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Dictionaries 2.0: Exploring the Gap Between the Supreme Court and Courts of Appeals

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INTRODUCTION

The remarkable rise in dictionary usage by the Supreme Court since the mid-1980s has been a subject of considerable scholarly and media interest. We published an article in November 2013 that explored the Court's new dictionary culture in depth from empirical and doctrinal perspectives.[1] In a *Yale Law Journal* Note one year later, John Calhoun embraced some of our findings, criticized others, and—importantly—broadened the inquiry to identify a sizeable gap in overall frequency of citation to dictionaries between the Supreme Court and the federal courts of appeals.[2]

This gap in dictionary usage is our primary focus here. Previously we analyzed nearly 700 Supreme Court cases decided between 1986 and 2011, taken from three fields that together comprise substantial portions of the Court's statutory docket: labor and employment law; business and commercial law; and criminal law.[3] In this Essay, we examine dictionary use by federal courts of appeals in these same cases before the Supreme Court granted

1. James J. Brudney & Lawrence Baum, *Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras*, 55 WM. & MARY L. REV. 483 (2013). The article has been downloaded 600 times on SSRN alone. It was featured in the Washington Post, Robert Barnes, *Dictionary: A Way to Define an Argument*, WASH. POST, Feb. 3, 2013, http://www.washingtonpost.com/politics/dictionary-a-way-to-define-an-argument/2013/02/03/7bc28cb6-6ca1-11e2-ada0-5ca5fa7ebe79_story.html [http://perma.cc/MU7Q-HYVR], and was cited with approval in two recent books by distinguished federal circuit court judges, *see* ROBERT A. KATZMANN, JUDGING STATUTES 43 (2014); RICHARD A. POSNER, REFLECTIONS ON JUDGING 181 (2013).

2. John Calhoun, Note, *Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use*, 124 YALE L.J. 484 (2014).

3. Except for a small number of labor and employment law cases (fewer than ten percent) addressing constitutional disputes, our Supreme Court dataset includes only cases with statutory issues. *See generally* Brudney & Baum, *supra* note 1, at 496, 516-18.

certiorari and reviewed them. Our analysis encompasses majority opinions from the circuit courts in 109 cases where the Supreme Court subsequently made affirmative use of dictionaries and in 106 cases where the Court's decisions did not make use of dictionary definitions.[4]

We find that circuit courts cited to dictionaries in *only one-sixth of the cases* where the Supreme Court went on to use dictionaries after granting certiorari and in only about one of every nineteen cases in which the Court did not use dictionaries. The frequency of circuit court citation increased from the early Rehnquist Court period to the late Rehnquist and early Roberts Court years, but over that same period the gap between appeals court and Supreme Court references to dictionaries grew by substantial amounts. Further, when dictionary definitions were invoked, Supreme Court justices *relied on those definitions* to help justify the result (not simply as citations in dicta) over four-fifths of the time—twice as often as circuit court judges did when they cited dictionaries. Additional findings, reported below, support our conclusion that there are striking differences between the dictionary cultures in the Supreme Court and the courts of appeals.

We begin by setting forth brief background regarding how our approach to analysis of dictionary use differs from Calhoun's. Contrary to Calhoun's assertions, there are no direct disagreements between us when our respective Supreme Court datasets are properly compared.[5] We then describe our empirical approach to the courts of appeals data and present our findings, which relate to the basic gap in frequency of usage and reliance. We also describe some finer-grained observations regarding number and types of dictionaries used, and how often the circuit court judges and the justices define the same word in the same case. Finally, we suggest possible reasons why the Supreme Court uses and relies on dictionaries so much more often than circuit courts, and we outline plans for further research in this area.

4. We winnow out a small number of Supreme Court decisions and rely on a stratified sample of the Supreme Court cases that did not use a dictionary, for reasons explained *infra* Part II.A.

5. That judgment is based on our best understanding of the procedures that Calhoun used in his empirical analyses. *See infra* Part I.

I. CLARIFYING ISSUES IN SUPREME COURT DICTIONARY PRACTICES

A. Background and Previous Research

Calhoun frames his Supreme Court inquiry largely in relation to our own research on dictionary use.[6] Our article was an effort to combine breadth and depth in analysis of dictionary use in the Supreme Court. We focused on opinions for the Court while giving secondary attention to dissenting opinions in cases in which majority opinions used dictionaries. We analyzed overall frequencies of majority opinion use in three prominent statutory fields over time. We compared dictionary use across justices (and groups of justices classified by ideological position); examined patterns in the numbers, kinds, and publication dates of dictionaries used; and compared justices' use of dictionaries with use in the briefs in the same cases. We then looked more closely in doctrinal terms at the ways that justices employed dictionaries as bases for their conclusions about the meaning of statutes.

Calhoun provides a different perspective by emphasizing breadth over depth. The sole concern of his empirical inquiry is whether or not an opinion cites any dictionaries, and he breaks down dictionary use only by justice and ideological groups of justices. Rather than limiting himself to opinions for the Court, or to certain statutory fields, he examines all opinions in all cases.[7] Thus his inquiry overlaps with one part of what we did.

