⁰

255. 510 U.S. 249 (1994) [hereinafter *NOW v. Scheidler*].

256. 115 S. Ct. 1671 (1995).

257. No Justice dissented. Justice Souter wrote a concurring opinion, in which Justice Kennedy joined, discussing the First Amendment implications of the decision. See *NOW*, 510 U.S. at 263 (Souter, J., concurring).

258. See *id.* at 255. Compare *United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983); *National Org. for Women, Inc. v. Scheidler*, 968 F.2d 612 (7th Cir. 1992); and *United States v. Flynn*, 852 F.2d 1045 (8th Cir. 1988) (all requiring economic motive), with *Northeast Women’s Ctr., Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir. 1989) (not requiring economic motive).

259. Brief for Petitioner at 21-22, *NOW v. Scheidler*, 510 U.S. 249 (1994) (No. 92-780) (quoting WNID3, *supra* note 34, at 757).

260. Brief for Respondent Randall A. Terry, Project Life and Operation Rescue at 20, *NOW v. Scheidler*, 510 U.S. 249 (1994) (No. 92-780) (quoting WNID3, *supra* note 34, at 757). Cunningham et al., *supra* note 33, at 1618-19, quotes several other dictionaries to show the variance in definitions of the word “enterprise.” These authors undertook their own extensive empirical research on the use and meaning of “enterprise.” They performed a search of the NEXIS database and designed a survey questionnaire that was administered to students at three universities as well as to United States District Court judges. Both of these empirical projects led to the conclusion that the word “enterprise” was not understood by most speakers as requiring an economic motive, although it did require a clear and specific goal, and some speakers did understand the word as requiring economic motive. See *id.* at 1596-1605.

In a short opinion, the Supreme Court held “that RICO requires no such economic motive.”²⁶¹ The Court, however, did not look to the dictionary for the meaning of “enterprise.” According to Justice Rehnquist, “the question presented for review asked simply whether the Court should create an unwritten requirement limiting RICO to cases where either the enterprise or racketeering activity has an overriding economic motive.”²⁶² The opinion assumed that the meaning of the word “enterprise” itself does not include an economic requirement.²⁶³ Rather than citing dictionary definitions, the opinion looked to another textualist tool, the structure of the statute itself, and found nowhere in the statute an indication that economic motive is required: “Congress has not, either in the definitional section or in the operative language, required that an ‘enterprise’ in § 1962(c) have an economic motive.”²⁶⁴ If, however, the very word “enterprise” in the statute meant an entity having an economic motive, such a requirement would not be unwritten and would be included in the meaning of the statutory words.²⁶⁵

NOW falls clearly into the category of pragmatic textualism. It accepts a broad, rather than a narrow, meaning for “enterprise” and thus for the reach of the statute. To do so, the opinion simply asserts that the language is unambiguous. For a claim to objectivity and certainty, this textualist opinion embraces a rhetoric of plain language rather than that of ordinary language as shown in dictionaries. The opinion decrees meaning to be plain. Here, where dictionary definitions would introduce, rather than obscure, the inevitable ambiguity of language, the opinion does not rely on them.²⁶⁶

As discussed earlier, Professor Schauer has speculated that pragmatic textualism eases the Supreme Court’s workload.²⁶⁷ Such assertion of plain meaning, however, can come at a tremendous cost to the lower courts. In one recent case, such an impact forced the Court to abandon

261. *NOW*, 510 U.S. at 252.

262. *Id.* at 262 n.6.

263. See Cunningham et al., *supra* note 33, at 1613-14 n.197.

264. *NOW*, 510 U.S. at 261.

