WAR OF THE WORDS: HOW COURTS CAN USE DICTIONARIES IN ACCORDANCE WITH TEXTUALIST PRINCIPLES

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Few people ask by what authority the writers of dictionaries and grammars say what they say.
– S.I. Hayakawa[1]

ABSTRACT

Dictionaries have an aura of authority about them—words mean what the dictionary says they mean. It therefore seems only sensible that courts seeking the plain meaning of language would look to dictionaries to find it. Yet to employ dictionaries as objective sources of meaning is to use them in a manner inconsistent with their creation and purpose. Previous scholarship has identified the Supreme Court's increasing reliance on dictionaries in construing statutes and constitutional provisions, and several articles have discussed different inherent problems with this practice. This Note builds upon that scholarship by bringing together the problems identified in prior articles, by identifying additional problems, and by proposing a set of best practices for courts seeking to use dictionaries in a manner consistent with textualist principles. Unless a principled approach is adopted, judges invoking dictionaries in textualist analysis are open to criticism for, at best, using dictionaries incorrectly—and, at worst, using them to reach their preferred outcomes.

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1. S.I. Hayakawa, *How Dictionaries Are Made*, *in* THE SEAGULL READER: ESSAYS 69, 69 (Joseph Kelly ed., 2002).

INTRODUCTION

Judge Harold Leventhal once said, and Justice Scalia has repeated, that the use of legislative history is "the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends," allowing judges to pick the evidence that best supports their own policy preferences.[2] Legislative history, however, is not the only external source of interpretation which can be used in this way. Dictionaries, too, lend themselves to this sort of manipulation, and in recent years, the Court has referred increasingly to dictionaries to determine the ordinary meanings of words.[3]

Dictionary usage is particularly important in textualist analysis,[4] which seeks to find "a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law"[5]and places foremost priority on the text itself, as opposed to utilizing external sources of understanding.[6] This method has its proclaimed roots in democratic principles: if the nebulous intent of the legislature controls over the plain meaning of its published text, how could citizens be on notice about the law which they are to follow?[7]

Textualism has seen increased purchase on the Supreme Court in recent years,[8] and with it, the Court has relied increasingly on dictionaries in its opinions.[9] Prior to 1864, the Court used dictionaries as authority only three times.[10] Yet during the 1990 through 1998

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2. *E.g.*, Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (crediting Judge Leventhal for the metaphor).

3. *See* Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1438–42 (1994) (detailing the increased reliance by the Supreme Court on dictionaries, focusing in particular on the 1988–1992 Terms); *see also* Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275 app. (1998) (detailing dictionary usage from the 1988 Term through the 1995 Term).

4. Aprill, *supra* note 3, at 280 ("Dictionary definition plays a key role for textualism.").

5. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (1997).

6. *See id.* (discussing the purposes of and principles behind statutory interpretation).

7. *See id.* (stating that interpreting statutes based on legislative intent is "simply incompatible with democratic government, or indeed, even with fair government").

8. *See infra* Part I.

9. *See supra* note 3 and accompanying text. For a detailed discussion of the Court's increased tendency to cite to dictionaries, see Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Has Become a Fortress: The United States Supreme Court's Use of Dictionaries*, 47 BUFF. L. REV. 227, 244–62 (1999). It is covered here briefly only to frame the problem at hand and to update the data.

10. Thumma & Kirchmeier, *supra* note 9, at 244–62.

Terms, the Court used dictionaries to define more than 220 terms.[11] This trend has continued into the 2000s, with the Court citing dictionaries (legal, specialty, or general purpose) in twenty-three cases during the 2008–2009 Term alone.[12] This is consistent with earlier findings, for example, that the Court utilized dictionary definitions in 28 percent of the 107 cases for which opinions were published in the 1991 Term.[13]

The manner in which the Court uses dictionaries has changed over time as well. Although in the past the Court would "employ[] dictionaries to refresh the Justices' memory about the meaning of words, or to provide potential meanings from which the Court would select based on statutory purpose, legislative intent, common sense, or some other contextual argument," more recent cases have placed dictionaries—rather than policy, context, or structure—at the center of the case.[14] Though previous scholars have suggested that dictionaries are less accepted in questions of constitutional interpretation,[15] several significant new cases suggest that dictionaries now play a crucial role in the interpretation of the Constitution as well.[16] With core constitutional questions, such as the meaning of the Second Amendment,[17] being decided on the basis of dictionary definitions, it can no longer be said that the "use of the dictionary to define constitutional terms . . . is an exception to the rule."[18]

Despite the Court's increasing focus on dictionaries, scholars have identified several distinct and important problems regarding the use of these tools in legal reasoning. These problems include arbitrary

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11. *Id.* at 256.

12. A Westlaw search in the SCT database for "dictionary & da(aft 8/2008 & bef 7/2009)" yielded twenty-three results.

13. Note, *supra* note 3, at 1438.

14. *Id.* at 1439–40 (footnote omitted). For an example of a recent case in which the Court placed dictionary definition at the heart of the analysis, see District of Columbia v. Heller, 128 S. Ct. 2783 (2008). This case is discussed in Part IV.B, *infra.*

15. *See, e.g.*, Thumma & Kirchmeier, *supra* note 9, at 277 (noting that "the Court has relied on dictionaries in comparatively few cases interpreting the Constitution" and attributing that trend to an opinion by Justice Holmes describing the flexible nature of the Constitution).

16. *See* Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2532 (2009) (using legal and general dictionaries to define "affidavit" as it has been applied to the Confrontation Clause); *Heller*, 128 S. Ct. at 2791–92 (relying extensively on dictionaries to define the individual terms of the Second Amendment); Giles v. California, 128 S. Ct. 2678, 2683 (2008) (using a dictionary to define "procure" and "procurement" as "to *contrive* and effect" in the context of making a witness unavailable).

17. *See infra* Part IV.B.

18. Thumma & Kirchmeier, *supra* note 9, at 278.

and arguably even biased selection of dictionaries by judges,[19] lack of determination as to the qualifications of a particular dictionary,[20] and failure to account for context when using a dictionary to define a single term.[21] Dictionaries, despite their allure as seemingly perfect arbiters of word meaning, do not reach the end goal of word definition. Ultimately, a court citing a dictionary is not seeking to find out what the *dictionary says* but rather what the *word itself means*—with the dictionary merely serving as a window into the lexicon. This means that any legal analysis must account for the inherent limitations of dictionaries as proxies for the lexicon.[22] This Note seeks to bring together the varying analyses, cautions, and criticisms in the literature and then proposes guidelines for the citation of dictionaries in briefs, arguments, and judicial opinions—with the ultimate goal of promoting consistency between the use of dictionaries and textualist principles.

Part I reviews the principles of textualism and how the use of dictionaries conflicts with these principles for many of the same reasons that some textualist critics fault the use of legislative history. Part II then turns to the science of dictionaries and the processes used in creating them, identifying additional pitfalls. Part III brings together these criticisms and warnings to construct a model of proper dictionary usage in textualist argument. Finally, Part IV analyzes that model in the context of two cases that involved controversial uses of dictionaries.[23]

I. TEXTUALISM, LEGISLATIVE HISTORY, AND LEXICOGRAPHY

The Court's increased use of dictionaries relates to a broader trend within the Court toward the use of textualist methodology in statutory and constitutional interpretation.[24] For Justices who place great emphasis on the objective meaning of words, dictionaries are appealing as easy and clear sources of that meaning.

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19. *See infra* notes 56–57 and accompanying text.

20. *See infra* Part III.D.

21. *See, e.g.*, Craig Hoffman, *Parse the Sentence First: Curbing the Urge to Resort to the Dictionary when Interpreting Legal Texts*, 6 N.Y.U. J. LEGIS. & PUB. POL'Y 401, 406 (2003) ("Dictionaries are less helpful when the inquiry properly extends beyond the word level.").

22. *See infra* Part III.

23. For a discussion of the lack of judicial guidelines for using dictionaries, see Thumma & Kirchmeier, *supra* note 9, at 290.

24. Note, *supra* note 3, at 1440.

A. Textualism and Original Plain Meaning

Justice Scalia describes the core principle of textualism as the belief that "[a] text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably, to *contain all that it fairly means*."[25] Driving this method of interpretation is a strong belief that judges are not given providence to create law—a statute or constitutional provision means whatever the language in it means, nothing more and nothing less. To be a "textualist in good standing," Justice Scalia says, "[o]ne need only hold the belief that judges have no authority to pursue [social or policy objectives] or write . . . new laws."[26] Justice Scalia is particularly associated with originalism, a corollary of textualism focusing on the original intent or meaning of the words in question.[27] And originalism, particularly Justice Scalia's form of originalism, has seen increased acceptance by the Supreme Court during Scalia's tenure.[28]

Like textualism, originalism can take several forms. Some originalists focus on the "original intent" of the provision, acquired by looking to the recorded intent of the drafters.[29] Others, including Justice Scalia, focus instead on the "original plain meaning" of the provision—the meaning ordinary people would have understood at the time of the statute's adoption, regardless of any secret or unknown intent that may have existed in the minds of the provision's framers.[30] Justice Scalia describes this method as "new textualism"[31]

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25. SCALIA, *supra* note 5, at 23 (emphasis added).

26. *Id.*

27. *See generally* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (discussing originalism and comparing it to other philosophies).

28. *See* George H. Taylor, *Structural Textualism*, 75 B.U. L. REV. 321, 323 (1995) ("Textualist interpretation seems to have gained increased attention, including on the Supreme Court, particularly since the arrival of Justice Scalia." (footnotes omitted)).

29. *See, e.g.*, Thomas B. Colby & Peter J. Smith, *Living Originalism*, 59 DUKE L.J. 239, 247–55 (2009) (discussing "original intent" originalism and its eventual evolution into "original plain meaning" originalism).

30. *See* SCALIA, *supra* note 5, at 38 ("What I look for in the Constitution is precisely what I look for in a statute: the original meaning of the text, not what the original draftsmen intended."); Taylor, *supra* note 28, at 331 (noting that such conservative thinkers as Justice Scalia, Judge Frank Easterbrook, and Professor Richard Epstein subscribe to original meaning originalism). Some scholars have pointed to the tension between "plain" and "ordinary" meaning, referring to dictionaries as an example of plain meaning that might not be ordinary. *See, e.g.*, Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027, 2036–38 (2005) (arguing that the distinction between these two terms—not generally made by the Court—would affect which evidence a court would consider in its analyses).

and, in the words of Professor William Eskridge, as the "best, and perhaps only legitimate, approach to statutory interpretation."[32]

As the name suggests, all forms of textualism focus on the text itself, claiming legitimacy in the idea that judges, when limited to the words within the provision to be interpreted, cannot as easily inject their own preferences into their interpretations.[33] By doing so, textualism invokes the democratic value that the people's legislature, not unelected judges, should create the law, and judges should be limited to objective interpretational sources of the law's meaning.[34] Although most textualists, particularly new textualists, reject external sources of interpretation such as legislative history, they still accept that "the terms, usage, or context of the larger statutory framework may help resolve apparent ambiguity."[35]

B. New Textualists and the Perils of Legislative History

Textualists—especially new textualists like Justice Scalia—generally reject legislative history as a source of interpretative

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31. Describing Justice Scalia as the "most notable" of the new textualists, Jason Weinstein defines "new textualism" as "a method of statutory interpretation whereby a judge reads a statute and asks how the ordinary reader would interpret the text." Jason Weinstein, Note, *Against Dictionaries: Using Analogical Reasoning to Achieve a More Restrained Textualism*, 38 U. MICH. J.L. REFORM 649, 650 (2005). Calling the use of a dictionary a "failed mechanism to pinpoint exact parameters of words when it is written to do exactly the opposite," Weinstein argues that new textualists should avoid dictionaries entirely, substituting analogical reasoning in their place. *Id.* at 673. This Note disagrees with a wholesale prohibition on the use of dictionaries, instead creating a framework under which dictionaries can be used in a manner consistent with textualist principles. *See infra* Part III.

32. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 235 (2d ed. 2006) (describing Justice Scalia's position on new textualism). Although Justice Scalia's new textualism in particular has seen increased acceptance on the Court, this Note addresses textualism generally, given that whichever denomination of textualism one might ascribe to, the basic rule of determining the objective meaning of statutory language from the text of the statute itself easily suggests the use of dictionaries as an objective interpretative tool. This observation is true whether one applies "soft plain meaning" textualism, in which the text controls absent "compelling evidence of a contrary legislative intent," *id.* at 232, or something more akin to Justice Scalia's new textualism.

33. *See* SCALIA, *supra* note 5, at 38–39 (criticizing the concept of a "Living Constitution" as an improper method of constitutional interpretation).

34. *See id.* (explaining that nontextualist modes of constitutional interpretation allow judges to "trump[] even the statutes of democratic legislatures"). Despite its claims to objectivity, textualism has likewise been criticized for selectively using certain interpretive tools to reach desired outcomes. *See infra* notes 56–57 and accompanying text.

35. Taylor, *supra* note 28, at 342–43.

meaning.[36] Justice Scalia cites four types of issues that make the use of legislative history problematic—issues, it turns out, that are similar to the problems that arise when dictionaries are relied upon for statutory interpretation.

First, Justice Scalia points to historical practice: focusing on legislative history, he claims, was not "the traditional English, and the traditional American, practice."[37] Quoting Chief Justice Taney, Justice Scalia argues that:

> [T]he only mode in which [the will of Congress] is spoken is in the act itself; and we must gather their intention from the language there used, comparing it, when any ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed.[38]

Justice Scalia asserts that "[e]xtensive use of legislative history in this country dates only from about the 1940s," arguing that such use is a new creation inconsistent with traditional American jurisprudence.[39]

Second, Justice Scalia argues that legislative history is improper because it is external to the statute. This argument relates to elements of both Congressional power—Congress only says that which it has passed in accordance with Article I, Section 7 of the Constitution[40]—and of fair notice. According to Justice Scalia, using legislative intent rather than the specific text approved is "one step worse than the trick the emperor Nero was said to engage in: posting edicts high up

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36. *See* ESKRIDGE ET AL., *supra* note 32, at 236 ("Justice Scalia is insistent that judges should almost never consult, and never rely on, the legislative history of a statute.").

37. SCALIA, *supra* note 5, at 30.

38. *Id.* (emphasis omitted) (quoting Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845)) (internal quotation marks omitted).

39. *Id.*

40. ESKRIDGE ET AL., *supra* note 32, at 236; *see also* SCALIA, *supra* note 5, at 35 ("A statute, however, has a claim to our attention simply because Article I, section 7 of the Constitution provides that since it has been passed by the prescribed majority (*with or without adequate understanding*), it is a law."). Justice Scalia points out the perils of relying on legislative history by quoting a debate on the Senate floor during which the committee chair admitted that he had neither helped to write nor read in full the committee report of the bill under consideration. The Senate, the transcript points out, neither formally considered nor adopted the committee report when adopting the bill itself, yet such a report was likely to be cited were the Court to later evaluate the final statute. *See* SCALIA, *supra* note 5, at 32–34. Justice Scalia also points out that this concern would not be remedied even if legislators knew the content of the committee reports, because a legislator's knowledge of what the bill means is "not a precondition for the authoritativeness of a statute," *id.* at 34, because Article I, Section 7 places no such condition on Congress, *id.* at 35.

on the pillars, so that they could not easily be read."[41] To look beyond the statute to an external source of meaning is to interpret the text according to an understanding not approved by Congress and not easily accessible to the governed.[42]

Third, Scalia asserts that even if these concerns could be addressed, legislative history is an impractical and perhaps impossible indicator of congressional intent. Congress is made up of hundreds of representatives, all voting for their own reasons, which may or may not be expressed in or consistent with the legislative history.[43] How is a judge to determine what Congress intended? Does Congress ever intend only one, unanimous thing?[44]

Finally, by means of combining these other arguments, Justice Scalia argues that the use of legislative history stands opposed to the ideal of judges as simple interpreters of law. On this note, Justice Scalia invokes Judge Leventhal's concern about "looking over the heads [of the cocktail party guests] for one's friends."[45] Because of the wide variety of opinions and statements found in most legislative history, a judge can cite support for the chosen outcome and simultaneously ignore contradictory evidence also found within the legislative history. And because legislative history is external to the statutory text, a judge can interpret a statute to mean something arguably contrary to the text itself, leaving those reading the statute without notice of the ultimate meaning.[46] Such a practice gives a judge an improper opportunity to shape the outcome of a case according to his or her own policy preferences.

C. How Dictionary Use Is Like Legislative History

Despite involving a nearly identical set of difficulties and objections as legislative history, dictionaries have not received the

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41. SCALIA, *supra* note 5, at 17.

42. *See id.* at 31 ("My Court is frequently told, in briefs and in oral argument, that 'Congress said thus-and-so'—when in fact what is being quoted is not the law promulgated by Congress, nor even any text endorsed by a single house of Congress, but rather the statement of a single committee of a single house, set forth in a committee report.").

43. *See* Taylor, *supra* note 28, at 339 ("The argument raised is that it is impossible to speak of 'an' intent of a multi-member legislature.").

44. *See, e.g.*, ESKRIDGE ET AL., *supra* note 32, at 219 (discussing critiques of legislative history which call it "multifaceted, potentially manipulable, and often unfocused and even contradictory").

45. *See supra* note 2 and accompanying text.

46. *See supra* note 41 and accompanying text.

same scrutiny from Justice Scalia and other textualists.[47] Although Part II delves more deeply into the science of dictionaries and the jurisprudential problems they raise, this Section first reviews the similar problems raised by dictionaries and legislative history.

First, like legislative history, dictionaries are external sources of interpretation.[48] It would be useful for interpretative purposes if Congress adopted an official dictionary or deputized particular dictionaries within the definitions sections of various statutes, but "[l]egislators do not consult dictionaries or incorporate by reference dictionary definitions in drafting statutes."[49] Without ratification of a particular dictionary, the use of such a resource in interpretation is necessarily external, given that dictionaries were not created by or necessarily consulted by the Congress that adopted the statute. Therefore, "[w]hen Congress uses a word, the word means what Congress says it means, all the dictionary definitions to the contrary notwithstanding."[50] Without knowing which dictionary (or which definition within a dictionary) the Court might one day use to construe the statute, a citizen cannot be on guard as to what the statute means—it may as well be hung up on one of Nero's poles.[51]

Second, dictionaries have not historically been used as extensively as the Court (and Justice Scalia in particular) uses them

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47. *See, e.g.*, Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441, 445 (1990) (noting that, unlike legislative history, the text of a statute has passed "a difficult set of procedural hurdles and either passed by a two-thirds vote or obtained the President's signature," but failing to address that dictionaries have not passed such hurdles either); *see also* Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 872 (1930) ("A legislative intent, undiscoverable in fact, irrelevant if it were discovered, is the last residuum of our 'golden rule.' It is a queerly amorphous piece of slag. Are we really reduced to such shifts that we must fashion monsters and endow them with imaginations in order to understand statutes?").

48. For the argument that textualists treat dictionaries as an "inherent part of determining the meaning of the text," making them essentially internal, see Aprill, *supra* note 3, at 280.

49. *Id.* at 299; *see also* Grp. Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 247 (1979) (Brennan, J., dissenting) ("The Congress that passed McCarran-Ferguson was composed of neither insurance experts nor dictionary editors."). Congress *has* imposed some general rules of construction. For example, a statute's use of a masculine form applies to the feminine as well; the use of a singular noun also refers to the plural. 1 U.S.C. § 1 (2006). That statute, originally referred to as the "Dictionary Act," Aprill, *supra* note 3, at 299 n.134, does not prescribe a particular dictionary or the use of any dictionary at all, 1 U.S.C. § 1.

50. Abner J. Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380, 386. Following this logic, Congress could actually create a new meaning for a word through statute, if it chose to do so.

51. *See* text accompanying *supra* note 41.

today.[52] This, in and of itself, is not necessarily problematic, but Justice Scalia criticizes legislative history for this same weakness.[53] If Justice Scalia can invoke Chief Justice Taney to argue that the use of legislative history lacks a traditional basis in the law, why can others not invoke, for example, Justice Holmes's statement that "the provisions of the Constitution are not mathematical formulas . . . . [and] their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary"?[54]

Finally, dictionaries, like legislative history, can be difficult to use effectively, which can give rise to judicial manipulation. Despite their aura of authority, dictionaries do not define the one, true meaning of a word—they generally provide multiple meanings intended to capture the wide breadth of possible usage.[55] Similar to legislative history, a judge can use a dictionary to pick out from the "cocktail party crowd" the meaning that supports the interpretation the judge is seeking. Indeed, some scholars have suggested that Justice Scalia in particular does exactly this, declaring the dictionary to provide objective, clear meaning only when it supports the ideologically conservative outcome.[56] Professor Ellen Aprill goes so far as to assert that "Justice Scalia's use of dictionaries as a tool of textualism appears instrumental indeed, invoked only when it produces the desired result."[57]

All in all, the use of dictionaries is very similar to the use of legislative history. Reliance on dictionaries pulls in an external source

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52. *See supra* notes 8–13 and accompanying text.

53. *See, e.g.*, SCALIA, *supra* note 5, at 30 (discussing the tendency of courts not to use legislative history before the 1940s); *see also supra* notes 37–39 and accompanying text.

54. Gompers v. United States, 233 U.S. 604, 610 (1914).

55. *See* B.T. SUE ATKINS & MICHAEL RUNDELL, THE OXFORD GUIDE TO PRACTICAL LEXICOGRAPHY 2 (2008) ("Dictionaries are often perceived as authoritative records of how people 'ought to' use language, and they are regularly invoked for guidance on 'correct' usage. They are seen, in other words, as *prescriptive* texts. Lexicographers have long been uncomfortable with this idea . . . ."); HOWARD JACKSON, LEXICOGRAPHY: AN INTRODUCTION 21 (2002) ("[W]e all take what the dictionary says as authoritative . . . ."); *see also infra* Part III.B.

56. *See, e.g.*, Aprill, *supra* note 3, at 321 ("To Justice Scalia, dictionary definitions are objective and dispositive only when they narrow the power of the federal government." (footnote omitted)); *see also* David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1389–90 (1999) (noting that "Scalia's opinions generally reflect his theoretical bias toward defining words narrowly" and discussing Scalia's use of dictionaries to construe constitutional language narrowly).

57. Aprill, *supra* note 3, at 321.

not ratified (or even, in many cases, read or understood) by Congress[58] and provides judges with the opportunity to selectively accept whichever of many conflicting statements conforms to a particular policy outcome. Without a principled method of using dictionaries in an objective, scientific fashion, it seems difficult to accept any usage of dictionaries by textualists.

