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# Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras

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OASIS OR MIRAGE: THE SUPREME COURT'S THIRST FOR  
DICTIONARIES IN THE REHNQUIST AND ROBERTS ERAS

JAMES J. BRUDNEY\* AND LAWRENCE BAUM\*\*

ABSTRACT

*The Supreme Court's use of dictionaries, virtually non-existent before 1987, has dramatically increased during the Rehnquist and Roberts Court eras to the point where as many as one-third of statutory decisions invoke dictionary definitions. The increase is linked to the rise of textualism and its intense focus on ordinary meaning. This Article explores the Court's new dictionary culture in depth from empirical and doctrinal perspectives. We find that while textualist justices are heavy dictionary users, purposivist justices invoke dictionary definitions with comparable frequency. Further, dictionary use overall is strikingly ad hoc and subjective. We demonstrate how the Court's patterns of dictionary usage reflect a casual form of opportunistic conduct: the justices almost always invoke one or at most two dictionaries, they have varied individual brand preferences from which they often depart, they seem to use general and legal dictionaries interchangeably, and they lack a coherent position on citing to editions from the time of statutory enactment versus the time the instant case was filed.*

*The Article then presents an innovative functional analysis of how the justices use dictionaries: as way stations when dictionary meanings are indeterminate or otherwise unhelpful; as ornaments when definitions are helpful but of marginal weight compared with more traditional resources like the canons, precedent, legislative*

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*history, or agency deference; and as barriers that preclude inquiry into or reliance on other contextual resources, especially legislative history and agency guidance. Ornamental opinions (the largest category) typically locate dictionary analysis at the start of the Court's reasoning, subtly conveying that the lexicographic method should matter more than other interpretive resources. Barrier opinions would have been inconceivable prior to 1987 but now occur with disturbing frequency: they elevate the justices' reliance on definitions in a radically acontextual manner, ignoring interpretive evidence from the enactment process and from agency experience.*

*Finally, the Article analyzes whether the Court's patterns of inconsistent dictionary usage, and its tendency to cherry-pick definitions that support results reached on other grounds, distinguish dictionaries from high-profile interpretive resources such as canons and legislative history that have been criticized on a similar basis. We contend that dictionaries are different from a normative vantage point, essentially because of how both wings of the Court have promoted them by featuring definitions frequently and prominently in opinions, and also how dictionaries are effectively celebrated as an independently constituted source of objective meaning (unlike the canons as judicial branch creations and legislative history as a congressional product). Yet our findings demonstrate that the image of dictionary usage as authoritative is a mirage. This contrast between the exalted status ascribed to dictionary definitions and the highly subjective way the Court uses them in practice reflects insufficient attention to the inherent limitations of dictionaries, limitations that have been identified by other scholars and by some appellate judges. The Article concludes by offering a three-step plan for the Court to develop a healthier approach to its dictionary habit.*

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“The writing of a dictionary ... is not a task of setting up authoritative statements about the ‘true meaning’ 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. *The writer of a dictionary is a historian, not a lawgiver.*”<sup>1</sup>

“[T]he acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny.”<sup>2</sup>

## INTRODUCTION

Over the past twenty-five years, the Supreme Court has substantially increased its use of dictionaries when construing statutory text.<sup>3</sup> Legal scholars link this remarkable proliferation to the rise of textualism and its intense focus on ordinary meaning. Many Justices invoke dictionary definitions as an objective and relatively

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1. S.I. Hayakawa, *How Dictionaries Are Made* (1939), in *THE SEAGULL READER: ESSAYS* 129, 130-31 (Joseph Kelly ed., 2d ed. 2008).

2. *Johnson v. United States*, 529 U.S. 694, 718 (2000) (Scalia, J., dissenting). See *infra* note 6 (providing extended discussion of the *Johnson* case); *infra* text accompanying notes 220-228.

3. See *infra* Part I.A. See generally Jeffrey L. Kirchmeier & Samuel A. Thumma, *Scaling the Lexicon Fortress: The United States Supreme Court’s Use of Dictionaries in the Twenty-First Century*, 94 MARQ. L. REV. 77 (2010) [hereinafter Kirchmeier & Thumma, *Scaling the Lexicon Fortress*] (discussing the high rate of the Supreme Court’s use of dictionaries within decisions since 1999); 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, 231 (1999) [hereinafter Thumma & Kirchmeier, *The Lexicon Has Become a Fortress*] (discussing the increase in dictionary usage within the Supreme Court decisions in final decades of the twentieth century).

This development has attracted some attention beyond the legal academy. See, e.g., Dennis Baron, *The Highest Dictionary in the Land?*, OUPBLOG (Oxford University Press) (June 23, 2013, 6:30 AM), <http://blog.oup.com/2013/06/scotus-marriage-definition-dictionary/> (discussing the Court’s frequent use of dictionaries in the context of the definition of marriage); Robert Barnes, *Dictionary: A Way to Define an Argument*, WASH. POST, Feb. 4, 2013, at A13 (discussing a preliminary version of our article).

Analyses of dictionary use by the Supreme Court, including our own, focus on traditional dictionaries. The justices have not yet made use of the online Urban Dictionary (*available at* [www.urbandictionary.com](http://www.urbandictionary.com)), a collection of slang terms, but many lower-court opinions have cited the Urban Dictionary. See Leslie Kaufman, *For the Word on the Street, Courts Call Up an Online Witness*, N.Y. TIMES, May 21, 2013, at A1 (discussing the Urban Dictionary and its use in court opinions). See also *infra* note 73 (examining illustrative court uses as well as particular concerns about reliance on Urban Dictionary by courts).

authoritative resource for discerning that ordinary meaning.<sup>4</sup> On the other hand, a chorus of critics has contended that, through their unrestrained use of dictionaries, textualist Justices are advancing a subjective and at times result-oriented approach to statutory interpretation.<sup>5</sup> There has been virtually no discourse among the Justices themselves regarding possible risks or benefits associated with dictionary reliance, even as that reliance continues to grow.<sup>6</sup> Such prolonged silence stands in marked contrast to the Court's internal debates regarding altered judicial attitudes toward the value of legislative history.<sup>7</sup>

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4. See generally Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 278 (1998); 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, 402 (2003); Lawrence M. Solan, *Finding Ordinary Meaning in the Dictionary*, in LANGUAGE AND THE LAW: PROCEEDINGS OF A CONFERENCE 255, 269 (Marlyn Robinson ed., 2003); Note, *Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437, 1440 (1994); Phillip A. Rubin, Note, *War of the Words: How Courts Can Use Dictionaries in Accordance With Textualist Principles*, 60 DUKE L.J. 167, 168 (2010); Jason Weinstein, Note, *Against Dictionaries: Using Analogical Reasoning to Achieve a More Restrained Textualism*, 38 U. MICH. J.L. REFORM 649, 650 (2005).

5. See, e.g., Aprill, *supra* note 4, at 315-21, 325-30 (criticizing Justice Scalia's dictionary use in four cases); Rubin, *supra* note 4, at 200-04 (criticizing Justice Scalia's dictionary use in a separate case); Hoffman, *supra* note 4, at 419-28 (criticizing the Court's dictionary reliance in three decisions in the 1990s); Solan, *supra* note 4, at 267-74 (same); see also Richard A. Posner, *The Spirit Killeth, but the Letter Giveth Life*, NEW REPUBLIC, Sept. 13, 2012, at 18 (reviewing ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012) and criticizing Justice Scalia's reliance on dictionaries as part of his "textual originalism").

6. *But cf.* ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 72, 415-19 (2012) (discussing the role of dictionaries in assisting a court to discern ordinary meaning). A rare instance in which two Justices debated the implications of dictionary usage was *Johnson v. United States*. See 529 U.S. 694, 706-07 n.9. In Justice Scalia's dissent, he criticized the majority's choice of dictionary definition as "fictitious" and added that the meaning assigned failed the "acid test" of "whether you could use the word in that sense at a cocktail party without having people look at you funny." *Id.* at 718-19 (Scalia, J., dissenting); see *supra* note 2 and accompanying text. Justice Souter for the majority responded that "relying on an uncommon sense of a word" was fully justified "when the ordinary meaning fails to fit the text" and would frustrate "the realization of clear congressional policy," adding that "[w]hen text implies that a word is used in a secondary sense, JUSTICE SCALIA's cocktail-party textualism ... must yield to the Congress of the United States." *Johnson*, 529 U.S. at 707 n.9. We discuss *Johnson* in more detail in Part IV.B.

7. See, e.g., *Bank One Chi. N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 276-78, 279-80 (1996) (Stevens, J., concurring, debating with Scalia, J. concurring); *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 610-12 n.4, 616-23 (1991) (White, J., majority, debating with Scalia, J., concurring). See generally James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB.

This Article aims to develop a deeper understanding of the Court's expanding appetite for dictionaries in the Rehnquist and Roberts eras. We explore different aspects of the Justices' dictionary use through an empirical examination of nearly 150 majority, concurring, and dissenting opinions from 1986 to 2011. Our dataset focuses on three statutory areas—criminal law, labor and employment law, and business and commercial law—in which the Justices have invoked a range of general, legal, and technical dictionaries.<sup>8</sup> Our findings are predictable in certain respects but surprising in many others.

Consistent with previous scholarship, we identify a major increase in usage over time that is evident for all three subject areas. Within the Rehnquist and Roberts eras, the most intriguing rise dates not from Justice Scalia's arrival in 1986 but from the arrival of Justices Souter, Thomas, and Breyer by the early and mid-1990s. In contrast with the sharp decline in legislative history use that followed right after Justice Scalia joined the Court,<sup>9</sup> dictionary usage in majority opinions doubled for all three subjects between the early Rehnquist terms (1986-91) and the remainder of the Rehnquist era. Usage has continued to rise since 2005, although not at quite the same steep rate.

We found that dictionary usage is more prevalent in criminal law cases than in the two civil law categories. Additionally, with respect to criminal law cases, the Justices use general dictionaries more often than in civil cases, and when referencing a dictionary they define more words per case in the criminal law area. We believe multiple factors may help explain these criminal law findings, including the higher stakes associated with a statutory violation and the related due process concerns of the Justices.

In the vast majority of instances across our dataset, the Justices use only one or two dictionaries to define a particular statutory term. Having reviewed a sample of briefs from one-seventh of the cases referencing dictionaries, we found that opinions for the Court

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L. 117, 161-62 (2008) (discussing ongoing and, at times, heated disagreement between Justice Scalia and other Justices concerning the utility of legislative history).

8. See *infra* Parts I.A, III (explaining our approach to coding for these three subject areas).

9. See *infra* notes 26-28 and accompanying text.

are highly selective about dictionary use in relation to what the litigants propose. Majority opinions generally use fewer dictionaries and define fewer words than have been offered by the parties or the federal government as amicus; in addition, majority opinions often make use of dictionaries and define words not mentioned in the parties' briefs. This selectivity, combined with the low number of dictionaries typically used to define a word, suggests that the Justices use dictionaries primarily to buttress positions they have already reached rather than to try and establish the true or truly applicable meaning of a contested word.

During our twenty-five year period, the heaviest dictionary users in our dataset include Justices Scalia, Thomas, Breyer, Souter, and Alito. The dictionary profiles for these Justices are individualized and distinctive. Justice Scalia opts more heavily for Webster's Second New International and the American Heritage Dictionary, general dictionaries that have been characterized as prescriptive in the lexicographic literature. Justice Thomas relies disproportionately on Black's Law Dictionary. Justice Alito is partial to Webster's Third New International and the Random House Dictionary, both regarded as descriptive. Justices Breyer and Souter are more eclectic: each is a frequent user of Black's, but Breyer also invokes Webster's Third and the Oxford English Dictionary (OED) with some regularity while Souter turns more often to Webster's Second. Indeed, even the Justices who make disproportionate use of one or two dictionaries are eclectic in that they frequently cite other dictionaries in particular cases. This pattern is consistent with a practice of seeking out definitions that fit a Justice's conception of what a word should mean rather than using dictionaries to determine that meaning.

At the same time, we found little apparent relationship between dictionary use and ideology in our dataset. Majority opinions by conservative Justices were not significantly more or less likely to cite dictionaries than majority opinions by liberal Justices. Additionally, dictionary use neither amplified nor constrained the ideological tendencies of liberal and conservative Justices with respect to outcomes. In contrast to previous findings involving the Court's



reliance on canons and legislative history,<sup>10</sup> the absence of any significant ideological relationships suggests that the Justices' dictionary use reflects a less purposive and more casual form of opportunistic conduct.

One further issue that has occasioned discussion among legal scholars is whether to rely on dictionaries from around the date of statutory enactment in an effort to reveal what might have been Congress's original intent or purpose in using the word, or from around the date the lawsuit was filed in order to reflect the understanding of readers who must comply with the statutory language today. Despite the possibility of a principled preference between these two time periods, the Court's practice—by subject and by individual Justice—suggests no coherent position on the issue.

Given our rich array of findings, we have some thoughts on their implications. The substantial growth in Supreme Court dictionary usage seems most likely to stem from the Justices' conception—subconscious or otherwise—that dictionaries are a valuable asset because they can be promoted to key audiences as objective and neutral proxies for ordinary meaning. The sharp increase occurred during a period when the Court's statutory decisions were being overridden with unusual frequency and the Justices were persistently criticized for ideological decisionmaking and a lack of judicial restraint. The asserted link between dictionaries and the discovery of ordinary meaning may well reflect the Court's search for an oasis from which to deflect or rebut charges of judicial activism. The perspective on dictionaries as authoritative, "law-like" interpretive resources is most closely associated with textualists such as Justices Scalia, Thomas, and Alito, but it also seems attributable to purposivists such as Justices Breyer, Souter, and Stevens.

A number of our findings, however, undermine the justification for dictionary use as promoting objectivity and principled analysis. The Court's tendency to rely on one or at most two dictionaries per case, the wide variation in dictionary brand preferences among the Justices, the fact that even Justices with "preferred" dictionaries are

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10. See *infra* Part III.A.3 at notes 146, 149 (discussing findings from prior studies by Brudney).

far from consistent in usage across individual cases, and the absence of a coherent approach to the time period distinction between statutory enactment and lawsuit filing, combine to suggest that this comparatively novel interpretive resource is being applied in strikingly subjective ways.

One might ask whether the Court's pattern of inconsistent dictionary usage, or its tendency to cherry-pick definitions that support results reached on other grounds, distinguishes dictionaries from high-profile interpretive resources such as canons or legislative history that have been criticized on a similar basis.<sup>11</sup> Our response to this question is that dictionaries *are* different from a normative vantage point because of how the Justices have, in effect, promoted them by frequently and prominently featuring dictionary definitions in their opinions. There has been an astonishing rise in dictionary usage by the Justices: from 3.3 percent of all decisions in the last five years of the Burger Court to 33.7 percent of our dataset decisions during the 2008-2010 Roberts Court Terms.<sup>12</sup> Unlike canons and legislative history, dictionaries have been invoked to a similar extent by liberal and conservative wings of the Court. Moreover, when the Justices cite dictionaries to help interpret statutory language, they typically do so as a first step before turning to other interpretive resources.

By using dictionary definitions in this way, the Justices have given them a special interpretive status, one that is derived from their proximity to the statutory text itself. Implicitly, the Justices have endorsed dictionary definitions for their non-ideological and objective veneer. In contrast with canons and legislative history, dictionaries are attractive to the Justices as an independently constituted source of meaning rather than an asset created by—and susceptible to manipulation from—the judicial or legislative branches. This attractiveness is reinforced by the Justices' seem-

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11. See, e.g., SCALIA & GARNER, *supra* note 6, at 376-78 (criticizing legislative history as prone to manipulation); Edward L. Rubin, *Modern Statutes, Loose Canons and the Limits of Practical Reason: A Response to Farber and Ross*, 45 VAND. L. REV. 579, 590 (1992) (criticizing canons on similar grounds).

12. See discussion of the 3.3 percent figure *infra* note 28, and discussion of the 33.7 percent figure *infra* Part III.A.1. The three subject-matter areas from our dataset on which the 33.7 percent figure is based cover a sufficiently broad range of decisions in both criminal and civil law fields to render the comparison a reasonable one.

ingly unreflective acceptance of dictionaries despite the cautions that scholars and some judges have repeatedly raised about their validity as a resource.

Yet, as our findings demonstrate, the image of dictionary usage as heuristic and authoritative is little more than a mirage. The Justices do not consult dictionaries to discover previously unknown word meanings but rather to choose a “correct” word meaning from various options. Although this process has involved considerable judicial discretion, dictionary definitions, as invoked by the Court, can confer a deceptive sense of objectivity and legitimacy even when they are a minor or peripheral contributor to the result. Such an effect becomes particularly troubling when dictionaries are given elevated status, effectively preempting analysis of a statute as a purposive communication drafted and negotiated among legislators and further shaped by implementing agencies.

In an effort to make sense of the Court’s opaque and subjective approach, we consider the Court’s dictionary usage decisions as performing certain distinct functions. One is limited and field-specific: in the criminal law area, the Justices’ dictionary-linked ordinary meaning approach fulfills a *notice* function for individuals faced with the possibility of severe penal sanctions.<sup>13</sup> The other three functions associated with dictionary use apply to all three areas that we examined. First, there are *way station* opinions, in which a Justice consults relevant dictionary meanings, recognizes that they are indeterminate or otherwise unhelpful, and concludes that the search for statutory meaning requires reliance on different contextual factors.<sup>14</sup> Second, there are *ornamental role* opinions, in which a Justice invokes dictionary meanings as support but in fact other resources—canons, precedent, legislative history and purpose, policy consequences, agency deference—carry far more weight in the Court’s reasoning.<sup>15</sup> Dictionaries contribute only marginal substantive value, but also add a certain authoritative gloss to the opinion’s interpretive fabric. Finally, there are *barrier* opinions, in which a Justice invokes the dictionary in conjunction with related “ordinary

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13. *See infra* Part IV.A.

14. *See infra* Part IV.B.

15. *See infra* Part IV.C.

meaning” arguments as effectively dispositive.<sup>16</sup> This approach enables the Court to preclude inquiry into or reliance on other contextual resources, especially resources derived from Congress, such as legislative history or purpose, and the Executive, in the form of deference to agency guidance.

We examine a cross section of Court cases to illustrate our broad functional categories. The way station opinions are refreshingly candid about the limited role dictionaries can and should play. The ornamental role opinions are easily the most numerous, and they tend to be authored by liberal Justices. These opinions elevate the dictionary’s status by featuring it as integral to statutory analysis even though other resources are ultimately more important. The consequent legitimization of dictionary usage helps give rise to the barrier opinions, authored primarily—if not exclusively—by conservative Justices. This third category highlights certain disturbing effects of dictionary usage.

Based on our empirical examination and doctrinal analysis, we conclude that dictionaries add at most modest value to the interpretive enterprise, and that they are being overused and often abused by the Court.<sup>17</sup> In consulting a very small number of dictionaries when searching for “ordinary meaning,” and in failing to announce and follow consistent practices or presumptions as to dictionary brands and their appropriate historical periods, the Justices have acted in a highly subjective manner. Indeed, they appear to behave as participants at a cocktail party in a different sense from the party envisioned by Justice Scalia in our opening quotation: they give selective attention to whatever definition suits their interests or value preferences while filtering out other definitional noise.<sup>18</sup>

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16. *See infra* Part IV.D.

17. *See infra* Part IV.E.

18. *See generally* Adelbert W. Bronkhorst, *The Cocktail Party Phenomenon: A Review of Speech Intelligibility in Multiple-Talker Conditions*, 86 ACTA ACUSTICA UNITED WITH ACUSTICA 117, 117 (2000), available at [http://ele.aut.ac.ir/~ahadi/Courses/Robust%20SP/References/Bronkhorst%20Cocktail\\_party%20Acta\\_acustica\\_2000.pdf](http://ele.aut.ac.ir/~ahadi/Courses/Robust%20SP/References/Bronkhorst%20Cocktail_party%20Acta_acustica_2000.pdf) (discussing studies “dealing with the intelligibility of speech presented against a background of competing speech[,]” i.e., the cocktail party effect); E. Colin Cherry, *Some Experiments on the Recognition of Speech, with One and with Two Ears*, 25 J. ACOUSTICAL SOC’Y AM. 975, 975 (1953), available at <http://www.ee.columbia.edu/~dpwe/papers/Cherry53-cpe.pdf> (publishing the first major scholarship on the cocktail party effect).

This subjectivity is especially troubling precisely because the Justices appear to view dictionaries as an unusually objective source of textual meaning. The contrast between the status ascribed to dictionaries and the way they are used in practice reflects insufficient attention to the inherent limitations of dictionaries and to the need to apply them with care when interpreting statutes. Further, the Justices' subjective dictionary culture may mislead lawyers faced with the responsibility to construct arguments for the Justices to review.