265. See *id.* at 257-58.

266. The opinion does cite to one dictionary definition, but only as further support for its conclusion that no economic motive is needed. Allowing that the statutory “phrase ‘any enterprise engaged in, or the activities of which affect, interstate or foreign commerce’ come[s] the closest . . . to suggesting a need for an economic motive,” Chief Justice Rehnquist turns to *Webster’s Third* for the definition of “affect” as “to have a detrimental influence on—used especially in the phrase affecting commerce.” *Id.* at 258 (emphasis in original omitted). He is confident that “an enterprise . . . can have a detrimental influence on . . . commerce without having its own profit-seeking motives.” *Id.* at 258. Thus, the opinion turns to a dictionary when it offers solace rather than uncertainty.

267. See Schauer, *supra* note 4.

another dictionary-driven broad interpretation.²⁶⁸ The Employment Retirement Income Security Act ("ERISA"), one of the statutes identified by Schauer as unappealing to the Justices,²⁶⁹ contains an unusually broad preemption provision. Section 514 of ERISA specifies that the federal statute "shall supersede any and all State laws insofar as they . . . relate to any employee benefit plan."²⁷⁰ In *Shaw v. Delta Air Lines, Inc.*,²⁷¹ the Court concluded that "a law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." As support for this conclusion, it cited only *Black's Law Dictionary*.²⁷² As recently as 1992, Justice Thomas, writing for eight members of the Court, again relied exclusively on *Black's Law Dictionary* to define "relates to" in the ERISA preemption statute as synonymous with "refers to" or "has a connection with."²⁷³ The Court disposed of these cases quickly and easily by reference to the dictionary. These pragmatic textualist opinions accepted an extremely broad meaning of the word "relates to" and thus of ERISA's preemption provision.

This easy, dictionary-driven, plain meaning disposition of the term by the Court produced a flood of litigation for the lower federal courts. Thousands of judicial opinions have addressed ERISA preemption.²⁷⁴ In 1995, in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*,²⁷⁵ the Court was forced to take another tack. The unanimous opinion declares: "We simply must go beyond the unhelpful text and the frustrating difficulty of defining its key term, and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive."²⁷⁶ To discover those objectives, the opinion rejects textualism and turns to legislative history, the favored tool of the intentionalists.²⁷⁷ The Justices in this opinion were forced to recognize

268. See *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995).

269. See Schauer, *supra* note 4, at 248.

270. 29 U.S.C. § 1144(a) (1994).

271. 463 U.S. 85 (1983).

272. See *id.* at 97 n.16.

273. *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 129 (1992).

274. See *id.* at 135 n.3 (Stevens, J., dissenting). For a listing of some of the cases, see Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 HARV. J. ON LEGIS. 35, 79 n.199 (1996).

275. 514 U.S. 645 (1995).

276. *Id.* at 656.

277. For example, the opinion quoted the statement of one of ERISA's sponsors that the purpose of preemption was "'to eliminat[e] the threat of conflicting and inconsistent state and local regulation.'" *Id.* at 657 (quoting 120 CONG. REC. 29,197 (1974)).

the limits of pragmatic textualism and the costs it can impose. Second best is not always good enough.

D. MCI Telecommunications and Sweet Home—Textualism Versus Intentionalism

The use of dictionary definition by pragmatic textualists is sometimes inconsistent with lexicographic principles. Pragmatic textualists however, do not have a theory that calls for reliance on dictionary definition. Their inconsistencies are thus less troubling than the same behavior by stricter textualists such as Justice Scalia, who proudly proclaim their allegiance to “the objective indication of the words” of a statute.²⁷⁸ Both of the following cases expose the inconsistency between lexicographic principles and Justice Scalia’s practice. The two cases also contrast Justice Scalia’s use of dictionaries, the Court’s leading strict textualist, with that of Justice Stevens, the Court’s leading intentionalist.²⁷⁹ They reveal that Justice Stevens’ intentionalism matches lexicographic principles better than does Justice Scalia’s textualism.