II. THE SCIENCE OF DICTIONARIES

Having broadly likened the use of dictionaries to reliance on legislative history, this Note now examines the many differences between them. Far from legitimizing the use of dictionaries as compared to the use of legislative history, however, these differences actually uncover *additional* pitfalls concerning dictionary use in judicial opinions. This Part discusses how dictionaries are created and then addresses the dangers created by the inherent qualities of dictionaries.[59]

A. What Is a Dictionary?

Everyone knows what a dictionary is in the everyday sense; dictionaries are "part of the cultural fabric of our society."[60] At its most basic, a dictionary is a reference book pertaining to the definitions of words.[61] But even the notion of "the dictionary" as one monolithic concept is troublesome: there are many dictionaries with different purposes, focuses, budgets, constraints, and methodologies.[62] Dictionaries can be monolingual or bilingual, and they can focus on general knowledge or on a specific trade or cultural area. They can be

58. Indeed, legislative history might be more legitimate in this regard, given that legislative history can at least claim a connection to the legislative process and Congress's acquiescence to its publication. Dictionaries are wholly external. *See* ESKRIDGE ET AL., *supra* note 32, at 310 ("Even a textualist might find something of value in legislative history, which might be a more democratically legitimate guide to meaning than the commonly deployed dictionaries that so fascinate the current Supreme Court.").

59. Though the full history of dictionaries is fascinating, this Note does not discuss it, instead touching on historical concepts only insomuch as they affect the use of dictionaries in legal interpretation today. For an excellent and detailed discussion of the history of the dictionary, see generally Thumma & Kirchmeier, *supra* note 9.

60. JACKSON, *supra* note 55, at 21.

61. *Id.*

62. *See id.* ("Compare some of the entries [of different dictionaries], and you soon realise that the notion of 'the dictionary' as a single text is wide of the mark. What distinguishes them is more notable than what they have in common.").

unabridged or concise—and everything in between.[63] Dictionaries can focus on different kinds of readers as well: some dictionaries are intended for native speakers, some seek to translate, and some are designed to help new speakers learn the language.[64] These differences require decisions early in the planning stages of dictionary creation that affect the sources chosen for the dictionary, the methodology used in constructing definitions, and the words and definitions included.[65]

B. How Dictionaries Are Created

Understanding the unique pitfalls presented by dictionaries requires an understanding of the creation of dictionaries and of lexicography—the science of determining the meaning of words.[66]

Though technology has changed the process considerably, the creation of a dictionary has always involved amassing examples of usage, which requires a tremendous amount of historical research.[67] Prior to the 1980s, the primary method of assembling these examples was a hands-on process of creating a catalog of "citation evidence."[68] A "citation" is a "short extract from a text which provides evidence for a word, phrase, usage, or meaning in authentic use."[69] Such extracts were collected by hand, sometimes using volunteers, and until the late twentieth century, were recorded on index cards and kept in a file.[70] Here, one of the first editorial judgments of dictionary

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63. *See* ATKINS & RUNDELL, *supra* note 55, at 24–25 (detailing the properties of different types of dictionaries).

64. *See id.* (listing specific considerations for, among other dictionary properties, a dictionary's language, coverage, size, and purpose).

65. *See id.* at 27–28 (discussing the various decisions made during the creation of a dictionary).

66. This Note discusses only briefly the deep underpinnings of lexicography here, as a broader overview of the process is sufficient to display potential problems dictionaries pose for legal scholars. For a good discussion of the lexicographical processes utilized by modern dictionary editors, see, for example, Aprill, *supra* note 3, at 283–300.

67. *See* SIDNEY I. LANDAU, DICTIONARIES: THE ART AND CRAFT OF LEXICOGRAPHY 44 (2d ed. 2001) (discussing the massive volume of information that lexicographers must sort through and the degree of scholarship required to complete the process).

68. ATKINS & RUNDELL, *supra* note 55, at 48, 50.

69. *Id.* at 48.

70. *Id.* at 50. Some of the vast citation files are still found only in paper form because the cards cannot be scanned into a computer due to faint type or handwriting. *See* LANDAU, *supra* note 67, at 190 (describing the formation of citation files).

creation is evident: which citations are included?[71] Selecting both the sources for citations and the individual citations themselves involves a "big subjective element," and "human readers tend to notice what is remarkable and ignore what is typical, [creating] a bias towards the novel or idiosyncratic usages which inevitably catch the reader's eye."[72]

The arrival of computers and databases dramatically changed the methodology used to create dictionaries, but it left the fundamental question of source selection similarly subjective. Nowadays, most dictionary authors create a "corpus," which is a collection of whole or partial texts or recorded speech stored and indexed electronically so that individual words can be found quickly.[73] Some corpora contain millions of words, and "may include all or parts of the running text of newspapers, books of fiction and nonfiction, magazines, scholarly and literary works, transcripts of television or radio programs, and unscripted speech."[74] Citation files, however, are still utilized to some extent in modern dictionaries.[75]

Even with corpora, some choices remain. A corpus is intended to be a sample of the language, representing the whole language in much the same way as a statistical sample is meant to represent the population.[76] Like any scientific research involving samples, the representativeness of the sample affects the viability of the results

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71. *See* Hayakawa, *supra* note 1, at 71 ("The writing of a dictionary, therefore, is not a task of setting up authoritative statements about the 'true meanings' of words, but a task of *recording*, to the best of one's ability, what various words have *meant* to authors in the distant or immediate past.").

72. ATKINS & RUNDELL, *supra* note 55, at 52.

73. LANDAU, *supra* note 67, at 190.

74. *Id.*

75. *See id.* at 193 ("However important corpora are, they cannot be as up-to-the-minute as citation files, because it takes time to convert and process text and to incorporate it into the rest of the corpus. So citation collection is still important for finding new words and senses and for spotting trends in usage . . . ."); *see also id.* at 182 ("The native-speaker dictionaries have been slower to make use of corpora than [English-as-a-second-language] dictionaries . . . ."). *But see* ATKINS & RUNDELL, *supra* note 55, at 53 ("Citation reading continues to have value, especially as a form of lexicographic training. But now that most written texts . . . are available in digital form, it has become a more marginal way of collecting linguistic data.").

76. *See* ATKINS & RUNDELL, *supra* note 55, at 54 (discussing the impossibility of collecting every instance of the use of a modern language, thus making the corpus a sample).

drawn from it. Dictionary makers must determine which sources to include in the corpus and how large it will be.[77]

Ensuring that the corpus is truly representative of the language can be difficult for a number of reasons. First, skewing can occur with the inclusion of technical sources, which may use some words at a frequency vastly greater than in the language as a whole. For example, the *British National Corpus* shows the same number of hits for "unfortunate" as it does for "mucosa," due to the inclusion of a large amount of data from *Gut: The Journal of Gastroenterology and Hepatology*.[78] As with most statistical data, a larger number of sources helps a corpus to avoid skewing based on outliers.[79]

Second, a majority of meaningful communication is spoken—particularly that which is unscripted and conversational—yet the majority of the sample for a corpus necessarily comes from published writing, meaning that a corpus will overrepresent written language.[80] Third, the corpus "does not favour 'high quality' language"[81] in the way that citation files did in the past, because a corpus does not rely on selections of specific passages and sentences which represent the best usage of the language.[82] Yet, paradoxically, corpora may in some ways be *underrepresentative* of "lower quality" language as well. If there is "no real distinction between formal and informal usage except among the privileged and highly educated,"[83] then any corpus focusing more on formal usages (which are more likely to be seen in print) would necessarily underrepresent the speech patterns of those with less education.[84] This issue is relevant to the use of dictionaries in

77. *See id.* at 57 (noting the decisions that corpus designers must make). *But see id.* ("For major languages like English, data sparseness is a thing of the past and corpus size has almost ceased to be an issue.").

78. *Id.* at 69. Although this problem can largely be avoided with due care, seemingly representative sources can be skewed simply by, for example, including a work of fiction in which the main character is a neurosurgeon whose work is described in technical detail. *See id.* (giving as an example the novel *Saturday* by Ian McEwan).

79. *Id.*

80. *See id.* at 77–78 (discussing the difficulties of recording "spontaneous, unscripted speech"). In the past, volunteers were recruited to create tape-recorded conversations to generate such samples for the corpus—but such information is costly. *Id.* at 77.

81. *Id.* at 55.

82. *See id.* ("The whole point of using corpora is to avoid pre-judging the data and choosing texts because you approve of them in some way.").

83. LANDAU, *supra* note 67, at 257.

84. It is for this reason, Landau surmises, that WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961) dropped the "informal" label, causing a huge controversy in the process. *See id.* at 258 ("The editors may have felt that they could not define or know the attitudes of the

analysis because anyone looking for the ordinary meaning of words wants to know how the average user would understand them—and such skewing affects the dictionary's ability to represent the average user. At the same time, the corpus method avoids some bias by not depending as much on the "collective judgments of a large number of people over an extended period of time" in the same way as a citation file, which requires that the creators select each individual quote to be included, as opposed to whole sources.[85]

Creating the database (whether of citation cards or a corpus), however, only begins the process of authoring a dictionary. The lexicographer must then divide up the various meanings of a word into manageable units.[86] The process involves research, but also decisionmaking: the primary job of the lexicographer in creating a dictionary is to determine meanings of words, and to determine what different meanings a word might have. The line between one meaning and another is seldom clear, which leaves much of the final determination to the experienced judgment of the editorial staff.[87] As Sidney Landau, editor of the *Cambridge Dictionary of American English* and one of the foremost scholars on lexicography, puts it, "[a]ll definitions of things are compromises between specific accuracy and breadth of inclusiveness. . . . [N]o definition can take in all of the particular things referred to by the word defined."[88] Ultimately, it "comes down to the lexicographer[s] exercising their informed judgment in the face of the evidence they have to work with."[89] Sometimes that judgment even involves the inclusion of eccentric uses made by "established writers of the literary canon."[90]

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class of people to whom some usages would be informal. . . . In deciding not to use the *informal* label, [*Webster's Third*] simply declined to represent a particular social class."). *See generally* HERBERT C. MORTON, THE STORY OF *WEBSTER'S THIRD*: PHILIP GOVE'S CONTROVERSIAL DICTIONARY AND ITS CRITICS (1994) (discussing the controversy surrounding the changes in presentation and research made in creating *Webster's Third*); *infra* note 104 and accompanying text.

85. LANDAU, *supra* note 67, at 192.

86. *Id.* at 200.

87. *See* JACKSON, *supra* note 55, at 91 (explaining that lexicographers must make final judgments based on their experience and the available evidence); LANDAU, *supra* note 67, at 62 ("All dictionary makers are sometimes faced with the necessity of making decisions without full information, which is sometimes impossible to obtain.").

88. LANDAU, *supra* note 67, at 182.

89. JACKSON, *supra* note 55, at 91.

90. *See* LANDAU, *supra* note 67, at 203 (discussing the *Oxford English Dictionary*'s deliberate focus on inclusion of the works of authors such as T.S. Eliot, James Joyce, and Virginia Woolf, even including unique uses of words by prolific authors).

Even after lines are drawn between meanings, several factors can influence the dictionary's final form. Space in a dictionary is a zero-sum game—including one word or usage necessarily reduces the space available for others.[91] Dictionary editors cannot include everything in the language, and they are forced to make choices concerning how detailed to make an entry and which entries to omit entirely.[92] The creation of a dictionary is a "pragmatic enterprise" limited at every stage by constraints of space, budget, and time.[93]

C. Distinctive Traits of Dictionaries

Sidney Landau categorizes dictionaries according to a number of criteria: the number of languages contained; the variety of English addressed; the age, purpose, and primary language of the users; the manner of funding; the period of time meant to be covered; and the size and scope of the work.[94] In addition, dictionaries differ in how descriptive or prescriptive they intend to be. Each of these elements can affect the resulting dictionary and its usefulness in legal analysis.