Relatedly and importantly, the thirst for dictionaries has too often encouraged the Court to minimize or ignore the legislative and regulatory contexts in which defined words are meant to be used. Any resolution of contested meaning should take thoughtful account of how a word is best understood as part of a purposive statutory communication. That in turn requires devoting more attention to what the enacting Congress and the implementing agency intended and focusing less on what a lexicographer's collection of prior or preferred uses suggests.

Part I of the Article provides an overview of the Court's substantial increase in dictionary usage and considers possible explanations for why the Court has embraced this relatively novel interpretive asset. Part II examines leading conceptual criticisms of the Court's newfound appetite for dictionaries, bringing together observations from appellate judges as well as legal scholars. Part III presents our empirical findings, including the methods we used to assemble our dataset. Part IV pursues aspects of these findings in doctrinal terms by analyzing illustrative decisions, and also explores implications of our results in a larger context.

## I. THE COURT'S EMBRACE OF DICTIONARIES

### A. *Striking Expansion in Usage*

Notwithstanding the availability of dictionaries since the dawn of the Republic, regular dictionary use in Supreme Court opinions is a very recent development. Jeffrey Kirchmeier and Samuel Thumma have assembled a dataset on dictionary usage by the

Justices.<sup>19</sup> Relying on their compilations, we calculate that from 1800 to 1969 the Court used dictionaries to define terms in a total of 145 opinions.<sup>20</sup> During the Burger Court years, from 1969 to 1986, the Justices used dictionaries in eighty-nine opinions—an increase from prior eras but still an average of only about five opinions per Term.<sup>21</sup>

Starting in the Rehnquist years, however, the Court experienced dramatic growth in dictionary usage. The Kirchmeier and Thumma data indicate that the Justices invoked dictionary definitions in 373 opinions during this nineteen-year period.<sup>22</sup> That is a 400 percent increase from the Burger era, even though the Rehnquist Court issued some 30 percent fewer total opinions than its predecessor.<sup>23</sup> Dictionary usage has continued to increase in the Roberts Court: during its first five Terms (through June 2010), the Justices relied on dictionaries to define a word or phrase in 138 opinions.<sup>24</sup> Taking the longer view, dictionary usage in the twenty-five years of the Rehnquist and early Roberts eras (October 1986 to June 2011) more than doubled the Court's total usage in the previous 186 years.

Our dataset, comprising nearly 700 cases decided since October 1986, reflects a steady and substantial increase in dictionary usage through the Rehnquist era and the Roberts years to June 2011. We

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19. See Kirchmeier & Thumma, *Scaling the Lexicon Fortress*, *supra* note 3, apps. A, B, C at 133-261; Thumma & Kirchmeier, *The Lexicon Has Become a Fortress*, *supra* note 3, apps. A, B, C at 303-562.

20. See Thumma & Kirchmeier, *The Lexicon Has Become a Fortress*, *supra* note 3, at 248-52 & n.179. We simply added the figures the authors presented for each decade through the 1960s, after determining that none of the sixteen opinions listed for the 1960s arose in the Burger era.

21. See *id.* at 252-53 & n.181. Of the ninety-six opinions listed for the 1980s, we determined that forty-nine arose in the Burger years and forty-seven in the Rehnquist Court.

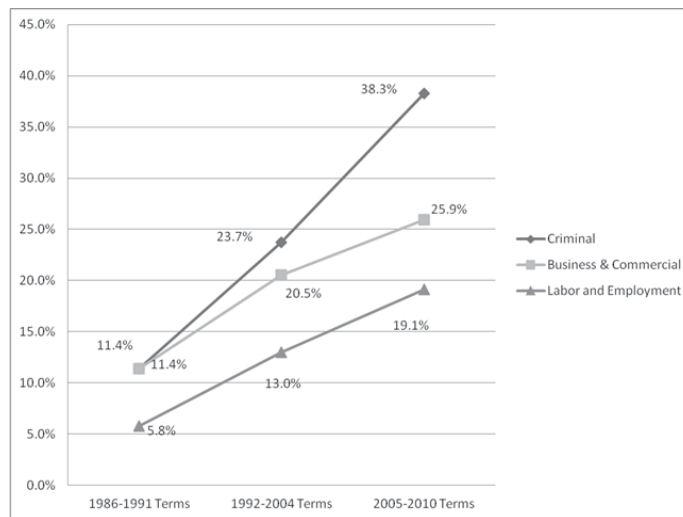
22. In addition to the forty-seven opinions from the 1980s, see *id.*, there were 239 opinions in the 1990s and eighty-seven in the final five Terms of the Rehnquist Court, October 2000 to June 2005. By reviewing the listings in Appendix B, opinions using dictionaries, classified by Justice and in reverse chronological order, we determined the breakdown for 2000 to 2005. See Kirchmeier & Thumma, *Scaling the Lexicon Fortress*, *supra* note 3, at 85, app. B at 180-221.

23. The Burger Court issued 2807 opinions for the Court and 6013 total opinions. The Rehnquist Court issued 2040 majority opinions and 4230 total opinions. See SUPREME COURT DATABASE, <http://scdb.wustl.edu/analysis.php> (last visited Sept. 21, 2013) (results on file with authors).

24. See Kirchmeier & Thumma, *Scaling the Lexicon Fortress*, *supra* note 3, app. B at 180-221 (relying on Appendix B classifications).

reviewed Supreme Court cases with published opinions in three different subject-matter areas. We examined 362 cases in labor and employment law, 218 cases involving criminal law statutes, and 115 cases related to business and commercial law.<sup>25</sup> Because Justices Souter, Thomas, and Breyer—among the more frequent dictionary users—had not all joined the Court until well into the Rehnquist era, we hypothesized that the largest increase in dictionary use might have come after the first six Rehnquist Terms. Figure 1 below illustrates how the Court's use of dictionaries in majority opinions has risen since the 1986 term. For each of our three subject areas, the proportionate use of dictionaries in majority opinions effectively doubled between the first six Terms of the Rehnquist Court and the ensuing thirteen Terms.

**Figure 1. Proportion of Majority Opinions Using Dictionary**



25. The labor and employment cases are those that directly address some aspect of the employment relationship under federal law. The criminal law cases are those that substantially implicate statutes listed under Title 18 of the U.S. Code. The business and commercial cases are those that substantially implicate statutes appearing in Title 15 of the U.S. Code. For further explanation on and more detail about our search techniques, see *infra* notes 124-27 and accompanying text.

Intriguingly, this pattern of *increased* dictionary usage over time suggests that Justice Scalia may not have been the same primary influence as he was in shaping the Court's *declining* appetite for legislative history. During his first five Terms on the Court, Justice Scalia authored more than a dozen opinions attacking the use of legislative history as an interpretive asset<sup>26</sup> and an even larger number of opinions invoking dictionary definitions as a positive interpretive resource.<sup>27</sup> The Court's overall reliance on legislative history experienced its most precipitous decline in the late 1980s and early 1990s, whereas our data indicate that the Court's thirst for dictionaries is more closely identified with the period after 1992.<sup>28</sup>

### *B. Shelter from the Storm*

A major factor in the post-1992 increase for our dataset is the impact of newly appointed Justices Souter (1990), Thomas (1991), and Breyer (1994). Each of these Justices authored close to the same number of dictionary-using majority opinions as Justice Scalia, although they all served for a shorter time period.<sup>29</sup> That Justices

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26. See Brudney & Ditslear, *supra* note 7, at 161 & n.164 (listing twelve concurring or dissenting opinions by Scalia attacking legislative history from 1987 to 1989). For additional separate opinions by Scalia attacking legislative history in 1990 and 1991, see, for example, *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 616-23 (1991) (Scalia, J., concurring); *Sullivan v. Finklestein*, 496 U.S. 617, 631-32 (1990) (Scalia, J., concurring in part); and *Taylor v. United States*, 495 U.S. 575, 603 (1990) (Scalia, J., concurring in part and concurring in judgment). See generally Joan Biskupic, *Scalia Sees No Justice in Trying to Judge Intent of Congress on a Law*, WASH. POST, May 11, 1993, at A4 (discussing Scalia's refusal to use committee reports to glean Congressional intent).

27. See Thumma & Kirchmeier, *The Lexicon Has Become a Fortress*, *supra* note 3, at 252 nn.180-81 (identifying fourteen separate Scalia opinions using dictionaries in 1986 to 1991 Terms in addition to eleven Scalia-authored majorities during same period).

28. See James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 35 (2005) (showing that Court's reliance on legislative history fell from 42.1 percent in 1984-88 to 22.6 percent in 1989-93 and remained between 22 and 25 percent for the next decade). A Westlaw search for dictionaries in majority and plurality opinions during the Burger Court shows that 28 of 846 cases (3.3 percent) used a dictionary from 1981-86, 19 of 802 (2.4 percent) from 1976-80, and 12 of 1159 (1 percent) from 1969-75. The 3.3 percent figure for 1981-86 rose to 8.0 percent of our dataset in 1986-91 and then 17.9 percent of our dataset for 1992-2004. See *infra* Part III.A.1.

29. Scalia served for all twenty-five Terms of our study. Souter served for twenty-one, Thomas for twenty, and Breyer for seventeen. See also *Members of the Supreme Court of the United States*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/>



who are far from avowed textualists—such as Justices Souter, Breyer, Stevens, and O’Connor—were relatively heavy dictionary users from the 1990s onward<sup>30</sup> suggests that there may be broader behavioral influences at work.

One possibility we considered is that the Justices are responding to the growing volume and length of federal statutes over recent decades. Perhaps generalist federal judges have come to believe that they lack sufficient subject-matter expertise to cope with Congress’s complex and, at times, opaque directives. They fall back on dictionaries and related textual maneuvering in order to avoid error or embarrassment in the face of information overload.<sup>31</sup>

We find this hypothesis interesting but less than wholly persuasive for several reasons. First, the number of public laws passed per Congress has diminished steadily in the past six decades and, in recent years, is less than three-fifths of what it was in the early 1950s.<sup>32</sup> The average length of enacted laws has substantially increased since 1951, but that steady increase began in the 1960s,<sup>33</sup> whereas the sharp rise in dictionary usage dates from the 1990s. Admittedly, the increasing length of the U.S. Code—criticized in the

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members.aspx (last visited Sept. 21, 2013).

30. See *infra* Part III.A.

31. This hypothesis was advanced by a federal judge and a legal scholar at a Yale Law School symposium. See Hon. Pierre N. Leval, U.S. Court of Appeals for the Second Circuit, and Thomas W. Merrill, Columbia Law School, Framing the Judicial Debate, Panel at Interpreting Federal Statutes: The Dysfunctional Dialogue Between the Courts and Congress Symposium (Mar. 28, 2012) (notes on file with Brudney, a participant on the panel).

32. Compare, e.g., 68 Stat. xxx (1995) (indicating that Congress enacted 781 public laws in the 83rd Congress (1953-54)), with 122 Stat. xviii (2010) (indicating that Congress enacted 460 public laws in 110th Congress (2009-10)).

33. Between 1951 and 1964, the pages per public law for each Congress ranged from 1.80 (84th Congress, 1955-56) to 3.00 (88th Congress, 1963-64). To calculate the pages per public law, we divided the total number of pages by the number of public laws enacted during the two sessions of a particular Congress. See, e.g., 75 Stat. 3-833 (1961) and 76 Stat. 3-1249 (1962) (enacting 885 public laws within 2076 pages and yielding 2.35 pages per public law for 87th Congress); 69 Stat. 3-726 (1955) and 70 Stat. 3-1126 (1956) (yielding 1.80 pages per public law in 84th Congress); 65 Stat. 3-769 (1951) and 66 Stat. 3-820 (1952) (yielding 2.66 pages per public law in 82nd Congress). The page averages rose to 3.59 in the 89th Congress (from 1965-66), to 7.01 by the 94th Congress (from 1975-76), to 9.38 by the 99th Congress (from 1985-86) and to 15.81 by the 104th Congress (from 1995-96). See, e.g., 119 Stat. 3-3619 (2005) and 120 Stat. 3-3702 (2006) (yielding 15.18 pages per public law for 109th Congress); 99 Stat. 3-1924 (1985) and 100 Stat. 3-4309 (1986) (yielding 9.38 pages per public law for 89th Congress); 79 Stat. 3-1313 (1965) and 80 Stat. 3-1603 (1966) (yielding 3.59 pages per public law for 79th Congress).

1970s as “hyperlexis”<sup>34</sup>—may have resulted in federal judges becoming less familiar with individual statutes. But the very recent jump in dictionary use by federal appellate courts extends to heavily litigated older laws, not just newer lengthy statutes.<sup>35</sup> Moreover, the heaviest dictionary use in our dataset was associated with criminal statutes. Although it is difficult to generalize across entire subject areas, these criminal laws appear to be shorter and to involve less complex terminology than their civil counterparts in employment discrimination, pension protection, securities regulation, or consumer law.<sup>36</sup>

A more likely explanation may well stem from growing criticism of the courts as activist and ideological. During the late 1970s and 1980s, Congress overrode Supreme Court decisions substantially more often than it had in the prior period.<sup>37</sup> These overrides were especially frequent in the ideologically charged areas of civil rights and criminal law.<sup>38</sup> When Congress in the 1991 Civil Rights Act overrode eleven Supreme Court decisions issued between 1985 and

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34. Bayless Manning, *Hyperlexis: Our National Disease*, 71 NW. U. L. REV. 767, 767-70 (1977). See also Richard J. Lazarus, *Congressional Descent: The Demise of Deliberate Democracy in Environmental Law*, 94 GEO. L.J. 619, 623-29 (2006) (identifying increased length of amendments to 1963 Clean Air Act—in 1970, 1977, and 1990—and describing amendments as primarily codifying, modifying, or rejecting various administrative regulations). But see Mila Sohoni, *The Idea of “Too Much” Law*, 80 FORDHAM L. REV. 1585, 1601-32 (2012) (discussing conceptual weaknesses in techniques for measuring hyperlexis and in proposals for remedying it).

35. We searched the U.S. Court of Appeals Westlaw database for majority or plurality opinions through April 2012 that cited to one of two older federal statutes and that also used a dictionary. Our Westlaw search found that, while only 6.0 percent of 779 circuit court majority opinions citing the Immigration and Nationality Act of 1952 used the term “dictionary,” that percentage rises to 12.8 percent when considering the subset of 227 circuit court majorities from 2002-12. Notes on file with authors. Similarly, while 12.3 percent of the 374 total majorities citing the Copyright Act of 1976 used the term “dictionary,” the number increases to 20.8 percent for the subset of 101 majorities from 2002-12. Notes on file with authors.

36. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2006) (codifying various definitions used throughout the enacted law); Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (2006); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78pp (2006); Fair Credit Reporting Act, 15 U.S.C. § 1681-1681x (2006); Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692p (2006).

37. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 338 (1991) (reporting increase from six Supreme Court overrides per congressional session from 1967-74 to twelve overrides per session from 1975-90).

38. See *id.* at 344-45; see also *infra* note 39 (listing eleven additional civil rights decisions overridden in 1991).

1990,<sup>39</sup> national media coverage reflected the widespread perception that the Rehnquist Court in the late 1980s had become dangerously activist on matters of statutory civil rights.<sup>40</sup>

Faced with a barrage of attacks on its neutrality and willingness to exercise restraint, the Court may have sought greater protection from such charges going forward. As Professor Lawrence Solan has observed, the shift in focus from “intended meaning” to “ordinary meaning” reflects a heightened concern to avoid being perceived as exercising judicial discretion and thereby “imposing [judicial] values on the people ... [and] reducing ... [the Court’s] legitimacy.”<sup>41</sup> Other scholars have observed that by citing dictionaries as “linguistic authority” for their language-based conclusions, the justices subtly analogize these dictionaries to the judicial precedent that serves as “legal authority” in their reasoning.<sup>42</sup> Reliance on dictionary definitions thus helps to confer an “aura of objectivity, precision, and certainty”<sup>43</sup> on the Court’s legal conclusions.

Ironically, almost a century earlier the Court faced charges that it was imposing its own ideological values by insisting upon “the theoretical objectivity of the plain meaning rule” and excluding consideration of legislative history.<sup>44</sup> In a parallel response over a

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39. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991); *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83 (1991); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987); *Library of Congress v. Shaw*, 478 U.S. 310 (1986); *Evans v. Jeff D.*, 475 U.S. 717 (1986); *Marek v. Chesny*, 473 U.S. 1 (1985). See generally Lori Hausegger & Lawrence Baum, *Behind the Scenes: The Supreme Court and Congress in Statutory Interpretation*, in GREAT THEATER 224, 224-31 (Weisberg & Patterson eds., 1998).

40. See, e.g., *Casting a Shadow Over Civil Rights*, N.Y. TIMES, April 27, 1988, at A26; Linda Greenhouse, *Job Ruling Makes It Clear: Court Has Shifted Right*, N.Y. TIMES, June 7, 1989, at A21; Judy Mann, *Judicial Activism at Work*, WASH. POST, June 9, 1989, at B3; *Never Too Late for White Men*, N.Y. TIMES, June 14, 1989, at A26. See generally THOMAS M. KECK, THE MOST ACTIVIST COURT IN HISTORY 165, 195 (2004).

41. Solan, *supra* note 4, at 278.

42. See Hoffman, *supra* note 4, at 412; James J. Weis, Comment, *Jurisprudence by Webster’s: The Role of the Dictionary in Legal Thought*, 39 MERCER L. REV. 961, 963 (1988).

43. Aprill, *supra* note 4, at 314.

44. Harry Willmer Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U. L.Q. 2, 24-25 (1939); see, e.g., *Caminetti v. United States*, 242 U.S. 470, 485 (1917) (stating that when language of statute has a plain meaning, “the duty of interpretation does not arise,” and “the sole function of the courts is to enforce it according to its terms”); *id.* at 496-500 (McKenna, J., dissenting) (emphasizing the importance of

period of several decades, conservative and liberal Justices increasingly came to rely on legislative history to insulate the Court from such attacks.<sup>45</sup>

Based on evidence of a downturn in congressional overrides since the 1990s,<sup>46</sup> one might infer that perceptions of the Court's objectivity and judicial restraint have improved in its new dictionary-consuming era. In a recent article, however, Professor Richard Hasen concludes that the decline is due not to renewed congressional or public respect but rather to deep political polarization within Congress that has seriously diminished override capacity.<sup>47</sup> Meanwhile, the Court has become more partisan in its alignment and also less favorably regarded by the public.<sup>48</sup>

The Court's embrace of dictionaries is, in our view, highly relevant to this volatile political climate. Some Justices may sincerely believe dictionaries to be objective and neutral interpretive resources whereas others may view them primarily as a tool to advance preferred outcomes. Perhaps the Justices act sincerely in some cases and more strategically in others. Before examining the results from our dataset, we consider certain criticisms leveled at

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"putting ourselves in the place of the legislators" even when the words have a clear meaning, and relying on legislative history as persuasive evidence in that case). *See generally* Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 379-81 (1907).

45. *See* James M. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 891 (1929) ("When the intent or meaning of the legislature is discoverable, statutory interpretation posits no serious problem except the political one of insistence on judicial humility."); *see, e.g.,* *United States v. Am. Trucking Assns.*, 310 U.S. 534, 542-49 (1940) (Reed, J.); *Bos. Sand & Gravel Co. v. United States*, 278 U.S. 41, 47-48 (1928) (Holmes, J.); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474-78 (1921) (Pitney, J.) *superseded by statute*, 29 U.S.C.A. § 52 (West 2013). *See generally* Jones, *supra* note 44, at 4-8, 23-26; Nicholas Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890-1950*, 123 YALE L.J. (forthcoming 2013) (documenting major increase in legislative history use by Court from 1940-45).

46. Richard Hasen, *End of the Dialogue? Political Polarization, the Supreme Court, and Congress*, 86 S. CAL. L. REV. 205, 209 (2013) (reporting that overrides declined to 2.8 per Term from 2001-12).

47. *See id.* at 233-42.

48. Since the appointments of Justice Alito to succeed Justice O'Connor and Justices Sotomayor and Kagan to succeed Justices Souter and Stevens, all conservative justices were selected by Republican presidents and all liberal justices by Democratic presidents. For evidence of the Court's loss of public support, see Adam Liptak, *Approval Rating for Justices Hits Just 44% in New Poll*, N.Y. TIMES, June 8, 2012, at A1; The Pew Research Center, *Supreme Court Favorability Reaches New Low* (2012), available at <http://www.people-press.org/files/legacy-pdf/5-1-12%20Supreme%20Court%20Release.pdf>.

the Court's dictionary practices. These concerns, expressed by appellate judges as well as legal scholars, reflect a series of reservations that have gone essentially unanswered.