B. Clarifications in Response to Calhoun

Calhoun argues that we are mistaken on certain empirical matters. To address those critiques, we first need to consider differences between his set of Supreme Court opinions and ours. One difference is clear: Calhoun's data are not limited by legal area. Beyond this, his criteria are not entirely clear. He seems to include both non-statutory cases and statutory cases that fall within the time period of his study,[8] and he takes concurring and dissenting opinions into account even when they do not accompany a majority opinion citing to a dictionary.[9] Calhoun appears to combine those separate opinions with majority opinions in analyzing the percentages of cases in which the Court cited to

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6. Calhoun cites us twenty times in his Note, often supportively but also critically on a number of occasions.

7. As discussed in the paragraph that follows, there is some uncertainty about the attributes of the opinions that Calhoun analyzes.

8. *See* Calhoun, *supra* note 2, at 491. The cases Calhoun analyzes therefore appear to include a substantial proportion decided under constitutional provisions.

9. *Id.* at 495 (referring to Calhoun's search for "cases with *an opinion* with a substantive citation to at least one dictionary" (emphasis added)).

dictionaries.[10] It also appears, though this is less clear, that in addressing the frequency of dictionary citation by different justices, he analyzes both separate and majority opinions by each justice.[11] Because our primary analyses were limited to majority opinions, and more than ninety-five percent of the cases in our sample were statutory, our analyses and those done by Calhoun are not fully comparable. So we proceed with caution.

Two of the matters on which Calhoun perceives disagreement between his findings and ours are of some importance.[12] One concerns the timing of the growth in dictionary use. We accepted growth before and during the early 1980s as a given, based on the findings of other scholars.[13] We then described the increase that occurred in our dataset majority opinions from 1986-91, and the further growth that occurred during the 1990s and 2000s.[14] Calhoun argues that the sharpest increase in dictionary citation occurred in the late 1980s,[15] while we gave more emphasis to the growth in the early 1990s.[16]

Contrary to Calhoun's Note, we did not offer any conclusions about when the Court's increase in dictionary usage became "precipitous."[17] We did note that although Justice Scalia authored an exceptionally large number of separate opinions using dictionaries between 1986 and 1991, the Court's reliance on dictionaries in majority opinions in our dataset grew more substantially after 1991 than it had between the early 1980s and the 1986-91 period.[18] The data

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10. *Id.* at 495, 497-98 (referring to a dramatic increase in "the rate at which a majority, concurring, or dissenting opinion . . . cited a dictionary definition").

11. *Id.* at 507-08 & note 48 (suggesting that citation rate for individual justices is based on "average termly dictionary citation rate," presumably relating back to a rate that includes citations in concurring, dissenting, and majority opinions).

12. We overlook minor disagreements, although we note that at one point Calhoun criticizes our finding that Justice Souter is one of the more frequent dictionary users on the Court while invoking his own chart several lines later to support the claim that Souter is a relatively frequent citer of dictionaries, a claim that comports with our finding. *Id.* at 504.

13. *See* Brudney & Baum, *supra* note 1, at 494-95 (citing studies by Jeffrey Kirchmeier and Samuel Thumma).

14. *See id.* at 495-97 (reporting on our own data as well as data from a 1999 study by Kirchmeier and Thumma); 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, 252-53 & n.181 (1999).

15. Calhoun, *supra* note 2, at 490, 497.

16. Brudney & Baum, *supra* note 1, at 497.

17. *Compare* Calhoun, *supra* note 2, at 490, *with* Brudney & Baum, *supra* note 1, at 496-97.

18. *See* Brudney & Baum, *supra* note 1, at 497 & nn. 27-28 (reporting that while Justice Scalia authored more separate opinions using a dictionary during the 1986-91 period than he did separate opinions condemning the use of legislative history, the decline in legislative history use in majority opinions was "most precipitous" between 1988 and 1993 before leveling off over the next decade; by contrast, the growth in dictionary use stretched over a longer

Calhoun presents are not altogether clear on the timing of growth in dictionary use when compared to our findings, because his data are aggregated by decade. His somewhat different base of Supreme Court opinions—including dissents and concurrences—also provides a different vantage point on the growth, but there is no direct disagreement between him and us.

The other matter of perceived disagreement concerns ideology and dictionary use. We found no meaningful difference between liberal and conservative justices with respect to the frequency of dictionary use in opinions for the Court.[19] We also found, however, that conservative justices were significantly more likely to use dictionaries in dissenting opinions.[20] Calhoun finds a higher rate of dictionary use by conservative justices and concludes that our findings were incorrect.[21] He does not test for the statistical significance of the difference between conservatives and liberals, but it appears that in some periods the difference between them is large enough to be significant. At the same time, if Calhoun included dissenting and concurring opinions in his analyses of dictionary usage by individual justices, as he seems to have done, his findings are consistent with our finding of similarity between liberals and conservatives in majority opinions and a sharp difference between them in dissenting opinions.