In *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*,²⁸⁰ Justice Scalia, writing for the majority, relied on the weight of dictionary authority to limit the power of the Federal Communications Commission. A provision of the Communications Act of 1934 required common carriers to file tariffs with the Federal Communications Commission, but also authorized the Commission to modify the requirement.²⁸¹ At issue in the case was whether the Commission had the authority to make filing tariffs optional for nondominant long distance carriers such as MCI.²⁸²

Justice Scalia wrote that such a basic and fundamental change exceeded the statutory authority “to modify.”²⁸³ Dictionary definitions provided the basis for his conclusion. “Virtually every dictionary we are aware of says that ‘to modify’ means to change moderately or in minor fashion.”²⁸⁴ He cited definitions from the 1987 second edition of *Random House Dictionary of the English Language*, the 1976 reprint of *Webster’s Third*; the 1989 second edition of *OED*; and the 1990 sixth edition of *Black’s*

278. A MATTER OF INTERPRETATION, *supra* note 14, at 29.

279. See Merrill, *supra* note 3, at 357; Popkin, *supra* note 7, at 1135.

280. 512 U.S. 218 (1994).

281. See 47 U.S.C. § 203(a)-(b) (1994).

282. See *MCI Telecomms.*, 512 U.S. at 220.

283. See *id.* at 234.

284. *Id.* at 225.

Law Dictionary.²⁸⁵ Justice Scalia found consensus among a wide variety of dictionaries—older and newer, larger and smaller, general and specialized. Unquestionably, such evidence supports a conclusion that to change moderately is one possible meaning of the word “modify.”

As the discussion earlier regarding citations demonstrated, even widespread consensus does not prove that such is the meaning in this particular case. Petitioner in fact pointed to another definition for “modify” listed in *Webster’s Third* and other Webster’s dictionaries—“to make a basic or important change in.”²⁸⁶ Petitioner argued that this definition created an ambiguity in the meaning of the statute that required deference to the administrative agency under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*²⁸⁷

Justice Scalia rejected this argument out of hand:

When the word “modify” has come to mean both “to change in some respects” and “to change fundamentally” it will in fact mean neither of those things. It will simply mean “to change,” and some adverb will have to be called into service to indicate the great or small degree of the change.²⁸⁸

He concluded that the particular definition in *Webster’s Third* was both peculiar and wrong. “[I]ntentional distortions, or simply careless or ignorant misuse, must have formed the basis for the usage that Webster’s Third, and Webster’s Third alone, reported.”²⁸⁹ He asserted that this one definition “contradicts one of the meanings contained in virtually all other dictionaries.”²⁹⁰ As support for this rejection of *Webster’s Third*, he cited to the widespread criticism when *Webster’s Third* was published for its “portrayal of common error as proper usage,”²⁹¹ even though none of the criticism about usage labels in *Webster’s Third* went to the accuracy of the definitions included in the dictionary.²⁹² For further support of his

285. *See id.*

286. *Id.* at 225-26.

287. *See id.* at 226 (referring to *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984)). An argument that inconsistent definitions created ambiguity leading to such deference had succeeded just two years before in *National Railroad Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417-19 (1992). *See Pierce, supra* note 7, at 756-58. Justice Scalia, however, distinguished the case, saying that *Boston & Maine* involved contextual indications as well as dictionary definitions and that the ambiguity in *Boston & Maine* referred to accepted alternative meanings and not a meaning found in a single dictionary. *See MCI Telecomms.*, 512 U.S. at 226-27.

288. *MCI Telecomms.*, 512 U.S. at 227 (emphasis in original omitted).

289. *Id.* at 228.

290. *Id.* at 227 (emphasis in original omitted).

291. *Id.* at 228 n.3.

292. *See supra* text accompanying note 102.

conclusion that “modify” must refer to moderate change, Justice Scalia looked to definitions of “modify” in dictionaries published in 1934, when the Communications Act became law.²⁹³

Again, understanding lexicography enables us better to critique these positions. Alternative dictionary meanings, whether in the same dictionary or different ones, may very well contradict one another because dictionary definitions are descriptive and not prescriptive. Meanings are based on citation sources and use of citation sources is based on the lexicographic principle that context differentiates meanings.²⁹⁴ Justice Scalia recognized that the definition he rejected was based on usage, but failed to acknowledge that *Webster's Third* would include a meaning only if it found numerous instances of such usage. Each meaning, based on citation files, represents the usage of some set of users, enough for the editors to include the usage as a definition.