## II. CONCEPTUAL CRITICISMS OF DICTIONARY USAGE

### A. *The Court's Reluctance to Value Larger Context*

The main users of dictionaries are not judges but students and adult learners, academics, and devotees of crossword puzzles and other word games.<sup>49</sup> Survey evidence indicates that the principal reasons people consult dictionaries are to establish the existence of a word, to check on a word's derivation or spelling, and to discover the meaning of a word unfamiliar or confusing to the user.<sup>50</sup> By contrast, judges almost never consult dictionaries to explore unfamiliar words; rather, they do so to select the "correct" or "appropriate" meaning from among definitional options.

This judicial mission is in tension with lexicographers' expressed reservations about the very term "definition." Lexicographers observe that it is more realistic to speak of their role as explaining the various ways a word has been used in the recent and distant past, rather than implying that a word's meaning can be "definitively" and precisely pinned down.<sup>51</sup> As emphasized by Professor (and later U.S. Senator) S.I. Hayakawa, a dictionary's function is to record prior uses of a word, not to make authoritative statements about the word's true meaning.<sup>52</sup>

In this connection, Judge Richard Posner recently expressed an overarching concern associated with dictionary usage by courts: "Dictionary definitions are acontextual, whereas the meaning of sentences depends critically on context, including all sorts of background understandings."<sup>53</sup> Two other respected appellate court judges have voiced similar skepticism about judicial reliance on

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49. See HOWARD JACKSON, *LEXICOGRAPHY: AN INTRODUCTION* 23 (2002). See generally B.T. SUE ATKINS & MICHAEL RUNDELL, *THE OXFORD GUIDE TO PRACTICAL LEXICOGRAPHY* 28-29 (2008).

50. See ATKINS & RUNDELL, *supra* note 49, at 29; JACKSON, *supra* note 49, at 23, 76.

51. See ATKINS & RUNDELL, *supra* note 49, at 407.

52. See Hayakawa, *supra* note 1, at 130-31.

53. *United States v. Costello*, 666 F.3d 1040, 1044 (7th Cir. 2012).

word definitions. They referred to dictionaries as “museum[s] of words ... rather than a means to decode the work of legislatures”<sup>54</sup> and as “word zoos” where “one can observe ... [a word’s] features ... but one still cannot be sure how the [word] will behave in its native surroundings.”<sup>55</sup>

To be sure, dictionary definitions can be both distinctive and nuanced. Definitions take several common forms, using concise analytic formulations, synonymous phrases, and specifications of what constitute typical or normal uses.<sup>56</sup> But although definitions may identify a prototypical use for a word, they also invariably include a broader range of acceptable uses. And when that word appears in a statute, two important aspects of context are implicated beyond definitional meaning.

The first is consideration of what the enacting Congress meant. It is entirely possible that members of Congress had both prototypical and broader definitional aspects in mind when drafting, debating, and approving the text. Accordingly, a court may wish to consult the legislative record rather than “assum[ing] that any instance of a statutory word that strays from the prototype is necessarily outside a statute’s scope.”<sup>57</sup> The second contextual consideration involves the statute’s intended audience. Contested statutory terms often identify a class of activities or things that share more than one salient feature.<sup>58</sup> Accordingly, a court may wish to take account of

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

55. A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL’Y 71, 74 (1994).

56. See ATKINS & RUNDELL, *supra* note 49, at 409; JACKSON, *supra* note 49, at 94-95.

57. Lawrence M. Solan, *The New Textualists’ New Text*, 38 LOY. L.A. L. REV. 2027, 2046 (2005); see, e.g., *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2002-04, 2007-08 (2012) (presenting disagreement over prototypical versus definitional meaning of “interpreter”); *Smith v. United States*, 508 U.S. 223, 228-33, 241-44 (1993) (presenting disagreement over prototypical versus definitional meaning of “use”); *Chisom v. Roemer*, 501 U.S. 380, 395-402, 410-13 (1991) (presenting disagreement over prototypical versus definitional meaning of “representative”).

58. See, e.g., *Smith*, 508 U.S. at 228-32 (concluding that a firearm may be “used” as a weapon or as an instrument for barter); *Chisom*, 501 U.S. at 398-400 (concluding that a “representative,” as an individual who has prevailed in a popular election, may cover elected judges as well as legislators).

the audience to whom the word or provision is addressed when deciding which feature is determinative.<sup>59</sup>

For example, consider the meaning of the word “interpreter” in a federal statute that authorizes district courts to include “compensation of interpreters” among the costs that may be awarded to prevailing parties.<sup>60</sup> In *Taniguchi v. Kan Pacific Saipan, Ltd.*, the Court relied primarily on dictionaries to conclude that the ordinary meaning of “interpreter” covers oral translation but *not* the costs of translating documents.<sup>61</sup> The majority opinion based its ordinary meaning conclusion on a survey of fourteen dictionaries—ten general dictionaries and four legal dictionaries.<sup>62</sup>

The majority recognized that numerous dictionaries defined “interpreter” simply as someone who translates orally.<sup>63</sup> On the other hand, the Court found many others were more expansive, referencing the interpretation of words written or spoken,<sup>64</sup> or describing a person who translates, “esp orally[,]”<sup>65</sup> from one language to another. The majority invoked a usage explanation of “esp” contained in a separate volume supplementing one of these dictionaries, and reasoned that because, under this explanation, oral translation was “the most common meaning” of interpreter, it should be deemed the ordinary meaning.<sup>66</sup>

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59. See *In re Erickson*, 815 F.2d 1090, 1092 (7th Cir. 1987) (Easterbrook, J.) (discussing why meaning of “mower” in Wisconsin statute that exempts certain agricultural equipment from debtor’s civil judgment obligations has changed over time, based primarily on audience of farm operators at whom law is aimed); see also *Lenox, Inc. v. Tolson*, 548 S.E.2d 513, 517 (N.C. 2001) (stating that taxing provisions are interpreted in favor of the taxpayer).

60. See 28 U.S.C. § 1920(6) (2006) (as amended by the Court Interpreters Act of 1978).

61. 132 S. Ct. 1997, 2007 (2012).

62. See *id.* at 2002-04, 2003 n.2 (Alito, J., majority). This review of fourteen dictionaries is highly anomalous; the Court usually consults only one or two dictionaries in its opinions. See *infra* Part III.B.

63. *Id.* at 2002-03 (citing AMERICAN HERITAGE 685 (1978); CHAMBERS TWENTIETH CENTURY 686 (1973); 5 OXFORD ENGLISH DICTIONARY 416 (1933); BLACK’S LAW DICTIONARY 953, 954 (4th ed. 1968); W. ANDERSON, A DICTIONARY OF LAW 565 (1888); B. ABBOTT, DICTIONARY OF TERMS AND PHRASES USED IN AMERICAN OR ENGLISH JURISPRUDENCE 639 (1878)).

64. *Id.* (citing BALLENTINE’S LAW DICTIONARY 655 (3d ed. 1969)).

65. *Id.* at 2002-03, 2003 n.2 (citing CASSELL’S ENGLISH DICTIONARY 617 (4th ed. 1969); CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 566 (6th ed. 1976); FUNK & WAGNALL’S NEW COM-PREHENSIVE INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE (1977); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1182 (1976); 1 WORLD BOOK DICTIONARY 1103 (C. Barnhart & R. Barnhart eds., 1977)).

66. *Id.* at 2003 (quoting 12,000 WORDS: A SUPPLEMENT TO WEBSTER’S THIRD 15a (1986)).

Rather than focusing so heavily on the dictionary, the Court might have instead begun by considering the legal audience at which the statutory section authorizing costs is aimed, namely district courts. Parenthetically, a focus on legal dictionaries as more relevant than general dictionaries might have left the semantic inquiry in equipoise.<sup>67</sup> More important, district judges have awarded document translation and oral translation costs for decades under the federal statute, both prior to and following the 1978 enactment of language authorizing compensation for interpreters.<sup>68</sup> As district courts have recognized, court interpreters operate in order to assure that relevant foreign-language communications are accessible to the court and the parties. In fulfilling this responsibility, interpreters often perform tasks in the courtroom that require both oral and written translation work.<sup>69</sup> Perhaps the prevailing pre-Act and post-Act understandings among district courts regarding court interpreters should matter more than even a thorough review of dictionary definitions.

Similarly, the Court might have focused on Congress's purpose in enacting the 1978 Court Interpreters Act. The law was evidently meant to expand access to interpretation services in order to "insure that all participants in our Federal courts can meaningfully take part."<sup>70</sup> This purpose does not seem compatible with an interpreta-

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67. Of the two twentieth-century legal dictionaries the majority invoked, Ballentine's 1969 edition defined interpreter as "one who interprets words written or spoken in a foreign language," *BALLENTINE'S LAW DICTIONARY* 655 (3d ed. 1969), whereas Black's 1968 edition defined interpreter as someone "sworn at a trial to interpret the evidence of a foreigner ... to the court" adding that "interpret" meant, in relevant part, "to translate orally," *BLACK'S LAW DICTIONARY* 953-54 (rev. 4th ed. 1968). The definition in a later Black's edition was broader, referencing "a person who translates, esp. orally, from one language to another." *BLACK'S LAW DICTIONARY* 838 (8th ed. 2004). One might infer that this broadening reflects an appreciation for developing district court practices, especially given that Black's derives its definitions from a review of court decisions. *See infra* Part II.B.2. The majority focused on dictionaries published around the time of the 1978 Court Interpreters Act, so it probably did not consider any post-1978 changes to be relevant. Yet, insofar as the majority's choice of dictionaries targets the enacting Congress, its refusal to consider evidence of contemporary district court practices or legislative purpose is troubling.

68. *See Taniguchi*, 132 S. Ct. at 2008-09 (Ginsburg, J., dissenting) (citing multiple lower court decisions before and after 1978).

69. *See id.* at 2010 (discussing in-court sight translation facilitated by written translation preparatory work, and transcribing a foreign language recording in order to translate it in court).

70. *See id.* at 2009 (quoting S. REP. NO. 95-569, at 1 (1977)).



tion that eliminates access to cost awards for all document translation when such access had been available before 1978.

The Court's holding in *Taniguchi* may well be supportable based on one or both of these non-lexicographic settings. But by approaching dictionary definitions as presumptively authoritative, the majority effectively preempted considerations of larger context. Background understandings of the statute's intended audience and the statute's enactors were heavily discounted. For the majority, dictionary definitions could be overcome only if the larger contextual evidence established that "Congress *must have intended* to dispense with the ordinary meaning of 'interpreter.'"<sup>71</sup>

This formulation arguably places the cart before the horse. Many judges and legal scholars have contended that ordinary meaning in a statute is not "ordinary" if it fails to accommodate statutory context from the start.<sup>72</sup> We noted earlier that judges using dictionaries are not discovering the meaning of an unfamiliar word but rather selecting an appropriate definition for a familiar word from among multiple options.<sup>73</sup> When considering these definitional choices it would seem that a formative—not simply reactive—factor should be the context in which the word appears, including the

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71. See *id.* at 2006 (Alito, J., majority) (emphasis added).

72. See, e.g., *United States v. Costello*, 666 F.3d 1040, 1044 (7th Cir. 2012); Easterbrook, *supra* note 54, at 67; Randolph, *supra* note 55, at 73-74; Aprill, *supra* note 4, at 278; Solan, *supra* note 4, at 267-69.

73. See *supra* text accompanying notes 50-51. In recent years, a number of courts have sought to discover unfamiliar connotations for a familiar word or phrase by referencing the Urban Dictionary, a crowdsourced collection of definitions for slang words that is available on the Internet ([www.urbandictionary.com](http://www.urbandictionary.com)). See, e.g., *Brown-Baumbach v. B&B Auto. Inc.*, 437 F. App'x 129, 135 n.2 (3d Cir. 2011) (relying on Urban Dictionary to define "to get busy" as "to have sex" in a sexual harassment case); *State v. Lumpkins*, 2013 WL 1296746, at \*4 (Wis. Ct. App. Apr. 2, 2013) (relying on Urban Dictionary to define "jack" as "to steal" in appeal from an armed robbery conviction).

Some observers have raised quality control reservations about Urban Dictionary, noting that unlike Wikipedia and other crowdsourced websites, its definitions cannot be edited or removed even when they are incorrect. See Pedro Celis, *Should Courts Use Urban Dictionary to Define Slang?*, LAW, TECH. & ARTS BLOG (July 8, 2013), <http://wjlta.wordpress.com/2013/07/08/should-courts-use-urban-dictionary-to-define-slang/>. In addition, "funny" is apparently the primary reason people vote for an Urban Dictionary Entry, which reinforces quality control concerns. See Kaufman, *supra* note 3, at A1. See generally Jason C. Miller & Hannah B. Murray, *Wikipedia in Court: When and How Citing Wikipedia and Other Consensus Websites is Appropriate*, 84 ST. JOHN'S L. REV. 633, 635, 653-55 (2010) (advocating use of Urban Dictionary in some settings because "slang is hard to define and constantly evolving" but also recognizing risk of inappropriate uses).

evident or reasonably inferrable intentions and perspectives of enacting lawmakers and, relatedly, persons at whose conduct the law is aimed.<sup>74</sup>

### *B. The Court's Indifference to Dictionary Taxonomy*

The concern that court inquiries into ordinary meaning may be systemically undervaluing statutory context relates to the judicial use of any type of dictionary. In addition, legal scholars have identified problems related to judicial selection of certain kinds of dictionaries rather than others. A diverse taxonomy exists among dictionaries, and lexicographers have emphasized the importance of these differences.<sup>75</sup> We focus here on certain sets of distinctions potentially implicated by the Supreme Court's use of dictionaries in our dataset.

#### *1. Prescriptive Versus Descriptive Dictionaries*

There is a longstanding debate involving lexicographers and commentators as to whether a dictionary's primary purpose is to serve as a standard of correctness telling people how they *should* use words, or rather as a more neutral describer of how words *are* used in daily speech and writing.<sup>76</sup> The debate achieved popular

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74. See Stanley Fish, *There Is No Textualist Position*, 42 SAN DIEGO L. REV. 629, 631, 644-45 (2005) (arguing that word meaning is inextricably bound up with the intentions of the word's author—a dictionary provides a record of the intentions of prior speakers when using a certain word, whereas a statutory text means only what its authors intend). It also is worth noting that congressional lawmakers have not incorporated dictionaries as an approved source for interpreting their enacted texts, nor do they appear to consult dictionary definitions when drafting statutes. See Aprill, *supra* note 4, at 299; Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside: An Empirical Study of Legislative Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 938 (2013); Nicholas S. Zeppos, *Legislative History and the Interpretation of Statutes: Toward a Fact Finding Model of Statutory Interpretation*, 76 VA. L. REV. 1295, 1320-21 (1990).

75. See generally ATKINS & RUNDELL, *supra* note 49, at 24-27 (surveying types of dictionaries); SIDNEY I. LANDAU, *DICTIONARIES: THE ART AND CRAFT OF LEXICOGRAPHY* 7-42 (2d ed. 2001) (same).

76. See generally Thumma & Kirchmeier, *The Lexicon Has Become a Fortress*, *supra* note 3, at 242. Some early dictionaries identified a correct or proper way to use particular words, and correspondingly stigmatized certain alternative uses, or other words. See JACKSON, *supra* note 49, at 64-65; HERBERT C. MORTON, *THE STORY OF WEBSTER'S THIRD: PHILIP GOVE'S CONTROVERSIAL DICTIONARY AND ITS CRITICS* 6-7, 84-86, 138-39 (1994).

currency when Webster's Third New International Dictionary was published in 1961 as an avowedly descriptive volume that minimized or withheld editorial judgments in contrast to some of its predecessors.<sup>77</sup> This was followed by publication of the American Heritage Dictionary of the English Language in 1969, proclaiming that "in these permissive times ... it would add the essential dimension of guidance" by employing "usage context indicators such as 'slang,' 'nonstandard,' or 'regional.'"<sup>78</sup>

The distinction between prescriptive and descriptive dictionaries in recent decades was never as substantive as the rhetoric suggests. Dictionary users tend to assume that definitions are largely prescriptive whereas lexicographers view meaning as dependent on usage.<sup>79</sup> In the twenty-first century, all general dictionaries are fundamentally descriptive; differences between Webster's Third and American Heritage are likely to be relatively modest, involving usage labels such as "nonstandard" or "erroneous" with respect to certain words rather than wholesale conflicts in definitional approaches.<sup>80</sup>

The distinction, however, does seem to matter to certain Justices, particularly Justice Scalia. As we explain in Part III, Scalia relies on Webster's Second and American Heritage—identified as belonging to the prescriptive camp—far more than Webster's Third, the poster child for descriptive dictionaries. This preference is not

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77. See MORTON, *supra* note 76, at 79, 87-88. The backlash to Webster's Third Edition was both immediate and widespread. See, e.g., Wilson Follett, *Sabotage in Springfield: Webster's Third Edition*, THE ATLANTIC MONTHLY, Jan. 1962, at 73; Sydney J. Harris, *Good English Ain't What We Thought*, CHI. DAILY NEWS, Oct. 20, 1961, at 10; *Webster's New Word Book*, N.Y. TIMES, Oct. 12, 1961, at 28; see also Geoffrey Nunberg, *When a Dictionary Could Outrage*, N.Y. TIMES, Sept. 25, 2011, at 35.

78. William Morris, Introduction, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE vi-vii (William Morris ed., 1969).

79. See MORTON, *supra* note 76, at 85; E-mail from American Dialect Society, on Behalf of Jonathan Lighter, to author (Aug. 30, 2012, 10:39 EST) (on file with author).

80. See E-mail from Steven Pinker, Chair of American Heritage Usage Panel, to author (Aug. 30, 2012, 13:29 EST) (on file with author); see also Steven Pinker, *False Fronts in Language Wars*, SLATE (May 31, 2012, 6:50 AM), [http://www.slate.com/articles/arts/the\\_good\\_word/2012/05/steven\\_pinker\\_on\\_the\\_false\\_fronts\\_in\\_the\\_language\\_wars\\_.html](http://www.slate.com/articles/arts/the_good_word/2012/05/steven_pinker_on_the_false_fronts_in_the_language_wars_.html) (discussing arguments regarding viewing dictionaries as prescriptive rather than descriptive and vice versa); Posting of Steve Kleinedler, Executive Editor of the American Heritage Dictionary, to ADS-L@LISTSERV.UGA.EDU (Aug. 30, 2012) (on file with author) (discussing the American Heritage Dictionary's databases).

inadvertent: Scalia has disparaged Webster's Third in his opinions as "widely criticized for its portrayal of common error as proper usage"<sup>81</sup> and in his recent book as "notoriously permissive."<sup>82</sup> To the extent that Justice Scalia acts on his criticism by regularly preferring certain dictionaries to others, this principled preference may operate to constrain a purely subjective approach. On the other hand, if Justice Scalia's choice of definitions reflects a distaste for "permissive" or "improper" usages, he may be expressing a belief that dictionaries can and should produce a correct meaning for statutory terms.

## 2. *General Versus Legal Dictionaries*

Unlike general dictionaries that rely on citation files or electronic corpora to identify word usages,<sup>83</sup> legal dictionaries such as Black's rely on judicial opinions as their primary citation source.<sup>84</sup> As Professor Ellen Aprill has observed, this is closer to a prescriptive definitional approach in that judicial interpretations are self-conscious efforts by experts to establish what words are supposed to mean, rather than collected examples of word usage from a wider spectrum.<sup>85</sup> Moreover, insofar as Black's is in large part a synopsis of court opinions, it is puzzling that the Justices would rely on a dictionary editor's characterization of judicial materials rather than analyzing those materials themselves.<sup>86</sup> Still, if legal dictionary definitions reflect some form of consensus among courts, they might be viewed as superseding general dictionary definitions in the identification of ordinary meaning for law-related words or phrases.<sup>87</sup> Alternatively, one might regard the two dictionary

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81. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 228 n.3 (1994).

82. SCALIA & GARNER, *supra* note 6, at 418.

83. See ATKINS & RUNDELL, *supra* note 49, at 48-57 (discussing two main forms of empirical language data used by lexicographers and describing shift after 1980 from reliance on millions of collected citation files to reliance on electronic corpora designed to capture objective evidence of language in use).

84. See generally Aprill, *supra* note 4, at 303-10 (discussing development of American law dictionaries from mid-nineteenth century to present).

85. See *id.* at 309.

86. We are indebted to Larry Solan for this insight.

87. Even with judicial consensus as to a word's accepted meaning, changes in legal usage by courts, legislatures, or agencies may result in that word acquiring a different meaning in

approaches as complementary, given that general dictionaries may at times define a law-related word in more detailed or fine-grained terms than a legal dictionary does.<sup>88</sup>

Legal scholars have criticized the Court's inconsistency and lack of explanation regarding when it views a legal dictionary as a relevant source and also why it opts to rely in particular instances on a legal dictionary alone, as opposed to a general dictionary alone, or both types of dictionaries.<sup>89</sup> The Court's practices in our dataset lend support to these criticisms. The Justices invoke Black's to define traditional legal terms such as "motion"<sup>90</sup> and "felony,"<sup>91</sup> but also for common words like "use"<sup>92</sup> and "occur."<sup>93</sup> And with respect to more technical law-related terms, the Court sometimes looks for meaning in legal dictionaries alone,<sup>94</sup> sometimes in general dictionaries alone,<sup>95</sup> and sometimes in both.<sup>96</sup> Whether the Justices believe that these two different types of dictionaries perform distinct functions in pursuit of ordinary meaning or they are simply interchangeable remains a mystery.