In sum, we and Calhoun do not actually disagree on the timing in growth of Supreme Court dictionary use. Moreover, his perception of the differences between his and our findings on ideology and dictionary use appears to rest on his aggregation of majority and dissenting opinions that we analyzed separately. His findings on use of dictionaries in the Supreme Court are helpful because they corroborate and extend the findings of prior studies, not because they refute those findings.

Calhoun's more important contribution to the dictionaries debate involves his threshold finding of comparatively low citation rates in the courts of appeals. He reports that the overall rate of dictionary citations "slightly increased" from two percent of all decisions in 1950 to seven percent in 2010.[22] An increase by a factor of around three and a half might not be viewed as "slight" in some settings, but as Calhoun observes, the increase is quite modest compared to what has occurred in the Supreme Court during the same period, and especially in the past three decades. As a result, the overall rate of

period, beginning in 1986-91 but then growing more substantially over two decades after 1992). *See also infra* Table 2.

19. *See* Brudney & Baum, *supra* note 1, at 489, 524-26.

20. *See id*. 526-27 (reporting that conservative justices cited dictionaries in 41.2% of their thirty-four dissenting opinions, while liberal justices cited dictionaries in only 19.6% of their forty-six dissents, a statistically significant difference).

21. *See* Calhoun, *supra* note 2, at 490, 511.

22. *Id*. at 502.

dictionary use in the Supreme Court has become far higher than the rate in the courts of appeals.

We were intrigued by Calhoun's circuit court findings and decided to explore the divergence between Supreme Court and court of appeals usage in more depth while retaining a degree of breadth as well. By gathering data on circuit court dictionary usage for 215 cases in which we previously analyzed dictionary use (or lack thereof) in the Supreme Court, we are able to probe differences in approach between these two judicial levels by comparing dictionary use in the same cases.

II. DIVERGENT DICTIONARY PRACTICES IN THE COURTS OF APPEALS

A. Our Empirical Approach

Our analysis was based on two sets of cases involving both a Supreme Court and a circuit court decision. One set consists of all cases in our original Supreme Court dataset in which the Court's majority opinion *used a dictionary*, so long as the case came from a federal court of appeals that had issued an opinion. The second set is comprised of a one-fifth sample of the cases in our original dataset in which the Court's majority opinion *did not use a dictionary*, so long as the same two criteria were met.[23] This sample was stratified so that the proportions of cases in the three statutory fields and from different time periods matched the proportions in the full set of Supreme Court cases not using a dictionary. Most of our analyses include both sets of cases, and in those analyses we weighted cases in the second set so that their proportion was the same as it was in the original dataset. Altogether, our analyses included 215 cases or, with weighting, 639 cases.[24] Our procedure to identify dictionary use by courts of appeals in the selected cases involved a search for words or word

23. We sampled these "No Dictionary" Supreme Court cases (totaling over 500 opinions for the Court) in order to make close analysis of dictionary use practical for any circuit court decisions that did use a dictionary. We omitted from both sets of cases the small number of Supreme Court majority opinions in cases that came to the Court from a state supreme court or federal district court rather than the federal courts of appeals. We also omitted the even smaller number of cases where no court of appeals opinion existed or could be found on Westlaw.

24. Of the 215 cases, the Supreme Court used dictionaries in 109. Those cases were counted once. The 106 cases in which the Supreme Court did not use dictionaries represented a one-fifth sample of the cases in which we found no dictionary use. In order for cases without dictionary use to be represented in our analyses in proportion to their appearance in the full set of cases, we used a standard weighting procedure that counted each of these cases (and all the attributes of each case) five times, for a total of 530 cases without dictionary use and 639 cases total. For some analyses it was appropriate to count the cases without dictionary use only once. Where we have done so, we indicate this fact in the footnotes.

fragments related to such use, followed by reading of opinions to determine whether a dictionary actually was cited.[25] In both the Supreme Court and the courts of appeals, we focus on majority opinions.[26]

B. Findings on Frequency of Dictionary Usage

Altogether, Supreme Court majority opinions used dictionary definitions in 17.1% of the cases, compared with 7.2% for the courts of appeals.[27] Table 1 shows the relationship between use of a dictionary by the Supreme Court and use by the court of appeals deciding the same case. As the table indicates, courts of appeals were considerably more likely to use a dictionary in cases in which the Supreme Court subsequently did so than in other cases. That relationship may stem from attributes of cases that make dictionary use seem more appropriate, from the influence of dictionary citation by the court of appeals on the Supreme Court, or a combination of the two.

Table 1.

RATE OF DICTIONARY USE BY COURTS OF APPEALS IN RELATION TO SUPREME COURT DICTIONARY USE, IN PERCENTAGES

		CA majority use dictionary?		
		Yes	*No*	*Total*
SC majority use dictionary?	*Yes*	17.0	83.0	100.0
	No	5.2	94.8	100.0

Importantly, these findings also show that for cases in which the Supreme Court used a dictionary, the court of appeals had done so only about one-sixth

25. The terms used in the search were "dictionar," "ed." or "edition," "defin," and "mean." Calhoun used a more elaborate search procedure, primarily because of the need to locate all relevant opinions within a far larger universe of cases. *See* Calhoun, *supra* note 2, at 494-95.