Justice Scalia's citations to dictionaries published in 1934 do not resolve the issue. The date of publication does not necessarily reflect the date of the edition. Moreover, no dictionary can be expected to report all usages, and no dictionary can be current as of its date of publication. Furthermore, since dictionaries can give only some approximate meanings, the words of dictionary definitions cannot resolve the statutory interpretation. A dictionary alone cannot tell us which of several possible meanings the statute reflects.

Justice Stevens' dissent rejected Justice Scalia's “rigid literalism.”²⁹⁵ It argued that, even if Justice Scalia's definition of “modify” was accepted, the Commission's detariffing policy could be seen in the context of the Commission's actions over time as a minor change.²⁹⁶ The dissent pointed as well to another series of dictionary definitions in which “modify” means “to limit or reduce in extent or degree.”²⁹⁷ More fundamentally, however, the dissent did not rely on the dictionary meaning. It emphasized the purpose of the statute to constrain monopoly power and grant discretion to the FCC.²⁹⁸ The dissent's use of the dictionary was squarely within the category of exploratory intentionalism. Dictionary definition did not control

293. See *MCI Telecomms.*, 512 U.S. at 228.

294. He notes, “Some dictionary must have been the very first to record the widespread use of ‘projection,’ for example, to mean ‘forecast.’” *Id.* at 227.

295. *Id.* at 235 (Stevens, J., dissenting).

296. See *id.* at 241 (Stevens, J., dissenting).

297. *Id.* at 241-42 (Stevens, J., dissenting) (quoting WEBSTER'S COLLEGIATE DICTIONARY 628 (4th ed. 1934), and listing in footnote 5, OED (2d ed. 1989), RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1236 (2d ed. 1987), WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d ed. 1987), and several other Webster's dictionaries).

298. See *id.* at 235-36, 241, 242 (Stevens, J., dissenting).

statutory meaning, but served as one step in understanding the purpose of the statute.

In *MCI*, Justice Scalia did not rely exclusively on the weight of dictionary authority. He also looked to the structure of the statute and his belief that the tariff-filing requirement is its heart.²⁹⁹ Because the Commission's authority to modify is subject to the exception that it may not require the notice period for changes to filed tariffs to be more than 120 days, he argued, the Commission's authority to modify did not give it the authority to make such a radical or fundamental change as eliminating the filing requirement for all except one firm.³⁰⁰ Justice Scalia, however, subordinated these structural and contextual arguments to that based on what he asserted was the unambiguous meaning of the word "modify." He weakened, rather than strengthened, his arguments by relying on one dictionary definition at the same time that he rejected a definition in the only unabridged English dictionary. He insisted that the dictionary gave a clear and certain answer, but was able to do so only by rejecting a definition that would introduce ambiguity that could require deference to an administrative agency.³⁰¹ Again, his use of the dictionary as a textualist tool appears not only instrumental, but also inconsistent with lexicographic principles.

A case from the 1995 Term, *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,³⁰² also charts the differences between an exploratory intentionalist use of dictionaries and Justice Scalia's instrumental use of them.³⁰³ At issue in the case was the authority of the Secretary of Interior to promulgate a regulation that interpreted a provision of the Endangered Species Act.³⁰⁴ The Endangered Species Act makes it unlawful to "take" an endangered or threatened species³⁰⁵ and defines "take [to mean to] harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect."³⁰⁶ In a regulation, the Secretary of the Interior defined "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife."³⁰⁷ Small landowners, logging companies, and others

299. *See id.* at 229-31.