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a specific legal setting. *See* Aprill, *supra* note 4, at 309. The preface to Black's sixth edition (1990) included a cautionary note that "[t]he language of the law is ever-changing" and "[a]ccordingly, a legal dictionary should only be used as a starting point for definitions." BLACK'S LAW DICTIONARY iv (6th ed. 1990). Neither the seventh nor the eighth editions include this prefatory warning. *See* BLACK'S LAW DICTIONARY ix-xviii (8th ed. 2004) (including preface to 7th ed. 1999).

88. For example, Webster's Third defines "procedure" in greater depth than does Black's eighth edition, but the reverse is true for "restitution." *Compare* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1807, 1936 (1961), *with* BLACK'S LAW DICTIONARY 1241, 1339-40 (8th ed. 2004).

89. *See, e.g.*, Aprill, *supra* note 4, at 310-12; Weinstein, *supra* note 4, at 657-58.

90. *See* Melendez v. United States, 518 U.S. 120, 126 (1996) (defining "motion").

91. *See* Carachuri-Rosendo v. Holder, 130 S. Ct. 2577, 2585 (2010) (defining "felony").

92. *See* Smith v. United States, 508 U.S. 223, 229 (1993) (defining "use").

93. *See* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 109 & n.5 (2002) (defining "occur").

94. *See, e.g.*, Beck v. Prupis, 529 U.S. 494, 504 (2000) (defining "civil conspiracy"); United States v. Salerno, 505 U.S. 317, 322 (1992) (defining "testimony").

95. *See, e.g.*, Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1331 (2011) (defining "file"); *id.* at 1337-38 (Scalia, J., dissenting) (defining "file" and "complaint"); Hartford Fire Ins. v. California, 509 U.S. 764, 801 (1993) (defining "boycott").

96. *See, e.g.*, Tapia v. United States, 131 S. Ct. 2382, 2389 (2011) (defining "imprisonment"); New Process Steel v. NLRB, 130 S. Ct. 2635, 2642 (2010) (defining "quorum"); Cuellar v. United States, 553 U.S. 550, 558 (2008) (defining "laundering").

3. *Dictionary Editions: Time of Enactment Versus Time of Case Filing*

When choosing which dictionary edition to consult, there is a distinction that implicates larger interpretive disagreements within the Court. If the focus is ordinary meaning as presumptively understood by the Congress that voted for the statute, then dictionaries from around the time of enactment are preferable.<sup>97</sup> This historical approach would seem appealing to intentionalist Justices who take seriously the idea that legislatures have a purpose when choosing to enact into law certain words of protection or regulation. The historical perspective also may be attractive to textualists who believe that the ordinary meaning of the words when enacted is pivotal in interpretive terms.

On the other hand, if the focus is on ordinary meaning as presumptively understood by citizens living under the statute today, one would prefer dictionaries from around the time the case before the Court was filed. This contemporaneous approach would seem appealing to Justices who believe statutes have a dynamic component in that the meaning of words may evolve with changes in societal conditions. It also should be attractive to pragmatic Justices concerned that the “notice” function of ordinary meaning should extend to today’s citizens, not those living decades earlier when the words were enacted. Reliance on contemporaneous dictionaries might even appeal to textualists to the extent they believe that ordinary meaning is best understood as applicable to current rather than historical users.

Admittedly, the dichotomy between dictionaries dating from time of enactment and time of filing is not quite this clean. Many dictionary definitions either do not change from one edition to the next or are copied from other dictionaries, and definitions in contemporary dictionaries therefore may be years if not decades old.<sup>98</sup> Further, because language is constantly changing, and it takes

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97. See April, *supra* note 4, at 332-33; Thumma & Kirchmeier, *The Lexicon Has Become a Fortress*, *supra* note 3, at 272-74; *Looking It Up*, *supra* note 4, at 1446-47; Rubin, *supra* note 4, at 186-88.

98. See Rubin, *supra* note 4, at 187 n.22; see generally ATKINS & RUNDELL, *supra* note 49, at 47 (observing that “[l]anguage in use ... is a moving target”).

time to assemble a thorough collection of uses for a word, dictionaries published around the time of enactment will likely rely on definitions from years earlier.<sup>99</sup> Accordingly, intentionalist or textualist Justices searching for word meaning as understood by the enacting Congress should refer to dictionaries from several years after the enactment date.<sup>100</sup>

Nonetheless, differences between the two periods are cognizable even if blurred at the margins, and one might expect some Justices to articulate a principled preference between these distinct options. Once again, the Justices have not done so. Indeed, the dictionaries they cite often are not contemporaneous with either the enactment date or filing date. This suggests a larger lack of interest by the Court in aligning its dictionary use with factors relevant to individual cases. One can find occasional ad hoc articulations of why enactment date dictionaries are relevant,<sup>101</sup> but the Court is far from consistent in its choices. Our dataset reflects this inconsistency.

#### 4. Other Distinctions: Dictionary Size and Definition Order

In addition to substantial differences in types of dictionaries and dates of publication, dictionaries vary considerably in size. Although there is no consensus as to the number of words in the English language, lexicographers estimate the total to be two million or more.<sup>102</sup> Even the largest unabridged American dictionaries contain well under half this total.<sup>103</sup> Abridged and collegiate dictionaries

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99. See Rubin, *supra* note 4, at 186-87.

100. See Aprill, *supra* note 4, at 332. How often the meaning of a contested statutory term changes substantially over time is an empirical question that we did not explore. For instances of such evolutionary change, see, for example, *Moskal v. United States*, 498 U.S. 103, 105 (1990) (applying the term “falsely made,” enacted in a 1948 statute, to transactions in the late 1980s). See also *McBoyle v. United States*, 283 U.S. 25, 26-27 (1931) (holding that theft of an airplane was not covered as a “vehicle” under 1922 statute criminalizing transportation of stolen vehicles across state lines). The *McBoyle* holding might well be different in 2013. See LAWRENCE M. SOLAN, *THE LANGUAGE OF STATUTES* 153-55 (2010) (discussing whether the *McBoyle* court would reach the same holding today).

101. See, e.g., *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) (Alito, J.); *Regents of Univ. of Cal. v. Pub. Emp’t Relations Bd.*, 485 U.S. 589, 598 (1988) (Stevens, J.); *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610-11 (1987) (White, J.).

102. See LANDAU, *supra* note 75, at 28-29.

103. Webster’s Second New International (1934) contains 600,000 words while Webster’s Third has 450,000. See MORTON, *supra* note 76, at 50-51, 153.

include a smaller number of words and—more relevant—they contain fewer and shorter definitions for these words.<sup>104</sup> In general, all dictionaries must deal with space limitations that affect the usage listings and amplifications contained in their definitions.<sup>105</sup>

Supreme Court cases do not address the consequences of these variable constraints related to size. Opinions that invoke definitions from collegiate or other abridged dictionaries are silent on the likelihood that the definitions will omit certain uses of words “[a]s a result of the need for abstraction, breadth, and brevity.”<sup>106</sup> Nonetheless, the Justices’ choice of dictionaries can yield sharp differences in the meaning of key words.<sup>107</sup> The very recent dictionary conflict over the definition of “interpreter” is one recent illustration,<sup>108</sup> and numerous other examples exist in cases from our dataset.<sup>109</sup>

Finally, English-language words that have been written and spoken for an appreciable period of time tend to develop multiple senses or significations. As one dictionary preface explains, the initial historical usage “has been gradually extended to include allied or associated ideas, or transferred boldly to figurative and analogical uses.”<sup>110</sup> Faced with a series of distinct yet often intricately related senses, dictionary editors must decide on some

104. See, e.g., *Aprill*, *supra* note 4, at 295-96 (reporting that definitions for “exercise” in a popular collegiate edition do not include any reference to the practice of religion); see generally LANDAU, *supra* note 75, at 121.

105. See LANDAU, *supra* note 75, at 248; *Aprill*, *supra* note 4, at 297.

106. *Aprill*, *supra* note 4, at 296.

107. Compare *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1331 (2011) (Breyer, J.) (defining “file”), *with id.* at 1338 (Scalia, J., dissenting) (discussing definition of “file”); *Muscarello v. United States*, 524 U.S. 125, 128 (1997) (Breyer, J.) (defining “carry”), *with id.* at 142 n.2, 143 n.5 (Ginsburg, J., dissenting) (discussing definition of “carry”); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 225 (1993) (Scalia, J.) (defining “modify”), *with id.* at 241-42 (Stevens, J., dissenting) (discussing definition of “modify”).

108. See *supra* notes 61-71 and accompanying text (discussing *Taniguchi v. Kan Pacific Saipan*, 132 S. Ct. 1997 (2012)).

109. Compare, e.g., *Begay v. United States*, 553 U.S. 137, 144 (2008) (Breyer, J.) (defining “otherwise”), *with id.* at 159 (Alito, J., dissenting) (discussing definition of “otherwise”); *Johnson v. United States*, 529 U.S. 694, 706 (2000) (Souter, J.) (defining “revoke”), *with id.* at 715-16 (Scalia, J., dissenting) (discussing definition of “revoke”); *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1998) (Stevens, J.) (defining “willful”), *with id.* at 137 (Marshall, J., dissenting) (discussing definition of “willful”).

110. 1 OXFORD ENGLISH DICTIONARY xxviii (2d ed. 1989) (discussing historical usage in the general explanations section).



principled basis for presenting an order of definitions that is recognizable and useful to readers.

At least three options are available: *historical order*, with the first sense listed being the earliest ascertainable; *frequency of use*, with the first sense listed being the one that recurs most often; or *structural coherence*, explained in one dictionary preface as “an effort to arrange a complex word in a psychologically meaningful order ... so that the word can to some extent be perceived as a structured unit rather than a string of unrelated senses.”<sup>111</sup> Of the four general dictionaries used most regularly by the Court in our dataset, none invokes frequency of use to establish definitional sequencing. Three rely on some version of historical order, and the fourth relies on structural coherence.<sup>112</sup>

By contrast, the Justices often simply assume that frequency of use is the standard organizing principle for definitional order. For instance, Justice Breyer, in *Muscarello*, emphasized his reliance on the “*first* definition” of the word “carry” in the Oxford English Dictionary and Webster’s Third as though this signifies the principal or typical use of the word.<sup>113</sup> Justice Thomas, in the *General Land Dynamics Systems* dissent, referred to a “secondary meaning” of “age” in Webster’s Third and American Heritage as “*of course, less commonly used* than the primary meaning.”<sup>114</sup> And Chief Justice Roberts recently disparaged Justice Ginsburg’s reliance on a definition of “regulate” from the time of the Constitution’s drafting because it was the “*second-alternative* definition” listed.<sup>115</sup>

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111. AMERICAN HERITAGE DICTIONARY xlvi (1981).

112. For historical order, see 1 OXFORD ENGLISH DICTIONARY xxvii-xxix (2d ed. 1989); WEBSTER’S NEW INTERNATIONAL DICTIONARY xv (2d ed. 1959); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 18a (1961). Webster’s Third and Oxford English acknowledge that development after the initial sense is often complex and not readily represented in a linear historical series. For structural coherence, see AMERICAN HERITAGE DICTIONARY xlvi (1981).

113. *Muscarello v. United States*, 524 U.S. 125, 128 (1998).

114. *Gen. Dynamics Land Sys. Inc. v. Cline*, 540 U.S. 581, 603 (2004) (Thomas, J., dissenting) (emphasis added).

115. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2586-87 n.4 (2012) (emphasis added). The dictionary invoked by Chief Justice Roberts, Samuel Johnson’s Dictionary of the English Language, relied on historical order. See SAMUEL JOHNSON, 1 A DICTIONARY OF THE ENGLISH LANGUAGE vii (6th ed. 1785). Only two senses of “regulate” are listed: “[t]o adjust by rule or method” and “to direct.” For the second sense, Johnson uses illustrative quotations from seventeenth-century surgeon Richard Wiseman (“*Regulate* the patient in his manner of living”) and seventeenth-century poet John Dryden (“no wife has power to *regulate* her

These examples of apparent insensitivity to how dictionaries establish priorities in definitional order are not isolated occurrences.<sup>116</sup> One might conclude that, along with the indeterminacy regarding legal versus general dictionaries and the choice of dictionary edition, the examples are emblematic. The Justices may simply be indifferent to the multiple and often subtle distinctions that characterize the nature of the dictionaries on which they regularly rely.

### *C. Justice Scalia's Indirect Efforts at Rebuttal*

At least one Supreme Court Justice has expressed awareness of certain risks associated with indiscriminate dictionary usage by courts. In his recent book, *Reading Law: The Interpretation of Legal Texts*, co-authored with Bryan A. Garner, Justice Scalia cautions against careless reliance on dictionaries.<sup>117</sup> He lists a series of principles that courts should bear in mind: notably, that context matters because words used in statutes have more than one definitional meaning, that a dictionary's prefatory material can provide enlightenment as to the order in which a word's several senses are presented, and that because dictionaries often lag behind developments in language, it is wise to consult a dictionary several years later than the date a contested word was enacted.<sup>118</sup> Some of Scalia's own opinions using dictionaries expressly adhere to his principles<sup>119</sup> and he is willing to chide colleagues who fail to do so.<sup>120</sup>

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husband's life"). 2 A DICTIONARY OF THE ENGLISH LANGUAGE cdlxxvi (6th ed. 1785). This "second-alternative" definition seems to have been well established at the time of the Constitution.

116. See, e.g., *Abbott v. Abbott*, 130 S. Ct. 1983, 1991 (2010) (Kennedy, J.); *id.* at 2001-02 n.4 (Stevens, J., dissenting); *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 69 (1989) (White, J.); *id.* at 79 (Brennan, J., dissenting).

117. See SCALIA & GARNER, *supra* note 6, at 417-18.

118. See *id.* at 418-19.

119. See, e.g., *Smith v. United States*, 508 U.S. 223, 241-42 (1993) (Scalia, J., dissenting) (drawing word meaning from context where dictionary definitions result in ambiguity); *Deal v. United States*, 508 U.S. 129, 131-32 (1993).

120. See, e.g., *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 228 & n.3 (1994) (criticizing particular dictionary relied upon by petitioners and also by Justice Stevens in dissent); SCALIA & GARNER, *supra* note 6, at 418 & n.18 (criticizing Justice Breyer majority opinion for erroneously concluding that first meaning listed in an Oxford English definition signified the word's primary meaning).

Despite the cautionary advice from one of its most frequent dictionary users, the Court as a whole continues to be chastised for careless or irresponsible use of dictionaries. Indeed, Justice Scalia is a principal target of some critics—for ignoring key elements of larger statutory context, for dismissing or discounting alternative definitions in respected dictionaries, and for failing to consider the time-lag problem.<sup>121</sup> Moreover, the conceptual criticisms summarized in this Part have been expressed by judges and legal scholars for the better part of two decades.<sup>122</sup> The fact that the Court has steadily increased its dictionary reliance over the same period while continuing to operate in detachment from these criticisms suggests that what is at stake goes beyond inattentive interpretive conduct.

The Justices may have subconsciously agreed on a resource that promotes their collective self-image as authoritative and objective while allowing them to use this resource individually to pursue subjective ends, in particular to support outcomes they prefer for other reasons. The prospect that dictionaries are being used in a fundamentally subjective way, rather than as a neutral interpretive asset, takes us to a detailed examination of our findings.

### III. EMPIRICAL FINDINGS ON DICTIONARY USE

We turn now to the actual patterns of dictionary usage by the Justices.<sup>123</sup> As noted earlier, our inquiry focuses on three broad fields of law, which we label criminal, business and commercial, and labor and employment. The fields are essentially defined by the sections of the U.S. Code that the Court interpreted: 18 U.S.C. for

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121. See, e.g., Aprill, *supra* note 4, at 317 & n.224 (questioning Scalia's reliance in his dissent in *Chisom v. Roemer*, 501 U.S. 380, 410 (1991), on a single 1934 edition of a dictionary to reject a 1982 statutory usage that later dictionaries recognized as proper); *id.* at 327-28 & n.293 (criticizing Scalia's reliance in his majority in *MCI Telecommunications* on a single definition as establishing lack of ambiguity when creditable alternative definitions established ambiguity that might have triggered agency deference); SOLAN, *supra* note 100, at 67-70 (expressing concerns about the same two Scalia opinions).

122. See generally Easterbrook, *supra* note 54, at 61; Randolph, *supra* note 55, at 71-72; Zeppos, *supra* note 74, at 1299; *Looking It Up*, *supra* note 4, at 1437-38.

123. In this Section, we focus primarily on the use of dictionaries in the Court's majority opinions. When we do not indicate otherwise, the findings that we describe are from those majority opinions, and we indicate explicitly when we analyze concurring and dissenting opinions separately or combine them with majority opinions.

criminal, 15 U.S.C. for business and commercial, and a more diverse set of titles and sections for labor and employment.<sup>124</sup> All decisions on the merits that met these criteria in the 1986-2010 Terms of the Court, a total of 695, were identified and analyzed.<sup>125</sup>

We divided the study period into three parts. We subdivided the Rehnquist Court into an early period (1986-1991 Terms) and a later period (1992-2004 Terms) because our initial exploration of dictionary use suggested that the first several Terms of the Rehnquist Court may have been a period of transition in the Justices' employment of dictionary definitions. The Roberts Court—2005-2010 Terms—constituted the final part.

As a first step, we determined whether the Court's majority opinion cited at least one dictionary of any type.<sup>126</sup> We then compared cases in which dictionaries were cited as a basis for interpretation of the statutory provision in question with cases in which there was no dictionary citation. If the majority opinion cited a dictionary, we also examined separate opinions to determine whether they responded with their own dictionary citations. We present these analyses in Section A.

Section B focuses on the opinions that do cite dictionaries. Within our three fields of law, 117 majority opinions during the 1986-2010 Terms cited dictionaries, as did twenty-seven separate opinions in the same cases. Within this set of cases, we analyze several attributes of the ways that dictionaries were used—overall, among

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124. For brevity's sake, we often use "labor" to refer to "labor and employment" and "commercial" to refer to "business and commercial." The criteria for selection of labor cases are fully described in Brudney & Ditslear, *supra* note 28, at 15-18. Selection focused on controversies that affected employees in their status as employees. These cases almost always involved employers and/or unions as well, although occasionally they concerned the immigration effects or tax consequences of an employment-based event.

In terms of their subject matter, the overwhelming majority of cases in the criminal category involved criminal prosecutions, but a handful arose in other contexts such as civil actions under the Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (2012). Most of the business and commercial cases involved government regulation of business practices; roughly half concerned securities law and antitrust law. The labor and employment cases were varied in subject matter, with the largest concentrations of cases involving employment discrimination and labor-management relations.

125. There were 226 decisions in the 1986-91 Terms, 319 in 1992-2004, and 150 in 2005-2010. Across the three periods, there were 362 labor and employment decisions, 115 business and commercial decisions, and 218 criminal decisions.

126. We included plurality opinions, of which there were a small number.

fields of law, and with respect to individual Justices.<sup>127</sup> For a sample of cases, we extend our analysis to the relationship between the dictionary definitions offered to the Justices in the parties' briefs and the definitions they actually cite in their opinions.

In Section C, we probe the implications of our findings. We examine what they tell us about the Justices' use of dictionaries in statutory interpretation. In particular, we discuss what the patterns that we found suggest about whether dictionaries are used as means to reach judgments rather than as means to provide support for judgments made on other bases.

#### *A. How Much Do the Justices Use Dictionaries?*

In our three fields of law across the twenty-five Terms from 1986 through 2010, the Court decided 695 cases. Among those cases, one-sixth of the Court's majority opinions—16.8 percent—cited dictionary definitions of words in statutes that the Court interpreted.

##### *1. Broad Patterns of Usage*

As shown in Figure 1 in Part I, the rates of usage varied considerably across fields and over time. Table 1 presents these rates in tabular form.

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127. For each opinion, we coded the field of law, author, and Court term as well as several types of information about the dictionary citation(s) in the opinion: the number of words in the statute for which dictionary definitions were cited; the total number of references to dictionaries in the opinion and the total number of dictionaries cited; whether the dictionary that was cited was published close to the time of enactment of the statute or close to the time in which the case was first filed in court; and the specific dictionaries that were cited in the opinion. We classified dictionaries as general, legal, and technical. We also classified general dictionaries as prescriptive or descriptive.