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91. ATKINS & RUNDELL, *supra* note 55, at 20–21 ("Space is finite . . . . Even the 20-volume [*Oxford English Dictionary*] makes no claim to include all the vocabulary of English. Inevitably, then, the average one-volume dictionary can cover only a small proportion of the vocabulary of a language." (citation omitted)). Online dictionaries could potentially reduce some of the size limitations present in printed dictionaries. *See Erin McKean Redefines the Dictionary*, TED (Mar. 2007), http://www.ted.com/talks/erin_mckean_redefines_the_dictionary.html (discussing the future of dictionaries).

92. Clarke D. Cunningham and his colleagues describe this well, noting that:

> Even when a dictionary does record a usage that corresponds to what appears to be a legally relevant meaning, it is dangerous to rely on the way that usage is characterized, categorized, and ordered. Dictionary entries are severely limited by time and space constraints; lexicographers must prepare thousands of dictionary entries, each one of which must fit into a very small space and predetermined format. Whether a particular usage is listed first or last in an entry has no bearing on whether it is the "plainest" meaning for the word in the context in question.

Clark D. Cunningham, Judith N. Levi, Georgia M. Green & Jeffrey P. Kaplan, *Plain Meaning and Hard Cases*, 103 YALE L.J. 1561, 1615 (1994) (book review).

93. ATKINS & RUNDELL, *supra* note 55, at 56; *see also* LANDAU, *supra* note 67, at 357 ("Considerations of available space always place practical limits on the number of entries that can be accommodated, especially in a one-volume dictionary. . . . If a college dictionary did not limit its entry count, it would run out of space somewhere in the letter D . . . ."); Cunningham et al., *supra* note 92, at 1615 (discussing the practical limitations lexicographers face in assembling word usages). Landau also notes that because dictionaries are expected to define every word used to define other words, it becomes almost a necessity to develop a complete word list before beginning to define any of the words. LANDAU, *supra* note 67, at 357.

94. *See generally* LANDAU, *supra* note 67, at 8–42 (discussing the different aspects of dictionaries).

1. *Intended User and Purpose.* As mentioned, many different kinds of dictionaries exist, each with a different purpose and intended audience, and the intended audience will dramatically affect every stage of the dictionary-creation process.[95] Trade dictionaries differ significantly from general dictionaries in the types of sources from which they derive their research.[96] Dictionaries designed to teach a language tend to describe words in a very different (and often simpler) manner than general-use dictionaries.[97]

2. *Prescription Versus Description.* One great debate throughout the history of lexicography has been that of prescription versus description.[98] The older, more conventional perspective, prescription, "assumes that there is a correctness in English languages as absolute as that in elementary mathematics."[99] Adherents to this school of thought presume there is a correct way and an incorrect way to use a particular word. A prescriptive dictionary "treats the entries in a dictionary as representing the 'proper' way to use English, rather than representing how language actually is being used."[100] Descriptive dictionaries, on the other hand, embrace the opposite philosophy: they simply seek to describe "what members of the speech community do when they communicate with one another."[101] Much of the disagreement between proponents of these two methods can be framed as a battle between grammarians seeking to define the language and linguists seeking to observe and describe it.[102]

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95. *See supra* notes 63–65 and accompanying text.

96. *See, e.g.*, LANDAU, *supra* note 67, at 32 ("[S]ubject-field dictionaries often have a normative purpose as well as an informative one, and they tend to be more encyclopedic in content.").

97. *Id.* at 16.

98. Thumma & Kirchmeier, *supra* note 9, at 242–44.

99. MORTON, *supra* note 84, at 139.

100. Thumma & Kirchmeier, *supra* note 9, at 242.

101. ATKINS & RUNDELL, *supra* note 55, at 2.

102. *See, e.g.*, MORTON, *supra* note 84, at 138–42 (describing the struggle between prescriptive grammarians and descriptive linguists). The shift toward description over prescription began in the mid-twentieth century, as demonstrated by a publication of the National Council of Teachers of English (NCTE) called *The English Language Arts*, which supported the idea that language is naturally in constant change and that correctness of the language "rests on usage." LANDAU, *supra* note 67, at 254 (discussing the movement in the 1940s and 1950s toward an understanding of English that embraced natural change and evolution of the language); *cf.* MORTON, *supra* note 84, at 140–41 (discussing NCTE's polling of educated writers, businessmen, and others, finding that "grammars and usage books were much more conservative than the practices of educated users").

Modern dictionaries generally follow the descriptive methodology,[103] though some tension still exists in this regard. For example, much of the controversy over *Webster's Third New International Dictionary* centered on how far toward the descriptive end of the spectrum it landed—omitting for the first time even normative usage cues such as the "informal" label.[104]

It might be tempting to disregard the discussion of description versus prescription, given that, by and large, description has won the battle, and modern dictionaries are clearly more descriptive than those of earlier times.[105] But because the Court often invokes contemporaneous dictionaries, prescriptive dictionaries find their way into Court opinions,[106] raising the question of whether a dictionary designed to dictate proper usage can reasonably be used to demonstrate plain meaning.

3. *Size and Scope.* Dictionaries come in many different sizes, designed for many different uses.[107] The entire English lexicon is

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103. Thumma & Kirchmeier, *supra* note 9, at 243; *see also* Aprill, *supra* note 3, at 284 ("Lexicographers did not always prefer description to prescription."); *Erin McKean Redefines the Dictionary*, *supra* note 91 ("I don't want to be a traffic cop. . . . So if I had to think of some kind of occupation as a metaphor for my work [as a lexicographer], I would much rather be a fisherman. I wanna throw my big net into the deep blue ocean of English and see what marvelous creatures I can drag up from the bottom.").

104. The controversy over *Webster's Third* is not covered in great detail here, but entire books have been devoted to the subject. *See generally* MORTON, *supra* note 84 (covering the entire making, controversy, and legacy of *Webster's Third*); DICTIONARIES AND THAT DICTIONARY (James Sledd & Wilma R. Ebbitt eds., 1962) (containing dozens of essays and critiques of *Webster's Third*). Justice Scalia even disposed of an unfavorable definition from *Webster's Third* by referring to the controversy discrediting the dictionary. *See* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 227–28 (1994) (disregarding the *Webster's Third* definition of the word "modify"); *see also* William Safire, *On Language: Scalia v. Merriam-Webster*, N.Y. TIMES MAG., Nov. 20, 2004, at 30, 32 (discussing the *MCI* case and Scalia's argument against *Webster's Third*). Despite Justice Scalia's aversion to it in *MCI*, *Webster's Third* is the Court's "most popular usage dictionary, appearing in 102 opinions through the 1997–1998 term." Thumma & Kirchmeier, *supra* note 9, at 262–63.

105. At the same time, some modern dictionaries are more descriptive or prescriptive than others. For example, the *American Heritage Dictionary* seeks to chart a more prescriptive path than *Webster's Third*. *See* Andrew Adam Newman, *Wordsmiths: They Also Serve Who Only Vote on 'Ain't,'* N.Y. TIMES, Dec. 23, 2006, at B11 ("*American Heritage* was intended as a more prescriptive response to *Webster's Third*, and to this day dictionaries strive to strike that balance between guarding and updating the language."). Interestingly, Justice Scalia serves as a member of the *American Heritage Dictionary's* usage panel, helping to determine the "correct" meaning of words in this more-prescriptive dictionary. Merriam-Webster has no plans to implement a usage panel for updates to *Webster's Third*. *Id.*

106. *See, e.g.*, sources cited *supra* note 16.

107. *See supra* notes 63–65 and accompanying text.

estimated to be about four million words,[108] yet even an unabridged dictionary might contain only 450,000 of them.[109] Indeed, despite the common misconception that unabridged dictionaries contain the entire language, the term, in practice, "has meant a dictionary of 400,000 to 600,000 entries."[110] So-called college dictionaries, by far the most popular general-use dictionaries in the United States, are smaller, typically containing only 160,000 to 180,000 entries.[111] Desk dictionaries are smaller still; they often contain only 60,000 to 80,000 entries.[112] A one-volume dictionary, of any size, "can cover only a small portion of the vocabulary of a language."[113] Although the absence of a particular word from a particular dictionary might tell the reader *something*, it does not indicate concretely that the word is not within the vocabulary of the language.

For the purposes of legal analysis, the statutory or constitutional words in question are generally acknowledged to be part of the language; it is their *definitions* that are in dispute. The size and scope of the dictionary matter here as well: smaller dictionaries "not only have fewer entries but their definitions are briefer and fewer senses are given for each word."[114] This means that a judge searching for the existence of a particular meaning may find it missing in a college dictionary even though an unabridged dictionary from the same time period might contain that usage.[115] And lack of space can lead to loss of meaning on both the research and definition sides of dictionary creation, because citations are expensive to collect and corpora expensive to compile. The number of sources that can be referenced

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108. LANDAU, *supra* note 67, at 28.

109. *See id.* at 29 (referring specifically to *Webster's Third*, which was published in 1961); *see also* Aprill, *supra* note 3, at 294–95 (containing a similar discussion of dictionary size).

110. LANDAU, *supra* note 67, at 30; *see also* ATKINS & RUNDELL, *supra* note 55, at 20 ("Even the 20-volume [*Oxford English Dictionary*] makes no claim to include all the vocabulary of English.").

111. LANDAU, *supra* note 67, at 30.

112. *Id.* at 31.

113. ATKINS & RUNDELL, *supra* note 55, at 21.

114. LANDAU, *supra* note 67, at 31 (referring specifically to desk dictionaries); *see also id.* at 377 (discussing the strict length requirements often imposed on definers by dictionary editors).

115. *See* Aprill, *supra* note 3, at 295–96 (noting that "unlike the [*Oxford English Dictionary*] or *Webster's Third*, the definitions listed for 'exercise' in the college edition of *Webster's New World Dictionary of the American Language* do not include any reference to the practice of religion"). *Compare* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 97 (4th ed. 2000) (including under the definition of "arms," the example of "troops bearing arms"), *with* AMERICAN HERITAGE COLLEGE DICTIONARY 77 (4th ed. 2002) (lacking this specific example, with the entire definition including fewer military connotations).

depends on the budget of the dictionary maker.[116] All in all, a court looking to see if a particular word *could* be used in a particular way should use as thorough a dictionary as possible, lest the meaning in question be cut solely due to issues of space or budget.

4. *Time Lag.* Whether a textualist seeks original intent or original plain meaning of a statute, the relevant time period is the one contemporary to the drafting of the provision. Therefore, originalists generally search for definitions published around the time of the relevant language.[117]

Yet, as this discussion demonstrates, creating a dictionary involves a tremendous amount of work—it takes time. And while that time passes, language is a "moving target."[118] Because of the "inevitable time delay between collection of citations [or assembling of the corpus] and publication of the dictionary, dictionaries must lag behind current use of the language."[119] Thus, invoking a dictionary published the same year as a statute would actually involve using a definition from several years prior. And usage can change quickly. As Professor Aprill points out, the 1992 edition of the *American Heritage Dictionary of the English Language* 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."[120] That definition is technically correct, but it is insufficient for the modern understanding (even in 1992) of a computer's function.[121]

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116. *Cf.* Richard W. Bailey, *Introduction* to DICTIONARIES OF ENGLISH, at v (Richard W. Bailey ed., 1987) ("It would take seven hours or more for a reader to mark the twenty or thirty new words in a single issue of the New York Times at an estimated cost of sixty dollars; recording and filing the data would cost very probably forty dollars. Each quotation in the file would cost very probably three to five dollars."). In terms of space within the actual book itself, some unabridged dictionaries choose to spend some margin space on pictures. *See, e.g.*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 115 (reserving margin space for pictures on each page, whether or not pictures actually appear there).