300. *See id.*

301. "The Court seems to believe that it has made doctrine more determinate by using dictionaries as a predictable source of meaning. But the result has been to exert greater judicial control over administrative agencies." Zeppos, *supra* note 5, at 1143.

302. 115 S. Ct. 2407 (1995).

303. *See Solan, supra* note 32, at 279-81 (contrasting these two opinions).

304. *See Sweet Home*, 115 S. Ct. at 2409.

305. *See* § 9(a)(1)(B) (codified at 16 U.S.C. § 1538(a)(1)(B) (1994)).

306. § 3(19) (codified at 16 U.S.C. § 1532(1a) (1994)).

307. 50 C.F.R. § 17.3 (1994).

challenged the regulation on its face.³⁰⁸ They alleged that its application to protect the habitat of the red-cockaded woodpecker and the northern spotted owl “injured them economically.”³⁰⁹ They argued that the word “harm” should be limited to direct application of force and that accordingly the regulation was invalid.

Justice Stevens, writing for the majority, upheld the Secretary’s authority to promulgate the regulation. His analysis of why the Secretary’s interpretation was reasonable began with a dictionary definition, that of *Webster’s Third*,³¹⁰ which he cites in order to show that “an ordinary understanding of the word ‘harm’ supports” the regulation.³¹¹ Justice Stevens properly claimed that the dictionary definition was an ordinary one, not the only ordinary one.³¹² The presence in the only unabridged English dictionary of a definition like that in the regulation did lend credence to the Secretary’s interpretation. It did not, however, prove the correctness of the Secretary’s position as a matter of statutory interpretation any more than the absence of such a definition would prove the Secretary’s interpretation wrong. The statutory meaning could be absent from the dictionary definitions.

Justice Stevens, however, did not stop with the dictionary definition. He went on to consider the broad purposes of the Endangered Species Act as well as the implications of a later amendment of the Act. The dictionary definition began but did not end the analysis.

In dissent, Justice Scalia struggled to shoehorn the statutory text into his reading of dictionaries and ordinary language.³¹³ He first acknowledged that “take” as defined in the Act is broader than its definition in either the *OED* or *Webster’s Second*. He conceded that the “verb ‘harm’ has a range of meaning, [from] ‘to cause injury’ . . . [to] ‘to do hurt or damage.’”³¹⁴ The dictionaries he cited to support the proposition are odd—first an 1828 edition of N. Webster, *An American Dictionary of the English Language*, and then a 1970 college dictionary. But then, citing a 1949 *Guide to Usage* and a 1981 edition of the *American Heritage Dictionary of the English Language*, he asserted, “the more directed sense of ‘harm’ [as to do hurt or

308. *Sweet Home*, 115 S. Ct. at 2410.

309. *Id.*

310. *See id.* at 2412 (relying on the *Webster’s Third* definition of “harm,” meaning “to cause hurt or damage to: injure”).

311. *Id.*

312. *See id.*

313. *See id.* at 2421-22 (Scalia, J., dissenting).

314. *Id.* at 2423 (Scalia, J., dissenting) (emphasis in original omitted).

damage] is a somewhat more common and preferred usage.”³¹⁵ He concluded, “[i]t should take the strongest evidence to make us believe that Congress has defined a term in a manner repugnant to its ordinary and traditional sense.”³¹⁶

Yet, Justice Scalia’s very citations show that the broader meaning is not repugnant to an ordinary and traditional sense. Leaving aside whether ordinary language, whatever it may be, is the appropriate standard for statutory interpretation, the earlier discussion of lexicographic principles shows that if understanding ordinary language is the judicial goal, dictionaries are not a reliable source. Lexicography teaches us that there is seldom one ordinary and traditional sense. Modern dictionaries do not purport or attempt to dictate a “preferred usage” when it comes to listing the various definitions of a word, although they generally include usage labels as well as definitions.