**Table 1. Rates of Dictionary Use in Majority Opinions, by Period and Field of Law**

Field	Period (in Terms)			Total
	1986-91	1992-2004	2005-2010	
Labor	5.8	13.0	19.1	11.3
Commercial	11.4	20.5	25.9	18.3
Criminal	11.4	23.7	38.3	25.2
Total	8.0	17.9	28.0	16.8

There was a clear and strong trend toward more frequent usage, as the proportion of majority opinions with at least one reference to a dictionary definition more than tripled between the first and last periods of the study.<sup>128</sup> It is noteworthy that five of the seven Terms with the highest rates of dictionary usage were the last five Terms in the study. The rates increased in each of those Terms, and the three highest rates came in 2008 (30.4 percent), 2009 (31.3 percent),

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128. For the relationship between time period and dictionary use, Kendall's tau-b was .184 and the relationship was statistically significant at the .001 level (i.e.,  $p < .001$ ). To probe temporal patterns further and more systematically, we analyzed rates of dictionary usage by term. For the relationship between year and usage, tau-b was .144,  $p < .001$ . There was considerable fluctuation in annual rates, which we would expect because of the relatively small numbers of decisions per year.

We will report levels of strength and statistical significance for all relationships between variables that we discuss. Our tests of statistical significance are two-tailed, meaning that for analytic purposes we are not imposing an expectation that the relationship between two variables was in one direction rather than the other. Statistical significance is only one criterion for assessment of the relationship between one variable and another. When there are relatively small numbers of cases in an analysis, as is true of some of the analyses in this Part, relationships that are substantively important may not meet the standard criterion of significance at the .05 level. Still, statistical significance is a helpful mechanism to avoid making too much of relationships that are likely not meaningful. On the value and limits of significance tests, see *THE SIGNIFICANCE TEST CONTROVERSY: A READER* ix-xi (Denton E. Morrison & Ramon E. Henkel eds., 1970).

For relationships involving variables with more than two categories and in which the categories of the variable have no particular order (such as the three fields of law) and for relationships between two dichotomous variables (in which each variable has only two values), we used the chi-square ( $X^2$ ) statistic to determine statistical significance. For relationships between two ordinal variables (such as the three time periods) when at least one variable is not dichotomous, we used Kendall's tau-b statistic to determine statistical significance. On the properties of measures of association between variables, see Herbert F. Weisberg, *Models of Statistical Relationship*, 68 AM. POL. SCI. REV. 1638 (1974).

and 2010 (39.3 percent), averaging 33.7 percent for the 2008-2010 Terms.

In each of the three fields of law, the rate of dictionary usage increased from the first to the second period and from the second to the third period. These increases were statistically significant in the labor and criminal law fields, and the differences among the fields also were statistically significant.<sup>129</sup> The overall rate of dictionary use in criminal law was more than twice the rate in labor, with commercial law about halfway between.<sup>130</sup> Criminal law ranked highest and labor law lowest in dictionary use in all three periods, although criminal and commercial law were tied for highest in the first period and the difference between those two fields did not become substantial until the advent of the Roberts Court.<sup>131</sup>

## *2. Usage by Different Justices*

As authors of the Court's majority opinions, the Justices differed in their propensity to cite dictionary definitions. Table 2 shows the rates of dictionary use by Justice.

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129. For differences across time periods in labor and employment cases,  $\tau\text{-}b=.145$ ,  $p=.004$ ; in criminal cases,  $\tau\text{-}b=.205$ ,  $p<.001$ ; in business and commercial cases,  $\tau\text{-}b=.142$ ,  $p=.104$ . The lack of statistical significance by the conventional .05 standard for business and commercial cases despite a fairly strong relationship was due to the relatively small number of these cases.

130. For differences among the three fields,  $X^2=18.98$ ,  $p<.001$ .

131. The differences among the fields were not statistically significant within any of the three periods because of the relatively small numbers of cases in fields within periods; these differences were more substantial and approached the conventional .05 criterion for statistical significance in the second and third periods. For the first period,  $X^2=2.27$ ,  $p=.321$ ; for the second period,  $X^2=5.38$ ,  $p=.068$ ; for the third period,  $X^2=5.74$ ,  $p=.057$ .

**Table 2. Proportions of Majority Opinions Citing Dictionaries, by Justice<sup>132</sup>**

Justice	Percent of majority opinions citing dictionaries	Number of majority opinions	Justice	Percent of majority opinions citing dictionaries	Number of majority opinions
Brennan	12.5	24	Kennedy	9.0	67
White	6.9	29	Souter	22.8	57
Marshall	13.0	23	Thomas	27.8*	54
Blackmun	11.1	36	Ginsburg	14.3	42
Powell	0.0	6	Breyer	21.7	60
Rehnquist	10.0	40	Roberts	35.7	14
Stevens	11.4	70	Alito	33.3	9
O'Connor	17.8	73	Sotomayor	25.0	8
Scalia	27.6*	58	Kagan	50.0	2

The dominant pattern is one of higher usage rates for Justices who served later in the study period, although Justice Ginsburg and Justice Kennedy are exceptions. Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito stand out for their high rates, but the proportions for Roberts and Alito should be interpreted with caution because of their small numbers of opinions in these three fields.<sup>133</sup>

The tendency for later-serving Justices to have higher rates of dictionary usage raises the question as to whether the substantial increase in those rates over time is primarily a function of changes in the Court's membership. We explore that question by breaking

132. Justices are listed in order of year of appointment. Percentages are in italics for Justices with fewer than ten majority opinions. Per curiam opinions are omitted. Rates of dictionary usage for individual Justices that differed from the rates of all the other Justices, taken together, to a degree that was statistically significant ( $p < .05$ ) are indicated with asterisks.

133. The differences among all the Justices in the rates at which they cited dictionaries in majority opinions were statistically significant by the .05 standard ( $X^2 = 28.86$ ,  $p = .036$ ). When each Justice was compared with all the other Justices as a group, Justice Scalia's relatively high rate was statistically significant ( $X^2 = 4.57$ ,  $p = .033$ ), and the same was true of Justice Thomas ( $X^2 = 4.39$ ,  $p = .036$ ). The high rate for Chief Justice Roberts came close to meeting the .05 criterion ( $X^2 = 3.33$ ,  $p = .070$ ), despite the small number of majority opinions that he wrote in these fields. No Justice had a rate sufficiently *below* the rate for other Justices to make the difference statistically significant. The absence of any such lower rate is one indicator that a "dictionary culture" has emerged at the Court. *See infra* notes 138-40 and accompanying text.



down the Justices' rates of usage by time period, shown in Table 3. The pattern is mixed.

**Table 3. Proportions of Majority Opinions Citing Dictionaries, by Justice and Time Period<sup>134</sup>**

Justice	Terms			Justice	Terms		
	1986-1991	1992-2004	2005-2010		1986-1991	1992-2004	2005-2010
<b>Brennan</b>	12.5			<b>Kennedy</b>	0.0	8.6	23.1
<b>White</b>	7.4	0.0		<b>Souter</b>	11.1	17.1	46.2*
<b>Marshall</b>	13.0			<b>Thomas</b>	33.3	24.3	35.7
<b>Blackmun</b>	0.0	44.4*		<b>Ginsburg</b>		8.0	23.5
<b>Powell</b>	0.0			<b>Breyer</b>		17.1	28.0
<b>Rehnquist</b>	8.3	10.7		<b>Roberts</b>			35.7
<b>Stevens</b>	8.3	13.3	12.5	<b>Alito</b>			33.3
<b>O'Connor</b>	6.7	25.6*		<b>Sotomayor</b>			25.0
<b>Scalia</b>	18.8	31.0	30.8	<b>Kagan</b>			50.0
				<b>All Decisions</b>	8.0	17.9	28.0

In general, Justices who served in multiple periods showed increases in their usage rates. The increases in Justice O'Connor's and Justice Scalia's rates between the first and second periods and in Justice Kennedy's, Justice Ginsburg's, and Justice Souter's rates between the second and third periods are striking. Other Justices whose increases across periods are noteworthy include Justice Blackmun and Justice Breyer. As the table shows, only three of the increases were statistically significant, primarily because of the relatively small numbers of majority opinions that some Justices wrote in some periods, but the general upward movement is clear.<sup>135</sup>

134. Justices are listed in order of year of appointment. Percentages are in italics for Justices with fewer than ten majority opinions in a time period. Per curiam opinions are omitted as a separate category of dictionary use but included in the total of decisions. Justices whose rates of dictionary use increased to a statistically significant degree ( $p < .05$ ) from one period to the next have asterisks in the period in which the significant increase occurred.

135. Another way to test for the statistical significance of increases is by analyzing the Justices' term-by-term rates of dictionary use. This approach identifies significant changes that may be obscured by the way that the periods are defined. By this criterion, there were significant increases over time for Justices Blackmun ( $\tau = .396$ ,  $p = .019$ ) and Roberts ( $\tau = .534$ ,  $p = .002$ ).

To get an additional sense of dictionary use over time, we analyzed the majority

At the same time, several of the Justices who first joined the Court during the Rehnquist and Roberts eras showed relatively high rates of dictionary usage from the start. In their early years, Justices Scalia, Thomas, Breyer, Roberts, and Alito had substantially higher rates than any holdover Justices from the Burger Court in the 1986-91 Terms.<sup>136</sup> Thus, both membership turnover and changes in the propensities of continuing members have contributed to the growing popularity of dictionaries in the Court. These two sources of change—high usage levels for newer Justices and increased usage among long-serving Justices—may be connected. The significantly higher use of dictionaries by Justices Scalia and Thomas<sup>137</sup> may well have encouraged other Justices, over the course of a number of Terms, to cite dictionaries more often than they had in the past.

Although Justices differed considerably in their use of dictionaries in all three periods, the differences declined over time.<sup>138</sup> Thus, as dictionary use became more common, the Justices increasingly converged in their willingness to cite dictionaries in their majority opinions. We also found that dictionary usage among the three fields converged in recent Terms when the overall rate of dictionary use exceeded 33 percent.<sup>139</sup> These identified convergences among the

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opinions written by Justices Stevens and O'Connor in the Burger and Rehnquist Courts, across *all fields* of law. We chose these two Justices because both served for at least five Terms in the Burger Court and neither was among the most frequent users of dictionaries in the Rehnquist and Roberts Courts. During his eleven Terms on the Burger Court, Stevens cited a dictionary in only one majority opinion, but he did so in eight opinions in the 1986-1991 Terms and in fifteen opinions in the 1992-2004 Terms. The comparable figures for O'Connor, who served five Terms during the Burger Court, were one, eight, and twenty. These records indicate a dramatic growth in the use of dictionaries by two Justices who almost never cited dictionary definitions early in their careers on the Court.

136. Among the holdover Justices from the Burger years, Marshall's 13.0 percent rate and Brennan's 12.5 percent rate were the highest in the 1986-1991 Terms.

137. See Table 2.

138. The coefficient of variation, which measures deviations from the average, was .72 in the early Rehnquist Court, .47 in the late Rehnquist Court, and .35 in the Roberts Court. The coefficient of variation (V) is the standard deviation of a set of scores (in this case, the proportions of majority opinions using dictionaries for each Justice) divided by the mean of those scores. We excluded Justices with fewer than ten majority opinions from the calculation of V.

139. During the 2008-2010 Terms, dictionary use was 33.7 percent overall: 37.1 percent for criminal law cases, 33.3 percent for commercial law cases, and 30.3 percent for labor cases. Unlike differences among the fields over the entire 2005-2010 period (see Table 1), the recent

Justices and the fields suggest the development of a pervasive and comfortable dictionary culture at the Court.<sup>140</sup>

### 3. Ideology

The relationship between the Justices' ideological positions and their use of particular interpretive resources has been a matter of some interest. Most visible is the debate over the use of evidence about legislative history, a debate that has fallen largely along ideological lines.<sup>141</sup> Because of their tendency to advocate textualism, conservative Justices might cite dictionaries at higher rates than liberals.

To explore this possibility, we classified the Justices as liberal or conservative based on the coding of their votes on case outcomes in the Supreme Court Database, a body of data on attributes of Supreme Court decisions since the 1946 Term that is archived at Washington University.<sup>142</sup> Although the criteria used in this database for labeling votes as liberal or conservative are open to some question,<sup>143</sup> on the whole the coding of votes captures the generally accepted understanding of those ideological labels. The eighteen Justices who served during our twenty-five-year period divided into two groups of equal size, those with more than 50 percent liberal votes over their careers through the 2010 Term and those with more than 50 percent conservative votes.<sup>144</sup>

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differences are not close to statistically significant.

140. See *supra* note 138 (reporting that no Justice uses dictionaries significantly less often than the Justices as a group).

141. See generally Brudney & Ditslear, *supra* note 7, at 125-28; Frank H. Easterbrook, *What Does Legislative History Tell Us?*, 66 CHI.-KENT L. REV. 441 (1990); Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 807-08 (1998).

142. The archive is located at SUPREME COURT DATABASE, <http://scdb.wustl.edu/> (last visited Sept. 26, 2013).

143. See Anna L. Harvey & Michael J. Woodruff, *Confirmation Bias in the United States Supreme Court Judicial Database*, 29 J.L. ECON. & ORG. 414, 416-17, 420-29 (2013) (discussing database criteria described at <http://scdb.wustl.edu/documentation.php?var=decisionDirection>).

144. The liberals were Justices Marshall, Brennan, Stevens, Sotomayor, Ginsburg, Souter, Breyer, Kagan, and Blackmun. The conservatives were Justices Rehnquist, Thomas, Scalia, Alito, Roberts, O'Connor, Powell, Kennedy, and White. Because different Justices decided different sets of cases, their proportions of liberal and conservative decisions are not fully

The relationship between ideology and dictionary use was weak. Conservatives were more likely to cite dictionaries across the three fields of law (18.3 percent versus 16.5 percent), but that difference was substantively small, not statistically significant, and inconsistent across the three fields.<sup>145</sup> Citation of dictionaries, unlike the use of legislative history,<sup>146</sup> does not differentiate the Justices along ideological lines.

A second possible relationship between dictionary use and ideology is that Justices might be more inclined to use dictionaries in opinions that reflect their general ideological tendencies or, alternatively, in opinions that counter those tendencies. Any such inclination is weak at best. For both liberal and conservative authors of majority opinions, the rate of liberal decisions was four percentage points higher when they cited a dictionary. Neither difference came close to achieving statistical significance.<sup>147</sup> Nor did

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comparable. However, they are sufficiently comparable to make meaningful distinctions between Justices with liberal tendencies and those with conservative tendencies. Of these Justices, Blackmun and White were distinctly more moderate than the other justices. When the relationship between the Justices' ideological positions and their use of dictionaries was analyzed with Blackmun and White omitted, the results were quite similar to those in the analyses that included all the Justices.

145. For all cases,  $X^2=.389$ ,  $p=.533$ . Conservatives were more likely than liberals to cite dictionary definitions in labor and employment law (13.5 percent to 9.6 percent) and criminal law (28.6 percent to 24.0 percent), but liberals were more likely to cite dictionaries in business and commercial cases (23.3 percent to 13.2 percent). None of those differences was close to achieving statistical significance.

146. See 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, 226-27 (2006) (reporting that liberal Justices use legislative history more than twice as often as conservative Justices do).

147. For liberal Justices,  $X^2=.989$ ,  $p=.320$ ; for conservative Justices,  $X^2=.754$ ,  $p=.385$ . The ideological direction of decisions was defined by the same criteria as the ideological direction of Justices' votes. See *supra* note 142 and accompanying text. For two individual Justices, there was a statistically significant relationship between dictionary use and direction of the decision in cases in which they wrote the majority opinion. Justice Ginsburg was more likely to reach a conservative result when she used a dictionary ( $X^2=5.80$ ,  $p=.016$ ), and Justice Breyer was more likely to reach a liberal result ( $X^2=5.88$ ,  $p=.015$ ). Chief Justice Roberts' tendency to reach more liberal results when he cited dictionaries approached statistical significance, even though he wrote only fourteen majority opinions in these fields ( $X^2=3.76$ ,  $p=.052$ ). These patterns indicate that there may be something interesting about dictionary use by these three Justices, but the small number of Justices with significant relationships, plus the fact that the relationship between dictionary use and outcomes had opposite directions for Ginsburg and Breyer, reinforce other evidence that any ideological element in the use of dictionaries is small. For Ginsburg, we speculate that the conservative relationship

significant differences in outcomes appear within specific fields of law for either liberals or conservatives.<sup>148</sup> This result indicates that Justices did not employ dictionaries chiefly to justify decisions reflecting their ideological leanings. At the same time, it indicates that dictionary use also did not constrain the Justices' ideological preferences.<sup>149</sup>

#### *4. Responses in Dissenting Opinions*

In the 117 cases in which majority opinions cited dictionaries, there were eighty dissenting opinions.<sup>150</sup> Of these dissenting opinions, 28.8 percent cited dictionary definitions.<sup>151</sup> That proportion is subject to multiple interpretations. On the one hand, it is distinctly higher than the 16.8 percent of all majority opinions that employed dictionaries. On the other hand, we might expect an even higher proportion for two reasons. The cases in which majority opinions cited dictionaries are probably more appropriate for such citations than the average case. Further, a dictionary citation in a majority opinion could spur a dissenter to answer by using a citation as well.

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may be a product of opinion assignments. Of her five conservative dictionary-using majorities, three are unanimous decisions in the criminal field; Ginsburg's overall voting record in criminal law cases is more liberal. For Breyer, it seems possible that dictionary use helped attract or retain textualist Justices Scalia and Thomas. Of his eleven liberal dictionary-using majorities, nine were joined by Scalia and eight by Thomas.

148. The largest difference for both liberal and conservative Justices between opinions citing to a dictionary and not doing so occurred in the field of commercial law. Because those cases often involve business disputes between institutional parties, we believe the Supreme Court Database's ideological coding in commercial cases is somewhat less reliable than in criminal cases—almost always prosecution versus defendant—and labor cases—almost invariably employer versus employee and/or union.

149. Our findings about the relationship between dictionary use and the ideological direction of decisions are broadly similar to those from a study of the use of canons of construction in labor and employment law, although that study found some significant effects of canon use on the ideological direction of decisions by conservative Justices. See Brudney & Ditslear, *supra* note 28, at 53-63.

150. We counted opinions that both concurred and dissented as dissenting opinions.

151. There were also fifty-four concurring opinions in these cases, of which only four cited dictionaries. This infrequent use is not surprising, in that concurring opinions are often narrowly focused and regular concurring opinions express no disagreement with the majority opinion.

The Justices differed considerably in their propensity to cite dictionaries in this set of dissenting opinions. The most frequent dissenters were Justice Stevens and Justice Breyer; Stevens cited a dictionary in only three of twenty-one dissents and Breyer in only one of twelve. In contrast, Justice Scalia cited a dictionary in six of ten dissenting opinions and Justice Alito in four of seven.

Largely as a result of those four Justices' tendencies, there was a substantial difference between the Justices we have classified as conservatives and liberals. The conservative Justices cited dictionaries in 41.2 percent of their thirty-four dissenting opinions. Liberals cited dictionaries in 19.6 percent of their forty-six dissents, less than half the rate for conservatives. Although the difference is statistically significant,<sup>152</sup> we do not want to overstate its importance. Still, it is noteworthy that in opinions that are largely individual expressions, in contrast with opinions for the Court, liberal and conservative Justices diverge in the extent to which they employ dictionaries. As we describe in Part IV, even in majority opinions there are differences between the ways liberals and conservatives employ dictionaries that simple frequency of use does not capture.

### *B. Patterns of Dictionary Usage*

We turn now from the proportion of opinions that cite dictionary definitions to the ways that dictionaries are employed when they *are* cited. Our focus is the 117 majority opinions in the 1986-2010 Terms that include at least one citation to a dictionary.

#### *1. Number of Dictionaries Used*

In the opinions in which majority opinion writers employed dictionaries, they typically did so for only a single word. Overall, the mean number of words defined was 1.30. The number of words defined per opinion was especially low in labor and employment law (mean of 1.07), considerably higher in business and commercial law (1.33), and highest in criminal law (1.45).<sup>153</sup>

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152.  $\chi^2=4.46$ ,  $p=.035$ .

153. The differences between labor and commercial law and between labor and criminal law were statistically significant ( $t=2.30$ ,  $p=.030$  for labor and commercial,  $t=3.75$ ,  $p<.001$ ).

In seeking to define these words, the Justices have many dictionaries from which to choose. How widely do they draw from the set of available dictionaries? In general, their search for definitions—or at least what they report from their search—is narrow.

In our set of majority opinions, a total of 152 words were defined through dictionary citations. The mean number of dictionaries per word was 1.58. Sixty-four percent of the words had citations to only one dictionary, and another 21 percent had citations to two dictionaries. More than three dictionaries were cited for only 3 percent of the words defined.