26. Our unit of analysis was the Supreme Court decision. When the Court reviewed two court of appeals decisions in its own decision, the two cases were combined into one. For the few cases in which one of the court of appeals decisions had used a dictionary in the majority opinion and the other had not, we counted that as one-half dictionary use.

27. This and other percentages for the Supreme Court differ marginally from those presented in our earlier article because of the omission of certain cases and the sampling of others. To ensure that we did not undercount dictionary use by the courts of appeals, we counted as dictionary use any reference to a dictionary; for the Supreme Court, we adopted a slightly more rigorous rule—that the Court indicate that it was making use of the dictionary it cited, either to rely on or to deflect a definition in substantive terms. Because of this difference, our figures marginally understate the differences in dictionary use between the two levels and marginally overstate the differences in reliance on dictionaries when they are used.

of the time. The Supreme Court's dictionary use may relate to its reason for granting certiorari on statutory questions, which in recent decades is typically in order to resolve a conflict in the circuits or between a court of appeals and a state court of last resort.[28] Such conflicts invite the justices to undertake first-order inquiry into what has become the highly contested meaning of certain statutory text. At the same time, a statutory case on which certiorari is granted has either created or crystallized the circuit court conflict; it seems probable that the parties and/or the judicial law clerks have made the appellate court panel aware of this conflict prior to its decision. Yet court of appeals judges are much less likely than Supreme Court justices to invoke dictionary definitions when faced with these conflicting approaches to an issue of statutory interpretation.

Admittedly, there are instances when the circuit courts used a dictionary and the Supreme Court did not do so after granting certiorari in the same case. But these instances amount to a very small proportion of Supreme Court non-use cases, about one in nineteen. They do not detract from our essential finding that, when reviewing the same legal and factual controversy, the justices are far more inclined to deem dictionary definitions worthy of consultation than are their appeals court counterparts.

Temporal patterns are shown in Table 2. The table can be interpreted in two different ways, depending on the measure applied. Dictionary use by the Supreme Court was double that in the courts of appeals in 1986-91, and the same ratio existed in 2005-2010. In that sense, the relationship between the two levels remained stable (though the ratio was higher in between those two periods). But this stability meant that the gap in the frequency of dictionary use between the two courts grew quite considerably, from 3.5 percentage points in 1986-91 to 14.1 percentage points in 2005-2010. Thus, even when we control for the content of cases, there has been a very substantial—and growing—

28. On the general importance of intercourt conflict as a criterion for selection of cases, see, for example, THE SUPREME COURT: A C-SPAN BOOK FEATURING THE JUSTICES IN THEIR OWN WORDS 13 (Brian Lamb et al. eds., 2010), which quotes Chief Justice Roberts: "Our main job is to try to make sure federal law is uniform across the country." On the importance of conflict as a criterion in statutory cases, see STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 241, 243-44 (10th ed. 2013), which reports that approximately seventy percent of certiorari grants in the 1993 Term were based on conflict, and later discusses, as illustrative of certiorari jurisdiction, the Court's agreement to resolve conflicts in 11 cases involving statutory provisions between 1995 and 2011; and RICHARD L. PACELLE, JR. ET AL., DECISION MAKING BY THE MODERN SUPREME COURT 177, 178, 195-96 (2011), which reports the dominance of conflict as a criterion for hearing statutory economic cases. On the overall importance of conflict in Supreme Court jurisdiction, see Supreme Court Rule 10.

difference in dictionary use between the Supreme Court and the courts of appeals.[29]

Table 2.

RATE OF DICTIONARY USE IN MAJORITY OPINIONS BY TIME PERIOD, IN PERCENTAGES[30]

	Supreme Court Terms		
	1986-1991	*1992-2004*	*2005-2010*
Supreme Court	6.9	18.7	28.1
Courts of Appeals	3.4	6.4	14.0

C. Other Patterns in Dictionary Usage

We can gain a fuller sense of the comparison between the two levels of courts by considering other attributes of their dictionary usage. In this regard, there is a difference between citing a dictionary definition and actually relying on that definition as a basis for decision. In our earlier article, we gave special attention in doctrinal terms to instances where the Court used dictionaries to explain or justify its holding. Analyzing numerous case law examples, we explained how the Court relied on dictionaries in this manner either by contributing to a result reached primarily on other interpretive grounds (which we called ornamental use of dictionaries) or by helping to establish a result with such clarity that other resources, especially deference to administrative agencies and use of legislative history, were essentially ignored (which we called using dictionaries as a barrier).[31]

In the dataset for this Essay, 81.7% of the 109 Supreme Court majorities that invoked dictionary definitions relied on these definitions rather than merely citing to them in dicta or deflecting them as inconclusive or inapposite. By contrast, only 40.8% of the circuit court references to dictionary definitions involve actual reliance; almost three-fifths reflect background citation or some

29. Of course, multiple words can be defined in an opinion. In the set of cases that we analyzed, the mean number of words defined in Supreme Court majority opinions that used dictionaries (1.28) was about the same as the mean number in the courts of appeals (1.30).