As Professor Karkkainen has shown, Justice Scalia did what he has done elsewhere. Scalia chose, from a range of competing plausible interpretations, the meaning that most narrowed the statute and justified it “by no more than Justice Scalia’s *ipse dixit* that one dictionary definition is more ordinary or plainer than another.”³¹⁷ Understanding how dictionaries are produced underscores even more strongly the arbitrariness of such an assertion. In this case, when the unabridged dictionary did not produce the result he desired, Justice Scalia turned to other dictionaries.

Whatever source he turns to, Justice Scalia acts as if there is an unquestioned single and ordinary meaning to the word. Frequently, as in *Sweet Home*, he finds that meaning in a dictionary definition. Asserting that there is a single ordinary meaning for a word, however, contradicts the lexicographic principles upon which dictionaries are built. The authority he chooses would deny itself the authority he claims for it. Moreover, as in this case, Justice Scalia often scavenges dictionaries until he finds the definition that suits his purposes. By this behavior, he himself undermines his claim to the objectivity of dictionaries. In contrast, intentionalists such as Justice Stevens do not seek in dictionaries the source of truth. They use dictionaries as they should be used—to surmise only approximately the meaning of the word in context. Often, for intentionalists, the context they consult includes the legislative history.

This is not to say that textualists ignore context. Indeed, often textualists use context in much the same way as lexicographers gathering a

315. *Id.* (Scalia, J., dissenting).

316. *Id.* (Scalia, J., dissenting).

317. Karkkainen, *supra* note 7, at 445.

citation, by examining with care and attention "the statutory language surrounding the disputed words."³¹⁸ But even this narrow use of context is absent from the textualist opinions that rely on dictionary definition. Moreover, examination of legislative and other external texts, as we see primarily in intentionalist opinions, is consistent with the goal of lexicographers to understand what users of a word meant by looking at uses of the word in many and varied contexts. Lexicographers do not base their definitions on a single use or expect the definitions they craft to apply to every use.

V. CONCLUSION

A judge's approach to dictionaries does not in and of itself constitute a theory of interpretation. A theory of statutory interpretation involves philosophy of language, psychology of language, linguistics, theories of government in general, and the role of the judiciary in particular. Nonetheless, jurists' attitudes toward dictionaries implicate their theories of interpretation.

My own sympathies lie with the intentionalists' approach to dictionaries, in which the dictionary definition becomes a resource in developing the judicial conception of a statute's interpretation. Like Professor Merrill, I believe that resort to legislative history can constrain judicial discretion and that plain meaning, rather than constraining judicial discretion, permits judges freely to decree the meaning of statutory language.³¹⁹ Meaning becomes what is plain to the judge.

Nonetheless, this exploration of lexicographic principles has implications for textualism and its implied theory of interpretation. Let us assume that textualism is not instrumental, that its focus is on discovering ordinary meaning, and that textualists would wish to use dictionaries in ways consistent with lexicographic principles. If so, *Moskal* offers a model for textualist interpretation,³²⁰ a model that permits use of dictionary definitions as a starting point, but requires going beyond the dictionary definition to choose among possible definitions. Ironically, the textualist search for the ordinary meaning of words requires the textualist to go outside the text to external sources in order to determine that meaning.

318. Solan, *supra* note 32, at 252.

319. See generally Merrill, *supra* note 3; Ellen P. Aprill, *Muffled Chevron: Judicial Review of Tax Regulations*, 3 FLA. TAX L. REV. 51, 87-90 (1996); Ellen P. Aprill, *Tribal Bonds: Indian Sovereignty and the Tax Legislative Process*, 46 ADMIN. L. REV. 333 (1994).

320. It is a better model than *Smith* because, in *Smith*, Justice Scalia offered only one source, the *Sentencing Guidelines*, as support for his conclusion.