Earlier we discussed the Court's recent decision in *Taniguchi v. Kan Pacific Saipan, Ltd.*, in which the majority opinion surveyed fourteen dictionaries in order to ascertain the meaning of one word.<sup>154</sup> Whether or not the Court's use of dictionaries was appropriate in that case, the opinion did develop a broad analysis of the evidence available from dictionaries. But *Taniguchi* is distinctly an outlier in this respect. Ordinarily, the Justices undertake a far more limited—and thus selective—search for meaning in dictionaries.<sup>155</sup>

The Justices varied somewhat in their practices. Among the eight Justices who cited dictionaries in more than five majority opinions, the mean number of dictionary references for each word defined in their opinions ranged from 1.28 for O'Connor to 1.94 for Thomas.<sup>156</sup> But even the mean for Justice Thomas is low compared with the number of major dictionaries that are available for consultation. It appears that the Justices are all highly selective in their use of dictionaries as evidence about the meaning of statutory language.

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for labor and criminal); the difference between commercial and criminal law was not ( $t=.863$ ,  $p=.392$ ). If concurring and dissenting opinions that used dictionaries are included, the overall mean remains 1.30, and the means for the three fields are similar to those for majority opinions only: 1.10 for labor law, 1.35 for commercial law, and 1.41 for criminal law.

154. 132 S. Ct. 1977 (2012); see *supra* notes 61-71 and accompanying text.

155. Because *Taniguchi* was decided in 2012, and because it fell outside our three areas of law, it was not included in our study of the Justices' practices.

156. The other means were 1.64 for Breyer, 1.57 for Ginsburg, 1.67 for Kennedy, 1.52 for Scalia, 1.44 for Souter, and 1.45 for Stevens. Four other Justices defined at least five words in their majority opinions. The mean number of dictionary references per word were 1.71 for Alito, 1.00 for Blackmun, 1.71 for Rehnquist, and 1.00 for Roberts.

## 2. Which Dictionaries?

We have discussed the distinction between general and legal dictionaries.<sup>157</sup> Some dictionaries fall into a third category, technical, in that they address a specialized field such as medicine or accounting. General dictionaries were used most often in the majority opinions, 74 percent of the time; legal dictionaries were cited 45 percent of the time; and technical dictionaries were used in only 6 percent of the cases.

Twenty-one percent of the opinions cited both a general dictionary and a legal dictionary, 53 percent a general dictionary but not a legal dictionary, and 24 percent a legal dictionary but not a general dictionary.<sup>158</sup> We might expect the Justices to rely on general dictionaries for non-legal terms and legal dictionaries for words that are specific to the legal system. But as described earlier, examination of opinions indicates that there is no consistent practice in the Justices' choices between these two types of dictionaries.<sup>159</sup> The substantial proportion of opinions in which Justices cited both general and legal dictionaries underscores the absence of a clear distinction between the two.

The Justices cited a wide range of general and legal dictionaries, but a few stand out for the frequency with which they are used. Among general dictionaries, four predominated: Webster's Third (cited in 36 percent of the opinions), the Oxford English Dictionary (20 percent), Webster's Second (19 percent), and the American Heritage (15 percent). Black's dominates the legal dictionaries, with citations in all but two of the opinions that cited any dictionary in that category.

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157. See *supra* Part II.B.2.

158. The other 2 percent cited neither type, using only a technical dictionary. In the types of dictionaries and specific dictionaries used, there were generally only small differences across the three fields of law. However, there were substantial and statistically significant differences in the frequency with which general dictionaries were cited in opinions: 52 percent in business and commercial law, 73 percent in labor and employment law, and 84 percent in criminal law. In addition, the Justices cited both general and legal dictionaries in 27 percent of the criminal law cases, a rate considerably higher than those for labor and employment law (17 percent) and business and commercial law (14 percent). There also were large differences in citations to Webster's Third: 14 percent in business and commercial, 29 percent in labor and employment, and 49 percent in criminal.

159. See *supra* notes 89-96 and accompanying text.



Not surprisingly, Justices differed in their use of particular dictionaries. Most striking were preferences between the second and third editions of Webster's. Justice Scalia cited Webster's Second in nine of his majority opinions, constituting 56 percent of all the opinions in which he cited dictionaries and more than four times the rate of other Justices. Scalia cited Webster's Third only twice, a rate (12.5 percent) less than one-third that of other Justices.<sup>160</sup> In contrast, Justice O'Connor cited Webster's Third in seven of her opinions, 54 percent of her total, but she cited Webster's Second only twice.<sup>161</sup> Justices also differed widely in their use of Black's, with Thomas employing it 73 percent of the time and Scalia doing so only 19 percent of the time.<sup>162</sup> Because Black's was the dominant dictionary in the legal category, similar differences existed for legal dictionaries as a whole.<sup>163</sup>

As we have noted,<sup>164</sup> the line between descriptive and prescriptive dictionaries is not nearly as clear as it is sometimes portrayed. But to the extent that the Justices perceive differences between the two, the balance between them merits consideration. Among the general dictionaries, the American Heritage and Webster's Second stand out for their reputation as prescriptive.<sup>165</sup> Altogether, 30 percent of all citations to general dictionaries in majority opinions were to the two prescriptive dictionaries. But the Justices differed in the shares of their citations that went to the dictionaries labeled as prescriptive.

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160. The other Justices collectively cited Webster's Second 12.9 percent of the time and Webster's Third 39.6 percent of the time. The differences between Scalia and all the other Justices were statistically significant for both Webster's Second ( $X^2=17.02$ ,  $p<.001$ ) and Webster's Third ( $X^2=4.41$ ,  $p=.036$ ).

161. The differences between O'Connor and all the other Justices for the two dictionaries were not close to achieving statistical significance. Thus it is Scalia who stands out as distinctive in his use of these dictionaries.

162. The differences among the Justices in the use of Black's were statistically significant ( $X^2=27.39$ ,  $p=.037$ ). In addition to the three Justices cited in the text, two other Justices cited a dictionary more than five times in majority opinions and used a single dictionary in half or more of their majority opinions: Justice Ginsburg used Black's in four of six opinions and Justice Stevens used Black's in five of eight opinions. Chief Justice Rehnquist cited Webster's Third in all four opinions in which he cited dictionaries.

163. Justice Thomas ranked highest among Justices with a substantial number of opinions that cited dictionaries, with 80 percent of his opinions citing legal dictionaries; for Justice Scalia, the proportion was 19 percent, the same as his proportion of opinions citing Black's alone.

164. See *supra* Part II.B.1.

165. See *supra* notes 80-82 and accompanying text.

Among the Justices who wrote more than five majority opinions, those shares ranged from 65 percent for Scalia to 15 percent for O'Connor.<sup>166</sup> To the extent that Justices responded to the reputations of dictionaries as prescriptive or descriptive, their preferences between the two varied considerably.

Although these differences among the Justices are of interest, ultimately they are less important than the eclecticism that characterizes nearly all the Justices. None of the Justices who cited dictionaries in a substantial number of opinions consistently relied on a single dictionary. Justice Thomas's 73 percent usage rate for Black's is noteworthy, especially because there are some words for which Black's has only limited relevance. But even Thomas was varied in his choices among general dictionaries. And no other Justice with a substantial number of opinions citing dictionaries came close to his high proportionate use of a single dictionary. This varied and selective usage pattern indicates that Justices employ particular dictionaries whose definitions they find useful in a particular case rather than binding themselves to the definitions of a single dictionary.<sup>167</sup>

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166. Among Justices with more than five majority opinions citing dictionaries, the other proportions were 19 percent for Breyer, 33 percent for Ginsburg, 29 percent for Kennedy, 50 percent for Souter, 25 percent for Stevens, and 35 percent for Thomas.

167. If we include concurring and dissenting opinions, we find the same basic patterns of usage by individual Justices. One noteworthy change resulted from Justice Scalia's heavy use of Webster's Second in his minority opinions: his overall rate of usage for that dictionary increased to 63 percent. Justice Scalia's citations in two cases illustrate the varied and highly selective usage patterns of the Justices. Scalia authored the majority opinions in *United States v. Williams*, 553 U.S. 285 (2008), and *United States v. Santos*, 553 U.S. 507 (2008), criminal cases in which the decisions were announced two weeks apart. Scalia used the American Heritage Dictionary to help define the statutory term "promotes" in *Williams*, see 553 U.S. at 294-95; in contrast, he cited Webster's Second to help define the statutory term "promote" in *Santos*, see 553 U.S. at 517-18. In both cases, one or more briefs for the parties cited dictionary definitions of "promote," but *none of those citations were to the American Heritage Dictionary or to Webster's Second*. See Brief for the United States at 27-28, *United States v. Williams*, 553 U.S. 285 (2008) (No. 06-494) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961) and RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1548 (2d ed. 1987)); Brief for Respondent Benedicto Diaz at 16, *United States v. Santos*, 553 U.S. 507 (2008) (No. 06-1005) (citing OXFORD ENGLISH DICTIONARY (2d. ed 1989)); Reply Brief for the United States at 7, *United States v. Santos*, 553 U.S. 507 (No. 06-1005) (citing OXFORD ENGLISH DICTIONARY (2d. 1989); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1548 (2d ed. 1987)).

### 3. Briefs and Opinions

As with other resources for interpretation of statutes, the Justices often receive inputs from the litigants in the form of dictionary definitions of statutory terms. To probe the relationship between those inputs and the definitions that Justices ultimately cite in their opinions, we analyzed a sample of sixteen of the 117 cases in our study.<sup>168</sup> For each case, we compared the words defined and the dictionaries cited in briefs for the parties and for the United States as an amicus, when the Federal Government participated in that role, with the dictionaries cited in the Court's opinion. We treated two dictionaries as the same if they were labeled as the same edition even if they were published at different times.

We found only a limited match between the use of dictionaries in the briefs and their use in the Court's opinion. Of the thirty-six words for which a dictionary was used in either a brief or a majority opinion,<sup>169</sup> only thirteen (36 percent) were defined with a dictionary in both the brief and the opinion. The disjunction ran in both directions. Among the thirty-one words with dictionary citations in a brief, only thirteen (42 percent) had dictionary citations in the Court's opinion; among the eighteen words with dictionary citations in the opinion, five (28 percent) did not have such citations in a brief.

When a dictionary definition was used for the same word in the Court opinion and one or more briefs, the specific dictionaries can be compared. Of the thirteen words in question, the opinion had at least one dictionary in common with the briefs for ten. But for eight

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168. We selected a sample that was designed to be representative of all cases in the set of 117 in terms of the mix of cases by field. We also made sure to include at least one Rehnquist Court and one Roberts Court decision in each field, and we overrepresented Roberts Court decisions (ten of the sixteen cases) to ensure that we were capturing current practices of the Justices well.

169. We counted a word ("willful") and a related phrase ("knowingly and willfully") in different briefs in *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47 (2007) as a single word. "Willful" was defined in the Brief for Respondent at 18, *Safeco Ins. Co.*, 551 U.S. 47 (No. 06-84); "knowingly and willfully" was defined in the Brief for the United States as Amicus Curiae Supporting Petitioners at 15, *Safeco Ins. Co.*, 551 U.S. 47 (No. 06-84). To avoid skewing the results, in *United States v. Williams*, 553 U.S. 285 (2008) we counted as one word a set of four parallel words ("advertise," "present," "distribute," and "solicit") that were cited in the Brief for the United States, *supra* note 167, at 27.

of the words, the opinion cited a dictionary that was mentioned in none of the briefs. And for all but one of the words, a brief cited a dictionary that the opinion did not. For only one of the thirteen words was there a full match between briefs and opinion, with each citing the same single dictionary.

We would not expect the use of dictionaries in the briefs and their use in the Court's opinion to be exactly the same in all cases any more than we would expect that with other interpretive resources. Still, the wide divergence between the two in the words defined and the dictionaries used to define them is striking. Like other evidence we have discussed, this divergence suggests that both the decision whether to employ dictionaries to help define a particular word and the choice of dictionaries to cite are primarily case-specific rather than the result of systematic judgments.<sup>170</sup>

#### *4. Date of Publication*

As we have discussed, Justices might have preferences for dictionaries published near the time at which a statute was enacted or the time when the controversy before the Court was initiated.<sup>171</sup> In turn, those preferences might reflect the Justices' broader approaches to statutory interpretation.

We probed these preferences by identifying the years in which dictionaries were published, statutes were enacted, and Supreme Court cases were initially filed in court. If the publication date was within six years of enactment, we counted the dictionary as

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170. This inquiry understates the divergence between briefs and the Court's opinions, because it is limited to cases in which the opinion cites at least one dictionary. We examined a small sample of a dozen cases out of the more than 500 in which the majority opinion did *not* cite a dictionary; we did so by drawing two cases randomly from each subject matter field in the Rehnquist Court and in the Roberts Court. In three of the twelve cases, or 25 percent, the briefs cited at least one dictionary definition. In one of those cases, *Howard Delivery Service, Inc. v. Zurich American Insurance Co.*, 547 U.S. 651 (2006), the petitioner's and respondent's brief each cited multiple dictionaries and used those dictionaries to define multiple terms. See Brief for Petitioners at 11-13, *Howard Delivery Serv., Inc.* 547 U.S. 651 (No. 05-128); Brief for Respondent at 19, 21, 26, *Howard Delivery Serv., Inc.* 547 U.S. 651 (No. 05-128). Justice Kennedy's dissenting opinion joined the two briefs in citing the definition of "contribution" in Webster's Third New International Dictionary. But Justice Ginsburg's opinion for the Court cited neither this nor any other dictionary definition.

171. See *supra* Part II.B.3.

proximate to enactment.<sup>172</sup> We used the same six-year rule for the time of initiation for the controversy, which we defined as the year that the case that ultimately came before the Court was filed. If any dictionary cited in an opinion was contemporaneous in terms of enactment date, the opinion was treated as citing an enactment-date dictionary; again, we used the same approach with respect to filing date.

For the Court as a whole, 40 percent of the majority opinions included at least one citation to a dictionary published near the time of enactment, and 45 percent included a citation to a dictionary published near the time the case was filed. Altogether, 11 percent of the opinions used dictionaries that met both of those criteria,<sup>173</sup> and 26 percent did not use a dictionary that met either criterion.<sup>174</sup>

As important as the pattern for the entire Court are the practices of individual Justices. The Justices differed to some extent, but all the Justices who used dictionaries in a substantial number of majority opinions were eclectic. Table 4 shows the distribution of practices among Justices who cited dictionaries in ten or more opinions.

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172. If the words being interpreted were enacted as an amendment to an earlier statute, such as the 1991 Civil Rights Act amending Title VII, we used the date of the amendment. For the few statutes enacted in the nineteenth century, we relaxed the six-year rule and counted dictionaries published in the same general era as contemporaneous.

173. An opinion could meet both criteria if a single dictionary did so or if the two criteria were met by different dictionaries.

174. There were small differences among the three fields of law in the frequency with which dictionaries close to the times of enactment and filing were used. There was a much bigger difference between criminal law and the other fields of law in the frequency with which no dictionary with either attribute was used. In 36 percent of the criminal cases, the majority opinion cited no dictionary that was published close to the enactment time or to the filing time. The proportions for business and commercial law and labor and employment law were 14 percent and 17 percent, respectively.

**Table 4. Use of Dictionaries According to Time of Enactment and Time of Filing by Justices with Ten or More Majority Opinions Citing Dictionaries, in Percentages<sup>175</sup>**

Justice	Close to enactment date	Close to filing date	Both	Neither	# of opinions
<b>Breyer</b>	15.4	38.5	0.0	46.2	13
<b>O'Connor</b>	46.2	30.8	7.7	30.8	13
<b>Scalia</b>	31.2	68.8	12.5	12.5	16
<b>Souter</b>	53.8	38.5	7.7	15.4	13
<b>Thomas</b>	46.7	40.0	0.0	13.3	15

Justice Scalia used dictionaries from close to the filing date more than two-thirds of the time, and Justice Souter used dictionaries from close to the enactment date more than half the time. But, with the possible exception of Scalia,<sup>176</sup> no Justice had a predominant practice, and all five Justices wrote multiple opinions with no definitions from dictionaries that were close to either the enactment or filing date.

### *C. Implications*

We have discussed a number of patterns in the Justices' choices whether to cite dictionary definitions of words in statutes, and in the more specific choices they make in cases in which they do cite dictionaries. One aspect of those general patterns involves what we found in comparing the three fields of law.

Although patterns of dictionary usage were mostly similar for the three fields, there were some notable differences, and it was generally opinions in criminal cases that diverged from the two other fields. The proportion of majority opinions citing dictionaries was distinctly higher in criminal law, overall and increasingly so

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175. Opinions are listed as close to filing date or enactment date if any dictionary cited in the opinion meets that criterion. The "both" column includes opinions from the "close to enactment" and "close to filing" columns, so percentages do not add up to 100 percent if there were any cases in the "both" category.

176. Scalia's proportion of opinions citing dictionaries published close to the filing time was lower in his separate opinions, bringing the total proportion down to 63 percent.

over our three periods. In the cases that cited dictionaries, the average number of words for which dictionaries were used was highest in criminal law. The Justices also cited general dictionaries more frequently in criminal cases than in business and commercial or labor and employment cases.

As we discuss in Part IV.A, these attributes can be understood in part to reflect the Justices' recognition of the personal stakes involved in criminal cases and the lack of sophisticated knowledge on the part of individuals who become criminal defendants. Yet when they cite dictionaries in their majority opinions, the Justices are a little less likely to use dictionaries published close to the time that a case was filed in criminal law than in the other fields, and they are distinctly more likely in criminal law opinions to cite no dictionaries that were contemporaneous with either the enactment of a statute or the filing of a case.<sup>177</sup>

Across the three fields of law, our data add to the evidence from other studies<sup>178</sup> that the Justices increasingly cite definitions of statutory language in their opinions. Some Justices are more likely to use dictionaries than others, but there has been a general movement toward dictionary use, so that the Justices differ less in their frequency of dictionary citation in the Roberts Court than they did in the two eras of the Rehnquist Court that we have analyzed. Nor do differences in Justices' frequency of dictionary use show an ideological division. This pattern is very different from the increasing divergence among the Justices in the use of legislative history, a divergence that falls largely along ideological lines.<sup>179</sup>

At the same time, our analysis of opinions that cite dictionaries paints a picture of dictionary use that is more casual and arbitrary

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177. The proportions of dictionaries close to case filing were 42 percent in criminal law, 44 percent in labor and employment law, and 57 percent in business and commercial law. The proportions on dictionaries that were not close to either enactment or filing dates were 36 percent in criminal law, 17 percent in labor and employment law, and 14 percent in business and commercial law.

178. See generally Kirchmeier & Thumma, *Scaling the Lexicon Fortress*, *supra* note 3; Thumma & Kirchmeier, *The Lexicon Has Become a Fortress*, *supra* note 3.

179. That divergence is documented for labor and employment law in Brudney & Ditslear, *supra* note 146, at 223, 226-27. The coefficient of variability among the Justices in the frequency with which they cited legislative history in majority opinions was .31 in the Burger Court and .55 in the Rehnquist Court. See *id.* at 223, for data from which these figures were calculated.

than principled or systematic. To begin with, even in an era in which dictionary use has become quite common in statutory interpretation cases, Justices often do not cite dictionaries in their opinions for the Court. In most of these cases, there likely were one or more terms for which dictionary definitions might well have been relevant. Moreover, in cases in which the Justices do cite dictionary definitions for one or more terms, we found that briefs for the parties and for the federal government as amicus frequently used the dictionary to define terms for which the Court's opinion did not cite a dictionary.<sup>180</sup> This limited overlap between the words for which dictionaries were invoked in the briefs and the words cited to dictionaries in the majority opinion underscores the arbitrariness of the Court's dictionary use.

Perhaps more telling, the Justices also seem to be casual and arbitrary when they do turn to dictionaries to define statutory language. They nearly always use a small number of dictionaries to ascertain the meaning of that term—typically, one or two. Their choices of dictionaries differ from case to case; they frequently substitute their own choices for those cited in briefs to define the same terms; and they do not adopt consistent practices in aligning the publication dates of the dictionaries they cite either with the dates of statutory enactment or with the dates on which the cases before them were filed.

The combination of the small number of dictionaries typically employed to define a word and the absence of a consistent practice in selecting those dictionaries is striking. The Justices' choices in citing dictionary definitions seem to be largely ad hoc, based on the appeal of particular dictionaries in particular cases.<sup>181</sup> Such ad hoc

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180. Altogether, in the sample of cases with majority opinions citing dictionary definitions that we examine, only 42 percent of the words with dictionary definitions in a brief had dictionary definitions in Court opinions that cited to a dictionary. *See supra* Part III.B.3. As we have noted, some of the cases in which the Court cites no dictionary definitions have briefs that do cite definitions. If those cases were taken into account, the proportion would be even lower than 42 percent. *See supra* note 170.