117. *See, e.g.*, text accompanying *infra* note 212.

118. ATKINS & RUNDELL, *supra* note 55, at 47.

119. Aprill, *supra* note 3, at 287 ("[D]ictionaries are out of date by the time they are published.").

120. *Id.* at 288 (quoting AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 389 (3d ed. 1992)).

121. And this problem is not resolved even in the Fourth Edition. *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 115, at 380 (including the identical definition of "computer," despite being well into the "computer age," which the book also defines on the same page). Interestingly, this edition contains a number of relatively recent computer-related terms, such as "computerized axial tomography," "computer literacy," and

Courts should take this time lag into account when citing to dictionary definitions—a dictionary published in 1950 does not capture the language from 1950 but rather that of some years before.[122]

5. *Time Period Covered.* In addition to the question of time lag, the temporal purpose of the dictionary must be taken into account. Dictionaries can be synchronic or diachronic—meaning that they can purport to represent the language at one particular time or over a span of time.[123] In modern dictionaries, this choice is essentially determined by what materials are included in the corpus and citation files.[124] Nearly all one-volume dictionaries made for commercial purposes in the United States and Britain are synchronic, including the Supreme Court's most-cited dictionary, *Webster's Third*.[125] In reality, this distinction is more of a spectrum, and "no dictionary can be purely synchronic, since it takes years to produce any dictionary, and even synchronic dictionaries include some archaic forms."[126]

Just as accepted modern practice does not resolve the debate surrounding the use of prescriptive versus descriptive dictionaries,[127] the fact that most contemporary dictionaries are synchronic does not entirely eliminate the issue of time period covered. The Court often

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"computer-aided design." *Id.* This example demonstrates that adding new words to a dictionary may, at times, be easier than accounting for changes in the meanings of older words.

122. This issue is exacerbated by the fact that dictionaries, particularly older ones, are known to copy each other—so a dictionary from 1850 may include research from the 1830s, and may simply copy another dictionary from 1830 that is based upon research from the early 1800s. *See, e.g.*, Rickie Sonpal, Note, *Old Dictionaries and New Textualists*, 71 FORDHAM L. REV. 2177, 2189 (2003) (noting that Noah Webster "borrowed from earlier dictionaries," including, at times, "entry words, definitions, and quotations" without acknowledgement).

123. *See* LANDAU, *supra* note 67, at 28 (discussing the differences between synchronic and diachronic dictionaries).

124. *See* ATKINS & RUNDELL, *supra* note 55, at 71 (discussing examples of synchronic and diachronic corpora).

125. LANDAU, *supra* note 67, at 27; *see also supra* note 104. It should be noted, however, that "larger synchronic dictionaries such as [*Webster's Third*] take in a broader band of time than smaller works." LANDAU, *supra* note 67, at 27. Historical dictionaries, such as the *Oxford English Dictionary*, require "a fully diachronic corpus," like the Oxford Historical Corpus, which covers twelve centuries. ATKINS & RUNDELL, *supra* note 55, at 71.

126. LANDAU, *supra* note 67, at 28; *see also* ATKINS & RUNDELL, *supra* note 55, at 71 ("Essentially, corpus-builders have to decide 'how diachronic' their corpus needs to be in order to support the kind of lexicography they will be doing."); *supra* Part II.C.4.

127. *See supra* Part II.C.2.

consults older and sometimes obscure dictionaries[128] and should be careful, for example, in using etymological dictionaries, which are "specialized diachronic dictionaries,"[129] or historical dictionaries designed to represent vast periods of time.

6. *Lexigraphic Versus Contextual Analysis.* Many words have only one meaning.[130] Yet "[t]he more common a word is, the more likely it is to have multiple meanings," and those common words "make up the bulk of most texts."[131] Determining the boundaries between those different meanings is both highly subjective and contextual. "The reality," the *Oxford Guide to Practical Lexicography* states, "turns out to be less clear-cut than the picture presented in dictionaries."[132] The nature of dictionaries allows them to be used in a lexigraphic manner, that is, devoid of all context. Yet context is essential to analysis.

Discussing linguists' explanation for how people derive meaning from sentences, Professor Craig Hoffman notes that "[l]inguists hypothesize that humans are born with a certain 'genetic endowment' that predisposes us to use language,"[133] and that this skill facilitates the internalization of certain unspoken rules about structure and meaning, which allow readers to understand sentences when words or phrases are unclear.[134] This, in turn, makes consideration of the surrounding context essential to actually understanding what a sentence means. Using a lexicographic analysis is simply taking a word out of a sentence and defining it.[135] The better method is to view words within their context—to "parse the statutory sentence and to

128. *See, e.g.*, District of Columbia v. Heller, 128 S. Ct. 2783, 2790–91 (2008) (reviewing dictionaries from the 1700s and early 1800s to determine the meaning of the Second Amendment).

129. LANDAU, *supra* note 67, at 27.

130. ATKINS & RUNDELL, *supra* note 55, at 264.

131. *Id.* at 265–66.

132. *Id.* at 272. Even the dictionaries' authors themselves have, at times, acknowledged the inherently subjective nature of dictionaries. *See, e.g.*, Geoffrey Nunberg, *Usage in* The American Heritage Dictionary, *in* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 115, at xxviii ("Custom can provide precedents and criticism can provide principles, but each has to be evaluated at the bar of opinion.").

133. Hoffman, *supra* note 21, at 408.

134. *See id.* at 407–08 (explaining the complex inner working of sentence structure and noting that all fluent speakers seem to inherently understand sentences even without referencing such rules).

135. *See* ATKINS & RUNDELL, *supra* note 55, at 264 (describing lexicographers' goal of identifying and describing "word senses").

explore the syntactic relationships among its constituents."[136] Dictionaries, therefore, "are less helpful when the inquiry properly extends beyond the word level,"[137] as statutory interpretation always does.

III. A FRAMEWORK FOR TEXTUALIST USE OF DICTIONARIES

The numerous complications related to judicial use of dictionaries do not necessarily mean that dictionaries cannot be used in a manner consistent with textualism—but the Court should account for these factors when citing to dictionaries in textualist analysis. This Part proposes a framework for the use of dictionaries in textualist analysis of both statutes and constitutional provisions.

First, in order to have a coherent framework, it is important to annunciate a general theory under which a dictionary is used for construing legal language—that is, what is the purpose of using a dictionary to look up a word? As the preceding discussion has shown, a dictionary is the result of extensive research and academic judgment and, when published, is the end-product-for-the-masses of research into the lexicon in much the same way that an encyclopedia article on nuclear fusion is the mass-marketed version of research into nuclear physics. In invoking a dictionary to define a word, one is not really searching for what the dictionary *says*, but rather what the word *means* within the lexicon. The dictionary, then, is simply the window through which one seeks to find that meaning. Ultimately, a court using a dictionary is allowing it to stand in as a proxy for the lexicon. But because the end goal is finding the correct meaning within the *lexicon*—not the *dictionary*—the limitations of dictionaries must be recognized lest the court find the answer to the wrong question. Dictionaries are proxies, and they can be good ones or bad ones. The following framework seeks to account for the limitations that make dictionaries, at times, bad proxies for the lexicon and to provide ways to make them better.[138]

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136. Hoffman, *supra* note 21, at 402.

137. *Id.* at 406.

138. Some of these rules have been suggested in one way or another in one of several previous articles on dictionaries and the Supreme Court. *See, e.g.*, Hoffman, *supra* note 21, at 402 (discussing the role of context); Sonpal, *supra* note 122, at 2177–78 (discussing the differences in meaning that can be difficult to ascertain from older dictionaries). My goal here is to bring together these suggestions in one cohesive collection in much the same style of Professor H. Jefferson Powell's *Rules for Originalists*. *See generally* H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659 (1987) (collecting fourteen rules for the responsible use of

A. Use Contextual Analysis Only

Dictionaries are inherently acontextual—they focus on individual words, devoid of the meaning created by the words and sentences around them.[139] Justice Scalia himself has mentioned the need for considering context in the use of dictionaries. In *Smith v. United States*,[140] Justice Scalia excoriated the majority's construction of the word "use" as inconsistent with the clear context of the statute in question.[141] Instead of simply picking a word out and defining it, as Justice Scalia claims the majority did in *Smith*, or as he himself could be said to have done in *District of Columbia v. Heller*,[142] judges should use dictionaries with the understanding that words "never stand by themselves," but rather "derive their meaning from context and their background in the relevant culture."[143] Without context, a word is meaningless. And without considering context, so too is the use of a dictionary to define a single statutory term.

Professor Hoffman describes two contrasting methods in which the Court might use the dictionary: the "definition" method, which involves defining words the reader of the statute might not know, and the "verification" method, wherein the Court verifies that a word could have a definition that the Court is assigning to it.[144] Hoffman argues that verification is dangerous because by using a dictionary to see if a word could mean what the Court is *hoping* it might mean, the Court is neglecting to "parse the statutory sentence as a first step in

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history in constitutional interpretation). Though Professor Powell's article does not address dictionaries, its analysis of the use of historical evidence in originalist constitutional interpretation is similar in purpose to this Note—as is some of the advice. *See, e.g.*, *id.* at 660 ("[T]he turn to history does not obviate the personal responsibility of the originalist interpreter for the positions he takes, because historical research itself, when undertaken responsibly, requires of the interpreter the constant exercise of judgment.").

139. *See* Sonpal, *supra* note 122, at 2206 ("Dictionaries by their very nature do not provide the precise meaning of a word as it is used in a particular context."). Judge Randolph refers to dictionaries as "word zoos" because "[o]ne can observe an animal's features in the zoo, but one still cannot be sure how the animal will behave in its native surroundings." A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 71, 74 (1994).

140. Smith v. United States, 508 U.S. 223 (1993).

141. *See id.* at 241–46 (Scalia, J., dissenting) ("We are dealing here not with a technical word or an 'artfully defined' legal term, but with common words that are . . . inordinately sensitive to context." (citation omitted)); *see also infra* Part IV.A.

142. District of Columbia v. Heller, 128 S. Ct. 2783 (2008); *see also infra* Part IV.B.

143. Taylor, *supra* note 28, at 364 (quoting CASS SUNSTEIN, AFTER THE RIGHTS REVOLUTION 114 (1990)).

144. Hoffman, *supra* note 21, at 402.

its linguistic analysis," leading it to miss contextual clues which might have allowed it to better understand the intended meaning of the language.[145] This distinction is helpful for considering the role of context in textualist analysis: if a court is looking for the honest, true meaning of a word within a statute (presuming there is such a thing as a true meaning), then the context should control over an external source such as a dictionary. Indeed, the drafter of the language could use a completely new word, or use an old word in a new and possibly "incorrect" way—and the context would still control its meaning.[146]

B. Establish Only Outer Boundaries

Building upon the previous rule, courts should only use dictionaries to establish outer boundaries of what a word *could* (or could not) mean—not to determine one true and right meaning.[147] The basic limitations of lexicography make such a rule necessary. First, dictionaries are the result of subjective processes at several different levels from the choice of data sources to the development of distinct usages for each word.[148] In addition, dictionaries—even unabridged dictionaries—function under limits on size and scope that can ultimately lead to the omission of a word or a particular meaning of a word.[149] And due to problems such as time lag,[150] which even when accounted for is relatively indeterminate, one can never be certain that the absence of a definition in a particular dictionary means that the definition is absent from the lexicon itself. Thus, dictionaries, even when accounting for all of these issues, should be used only to say what a word *could* mean, not what it *must* mean—they can only establish outer boundaries.[151]

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145. *Id.*

146. *See supra* note 50 and accompanying text.