Nonetheless, to undertake this search for external sources, textualists must ask whose ordinary language they are seeking. Despite the language to the contrary in *Chisom v. Roemer*,³²¹ textualists generally speak as if they read the words for their meaning to the reader rather than their meaning to the congressional drafters. For example, in his recent essay explicating his theory of interpretation, Justice Scalia wrote, “[g]overnment by unexpressed intent is . . . tyrannical. It is the *law* that governs, not the intent of the lawgiver.”³²² Thus, the textualist’s interpretive move seems to reflect a theory of government that legitimacy of a law requires notice to the citizenry.

Choosing the people as the interpretive community rather than the members of the legislature, however, raises additional questions. Is it only the citizens of the time the statute was passed who are to be put on notice? Answering that question “yes” introduces yet more difficulties. If so, resort to contemporaneous dictionaries would be appropriate as a first step. If the statute predates *Webster’s Second* or the first edition of the *OED*, the textualist will need to remember that older dictionaries are less broadly based and thus less reliable than modern dictionaries. Moreover, given that language changes and meanings contemporary to the date of a dictionary’s definition will not be reflected in that dictionary, textualists will need to search out dictionaries published (not just reprinted) a few years after the date of the statute. Thus, interpreting older statutes in some ways calls for particular effort in seeking confirmation of a dictionary definition in a variety of contemporary sources, as Justice Scalia did in *Moskal*.

Furthermore, if textualists believe that statutes must put citizens on notice, they will need to be careful to specify which group of citizens they have in mind. Use of dictionaries suggests that only the more educated citizens, “intelligent and informed people of the time,”³²³ are those to whom

321 501 U.S. 380 (1991).

322. A MATTER OF INTERPRETATION, *supra* note 14, at 17. In *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989), Justice Scalia wrote in his concurring opinion that the meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis on which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which, by a benign fiction, we assume Congress always has in mind.

Id. at 528 (Scalia, J., concurring) (emphasis in original omitted).

323. A MATTER OF INTERPRETATION, *supra* note 14, at 38 (explaining why he looks to Hamilton and Madison for constitutional interpretation).

legislation is addressed. Why should such be the case? Is it simply a practical necessity? If such is the assumption, it needs to be spelled out. Moreover, even this assumption raises questions about the use of legal dictionaries. In *Moskal*, for example, Justice Scalia applied a specialized legal meaning to a criminal statute. If some legislation is addressed only or particularly to lawyers or other special groups, textualists interpreting them should so state before resorting to legal dictionaries and explain how a specialized audience comports with the theory of government implied by their method of interpretation.

In fact, for textualists, recently enacted laws may pose more danger than older laws, because of the easy assumption that we understand the words of the statute. But, as the example of “computer” shows, meaning can change very quickly. College dictionaries, as noted earlier, are usually revised every ten years because the language has changed sufficiently to warrant a new edition. Thus, a careful textualist might well impose a rule that any statute more than ten years old calls for examination of dictionaries contemporary to and slightly later than the statute, followed by confirmation of the most likely dictionary definitions from sources contemporaneous to the legislation. Such a self-imposed requirement may be very difficult to meet, insofar as college dictionaries are so limited in the number of their entries and larger dictionaries are revised far less often.

If statutes, however, are to give notice to citizens to whom they apply, that notice should apply to today’s public as well. If such is the underpinning of textualism, it may well require a theory of implied reenactment of old statutes by congressional inaction. Textualists will need to specify whether this inaction reenacts the old or the contemporary meaning of words, particularly if that meaning has changed. If the contemporary meaning of words is to apply, however, judicial interpretation, which we generally treat as authoritative in a way dictionary definition is not, should not freeze the meaning of the statute.