181. To go beyond our findings, the Justices also may be engaging in ad hoc practices when they choose particular definitions from a dictionary. As discussed in Part II.B, in the dictionaries that the Justices use most often, the order of definitions does not provide a basis for selection. For words that have several different definitions, some may be excludable because they clearly do not apply to the context in which a statutory word is used. But the Justices still have a wide range of choice that is effectively unconstrained. *See, for example,*



usage strongly suggests that definitions are being invoked in support of Justices' pre-existing conceptions of reasonable meanings for words rather than serving as independent guides to judgment about those meanings.

To return to a metaphor that we employed earlier,<sup>182</sup> the image of legislative history that has been ascribed to Judge Harold Leventhal seems to apply powerfully to dictionary usage. As reported by Justice Scalia, Leventhal spoke of "use of legislative history as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends."<sup>183</sup> Leventhal was underlining the selectivity that can take place in choices of legislative history materials to support a judge's preferred interpretation of a statute.

One of us has argued that the existence of a hierarchy of legislative history sources, tied to the structure of congressional law making and long recognized in Supreme Court opinions, operates as a constraint on judicial selectivity.<sup>184</sup> But insofar as legislative history is susceptible to selective use, dictionaries seem considerably more susceptible. The Justices could use certain guidelines to reduce the element of arbitrariness in their reliance on dictionaries. For instance, they could adopt the consistent approach of reporting a wide range of relevant dictionary definitions for whatever terms are at issue in a case. They also could develop standards for when to rely on a general dictionary as opposed to a legal dictionary, or on a dictionary edition close to date of enactment as opposed to date of case filing. As we have documented, however, the Justices' actual practices diverge fundamentally from any such approaches.

In sum, what our findings suggest is that the powerful movement toward citation of dictionary definitions in the Court's opinions represents primarily a change in rhetoric. The Justices as a group have become increasingly prone to employ dictionaries in the process of defending their interpretations of terms whose meaning

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our discussion of the Court's choice of definition in *Janus Capital Group v. First Derivative Traders*, 131 S. Ct. 2296 (2011), in Part IV.D.

182. See *supra* note 18 and accompanying text (discussing the cocktail party effect).

183. *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring). Justice Scalia again invoked the Leventhal quip in his book. SCALIA & GARNER, *supra* note 6, at 377.

184. See James J. Brudney, *Canon Shortfalls and the Virtues of Political Branch Interpretive Assets*, 98 CALIF. L. REV. 1199, 1225-27 (2010); Brudney & Ditslear, *supra* note 7, at 146-60; see also *infra* text accompanying notes 338-41 for further discussion of this issue.

is contested. But our evidence about their citation practices indicates that the Justices generally do not allow dictionary definitions to constrain them as they work toward their independently preferred conclusions.

Our quantitative data provide one perspective on the Justices' use of dictionaries in their opinions. To explore further the ways that the Justices utilize dictionaries, we need to analyze in closer, qualitative terms the opinions in which dictionaries are cited.

#### IV. A SEGMENTED AND SUBJECTIVE DICTIONARY CULTURE

Our results reveal the growth over twenty-five years of a pervasive dictionary culture at the Court, one that extends to both liberal and conservative Justices, to purposivists as well as textualists. There is no obvious ideological dimension to the Court's dictionary usage, perhaps because dictionary definitions seem to lack the intrinsic association often present between canons and conservative values or between legislative history and remedial purposes. At the same time, the Justices' strikingly subjective and standardless dictionary practices indicate that what is at stake doctrinally is more than a straightforward search for ordinary meaning.

In our view, it is helpful to consider the Court's approach to dictionaries from a functional perspective. Specifically, we believe the Court invokes dictionary definitions to serve four distinct functions. One is subject-specific, involving the high degree of use in criminal law majority opinions. The other three are more generally applicable, reflecting distinct roles that dictionaries play as part of the Court's overall interpretive methodology.<sup>185</sup>

We begin by examining briefly two decisions in the criminal law area, in which dictionary usage is greatest. These cases illustrate a notice function that the Court has effectively associated with dictionaries in its criminal law decisions.

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185. We develop these four distinct functions based on a close examination of seventeen majority opinions. Overall, we reviewed fifty of our 117 majority opinions for purposes of functional categorization. *See infra* notes 273, 345, and 346 for further discussion of our process.

We then turn to a more detailed analysis of decisions illustrating how the Court's dictionary usage serves three broad instrumental functions from an interpretive standpoint. One function is as a way station. The majority examines dictionary meanings but finds them to be unhelpful and turns elsewhere to justify its holding. This bypassing of the dictionary resource may occur because definitions are deemed insufficiently determinate, or because other interpretive resources trump the definitional approach.

A second function served by dictionaries is as an ornament. The majority describes dictionary meanings as helpful, but they play only a minor role in justifying the result reached. The majority relies primarily on other interpretive assets including at times its separate construction of ordinary meaning but more often larger contextual resources such as legislative history or purpose, canons, precedent, practical consequences, and agency deference. Dictionary definitions are invoked as pointing in the same direction and they enhance the authoritative tone of the decision, but they are at most reinforcing and often simply decorative.

The third function served by dictionary usage is as a barrier. The majority determines that the dictionary definition is virtually dispositive and therefore justifies discounting or ignoring larger contextual factors. In a series of decisions, the Court relies on dictionaries to preclude or override probative evidence of congressional intent, executive branch understanding, and/or judicial precedent.

After examining cases involving these three functions, we offer thoughts on the role played by dictionaries in general, including the troubling implications of the Court's new dictionary culture. We recognize that, as is true with respect to legislative history, canons, or judicial precedent, the Court's use of dictionaries may be challenged as prone to selective application or cherry-picking. But we explain how dictionary usage has assumed a normative dimension that differs in important respects from the application of these other interpretive resources, and why this normative dimension makes the Court's instrumental and subjective use of dictionary definitions especially disturbing.

*A. The Dictionary and Criminal Law Cases*

As described in Part III, dictionary use is significantly greater in the criminal law field than in commercial or labor law.<sup>186</sup> Dictionary usage in criminal law majority opinions ranked highest in all three periods, and in the Roberts Court the justices have used dictionaries in close to 40 percent of their majorities in these cases. Further, when using dictionaries the Justices define more words per opinion in criminal law cases than in the other two fields. They also use general dictionaries significantly more in criminal law majority opinions than in labor law and commercial law majorities, and they use both general and legal dictionaries together far more often in criminal majorities than in the two other fields.<sup>187</sup>

We believe a range of factors likely contributes to the Court's special level of dictionary interest in the criminal law area. Criminal statutes may use more common everyday language than their civil law counterparts, inviting relatively greater emphasis on ordinary meaning analysis. Relatedly, criminal statutes tend to affect a less educated population than laws regulating employers and businesses in general. And because the cohort of potential criminals is less likely to receive legal counsel about how to comply with statutory prohibitions, the unfiltered ordinary meaning of text may assume greater importance.

In addition, the consequence of violating a federal criminal statute is typically imprisonment as opposed to injunctive relief or monetary damages.<sup>188</sup> The severity of this consequence has given rise to special concerns and sensitivities in our legal system, from a higher burden of proof and the right to a jury trial to rule of lenity protections against vaguely worded penal prohibitions. The Court's robust appetite for dictionaries in the criminal law area probably reflects to some degree the Justices' sense that defendants should have sufficiently clear notice and understanding of offenses the

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186. See *supra* note 130 and accompanying text.

187. See *supra* Part III.A.

188. See generally William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2027 & n.272 (2008) (discussing how broad federal liability rules and severe federal sentences increase the number of incarcerated persons in state prisons).

government claims they have committed. We briefly describe two decisions in our dataset that illustrate this perspective.

In *Bailey v. United States*, the Court had to decide whether carrying a firearm in a bag in a locked car trunk was sufficient evidence of proximity and accessibility to support a conviction for “use” of a firearm during and in relation to a drug trafficking offense.<sup>189</sup> The Court decided it was not, relying in part on dictionary definitions of “use” that require active employment of the object used.<sup>190</sup> In reaching this conclusion, the Court recognized that by ascribing an active-employment meaning to “use” it was restricting the government’s ability to prosecute under the statutory provision.<sup>191</sup>

In *Abuelhawa v. United States*, the issue was whether a person who used his cell phone to arrange for a misdemeanor drug purchase also committed a separate felony by “facilitating” the distributor’s drug sales.<sup>192</sup> The Court recognized that the plain meaning of “facilitate” encompassed the defendant’s phone calls inasmuch as the calls made distribution of the drugs easier.<sup>193</sup> Instead the Court reasoned that the word as used in this statute did “not extend to the outer limits of its definitional possibilities.”<sup>194</sup> The Court relied in this context on a legal dictionary definition of facilitating a crime as synonymous with aiding or abetting its commission, and it determined that a misdemeanor purchaser—although a necessary participant to the drug sales—was not a facilitator in this more active sense.<sup>195</sup>

We do not mean to suggest that the Justices’ use of dictionaries in criminal cases is necessarily justified in normative terms. It may be, for instance, that examples of how “use” or “facilitate” are regularly employed in everyday sentences would provide a more

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189. See 516 U.S. 137, 142-43 (1995) (citing 18 U.S.C. § 924(c)(1)), *superseded by statute*, Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469, *as recognized in* *Abbott v. United States*, 131 S. Ct. 18 (2010).

190. See *id.* at 145 (relying on definitions from two dictionaries).

191. See *id.* at 150.

192. 556 U.S. 816, 818 (2009) (citing 21 U.S.C. § 843(b) (2006)).

193. See *id.* at 819.

194. *Id.* at 820 (citation omitted).

195. See *id.* at 820-21 (relying on Black’s Law Dictionary definitions of “aid and abet” and “facilitation”).

reliable indicator as to ordinary meaning.<sup>196</sup> We also do not mean to suggest that the Court's dictionary usage in criminal cases is predominantly pro-defendant. There are numerous instances where the Court invokes dictionary definitions to help establish that the contested criminal statutory provision does cover the defendant's conduct.<sup>197</sup> Our point is rather that the Court's especially frequent use of dictionaries in the criminal law field reflects to a considerable extent an interest in assuring that defendants—and citizens more generally—have been given adequately clear notice of what conduct can lead to federal criminal prosecution.

### *B. The Dictionary as a Way Station*

In *United States v. Santos*, the Court construed the principal federal money-laundering statute, which makes it a crime to engage in financial transactions using the “proceeds” of certain unlawful activities with a specified intent.<sup>198</sup> Writing for a four-member plurality,<sup>199</sup> Justice Scalia concluded that the term “proceeds” referred not to the expansive concept of “receipts” generated by the unlawful activities, but rather to the narrower idea of “profits,” that is, gross receipts less expenses.<sup>200</sup> Although the Court was closely divided as to the meaning of “proceeds,” there was agreement that dictionary definitions were of no assistance in resolving the issue.

Justice Scalia began his analysis by noting that the statute does not define “proceeds”; he then cited three dictionaries for the proposition that in ordinary usage terms “proceeds” has long been understood to mean either receipts or profits.<sup>201</sup> Scalia proceeded to

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196. See *United States v. Costello*, 666 F.3d 1040, 1044-45 (7th Cir. 2012) (Posner, J.) (relying on examples from Google search and illustrative usage to determine ordinary meaning of “harboring” an undocumented alien under criminal statute).

197. See, e.g., *United States v. Williams*, 553 U.S. 285, 294-95 (2008); *James v. United States*, 550 U.S. 192, 207-08, 213-14 (2007); *Muscarello v. United States*, 524 U.S. 125, 127-28, 130-31 (1998); *Smith v. United States*, 508 U.S. 223, 227-29 (1993).

198. 553 U.S. 507, 510-11 (2008); 18 U.S.C. § 1956(a)(1) (2006).

199. Joining Justice Scalia's opinion were Justices Souter, Ginsburg, and Thomas; Justice Stevens concurred in the judgment. Justice Alito's dissent was joined by Chief Justice Roberts and Justices Kennedy and Breyer; Justice Breyer also filed a separate dissenting opinion. *Santos*, 553 U.S. at 509, 524, 529, 531.

200. See *id.* at 511-14.

201. *Id.* at 511 (citing 12 OXFORD ENGLISH DICTIONARY 544 (2d ed. 1989); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1542 (2d ed. 1987); WEBSTER'S NEW INTERNATIONAL

examine the word's use in multiple provisions of the federal money-laundering statute and concluded that its meaning remained entirely ambiguous.<sup>202</sup> Accordingly, he invoked the rule of lenity to construe the term narrowly in favor of the defendant.<sup>203</sup> Justice Alito, dissenting for four members of the Court, agreed that dictionaries did little or nothing to resolve the meaning of "proceeds."<sup>204</sup> He then relied on other contextual resources to argue that the word as enacted meant gross receipts.<sup>205</sup>

Dictionaries received relatively short shrift from Justices Scalia and Alito as their opinions turned to more complex and multi-layered treatment of how to interpret a key contested term in its larger statutory setting.<sup>206</sup> Each opinion consulted more than one general dictionary definition for the word "proceeds." But each was candid enough to recognize that the dictionary added no value in this instance and that only other interpretive resources would enable the Court to reach a result.

In *Robinson v. Shell Oil Co.*, the Court had to decide whether Title VII's anti-retaliation provision protects former employees as well as current ones.<sup>207</sup> The statute prohibits retaliatory discrimination by an employer against "any of his employees or applicants for employment."<sup>208</sup> The court of appeals had held that "employees" refers to current and not former employees,<sup>209</sup> but the Supreme Court reversed in a unanimous opinion by Justice Thomas.

The Court first determined that the term "employees" was ambiguous with respect to excluding former employees. Justice Thomas reasoned that neither the Title VII definition of "employee" nor treatment of the term in Black's Law Dictionary included a clear

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DICTIONARY 1972 (2d ed. 1954).

202. *Id.* at 511-14.

203. *Id.* at 514.

204. *Id.* at 532.

205. *See id.* at 533-46 (invoking meaning of "proceeds" in international money-laundering treaty, model money-laundering act, and multiple state money-laundering statutes, as well as legislative history and purposive considerations from Congress).

206. Justice Stevens, concurring in the judgment, did not discuss dictionary definitions at all; he relied principally on legislative history and policy arguments. *Id.* at 524-28.

207. 519 U.S. 337, 339 (1997).

208. 42 U.S.C. § 2000e-3(a) (2006).

209. *Robinson v. Shell Oil Co.*, 70 F.3d 325, 329-30 (4th Cir. 1995) (en banc).

temporal qualifier.<sup>210</sup> After noting the statutory definition of “employee” as “an individual *employed by an employer*,” Thomas quoted from the legal dictionary definition of “employed” as “performing work under an employer-employee relationship.”<sup>211</sup> But he dismissed this definition as unhelpful because the statutory term “employed” could as easily be read to mean “was employed” as “is employed.”<sup>212</sup> The Court then relied at length on larger structural and purposive arguments, emphasizing that Title VII uses “employees” to include former employees in numerous other provisions and also that authorizing the prospect of post-employment retaliation would deter victims of discrimination from complaining about unlawful employer conduct.<sup>213</sup>

In both *Santos* and *Robinson*, the Court quickly sidestepped dictionary definitions because it found them to be inconclusive.<sup>214</sup> The Court also has treated dictionaries as an afterthought to its interpretive analysis. In *Watson v. United States*, the Court held that a person who trades his drugs for a gun does not “use” a firearm “during and in relation to ... [a] drug trafficking crime” so as to qualify for a mandatory minimum sentence.<sup>215</sup> Writing for eight members of the Court, Justice Souter observed that absent any statutory definition of the verb “use” its meaning “has to turn on the language as we normally speak it.”<sup>216</sup> He then proceeded to rely on analogies from everyday life to reason that no ordinary person would understand receiving an object in a barter transaction as tantamount to “using” that object.<sup>217</sup> This common sense introspective approach to discovering ordinary meaning was fairly typical of the Court’s reasoning prior to 1986.<sup>218</sup> In a short footnote, Justice

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210. *Robinson*, 519 U.S. at 342.

211. *Id.* (emphasis added) (quoting 42 U.S.C. § 2000e(f); BLACK’S LAW DICTIONARY 525 (6th ed. 1990)).

212. *Id.*

213. *Id.* at 342-46.

214. *See also* TRW Inc. v. Andrews, 534 U.S. 19, 32 (2001) (sidestepping a dictionary argument on meaning of when liability “arises” under Fair Credit Reporting Act because dictionary definitions of “arise” are ambiguous).

215. 552 U.S. 74, 76 (2007) (quoting 18 U.S.C. § 924(e)(1)(A) (2006)).

216. *Id.* at 79.

217. *See id.*

218. *See, e.g.*, *Greyhound Corp. v. Mount Hood Stages, Inc.*, 437 U.S. 322, 330-31 (1978); *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 172-74 (1978); *Burns v. Alcala*, 420 U.S. 575, 580-81 (1975). *See generally* SOLAN, *supra* note 100, at 74-75.



Souter added that “dictionaries confirm this conclusion” because even the expansive standard definitions of “use” do not stretch this far.<sup>219</sup>

Finally, the Court has discounted dictionary definitions when they are overcome by sufficiently clear evidence that Congress meant to depart from a dictionary’s definitional priorities. In *Johnson v. United States*, the Court held that a provision of the 1984 Sentencing Reform Act authorizing a district court to “revoke” a term of supervised release in favor of reimprisonment impliedly permitted the lower court to require service of a *further term* of supervised release following the added incarceration.<sup>220</sup> Writing for seven members of the Court,<sup>221</sup> Justice Souter acknowledged that the primary dictionary meaning of “revoke” is “to annul by recalling or taking back.”<sup>222</sup> He concluded, however, that Congress meant to use “revoke” in an unconventional sense, as “allowing a ‘revoked’ term of supervised release to retain vitality after revocation.”<sup>223</sup>

Justice Souter based his conclusion on the overall structure and purpose of the supervised release provision. In different paragraphs of the text, Congress authorized district courts to “terminate” supervised release under certain conditions and to “revoke” it under others, suggesting Congress did not intend that the sense of finality

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219. *Watson*, 552 U.S. at 79 n.7. The Court in *Watson* had to navigate around its earlier decision in *Smith v. United States*, 508 U.S. 223, 241 (1993), holding that a person who trades his gun for drugs is “using” a firearm under the mandatory minimum sentencing provision. See *Smith*, 508 U.S. at 241. Justice Souter’s footnote essentially sought to reconcile *Smith* and *Watson* while alluding to Justice Scalia’s dissenting position in *Smith* that the dictionary definition of “use” is so elastic as to be unhelpful. See *Watson*, 552 U.S. at 79 n.7. Justice Ginsburg’s concurrence in *Watson* argues that the two decisions cannot coexist; she would interpret “use a firearm” in this statute to mean use for its intended purpose as a weapon. See *id.* at 84 (Ginsburg, J., concurring). For another example in our dataset of the Court’s quick reference to the dictionary to confirm its own ordinary meaning analysis, see *Heintz v. Jenkins*, 514 U.S. 291, 294 (1995).

220. See 529 U.S. 694, 703-07 (2000) (construing 18 U.S.C. § 3583(e)(3) (2006)). The Court in *Johnson* also addressed allegations that a different subsection of the law violated defendant’s rights under the ex post facto clause; that portion of the majority opinion does not involve dictionary usage. See *id.* at 699.

221. Justice Thomas concurred in the judgment and Justice Scalia dissented. Justice Kennedy wrote a separate concurrence that joined the majority opinion in relevant part. See *id.* at 713-15.

222. *Id.* at 704 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1944 (1981)).

223. *Id.* at 707.

attached to the former verb was necessarily present for “revoke.”<sup>224</sup> Further, because the reimprisonment that accompanied a revocation of supervised release was, in effect, a continuation of the terms of supervision, the majority reasoned that the balance of this supervised reimprisonment could remain effective as a term of supervised release.<sup>225</sup> Souter recognized that the Court was construing “revoke” as meaning “to call or summon back” in a provisional or tentative sense rather than the final or rescinding sense that was prototypical in the dictionary.<sup>226</sup> But having concluded that this unconventional sense departed from the ordinary meaning of the statute’s key contested word, Souter insisted that “this is exactly what ought to happen when ... the realization of clear congressional policy (here, favoring the ability to impose supervised release) is in tension with the result that customary interpretive rules would deliver.”<sup>227</sup>

In *Johnson*, the Court’s bypass of dictionary-defined ordinary meaning was due to the inapposite rather than the inconclusive nature of the dictionary approach.<sup>228</sup> Under either rationale, the Court was candid about the limited role for dictionary definitions, but *Johnson* was unusual in explicitly subordinating ordinary meaning to congressional purpose.