30. Because the time period for each case is defined by the term in which the Supreme Court decided the case, the periods in which the courts of appeals decided the same cases begin and end a little earlier.

31. *See* Brudney & Baum, *supra* note 1, Parts IV.C-D.

form of deflection.[32] Thus, not only does the Supreme Court cite dictionaries far more often than the courts of appeals, but it is also twice as likely to rely on one or more definitions that it cites than are the courts of appeals. Put differently, the gap between the two levels in the importance of dictionary definitions to decisions is even greater than the frequency of citations to dictionaries suggests.

The balance between general dictionaries (such as the various "Webster's" dictionaries, the Oxford English Dictionary, and the American Heritage Dictionary) and legal and technical dictionaries (primarily Black's Law Dictionary) was about the same at the two levels—sixty-six percent general dictionaries in the Supreme Court, sixty-two percent in the courts of appeals. The two levels were also similar in the frequency with which they cited more than one dictionary definition for the word or phrase in question—thirty-seven percent in the Supreme Court, thirty-one percent in the courts of appeals.

One issue we discussed in our earlier article was the relationship between dictionary use by the Supreme Court and by briefs for the parties (or the federal government as amicus). We found a conspicuous divergence between the words for which the briefs used dictionaries and the words for which the Court's majority opinion did so.[33] Here, we explored the same questions in an analogous way, comparing the words for which the circuit courts used dictionaries with the words for which the Court's majority opinion did so in the same case. To start with, in the great majority of cases in which one or more dictionaries were cited at either level (eighty-three percent of the time), no dictionaries were cited at the other.[34] The fact that these two levels of appellate tribunals cannot even agree on whether any statutory terms require reference to dictionaries lends support to our earlier conclusion that the dictionary as an interpretive resource is being used in strikingly subjective ways.[35] Moreover, in the cases in which both the Supreme Court and the court

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32. The proportion for the courts of appeals reflects the weighted sample. The unweighted percentage is 48.0%. For examples of mere background citation, see U.S. v. Williams, 444 F.3d 1286, 1289 n.2, 1298 n.10 (11th Cir. 2006); Empagran S.A. v. Hoffman-LaRoche Ltd., 351 F.3d 338, 351 (D.C. Cir. 2002); and United Autoworkers v. Johnson Controls, 886 F.2d 871, 881 n.21 (7th Cir. 1989). For examples of deflection (that is, dictionary definitions considered but deemed inapposite or inconclusive), see Andrews v. TRW Inc., 225 F.3d 1063, 1067 (9th Cir. 2000); and Al-Khazraji v. Saint Francis College, 784 F.2d 505, 516 n.13 (3d Cir. 1986). By contrast, for an example of a dictionary definition being used as a barrier, see Robinson v. Shell Oil Co., 70 F.3d 325, 330 (4th Cir. 1995).

33. Brudney & Baum, *supra* note 1, at 532-33.

34. This percentage is based on data in which the cases without Supreme Court dictionary use were not weighted and in which the citation of a dictionary by one of two courts of appeals was counted as dictionary use at that level. If weighting is used, eighty-six percent of the cases with dictionary use at one level did not have dictionary use at the other level.

35. *See* Brudney & Baum, *supra* note 1, at 490-91.

of appeals used dictionaries, only thirty-three percent of the words defined by one were also defined by the other.[36] This finding further reinforces the implication of our prior analyses, where we concluded that dictionary use by the Supreme Court is "more casual and arbitrary than principled or systematic."[37]

In sum, there are deep and continuing differences in how Supreme Court justices and circuit court judges have approached dictionary usage over a twenty-five year period. We turn next to possible explanations for those differences.

III. ACCOUNTING FOR THE GAP

Our most notable findings involve disparities in frequency and depth of usage by courts of appeals and the Supreme Court. Although Calhoun identified this phenomenon in broad terms based on dictionary citations, our analysis of the identical set of cases from circuit courts and Supreme Court establishes the magnitude and nature of the gap in a context that is more focused and fine-grained.

Normative and empirical research on the use of various interpretive resources has long concentrated on the Supreme Court. More recently, some scholars have argued as a normative matter that interpretive approaches should not be uniform across the judiciary, given salient political or hierarchical differences between the Supreme Court and lower federal courts, or between federal appointed and state elected judges.[38] For example, with respect to the hierarchy of federal courts Aaron-Andrew Bruhl suggests that because Congress is unlikely to monitor or be aware of lower federal court decisions, interpretive doctrines such as valuing congressional acquiescence or crediting the disciplining effects of strict textualism may have no relevance in lower court

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36. Of the words for which the Supreme Court used dictionaries, fifty percent had dictionary definitions cited in the courts of appeals; coincidentally, of the words with dictionary citations in the courts of appeals, fifty percent had dictionary usage in the Supreme Court. Because our unit of analysis for this comparison is the word, we did not weight cases when analyzing words defined at one or both court levels.