And if the meaning of legislation is to be sought in the meaning of ordinary language today for the populace as a whole, the dictionary, with its conservative tendencies, does not seem the appropriate resource. Such a theory of meaning would seem to require the textualist justice to undertake, for many statutes, the kind of empirical search and survey that Cunningham and his colleagues undertook for the word “enterprise.”³²⁴

If a textualist judge’s search for ordinary meaning must be limited by practicality, the exclusion of legislative history as one of the sources for choosing or testing a possible dictionary definition becomes particularly

324. See *supra* note 260.

questionable. When it comes to constitutional interpretation, for example, Justice Scalia explains that he is willing to consult men who were framers because their writings, along with others, “display how the text of the Constitution was originally understood.”³²⁵ Such is equally the case for legislative history. A textualist need not accept legislative history as the source for legislative intent nor look only to legislative history to see the original meaning of the text, but excluding its evidence altogether seems inconsistent with the textualist endeavor.³²⁶ Legislative history will stand in closer relationship to a statute than a text such as the *Sentencing Guidelines* cited by Justice Scalia in *Smith*. To textualists such as Justice Scalia, however, legislative history represents “legislators at their worst—promoting private interest deals, strategically posturing to mislead judges, or abdicating all responsibility to their unelected staffs.”³²⁷ In short, according to the argument, legislative history is too interested to be reliable. Textualists see legislative history as a false authority.

Dictionary definitions are also a false authority, but for the opposite reason: they are too disinterested to be reliable. Their purpose of giving readers and speakers approximate meanings of words so that they begin to understand the meaning of the word in context makes dictionaries ill-suited for determining the meaning of a particular word in a particular statute. If ordinary speakers frequently misunderstand the function of dictionaries and treat them as if they in fact do prescribe meaning, such error does not require judges seeking ordinary meaning to do the same, any more than judges must accept at face value legislative history claiming to describe the intent of the entire Congress.

A large and growing body of scholarship debates the distinction between decision-making and decision-justifying and whether any discrepancy between the two is a cause for celebration or alarm.³²⁸ This study suggests that both citation to dictionary definitions and the failure to cite dictionaries often represent strategic moves intended not only to make judicial subjectivity look objective, but also to narrow congressional power and administrative discretion whenever possible.³²⁹ But whether citation to

325. A MATTER OF INTERPRETATION, *supra* note 14, at 38.

326. In fact, legislative history sometimes supplies definitions. See S. REP. NO. 104-5, at 16 (1995) (defining “debt” for purposes of the Balanced Budget Amendment).

327. Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 437-38 (1988).

328. See, e.g., Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990); David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987); Nicholas S. Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353 (1989).

329. See *Looking It Up*, *supra* note 2, at 1448; Zeppos, *supra* note 5, at 1143; Karkkainen, *supra* note 7, at 440-43; Pierce, *supra* note 7, at 762-63.

dictionary definitions is an attempt to find objectivity or only to look objective, an understanding of the purpose of dictionaries and the process by which they are compiled teaches that dictionary definitions do not supply the kind of certain and objective meaning for which they are cited. Intentionalists properly reject rigid reliance on dictionary definitions in interpreting statutes.

Schauer suggests that it can "be illuminating and useful to read Webster's dictionary in a society that for generations has thought it useful to produce it."³³⁰ It is also illuminating and useful to understand how Webster's dictionary is produced. Having done so, we realize that dictionaries are less comprehensive and authoritative than we previously thought. Their definitions are quick pencil sketches of our colorful, growing, and ever-changing English language. These sketches should not be superimposed onto the dense texture of statutory language.

330. Schauer, *supra* note 4, at 256.

APPENDIX

Dictionary Usage by Justice, 1988 Term-1995 Term

	Majority	Concur	Dissent	Total	Opinions	Percentage
Rehnquist	8	0	4	12	144	8.33
Brennan	4	0	3	7	88	7.95
White	6	1	4	11	142	7.75
Marshall	5	2	0	7	96	7.29
Blackmun	6	1	4	11	167	8.38
Stevens	10	1	9	20	293	6.82
O'Connor	14	2	3	19	266	7.14
Scalia	14	4	10	28	267	10.49
Kennedy	6	0	2	8	176	4.54
Souter	8	1	4	13	102	12.74
Thomas	7	3	5	15	94	15.96
Breyer	4	0	0	4	33	12.12
Ginsburg	2	1	0	3	65	4.61