147. *See* Note, *supra* note 3, at 1452 ("[D]ictionaries should occupy a space at the beginning rather than at the end of the interpretative process."); *see also* Solan, *supra* note 30, at 2056 ("The problem with using dictionaries to determine the ordinary meaning of a word . . . is that the purpose of a dictionary is to determine the outer boundaries of appropriate usage for each entry.").

148. *See supra* notes 76–77, 88–90 and accompanying text.

149. *See supra* Part II.C.3.

150. *See supra* Part II.C.4.

151. *See* Thumma & Kirchmeier, *supra* note 9, at 296 ("Although dictionaries cannot provide the end point in defining terms, dictionaries are a proper and useful source in determining what a word may mean."). This is not to say that a court would not ultimately decide what a word means in the context of a statute—indeed, that is the job of the court in

C. Use Contemporaneous Research on Word Meaning

New textualist judges, such as Justice Scalia, have been generally consistent with their interpretive theory by using dictionaries published around the time of a provision's enactment.[152] But proper usage is complicated due to the inherent qualities of dictionaries.[153] Language is a "moving target,"[154] and citing a dictionary from 1787 to reflect the common understanding at the time the Constitution was written is actually to cite research from some years *before* 1787—the sources used could potentially date back decades.[155] Language changes can occur rapidly, as evidenced by the change in noun capitalization between the Constitution of 1787 and the Bill of Rights in 1789—two documents written closely in time, yet utilizing different rules for capitalization of nouns.[156]

It can be very difficult to determine the time frame in which a dictionary was created, however.[157] As such, courts (and litigants) should only use dictionaries to establish an outer boundary—consistent with the "areas of meaning"[158] mentioned above—by examining various dictionaries from the years surrounding a provision. Agreement among several such dictionaries would seem to indicate a consistency of usage.

D. Justify the Choice of Dictionary and Definition

What makes a dictionary reliable? According to the *Oxford Guide to Practical Lexicography*, a reliable dictionary "is one whose

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statutory or constitutional interpretation. Instead, this Section argues that the dictionary itself should not be used to provide a dispositive meaning of a word.

152. *See, e.g.*, *infra* Part IV.B.

153. *See supra* Part II.C.4–5.

154. ATKINS & RUNDELL, *supra* note 55, at 47.

155. *See supra* Part II.C.4.

156. The real question, perhaps, is which printing of the Constitution to consider. The rules regarding capitalization seemed to be in such flux at the time that different printings of the Constitution from early in the Republic have been found to have numerous differences in capitalization and punctuation. *See* Denys P. Myers, *History of the Printed Archetype of the Constitution of the United States of America*, 11 GREEN BAG 2D 217, 240 (2008) ("The Committee of Style and Arrangement allowed [Jacob] Shallus to capitalize every noun in his engrossing but it was restrained in using initial capitals in the printed copy for the Federal Convention.").

157. *See supra* Part II.C.4.

158. S.I. HAYAKAWA, LANGUAGE IN THOUGHT AND ACTION 57–58 (4th ed. 1978) (noting that dictionaries are useful not for finding one true perfect meaning but rather for determining "areas of meaning" surrounding a word).

generalizations about word behavior approximate closely to the ways in which people normally use and understand language when engaging in real communicative acts (such as writing novels or business reports, reading newspapers, or having conversations)."[159] Given the complicated research and deliberation required to create a dictionary, it stands to reason that not all dictionaries are created equal.[160]

Further, even dictionaries of equal quality can be designed for substantially different purposes. Is a college dictionary sufficient to support an assertion about the absence of a particular meaning? Probably not, especially when a contemporaneous unabridged dictionary *does* contain that meaning.[161] Yet even very recently the Supreme Court has cited collegiate dictionaries to demonstrate the absence of a particular word meaning.[162] Though specific cases might present exceptions, an originalist seeking to understand the breadth of a word's plain meaning would generally want to consult a respected unabridged, contemporary, synchronic dictionary.

Furthermore, the Court should actually justify its choice of dictionary and usage explicitly, stepping out from behind the aura of authority dictionaries generally provide to explain why a particular dictionary is well suited for the task to which it is being applied. The Court rarely does this, generally noting at most the contemporaneous publication date.[163] Instead, the Court should make "at least some prima facie argument about the relevance of that particular dictionary" to the question at hand.[164] Moreover, the Court should demonstrate why its chosen dictionary is reliable, suitably contemporary and complete, and duly representative of the language

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159. ATKINS & RUNDELL, *supra* note 55, at 45.

160. As mentioned, Justice Scalia has used this argument to dismiss *Webster's Third* despite it being the Court's most commonly cited dictionary. *See supra* note 104 and accompanying text.

161. *See supra* Part II.C.3.

162. *See, e.g.*, Kucana v. Holder, 130 S. Ct. 827, 834 n.10 (2010) (noting that "specified" is not synonymous with "implied" or "anticipated" and citing WEBSTER'S NEW COLLEGIATE DICTIONARY 1116 (1974) for support).

163. *See, e.g.*, District of Columbia v. Heller, 128 S. Ct. 2783, 2791 (2008) (seeking the eighteenth-century meaning of "arms" by looking to dictionaries from 1771, 1773, and 1828).

164. Note, *supra* note 3, at 1453. This suggestion also carries with it the need to justify the use of any dictionary, as it "is not always easy to tell when a statute is ambiguous." LAWRENCE M. SOLAN, THE LANGUAGE OF JUDGES 93 (1993); *see also* Taylor, *supra* note 28, at 356 ("The problem is that the meaning of plain meaning is itself not plain."). Over time, certain dictionaries would likely become de facto justified for particular uses on the basis of their repeated use in such instances. At present, such repeated use exists, but a justification for doing so does not.

it seeks to define. Similarly, if the Court selects a particular usage as the "correct" one, it should justify why that definition is superior to others.[165]

E. Use Multiple Dictionaries

In accordance with the idea that dictionaries should establish only outer boundaries,[166] it seems reasonable for the Court to consult more than one dictionary. The wide discrepancy in the definitions of terms among contemporary, respectable dictionaries is well established; for example, the Supreme Court has addressed the definition of the word "sacrilege,"[167] a word which has a more expansive meaning in *Webster's Third* than in the *American Heritage Dictionary*.[168] Why should the first dictionary taken from the shelf control over other equally qualified dictionaries?[169] If judges are to be truly objective in their quest to determine the ordinary meaning of a word, only a scientific approach—a survey of relevant dictionaries—can bring to light what consensus, if any, exists. To consider only one dictionary risks looking out over the proverbial cocktail party and selecting a friendly face, as Justice Scalia fears with legislative history.[170] Using a survey method would instead promote objectivity

165. *See infra* Part III.F; *see also* Sonpal, *supra* note 122, at 2205 (discussing the problems presented by the Court taking the first definition listed in a particular dictionary as the primary meaning, given that many dictionaries order definitions historically or provide no method for the ordering of definitions).

166. *See supra* Part III.B.

167. *E.g.*, Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 525–26 (1952).

168. *Compare* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1996 (1993) (defining "sacrilege" as "the crime of stealing, misusing, or desecrating that which is sacred holy, or dedicated to sacred uses," "the unworthy or irreverent use of sacred persons, places, or things," and "the profanation of that which is dedicated to God or to sacred purposes"), *with* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 115, at 1530 (defining "sacrilege" simply as "desecration, profanation, misuse, or theft of something sacred"). The *American Heritage Dictionary*'s definition seems limited to *things* whereas *Webster's Third* explicitly includes persons and places, as well as an internal suggestion as to the definition of sacred—that it includes things "dedicated to God." While this distinction might be narrow, it could have been relevant to the Court's consideration of the word in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), where the court found it impossible to determine the meaning of "sacred" in the context of media censorship. *Id.* at 526.

169. This is not to say that all dictionaries are equal. There might be multiple dictionaries, however, which meet the criteria discussed in this Part concerning a given use, and judges should utilize multiple dictionaries rather than just the first acceptable one they encounter.

170. *See supra* note 2 and accompanying text.

and prevent judges from selecting definitions based solely on their personal preferences.[171]

F. Acknowledge Contrary Definitions and Dictionaries

Instead of considering one dictionary authoritative, the proper authority for lexicographical meaning should be *the lexicon itself*, with each dictionary providing only a window into the lexicon.[172] A dictionary is a proxy for demonstrating that the lexicon does (or does not) contain a certain meaning. Litigants and judges alike should cease the practice of citing to one dictionary alone to make a claim about the lexicon when another relevant dictionary supports the opposite claim—both definitions should be explicitly acknowledged, given that together they make one overall suggestion about the lexicon.[173] Proper legal arguments should address whether the weight of the evidence supports or fails to support a particular reading of the lexicon as a whole.[174]

In this vein, judges (and even litigants) should acknowledge those dictionaries which strike against the meaning presented in a brief or opinion. Lawyers have an ethical obligation to cite to contrary controlling authority when such authority exists.[175] The

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171. Justice Scalia's criticism of *Webster's Third*'s definition of "modify" in *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994), suggests that he, too, should support this principle. *Id.* at 225–27. In proclaiming *Webster's Third*'s broader definition of the word invalid because it contradicted many other dictionaries, Justice Scalia implicitly acceded to the notion that some survey method is necessary—otherwise, the sole dictionary used could itself be an outlier. Had *Webster's Third* been the only dictionary the Court consulted in *MCI*, it seems likely that the definition Justice Scalia rejected would have been accepted as a possibility.

172. *See supra* text accompanying notes 136–38.

173. One could still attack one of the dictionaries as being inaccurate, poorly made, or inapplicable. This argument is quite similar to that of Professor Frederick F. Schauer regarding legal arguments in general. *See* FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 72 (2009) ("Even more frequently, optional authorities are employed in a way that hovers precariously on the edge of genuine authority. Thus, when a lawyer in a brief, a judge in an opinion, or a scholar in a law review article makes reference to an authority, it is often to provide so-called support for some proposition. . . . But the idea of 'support' here is odd. The authority alleged to provide support is often not one that supports a proposition more than another authority negates it. This kind of 'support' is a peculiar sense of authority, because the balance of all the authorities might not point in one direction or another, or might even point against the very proposition allegedly being supported." (citation omitted)).

174. This, in turn, is quite similar to this Note's earlier argument regarding the survey method and the use of multiple dictionaries. *See supra* Part III.E.

175. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2009) ("A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . . .").

specific requirement specified in the *Model Rules of Professional Conduct* leaves plenty of room to ignore contrary dictionary definitions as noncontrolling without technically violating the rule, but honest scholarship requires something more when dictionaries are being cited as true authority that a particular word in the lexicon means (or doesn't mean) something.[176] There is an almost dishonest quality to citing a dictionary as demonstrating a lack of support for a particular meaning with the knowledge that other, equally appropriate dictionaries or definitions *do* support that meaning. The dissent in a judicial opinion, or an opponent in litigation, can be left to account for the discrepancy—but such tactics result in two opinions, each holding up different dictionaries[177] and claiming a monopoly on the "true meaning" of a word when both sides know that their chosen dictionary demonstrates no such true meaning. This situation is different from that of citing noncontrolling case law. A noncontrolling court ruling from another jurisdiction is not cited to demonstrate what the law says, but rather what another court said, which may or may not be in accordance with the law in the authoring court's jurisdiction. Conversely, both dictionaries cited to support opposing propositions invoke the same source of authority: the lexicon.