37. Brudney & Baum, *supra* note 1, at 536-37.

38. *See* Aaron-Andrew Bruhl, *Hierarchy and Heterogeneity: How to Read a Statute in a Lower Court*, 97 CORNELL L. REV. 433 (2012) (arguing that lower federal courts should approach statutory interpretation differently from the Supreme Court); Aaron-Andrew Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215 (2012) (arguing that elected state court judges should approach statutory interpretation differently in a range of scenarios). *See generally* ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006) (offering an argument for formalist interpretive techniques based on the institutional capacities of judges and courts).

settings.[39] Empirical studies of circuit court interpretive approaches in more recent decades have produced interesting though inconclusive results regarding use of particular resources such as legislative history and canons.[40]

Our findings, based on decisions by two levels of the federal judiciary in the same cases, invite reflection as to what accounts for such dramatic interpretive divergence in dictionary usage between these two different levels. We propose that hierarchical differences in decision-making processes and institutional structure between the Supreme Court and the courts of appeals play a central role in accounting for the divergence.

A. Political Visibility and Exposure

In our earlier article, we offered a general and a more particularized explanation for the enormous increase in dictionary usage by the Supreme Court. At a general level, we suggested that dictionary use had become an oasis from which the justices sought to deflect charges of judicial activism. We contended that by citing dictionary definitions as linguistic authority for their conclusions about the meaning of statutory text, the justices subtly analogize dictionaries to legal authority and thereby seek to avoid being perceived as acting on the basis of ideology or untrammeled judicial discretion.[41] We also noted the especially large increase in dictionary use for criminal law cases. We suggested as an explanation that the justices were emphasizing ordinary meaning and clear notice in a field where defendants often are disadvantaged in terms of both education and resources for securing counsel, and where the stakes in court are exceptionally high.[42]

Calhoun speculates that our "oasis" explanation may have less resonance in the circuit courts, where judges are less well known, decisions are less carefully

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39. *See* Bruhl, *supra* note 38, at 459-61. Bruhl recognizes that these interpretive doctrines are contested in the Supreme Court setting; his point is that they have traction given the Court's high political visibility to Congress and interest groups in a way that they do not for lower court interpretive approaches.

40. *See* Frank B. Cross, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 180-91 (2009) (studying circuit court opinions from 1976-2005 and finding that courts increasingly reference textualism and canons and decreasingly reference legislative history starting in the early 1990s—although the number of references to legislative intent appear greatly to exceed those to textualism or canons even at the end of Cross's study period); Jason J. Czarnezki & William K. Ford, *The Phantom Philosophy? An Empirical Investigation of Legal Interpretation*, 65 MD. L. REV. 841, 856, 888-90 (2006) (studying Seventh Circuit non-unanimous opinions from 1997 to 2003 and finding that the median level of usage for legislative history across its judges was more than ten times as high as the usage of canons and about forty percent higher than use of the plain meaning rule).

41. *See* Brudney & Baum, *supra* note 1, at 499-500.

42. *See id.* at 541-43.

scrutinized for activism, and the public inadequately understands circuit court power and influence.[43] We agree with him up to a point. However, we found the "oasis" justification itself unsatisfactory in normative terms, concluding that it too often allows or encourages the justices to cherry-pick definitions under the guise of objectivity, and to rely on those definitions to foreclose consideration of highly relevant interpretive evidence from the enacting Congress and the implementing agency.[44] It may be that circuit court judges—relatively unaffected by the judicial activism critique—are more sensitive to or cautious about these risks of subjectivity and bias, and therefore less susceptible to being seduced by visions of an oasis.[45] Relatedly, several prominent circuit court judges have criticized the acontextual approach that dictionary use by courts tends to reflect if not promote.[46]

Our particularized explanation regarding criminal law does not appear to resonate in the courts of appeals. Within the cases in our current analysis, the Supreme Court used dictionaries at a twenty-five percent rate in criminal cases, compared with seventeen percent for commercial cases and twelve percent for labor and employment cases. In contrast, the rate of dictionary use in the courts of appeals varied little by field, and it was actually lowest in criminal cases (six percent, compared with eight percent in the two other fields). Perhaps because circuit courts review far more criminal appeals, including a large number that are routine and/or essentially fact-bound, these appeals are less often subject to close interpretive scrutiny. Appeals court judges accordingly may not view the universe of criminal statutory decisions as occasions for establishing broader commitments to the value of clear notice or the importance of ordinary meaning in text.

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43. Calhoun, *supra* note 2, at 515.

44. *See* Brudney & Baum, *supra* note 1, at 536-78.

45. To test this normative assertion, we would need to examine in more depth whether circuit court judges have increasingly embraced textualism, and relatedly whether they have eschewed reliance on legislative history, as has been demonstrated for the Supreme Court justices. *See generally* James J. Brudney & Corey Ditslear, *The Decline and Fall of Legislative History? Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras*, 89 JUDICATURE 220 (2006); Michael H. Koby, *The Supreme Court's Declining Reliance on Legislative History: The Impact of Justice Scalia's Critique*, 36 HARV. J. ON LEGIS. 369 (1999). Although Cross suggests a trend toward textualism and away from intentionalism, both he and Czarnezki and Ford find that references to legislative intent remain high in the circuit courts through the early 2000s. *See* CROSS, *supra* note 40.

46. Judge Posner did so in *United States v. Costello*, 666 F.3d 1040, 1044 (7th Cir. 2012). *See also* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y 61, 67 (1994); A. Raymond Randolph, *Dictionaries, Plain Meaning and Context in Statutory Interpretation*, 17 HARV. J. L. & PUB. POL'Y 71, 74 (1994).

B. Decision-Making Processes and Institutional Structure

The explanation we offer with respect to criminal law cases suggests how hierarchical differences in institutional structure may play a meaningful role in accounting for the divergence on dictionary use. More broadly, the Supreme Court consists of nine continuous repeat players: they decide all cases together, and over the past few decades there have been several periods of five or more terms—in one instance, eleven terms—with no changes in the Court's membership.[47] When one or two justices begin to invoke dictionaries on a regular basis, the subtle pressure on fellow justices to participate seems real. Whether out of simple respect for colleagues they interact with on 70 to 150 argued cases every Term,[48] or from a strategic need to retain members of a majority coalition, the justices appear relatively amenable to incorporating a new interpretive resource into their reasoning framework.[49]

By contrast, circuit courts lack anything close to the one-hundred percent repeat player element. Even for a smaller circuit, judges sit together only on a very small proportion of all cases.[50] The presence of numerous senior status

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47. These periods are the 1976-1980 Terms, the 1981-1985 Terms, the 1994-2004 Terms, and the 2010-2014 Terms. *See* LAWRENCE BAUM, THE SUPREME COURT 29 (11th ed. 2013); *Members of the Supreme Court of the United States*, U.S. SUP. CT., http://www.supremecourt.gov/about/members.aspx [http://perma.cc/VZ7Q-KEJ3].

48. The Court decided as many as 150 cases during some Terms in the late 1970s and early 1980s; in recent Terms the number of cases argued and decided has hovered around 70. *See* Adam Liptak, *The Case of the Plummeting Supreme Court Docket*, N.Y. TIMES, Sept. 29, 2009 (reporting that the Court decided more than 150 cases a year in early 1980s and now decides about half that many); *Opinions*, U.S. SUP. CT., www.supremecourt.gov/opinions/opinions.aspx [http://perma.cc/SF2G-947N] (listing 68 non-per curiam Court opinions for 2014 Term and 67 non-per curiam opinions for 2013 Term).

49. They also seem amenable to minimizing use of a resource that irritates or alienates one or more colleagues. *See* James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 160-69 (2008) (identifying and analyzing a trend to more restrained use of legislative history by liberal justices in majority opinions that Justice Scalia joins). The more liberal members of the Court have recently begun including qualifying language before discussing legislative history, including Justice Kagan in *Yates v. United States*, 135 S. Ct. 1074, 1093 (2015), stating that "legislative history, for those who care about it, puts extra icing on a cake already frosted"; Justice Sotomayor in *Hall v. United States*, 132 S. Ct. 1882, 1888 n.3 (2012), stating that "[f]or those of us for whom it is relevant, the legislative history confirms" the result; and Justice Breyer in *United States v. Tinklenberg*, 131 S. Ct. 2007, 2015 (2011), stating that "for those who find legislative history useful, it is worthwhile noting" that the history confirms the result.

50. The First Circuit, with six active judges, is the smallest of the federal circuits. If only those six judges heard cases, each judge would serve with a specific pair of colleagues in ten percent of all cases. When the Ninth Circuit is at its full strength of twenty-nine judges, the comparable rate is well under one percent. (Because of participation by visiting judges and

judges on the circuit courts leads to further dilution of repeat player possibilities.[51] Accordingly, the idea of a collegial or institutional culture regarding use of particular interpretive resources seems less likely to develop.

A related hierarchical factor is that the Supreme Court's acceptance of a case means new law will be made. Indeed, as noted earlier, the existence of circuit court disagreement on an issue of statutory meaning is the primary gateway to Supreme Court review.[52] And while the justices regularly cite precedent as a mantle of authority in disputes over statutory meaning,[53] the Court is seeking to resolve unaddressed problems, which means proceeding largely on an *ab initio* or *de novo* analytic basis starting with close textual analysis. Again by contrast, circuit court judges may be less disposed to view disputes on automatic appeal as presenting novel, or important and unresolved, matters of law. By relying more heavily on precedent (their own and the Court's), they have less occasion to begin from scratch with an analysis that invokes the need to unearth or create fresh ordinary meaning.

This behavioral predilection is especially likely to apply for the first or second circuit court that addresses a statutory issue, when a conflict has not yet arisen. But even appeals court judges who create or sharpen a circuit conflict do not know whether the Supreme Court will grant certiorari to make new law. Their focus in the midst of a heavy mandatory docket is primarily on resolving disputes presented by the parties before them rather than fashioning novel interpretive or doctrinal approaches.