G. Account for Weaknesses in Older Dictionaries

Methods of researching language and creating dictionaries have changed over time, generally evolving toward methods that pose fewer problems for textualism. First, modern dictionaries are more descriptive in nature than their predecessors, making definitions more objective and reflective of the plain or ordinary meaning of words.[178] Second, the use of a corpus makes the research materials more objective than in the past by relying less on the process of selecting specific (and sometimes highly uncommon) usages for inclusion in lexicographical research and more on the use of whole sources, such as entire newspapers.[179] And finally, modern computing technology allows those databases to encompass a quantity of material far greater

176. The purpose of this Note and other similarly focused articles, however, is to undermine the idea that any dictionary can be the one true authority on the meaning of a word.

177. Sometimes opposing opinions will even cite to different editions of the *same* dictionary. *See infra* Part IV.B.

178. *See supra* Part II.C.2.

179. *See supra* notes 73–75 and accompanying text.

than the handwritten citation files of the past, making the data a better survey of the whole language.[180] But if a court is to use a contemporaneous dictionary when interpreting an older statute or a constitutional provision, it must consider all the weaknesses of the methods used in compiling older dictionaries. The Supreme Court, for example, frequently cites old dictionaries when considering language from the Constitution,[181] but the Court seldom justifies why the specific dictionaries selected are reliable and whether the problems of prescription and completeness have been accounted for in the selection. Such justification is most needed with older dictionaries, because "modern judge[s] construing an old statute with the help of an old dictionary will not have the same intuitive sense of the language of the statute and dictionary" as they would with modern language.[182] In addition, Rickie Sonpal points out the additional problems of politics in older dictionaries[183] and the inability of modern judges to understand "the sexual and moral connotations [older] dictionaries attribute to the words."[184] Generally speaking, if the language in question "predates *Webster's Second* or the first edition of the [*Oxford English Dictionary*], the textualist will need to remember that older dictionaries are less broadly based and thus less reliable than modern dictionaries."[185]

Overall, older dictionaries present a particular danger in analysis. Well-meaning judges can easily attribute inaccurate meanings to statutory or constitutional language due to older dictionaries' political nature, tendency to prescribe rather than describe the language, and weaker methodology. Furthermore, a modern judge may lack the intuitive knowledge about older usage that might have allowed a judge more contemporary to the statute to properly understand it.[186]

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180. *See supra* notes 73–75 and accompanying text.

181. *See, e.g.*, Sonpal, *supra* note 122, at 2177–78 (discussing Justice Thomas's use of SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773), NATHANIEL BAILEY, AN UNIVERSITY ETYMOLOGICAL ENGLISH DICTIONARY (26th ed. 1789), and THOMAS SHERIDAN, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796), in defining the word "commerce").

182. *Id.* at 2206.

183. *See id.* at 2212–13 (discussing, for example, the Court's willingness to rely on Samuel Johnson's dictionary despite clearly demonstrated "linguistic and nationalistic prejudices—including his scorn for American English and his refusal to record it").

184. *Id.* at 2214.

185. Aprill, *supra* note 3, at 332.

186. To avoid these problems, Sonpal recommends a "usage based" approach, looking to contemporary primary sources instead of dictionaries, Sonpal, *supra* note 122, at 2215–19,

H. Recognize the Limitations

As this framework shows, the use of dictionaries is complicated and their effectiveness in determining the plain meaning of text is more limited than many would like to believe. But these limitations exist nonetheless. A statute could use a word in an entirely new and previously incorrect way—but if, as textualists argue, the text of the statute controls, an incorrect or creative use of a word, if supported by the context in which it is used, must control above all else. Otherwise, the text yields to an external source of interpretation, and dictionaries become very much like legislative history indeed.[187] Likewise, the problems associated with older dictionaries may render them completely unusable in certain circumstances; in such situations, other methods, such as Sonpal's suggestion of a "usage based" approach[188] or an appeal to common law or common sense, might be more appropriate.

IV. APPLICATION OF THE FRAMEWORK

This Part applies the framework for using dictionaries properly in legal reasoning to two Supreme Court cases, testing whether the framework proposed in this Note would have assisted the Court in its reasoning.

A. The Smith *Case*

Smith v. United States is perhaps the most frequently discussed case concerning the Court and dictionaries, and the case is one of Justice Scalia's favorite examples of flawed acontextual reasoning.[189] *Smith* involved the application of a statute that increased penalties if, "during and in relation to any crime of violence or drug trafficking crime . . . [a person] *uses* or carries a firearm."[190] The defendant in

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though he acknowledges the cost and time issues with such research, noting that truly analyzing a word might take the "experienced editors of the *Oxford English Dictionary* over one month," *id.* at 2219. This Note argues that a dictionary could still be relevant if used properly, but Sonpal's point stands: old dictionaries can be problematic.

187. *See supra* Part I.C.

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

189. *See, e.g.*, SCALIA, *supra* note 5, at 23–24 (describing *Smith* as an example of strict constructionism, "a degraded form of textualism that brings the whole philosophy into disrepute").

190. 18 U.S.C. § 924(c)(1)(A) (2006) (emphasis added); *see also* Smith v. United States, 508 U.S. at 227–41 (interpreting § 924(c)(1)).

question "used" a MAC-10 machine gun by bartering it for drugs.[191] Arguing before the Court, the defendant-petitioner asserted that the statute only applied if the gun were used as a weapon.[192]

Explicitly invoking an ordinary meaning analysis,[193] Justice O'Connor acknowledged that "[l]anguage . . . cannot be interpreted apart from context" and that "[t]he meaning of a word that appears ambiguous if viewed in isolation may become clear when the word is analyzed in light of the terms that surround it."[194] Nonetheless, Justice O'Connor, writing for the Court, utilized *Webster's Second* to define "to use" as "[t]o convert to one's service" or "to employ" and thus found bartering to be within that definition.[195] Despite declaring context central to the analysis, the Court went on to decide that bartering a gun was "using" it within the meaning of the statute on the basis of the dictionary's inclusion of such a definition.[196]

Justice Scalia's dissent—and his subsequent book on interpretation—excoriate the majority's use of the dictionary, stating that for a word as "elastic" as "use," context is particularly important.[197] As a demonstration of ordinary meaning, Justice Scalia asked what someone would imagine using a cane to mean—it would not indicate displaying a cane on the wall, but would rather, to an ordinary listener, refer to using it to walk. Use of a firearm, he argued, is similar: "[T]o speak of 'using a firearm' is to speak of using it for its distinctive purpose, *i.e.*, as a weapon."[198] The majority's construction of this common word, Justice Scalia wrote, is "unquestionably *not* reasonable and normal."[199]

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191. *Smith*, 508 U.S. at 227–28.

192. *Id.* at 229.

193. *See id.* at 228 ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning.").

194. *Id.* at 229.

195. *Id.* at 228–29 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 2806 (2d ed. 1950)). The Court also utilized *Black's Law Dictionary*, which had a similar definition. *Id.* at 229 (citing BLACK'S LAW DICTIONARY 1541 (6th ed. 1990)).

196. *Id.* at 229.

197. *See id.* at 241–42 (Scalia, J., dissenting) ("It is . . . a fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." (quoting Deal v. United States, 508 U.S. 129, 132 (1993))).

198. *Id.* at 242.

199. *Id.* at 243.

Applying his distinction between verification uses and definition uses to *Smith*,[200] Professor Hoffman describes the majority's argument as relying on a flawed verification method:

> Although it professes to be interested in the 'ordinary meaning' of the word that it is defining, the majority ignores the syntactic context in which the word appears. . . . 'The Court does not appear to grasp the distinction between how a word can be used and how it ordinarily is used.'[201]

Such a statement is at the heart of the rule that context should be given primacy over single-word definitions; dictionaries should not be used to say that a word can mean something that stretches it beyond its context.

In fact, perhaps the real problem with the majority's approach in *Smith* is the use of a dictionary at all. The statute was relatively modern, and everyone on the Court, in the gallery, and in the high school down the street knew what "use" can mean—the Court was supposed to be determining what it meant *within the text of the statute*. This problematic use of a dictionary highlights two of the rules proposed in the framework above: the majority in *Smith* failed to apply the rules of *contextuality*, and *establishing only outer boundaries*.[202] A proper application of the suggested framework would have resolved the statutory question in the other direction: bartering a gun would not be considered "using" it, and the increased penalties would not have attached.

B. The Heller *Case*

Decided in 2008, *District of Columbia v. Heller* provides an opportunity to apply other parts of the proposed framework to a recent and still much-debated constitutional question: does the Second Amendment provide an individual right to possess a firearm, or a collective right referring only to militias?[203] To resolve that

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200. *See supra* note 144 and accompanying text.

201. Hoffman, *supra* note 21, at 421–22 (quoting *Smith*, 508 U.S. at 242). Professor Hoffman praises Justice Scalia's approach in the dissent as proper. *See id.* at 423 (calling Justice Scalia's reasoning an "admirable attempt to throw off" an out-of-context method of dictionary use).

202. *See supra* Part III.A–B.

203. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2789 (2008) (noting the disagreement between the petitioners and the respondent over whether the amendment relates only to militia service or to "an individual right to possess a firearm unconnected with service in a militia").

question, the Court analyzed the language of the Second Amendment, which reads: "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[204]

Justice Scalia, writing for the majority, noted the uniqueness within the Constitution of the first clause of the Second Amendment, an explanation of purpose which he termed the "prefatory clause."[205] Justice Scalia then compared it to the structure of other founding-era documents.[206] Citing to a later-modified rule from a 1716 English case—which held that preambles "could not be used to restrict the effect of the words of the purview"—Justice Scalia declared that it is settled law in America that a prefatory clause is not controlling when the operative clause is clear and unambiguous,[207] though a prefatory clause could be useful for the sole purpose of "ensur[ing] that our reading of the operative clause is consistent with the announced purpose."[208]

For the purposes of this Note, the most interesting aspect of the case is the Court's construction of the operative clause. Justice Scalia broke it into parts—"right of the people"[209] and "to keep and bear Arms"[210]—and addressed each separately. Although Justice Scalia properly looked to other sources beyond historical dictionaries (such as other founding-era documents), the dictionary played a starring

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204. U.S. CONST. amend. II.

205. *Heller*, 128 S. Ct. at 2789. Scholars have argued that Justice Scalia noted this separation simply to reach his desired conclusion and that such a division is not supported by the syntax, legislative history, or the historical context of the amendment. *See, e.g.*, William G. Merkel, The District of Columbia v. Heller *and Antonin Scalia's Perverse Sense of Originalism*, 13 LEWIS & CLARK L. REV. 349, 365 (2009) (noting that dividing the prefatory clause and the operative clause was "a crucial step for Justice Scalia as it allow[ed] him to uncouple the right to arms from the militia," even though such an argument is in conflict with the "syntax, the debates in the first Congress, and [the] historical context"); *see also* Brief for Professors of Linguistics and English Dennis E. Baron et al. in Support of Petitioners at 5–14, *Heller*, 128 S. Ct. 2783 (No. 07-290) (discussing how the structure of the Second Amendment makes the so-called prefatory clause an essential component of the meaning of the operative clause).

206. *See Heller*, 128 S. Ct. at 2789 ("Although this structure of the Second Amendment is unique in our Constitution, other legal documents of the founding era, particularly individual-rights provisions of state constitutions, commonly included a prefatory statement of purpose.").

207. *Id.* at 2789 n.3 (citing 2A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 47.04 (5th ed. 1992) (citing Copeman v. Gallant, [1716] 24 Eng. Rep. 404 (Ch.))).

208. *Id.* at 2790.

209. *Id.*

210. *Id.* at 2791.

role in defining "keep," "bear," and "arms."[211] Justice Scalia cited to a number of dictionaries, including Samuel Johnson's *A Dictionary of the English Language* (1773), Timothy Cunningham's *A New and Complete Law Dictionary* (1771), and Webster's *American Dictionary of the English Language* (1828).[212] Applying the framework, a number of issues arise.