In short, the routinized aspects of circuit court review, encompassing a substantial number of cases that turn on facts alone or on well-settled

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senior judges, the actual percentages are even lower.) These figures are based on the rules for determination of the number of possible distinct combinations of subsets of a full set, such as panels created from the full membership of a court. The formula is $n!/(k!(n\text{-}k!))$, where n (for our purposes) is the total number of judges on the court other than the judge in question, k is the number of panel members to be selected (two, in addition to the judge in question), and ! is the factorial of a number. For the relevant principles and the formula, see *Permutations and Combinations*, THE MATH FORUM @ DREXEL, http://mathforum.org/dr.math/faq/faq.comb.perm.html [http://perma.cc/R6SA-4C2M].

51. Federal judges may take senior status (a form of semi-retirement) if they are at least sixty-five years old and have served a minimum of ten years on the federal bench, so long as age in years and years of service add up to eighty. *See* 28 U.S.C. § 371. Senior status judges on the circuit courts generally continue to sit on panels reviewing appeals, often for many years; as of March 31, 2015, some ninety senior status circuit court judges were sitting in cases. *Federal Court Management Statistics, March 2015*, U.S. CTS., http://www.uscourts.gov/statistics-reports/federal-court-management-statistics-march-2015 [http://perma.cc/68RV-MN7B]. By contrast, Supreme Court justices cease to participate in any Supreme Court decisions once they relinquish their regular status on the Court.

52. *See supra* note 28 (discussing the importance of conflict as a criterion for the Supreme Court's granting of certiorari).

53. *See* James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 31 (2005).

precedent,[54] may contribute to the overall disparity in dictionary use between circuit courts and Supreme Court, as found by Calhoun. But even when circuit court cases raise sufficiently important and unsettled issues to be deemed "cert-worthy"—which is the focus of our dataset—the courts of appeals seem substantially less conditioned to pursue dictionary-based analysis.

By emphasizing the intensely collegial and predictably selective nature of Supreme Court review when compared with circuit court decision making, we do not mean to negate the influence of the Court's special political visibility and the justices' likely sensitivity to that role. It is doubtless true that multiple factors help to account for the difference in dictionary usage, especially given its magnitude. For this reason, the explanation we have outlined here is surely incomplete. At the same time, we are persuaded that other differences between the Supreme Court and the courts of appeals—related to dynamics of collegial decision making and comparative aspects of jurisdiction more than to political vulnerability—play an important role in accounting for the striking difference in the use of dictionaries that we and Calhoun have documented. Moreover, because our analysis focused on the same cases in the two levels of courts, we have established that the difference in dictionary use goes well beyond being a reflection of differences in the universe of cases decided by the Supreme Court and the courts of appeals.[55]

IV. DIRECTIONS FOR FUTURE RESEARCH

We have analyzed patterns in the use of dictionaries in the Supreme Court and the federal courts of appeals and offered possible explanations for the substantial difference in use and reliance on dictionaries at the two levels. More can be done to explore this difference and its sources. That is especially true in the current era, when dictionaries have become a highly visible and also controversial resource for judges who seek to interpret statutes.

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54. One possible metric for the proportion of routine cases decided by circuit courts is the ratio of reported to unreported decisions as classified by many, although not all, circuits. Between 2005 and 2014, the Second Circuit's ratio of unreported to reported decisions was 4.5 to 1. The Tenth Circuit's ratio was 3.4 to 1. On the other hand, the Seventh Circuit decided slightly more reported than unreported cases during this same ten-year period. All data for reported and unreported circuit court cases are on file with authors. Calculations are based on application of the Westlaw filter that distinguishes reported from unreported cases. We used the filter after conducting an initial search—for example, for Seventh Circuit criminal law cases.

55. It does seem likely that differences in the two sets of cases account for a portion of the difference in the dictionary usage. Indeed, at least in the first decade of the twenty-first century, the overall difference in dictionary usage that Calhoun depicts in his Figure 3, *see* Calhoun, *supra* note 2, at 502 fig. 3, appears to be larger than the difference in our set of cases. But without more precise data on Calhoun's cases, we cannot be certain of that.

We plan to explore dictionary use more deeply by comparing the Roberts Court from 2005 through 2015 with several federal circuits during the same period. Review of comparative decision making over the full decade will allow us to determine whether the gap between the Supreme Court and the courts of appeals has become stable or continues to grow. Close examination of multiple circuits also will tell us more about similarities and differences among them in dictionary use.

In addition, we can gain a broader perspective by comparing dictionary use with circuit courts' approach to other important interpretive resources. It might be that courts of appeals make less use of the full range of resources available to them because of differences in styles of opinions or approaches to the task of statutory interpretation. We expect to focus on legislative history, a quite different resource but one that also has been the subject of considerable controversy associated with substantial changes in Supreme Court usage. By comparing circuit court use of dictionary definitions and legislative history, we hope to develop a more complete sense as to the roots of the substantial differences in dictionary use between the Supreme Court and courts of appeals, differences that Calhoun identified and that we have examined more deeply in this Essay.

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