1. *Use Contextual Analysis Only and Establish Only Outer Boundaries.* Perhaps the fundamental problem with Justice Scalia's opinion in *Heller* is that he did exactly what he criticized the majority for doing in *Smith*;[213] to borrow Professor Hoffman's terminology, Justice Scalia used a verification argument.[214] That is, Justice Scalia chose definitions (that "arms" means any kind of weapon, and that "keep arms" means to have such weapons) and invoked the dictionary to say that those meanings were correct *because* the dictionary contained them.[215] But the extent of what a dictionary can be used to say about the matter is that the words *could* have the meanings Justice Scalia attributed to them—not that they *must* have those meanings in a given context.[216] In his dissent in *Smith*, Justice Scalia noted that "[t]he Court does not appear to grasp the distinction between how a word *can* be used and how it *ordinarily is* used."[217] The Court, this time represented by Justice Scalia, failed to make that distinction in *Heller* as well.[218]

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211. *See id.* (beginning his analysis by looking at the dictionary definitions of "arms").

212. *Id.* (citing 1 JOHNSON, *supra* note 181; 1 TIMOTHY CUNNIGHAM, A NEW AND COMPLETE LAW DICTIONARY (London 1771); NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828)).

213. *See* SCALIA, *supra* note 5, at 23–24 (criticizing the *Smith* majority's use of the dictionary to define "use" in a manner inconsistent with its plain meaning within the statutory context).

214. *See supra* notes 144–46 and accompanying text.

215. *See Heller*, 128 S. Ct. at 2791–92 (explaining Justice Scalia's interpretation of the amendment's language).

216. And ironically, the strongest piece of contextual evidence is exactly that which Justice Scalia quickly dismissed: the prefatory clause.

217. Smith v. United States, 508 U.S. 223, 242 (1993). Indeed, Justice Stevens's dissent uses this specific quote to criticize Justice Scalia's acontextual construction of the Second Amendment. *Heller*, 128 S. Ct. at 2829–30 n.11 (Stevens, J., dissenting).

218. The issue in *Heller* is a bit more complicated than the controversy in *Smith*, because the phrase "keep and bear Arms" is both more complex than a word such as "use," and because it is found in a much older document. And indeed, it may be that Justice Scalia's interpretation of the language is correct—the majority does provide other contextual arguments from the founding era. The dictionary, however, simply cannot be used to say that the Second Amendment must provide an individual right. All it can be used to show is that it *could* provide such a right, depending on the context.

2. *Use Contemporaneous Research on Word Meaning.* At first glance, the Court seems to have followed this rule, but most of the research leading to the creation of the dictionaries cited by the majority actually came from the decades before the founding era. For example, Justice Scalia cited the 1773 edition of Samuel Johnson's *Dictionary of the English Language* and the 1771 edition of Timothy Cunningham's *A New and Complete Law Dictionary*.[219] Considering time lag in older dictionaries[220] and the tendency of old dictionaries to copy even *older* dictionaries,[221] these two works reference the language as much as forty years or more before the Second Amendment was written.[222] However, Justice Scalia also referred to Webster's 1828 *American Dictionary of the English Language*,[223] which seems a better fit for this analysis[224] and appears to follow the concept of citing to multiple dictionaries.

3. *Acknowledge Contrary Definitions and Dictionaries and Recognize the Limitations.* Perhaps the most frustrating part about both the majority and the dissent in *Heller* is the failure—on both sides—to acknowledge contrary dictionary definitions. For example, although Webster's 1828 dictionary supports the definition of "arms" that Justice Scalia selected,[225] defining "arms" as "[w]eapons of offense, or armor for defense and protection of the body," the same dictionary *also* provides a second definition: "[w]ar; hostility."[226] The

219. *Heller*, 128 S. Ct. at 2791; *see also supra* note 212.

220. *See supra* Part II.C.4.

221. *See supra* note 122.

222. And this gap in time can matter. For a discussion of the changes in the English language around the founding era, see *supra* note 156. Justice Scalia himself has, in the past, been sensitive to time gaps of this size. *See* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 228 (1994) (noting that when the Communications Act became law in 1934, *Webster's Third* "was not yet even contemplated," even though *Webster's Third* was published in 1976 and thus probably contains research from the decades before that time).

223. *Heller*, 128 S. Ct. at 2791; *see also supra* note 212.

224. In his dissent, Justice Stevens cites THE OXFORD ENGLISH DICTIONARY 634 (2d ed. 1989) to provide a definition for "bear arms," *Heller*, 128 S. Ct. at 2828 (Stevens, J., dissenting), which was created at a time far later than the relevant period.

225. WEBSTER, *supra* note 212; *see also Heller*, 128 S. Ct. at 2791 (citing WEBSTER, *supra* note 212, and likening this dictionary's definition to the definitions provided by other dictionaries, which say that "arms" are weapons of offense or armor of defense).

226. WEBSTER, *supra* note 212.

entry then gives a number of examples of arms, several of which involve war or soldiers.[227]

In the dissent, Justice Stevens cited another edition of one of the same dictionaries cited by the majority to reach the opposite conclusion. Justice Stevens referenced the 1755 edition of Samuel Johnson's *A Dictionary of the English Language* to assert that "arms" refers to "[w]eapons of offence, or armour of defence."[228] Justice Stevens also referred to "literally dozens of contemporary texts" to say that "bear arms" "refers most naturally to a military purpose,"[229]—just as Justice Scalia did to make the opposite argument.[230] Neither side seemed willing to acknowledge the other side's evidence—including the warring dictionary definitions.

The dispute in *Heller* typifies the problem that this Note addresses. The dictionary was used by both sides in the same way that Justice Scalia argues that legislative history can be incorrectly used in judicial interpretation: as an external, nonauthoritative source used to pick out a supporting argument while ignoring any contradictory information in that same source. A dictionary simply cannot be used to say that a word like "bear" or "arms" *must* have meant a particular thing—in fact, the very dictionaries used by the Justices show that those words *could* have meant several different things. But such acknowledgements are absent from the opinions. Instead, both sides in *Heller* use dictionaries to prop up conflicting evidence as decisive.[231]

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227. *See id.* (providing, for example, that "[t]o arms" denotes "taking arms for war or hostility; particularly a summoning to war"). Interestingly, Webster also provides another definition of "arms," stating that, "[i]n law, arms are any thing which a man takes in his hand in anger, to strike or assault another." *Id.*

228. *Heller*, 128 S. Ct. at 2828 (Stevens, J., dissenting) (quoting 1 JOHNSON, *supra* note 181 (London, 1st ed. 1755)). Justice Stevens also quoted from a dictionary-like reference guide from 1794 to say that "[b]y *arms*, we understand those instruments of offence generally made use of in war." *Id.* (quoting JOHN TRUSLER, THE DISTINCTION BETWEEN WORDS ESTEEMED SYNONYMOUS IN THE ENGLISH LANGUAGE 37 (London, 3d ed. 1794)).

229. *Id.*

230. *E.g.*, *id.* at 2792 n.7 (majority opinion). That said, considerable evidence suggests that the general use of "bear arms" contemporary to the Second Amendment was overwhelmingly related to military service. *See* Merkel, *supra* note 205, at 353 (discussing findings from over 120 American newspapers contemporary to the Second Amendment suggesting that roughly 98 percent of the uses of the phrase were related to military or militia service).

231. It is not correct that the responsibility for making counterarguments lies with the other side. A strong supporting argument in favor of contradictory evidence is not necessary, but the simple acknowledgment that such evidence exists is. It is inaccurate to say that the evidence clearly supports one meaning while evidence exists suggesting otherwise. *See supra* Part III.F.

Neither side recognizes the limitations inherent in citation to dictionaries.

4. *Demonstrating a Potential Bias.* As discussed in Part III, a dictionary is essentially used as a proxy for the meaning of a word within the language as a whole—much as a survey might be used as a proxy for the opinions of the population as a whole.[232] The use of dictionaries as proxies is, perhaps, necessary in textualist interpretation because conducting a true linguistic analysis is far too burdensome for a court to do on its own. Recognizing the rationale behind the use of dictionaries, it is interesting that the *Heller* majority did not more directly engage with a truer proxy for word meaning: the considered research and findings of linguistics professors on this specific subject.[233] Rarely are such findings available for the Court to use. In *Heller*, however, professors of linguistics and English filed an amicus brief discussing in great detail the linguistic construction of the Second Amendment with an eye toward how it would have been perceived at the time of its creation.[234]

The professors' brief accounts for all of the considerations that the blind use of dictionaries fails to: it considers the context of the words,[235] it focuses on contemporary writings in making its structural comparisons, and it uses multiple lexicographic sources for reaching its conclusions.[236] Justice Scalia, however, preferred a dictionary approach to that of the linguistics experts.[237] According to the amicus brief, a broader survey of dictionaries and contemporary writings reveals that "[i]n each instance where 'bear arms' . . . is used without additional language modifying the phrase, it is unquestionably used in its ordinary idiomatic sense," which is service as a soldier in the

232. *See supra* Part III.F.

233. For a discussion of the true goal of using a dictionary as a window into the lexicon, see *supra* Part III.

234. Brief for Professors of Linguistics and English Dennis E. Baron et al. in Support of Petitioners, *supra* note 205.

235. In fact, the brief's entire first argument focuses on how the structure of the Second Amendment affects the meaning of the words within it. *See id.* at 5–14 (arguing that the "absolute construction" of the prefatory clause causes it to function as a sentence modifier).

236. *See id.* (utilizing structural comparison and multiple sources of meaning to assess the plain meaning of the Second Amendment).

237. *See id.* at 23–24 (examining usage in "books, pamphlets, broadsides, and newspapers from the period between the Declaration of Independence and the adoption of the Second Amendment").

military.[238] In fact, historian Saul Cornell compiled 115 texts containing the phrase "bear arms," finding that 110 used it in a military context and that four of the remaining five added additional words to the phrase to give it a nonmilitary context.[239] Justice Scalia's preference for the dictionary (and his own linguistic intuition) over the scientific method used by the linguistics professors is troubling because it places more importance on a judge's personal perspective on the language than on objective research.[240]

CONCLUSION

Textualism demands adherence to an objective, original meaning of the text. Thus, it is no surprise that dictionaries are so appealing to textualists: dictionaries present an aura of objective authority, and there are dictionaries from any time period relevant for legal analysis. But fidelity to textualist principles requires a disciplined approach to using dictionaries because they are neither as objective nor as authoritative as they seem. And their misuse can lead to exactly what textualists often bemoan: the personal preferences of judges creeping into their interpretations of statutes or the Constitution.

Although some writers have concluded that the inner workings and flaws of dictionaries make them completely unsuitable for use by judges and litigants, this Note has sought to provide a different approach, identifying the complications provided by dictionaries—some mentioned in previous articles, some new—and creating a broad framework centered upon avoiding those pitfalls. If textualists, and indeed all judges, can account for the dangers inherent in the use of dictionaries in legal interpretation, perhaps they can still use dictionaries to provide valuable insight without undermining the objective rationality that is central to legal discourse.

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238. *Id.* at 20–21.

239. *Id.* at 24.

240. One could attack the linguistics professors, whose brief supported the petitioners, for their own biases. But a proper argument would instead be directed to the validity of their findings. Further, this Section does not intend to imply that scientific linguistic analysis should automatically merit total deference. The point is that the Court had the benefit of this information, which is conceptually truer to textualist aims than dictionaries can hope to be, and engaged with it only minimally.