One might ask why the Court consults dictionaries at all in this way station category of cases, as it does not routinely invoke canons, precedent, or legislative history when those resources are not deemed supportive of its final result. The Justices may well be responding to dictionary-based positions advanced by the parties, although even there the Court does not address every losing argument. A more plausible response may be the extent to which

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224. *See id.* at 704-05.

225. *See id.* at 705-06.

226. *Id.* at 706 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1944 (1981)).

227. *Id.* at 706 n.9. Justice Scalia vigorously dissented, arguing that the meaning of “revoke” ascribed by the majority was not just unconventional but fictitious. *See id.* at 716-17 (Scalia, J., dissenting).

228. The Court pursued a comparable bypass in *Mayo Foundation v. United States*, involving whether medical residents are properly viewed as employees or as “students” exempted from FICA taxes by Congress. 131 S. Ct. 704, 708 (2011). Chief Justice Roberts for a unanimous Court acknowledged petitioner’s argument that the standard dictionary definition of “student” encompasses medical residents, but then looked both to other sections of the tax code that excluded medical residents from certain exemptions available to employees and to traditional notions of *Chevron* deference to rule for the IRS. *Id.* at 708, 711-16.

the Justices as a group have come to regard dictionaries as a necessary intermediate element in their interpretive approach to statutes.

### *C. The Dictionary as an Ornament*

It is important to be clear about the contours of this category. In the cases that follow, the Court credits dictionary usage as contributing to its result, and this assertion is technically accurate. At the same time, the dictionary is neither a necessary nor a substantial element in the Court's reasoning; in most instances, it is of peripheral importance. Despite its typical location at the start of the Court's analysis, dictionary usage could be eliminated from these majority opinions with no real diminution in their persuasive force. At the same time, the dictionary's presence at an early stage lends a patina of objectivity and legitimacy based on its close relationship to the disputed statutory text. Accordingly, we refer to dictionary use here as ornamental.<sup>229</sup>

In *Mac's Shell Service, Inc. v. Shell Oil Products Co.*, the Court had to decide whether substantial alterations in rental terms imposed by a petroleum franchisor on its service-station franchisees amounted to constructive termination under the Petroleum Marketing Practices Act (PMPA) when the franchisees continued to operate despite the significant material changes.<sup>230</sup> The appellate court had held that a franchisee could recover for constructive termination without abandoning its franchise.<sup>231</sup> A unanimous Supreme Court reversed.

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229. We recognize that invoking dictionary definitions may provide an incrementally supportive justification for the Court's determination as to the meaning of the text. We use the label "ornamental," however, because the minimal substantive contribution made by dictionary definitions is less salient than the legitimating role these definitions play when they are deliberately identified and assessed in objective terms near the start of the Court's analysis.

230. See 130 S. Ct. 1251, 1254-55 (2010) (citing 15 U.S.C. § 2801 (2006)). The PMPA prohibits a franchisor from terminating a franchise except for specified reasons. 15 U.S.C. § 2802 (a)-(b) (2006).

231. See *Marcoux v. Shell Oil Prod. Co.*, 524 F.3d 33, 45-47 (1st Cir. 2008), *aff'd in part, rev'd in part*, 130 S. Ct. 1251 (2010).

Noting that the PMPA gave only an elliptical definition of the word “termination,” Justice Alito turned first to the dictionary.<sup>232</sup> As the word “terminate” ordinarily means “put an end to,” the Court reasoned that conduct is not prohibited under the Act’s plain language unless it forces an end to the franchise.<sup>233</sup> But having made this point, the Court proceeded to provide four or five additional grounds for its result.

Relying on the Uniform Commercial Code, Justice Alito noted that the technical meaning of “terminating” a contract was well-settled when Congress enacted the PMPA.<sup>234</sup> He then explained how requiring that franchisees abandon their franchises was consistent with the doctrine of constructive termination in employment law—constructive discharge—and landlord-tenant law—constructive eviction.<sup>235</sup> This in turn led to an examination of the legal term “constructive.” The Court found that although the legal relationship does end, it is the plaintiff rather than the defendant who effectuates termination.<sup>236</sup>

The majority went on to impute awareness of the constructive termination doctrine to the Congress that enacted the PMPA.<sup>237</sup> In addition, the majority described how Congress’s purpose in enacting the statute was to federalize only the termination of franchise relationships, leaving regulation of other franchisor-franchisee disputes to their traditional domain under state law.<sup>238</sup> Finally, the Court concluded that it would be judicially unmanageable as a practical matter to articulate a standard for when breaches of contract were actionable under the PMPA even though the franchise relationship endured.<sup>239</sup> Viewed against this detailed reliance on technical legal meaning, analogous common law doctrines, congressional intent and purpose, and practical consequences, the Court’s

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232. *See* 130 S. Ct. at 1257 (stating that under the PMPA “termination” includes cancellation, but there is no further definition of terminate or cancel).

233. *See id.*

234. *See id.* at 1258.

235. *See id.*

236. *See id.* at 1259.

237. *See id.*

238. *See id.* at 1259-60.

239. *See id.* at 1260.

use of a general dictionary definition seems little more than window-dressing.

A similar pattern is evident in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, a unanimous opinion authored by Justice Scalia.<sup>240</sup> The case involved whether the Lanham Act prohibited unaccredited copying of a television series that was in the public domain after its copyright had expired decades earlier.<sup>241</sup> The statutory provision before the Court created a federal remedy against a person who makes a “false designation of origin [or] false or misleading description of fact ... which ... is likely to cause confusion ... as to the origin ... of his or her goods.”<sup>242</sup>

Justice Scalia began by reviewing the dictionary definition of “origin,” which he identified as “[t]he fact or process of coming into being from a source.”<sup>243</sup> In this instance, the “most natural” meaning of source was the producer of the videotape being marketed as “goods” by petitioner, Dastar, and it would be unnatural to extend that meaning to encompass a person who may long ago have originated the ideas or communications now embodied in the videotape.<sup>244</sup> He then demonstrated at length that any such extension was incompatible with the purpose of the Lanham Act, the larger structure of federal intellectual property law, and Supreme Court precedent, as well as being unmanageable in pragmatic terms.<sup>245</sup>

In doing so, Justice Scalia reasoned that the Act’s purpose—to prohibit false or misleading designations likely to confuse consumers as to the source of goods—did not apply to where a non-infringing producer’s ideas came from because consumers typically do not care about that question.<sup>246</sup> Further, because patent and copyright

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240. 539 U.S. 23, 24 (2003).

241. *Id.* at 3 (citing 15 U.S.C. § 1125(a) (2006)).

242. 15 U.S.C. § 1125(a)(1) (2006). The Lanham Act largely regulates trademarks, but this provision extends beyond trademark protection, addressing the violation known as “reverse passing off”—where a producer represents someone else’s goods or services as his own. *See Dastar Corp.*, 539 U.S. at 27-29. It was undisputed that “origin” refers to origin of production as well as geographic origin. *See id.* at 29-31.

243. *Dastar Corp.*, 539 U.S. at 31 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY 1720-21 (2d ed. 1949)).

244. *Id.* at 31-32.

245. *See id.* at 32-37.

246. *See id.* at 32-33.

law protect and also limit the rights of original creators of works, extending trademark law to uncopyrighted works would impinge upon areas Congress had traditionally reserved to those separate fields of federal law.<sup>247</sup> Finally, requiring attribution of uncopyrighted materials would pose serious practical problems for courts and product manufacturers, and would conflict with several prior Supreme Court decisions.<sup>248</sup> Once again, although a dictionary definition was used to launch the Court's analysis, the core of the Court's reasoning involved other interpretive resources.

Using the dictionary for essentially ornamental purposes is not limited to unanimous opinions or to commercial law cases. In the labor field, the Court in *Crawford v. Nashville* held that the "opposition clause" of Title VII's anti-retaliation provision protected an employee who spoke out during an investigation into a co-worker's complaints of sexual harassment.<sup>249</sup> Writing for seven members of the Court, Justice Souter noted that the applicable statutory text prohibits employer discrimination against any employee "because he has opposed any practice made" unlawful by the statute.<sup>250</sup> Souter began by consulting two dictionaries to determine that the verb "oppose" covers resisting and confronting but also less active positions such as contending against and being hostile or adverse to an opinion.<sup>251</sup> Although the majority concluded that some of these less energetic dictionary senses applied to an employee's communication to her employer about his discriminatory conduct,<sup>252</sup> it relied more extensively on numerous other factors. These other grounds included an analysis of how "oppose" is used in ordinary discourse to encompass reactive as well as proactive conduct;<sup>253</sup> a desire to avoid the absurd or "freakish" rule that an employee is protected for reporting discrimination on her own but

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247. *See id.* at 33-34.

248. *See id.* at 34-37.

249. 555 U.S. 271, 273 (2009).

250. *Id.* at 274 (quoting 42 U.S.C. § 2000e-3(a) (2006)).

251. *See id.* at 276 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY 1710 (2d ed. 1957) and RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1359 (2d ed. 1987)); Justice Alito wrote separately concurring in the judgment, for himself and Justice Thomas. *See id.* at 276 (Alito, J., concurring).

252. *See id.* at 276.

253. *See id.* at 277.

not in response to an employer question;<sup>254</sup> a respect for the agency guideline in this area;<sup>255</sup> a concern that failing to protect responsive opposition would chill employee reporting of violations thereby frustrating congressional purpose;<sup>256</sup> and an understanding that the Court's Title VII precedents supported its position.<sup>257</sup>

In *Saint Francis College v. Al-Khazraji*, an early Rehnquist era decision, the Court held that a person of Arabian ancestry is protected against racial discrimination under 42 U.S.C. § 1981.<sup>258</sup> Justice White for the Court stated that the case hinged on the understanding of "race" in 1870 when Congress enacted the law, not in the present when a person of Arab ancestry is considered to be within the Caucasian race.<sup>259</sup> He began by consulting a series of mid-nineteenth-century dictionaries and determined that they described race in the narrower terms of ethnic groups.<sup>260</sup> But the Court ultimately relied on the legislative history and congressional purpose accompanying this post-Civil War legislation. Justice White noted that the congressional floor debates were replete with references to Scandinavians, Anglo-Saxons, Mexicans, Gypsies and Germans as "races," and that legislators spoke of section 1981 as meant to protect immigrant groups such as the Chinese and French.<sup>261</sup> "Based on" this evidence of legislative purpose, the Court had "little trouble in concluding that Congress intended to protect from discrimination ... persons ... because of their ancestry or ethnic characteristics ... whether or not [this] would be classified as racial in terms of modern scientific theory."<sup>262</sup>

The Court in *Saint Francis College* used dictionaries from around the time of enactment to help reframe the key interpretive issue in

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254. *See id.* at 277-78.

255. *See id.* at 276 (quoting EEOC guideline).

256. *See id.* at 278.

257. *See id.* at 273-79 (relying on three decisions).

258. 481 U.S. 604 (1987). The statute, enacted in 1870, guaranteed to all persons "the same right ... to make and enforce contracts ... as is enjoyed by white citizens," and the Court had previously interpreted the provision as banning all "racial" discrimination in the making of private contracts. *See id.* at 609.

259. *See id.* at 610.

260. *See id.* at 610-12 (consulting four dictionaries and also three encyclopedias published between 1830 and 1887).

261. *See id.* at 612-13.

262. *Id.* at 613.

historical rather than current terms.<sup>263</sup> In this respect, reliance might be viewed as more substantially supportive. Nonetheless, because the majority was unusually explicit that its holding was based simply on Congress's clear understanding of the race-discrimination protections it was enacting, the role of dictionaries remained supplemental even if not marginal.

Finally, in *Begay v. United States*, the Court had to decide whether the state felony offense of driving under the influence of alcohol (DUI) qualifies as a "violent felony" under the Armed Career Criminals Act.<sup>264</sup> The federal statutory provision defines a violent felony as one that either has an element of physical force or "is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."<sup>265</sup> Writing for five members of the Court, Justice Breyer held that the DUI offense did not qualify under this provision.<sup>266</sup>

Breyer began by relying on two language canons to reason that the statute's listed examples of violent felonies—burglary, arson, extortion, or using explosives—illustrate and limit the kinds of criminal conduct connoted by "otherwise."<sup>267</sup> Although driving under the influence creates a risk of physical injury, it is not purposeful and aggressive in the same way as the listed offenses.<sup>268</sup> Breyer then invoked the Act's legislative history as further support, emphasizing that Congress had rejected a proposal to include every offense involving a substantial risk of physical force and opted instead for the current examples.<sup>269</sup> He also relied on the Armed Career Criminal Act's purpose, noting that Congress's focus was on

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263. See *supra* notes 259-260 and accompanying text.

264. 553 U.S. 137, 139-40 (2008) (interpreting 18 U.S.C. § 924(e)(2)(B) (2006)).

265. 18 U.S.C. § 924(e)(2)(B) (2006) (emphasis added).

266. *Begay*, 553 U.S. at 138, 148. Justice Scalia concurred in the judgment, while Justice Alito dissented, joined by Justices Souter and Thomas. *Id.* at 138.

267. See *id.* at 142. Breyer does not name the canons, but he used (a) *ejusdem generis*, reasoning that the general reference to "crimes present[ing] a serious potential risk of physical injury" is limited to the same kind of crimes previously listed and (b) the rule against surplusage, reasoning that if Congress had wanted the provision to cover every crime that creates risk of physical injury it would not have needed to include any examples. *Id.* (internal quotations omitted).

268. See *id.* at 144-45.

269. See *id.* at 143-44.



augmenting punishment for a particular subset of offenders—criminals with a record of aggressive and intentional crimes rather than the strict liability offense of DUI.<sup>270</sup> Breyer did invoke the dictionary definition of “otherwise” in the midst of his discussion, but only to establish that it was not inconsistent with the majority’s analysis based on canons, legislative history, and purpose.<sup>271</sup>

In these five decisions, covering all three subject areas, the Court used the dictionary as an affirmative component although it was never of primary or even substantial weight. There are numerous additional cases from our dataset in which the majority opinion author invoked dictionary definitions as nominally supportive while relying to a far greater extent on other interpretive resources.<sup>272</sup> Indeed, Court opinions using the dictionary for essentially ornamental purposes constitute the largest of our three general categories, comprising more than half the majority opinions that we classified.<sup>273</sup>

One might see little reason for concern regarding the repeated invocation of a resource that plays only a subsidiary or marginal role in the majority’s analysis. But in understanding how the Court’s overall interpretive approach has evolved, a resource’s location and persistence can have a cumulative effect. The dictionary’s frequent appearance near the start of the Court’s reasoning, as an integral component of textual analysis, creates an impression

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270. *See id.* at 147-48.

271. *See id.* at 144 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1598 (1961) (defining “otherwise” to mean “in a different way or manner”). Breyer incorporated the definition by contending that it could refer to a crime that is *different* from the listed examples in one respect, “the way or manner ... it produces [a] risk”, but *similar* in another respect, “the degree of risk it produces.” *Id.*

272. *See, e.g.*, *New Process Steel v. NLRB*, 130 S. Ct. 2635, 2642-43 (2010) (Stevens, J.); *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 112-13 (2008) (Breyer, J.); *Cook Co., Ill. v. United States ex rel. Chandler*, 538 U.S. 119, 125-29 (2003) (Souter, J.); *Muscarello v. United States*, 524 U.S. 125, 128-32 (1998) (Breyer, J.); *Reves v. Ernst & Young*, 507 U.S. 170, 177-79 (1993) (Blackmun, J.); *H.J. Inc. v. N.W. Bell Tel. Co.*, 492 U.S. 229, 238-39 (1989) (Brennan, J.).

273. Of the fifty majority opinions that we reviewed with an eye toward classifying them in a general category, thirty-one used the dictionary essentially for ornamental purposes, eleven used it as a way station, and six used it as a barrier. The other two majorities, *Bailey* and *Abuelhawa*, fell into the notice opinions category, although they could also be classified as using dictionary definitions in ornamental fashion. *See Abuelhawa v. United States*, 566 U.S. 816, 820-24 (2009); *Bailey v. United States*, 516 U.S. 137, 142-45 (1995).

that the lexicographic method is fundamentally legitimating and should matter more than many, if not most, other interpretive resources.

As we have explained, this dictionary emphasis is a very new development steadily fostered over the past twenty-five years by the Rehnquist and Roberts Courts. It has supplanted prior approaches in which judges used their own common sense or analogical powers to determine ordinary meaning, or inquired more vigorously into Congress's intended meaning. And even though the Justices continue to rely on both their own introspective analysis and the record of Congress's intentions, the dictionary's recently elevated status effectively invites them to accord a diminished role to these other resources. The final group of cases illustrates one effect of that invitation.

#### *D. The Dictionary as a Barrier*

In *Janus Capital Group v. First Derivative Traders*, the Court recently held that Rule 10b-5's prohibition against the *making* of material misrepresentations in connection with the purchase or sale of securities did not apply to a mutual fund advisor because the false statements appeared in documents formally issued by the mutual fund, not by the investment advisor that created them.<sup>274</sup> Writing for a five-person majority, Justice Thomas relied initially and substantially on his choice of a general dictionary definition for "make."<sup>275</sup> In the Court's view, this definition was so clear and the implications of a different meaning so adverse that it foreclosed any need to examine either agency intent in promulgating the rule or agency practice in applying it.

The majority's chosen definition specifies that when "make" is followed by "a noun expressing the action of a verb," the entire phrase is "approximately equivalent in sense to that verb."<sup>276</sup> Under this dictionary approach, to make a promise is the equivalent of to

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274. 131 S. Ct. 2296, 2301-05 (2011) (applying Rule 10b-5, promulgated pursuant to § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (2006)).

275. *See id.* at 2302-03.

276. *Id.* at 2302 (quoting 6 OXFORD ENGLISH DICTIONARY 66 (1933); WEBSTER'S NEW INTERNATIONAL DICTIONARY 1485 (2d ed. 1934)).

promise, and one “makes” a statement by stating it.<sup>277</sup> Accordingly, for the purposes of Rule 10b-5, the maker of the contested statement was the mutual fund that had ultimate formal authority over its content and any decision to communicate it.<sup>278</sup> An investment advisory firm that prepares or publishes the statement on behalf of the fund is not a maker of the statement, just as a speechwriter does not make a statement when the politician for whom he wrote the speech delivers it.<sup>279</sup>

Justice Thomas recognized the presence of a respectable alternative definition of “make” as “create” in the sense of causing something to exist or occur.<sup>280</sup> Although this definition might be acceptable when the word is paired with an object not associated with a verb, such as making a chair, it “fails to capture [the correct] meaning when directed at an object expressing the action of a verb.”<sup>281</sup> Moreover, because Thomas found the meaning of “make” in Rule 10b-5 to be unambiguously clear, he declined to consider the Government’s argument that the Securities & Exchange Commission’s position warranted deference.<sup>282</sup>

The Court’s dictionary approach in *Janus Capital* erected a barrier to responsible judicial review. In determining that a certain definition of the verb “make” was unequivocally correct even though the dictionaries it consulted contained multiple alternative senses of that word,<sup>283</sup> the Court demonstrated its selective approach to dictionaries. Under other well-recognized definitions of the verb, corporate employees or advisors may be said to “make” statements even though they and their statements are subject to the control of more senior officials or boards of directors.<sup>284</sup>

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277. *See id.*

278. *See id.* at 2305.

279. *See id.*

280. *See id.* at 2303.

281. *Id.*

282. *See id.* at 2303 n.8.

283. *See* 9 OXFORD ENGLISH DICTIONARY 235-43 (2d ed. 1989) (listing more than seventy different definitional senses of verb “to make”); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1363-64 (1986) (listing more than forty senses of the verb “make” that are not obsolete or dialect).

284. *See, e.g.,* AMERICAN HERITAGE DICTIONARY 758 (2d ed. 1982) (defining “make” as “to perform” as in “make a bow”); WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1363 (1986) (defining “make” as “compose, write” with reference to verses and epigrams). *See generally* *Janus Capital Grp., Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2307 (Breyer, J.,

Moreover, by insisting that the dictionary-defined text was unambiguous, the Court felt free to minimize or ignore the Agency's contextual contentions. Specifically, the Court had no answer to the argument that an investment advisor may be held primarily liable under section 10(b) of the Securities Exchange Act because, in contrast to secondary actors like lawyers or accountants, an adviser is the equivalent to a corporate insider, exercising daily management control over the mutual fund.<sup>285</sup> Further, given plausible conflicting definitions of the verb "make," the SEC's interpretation of that term in briefs and adjudication ought to have received some level of deference.<sup>286</sup> The majority argued that its dictionary-based approach was supported by Supreme Court precedent, but Justice Breyer, in dissent, cast serious doubt on that position,<sup>287</sup> and corporate law scholars have criticized the Court's definitional approach.<sup>288</sup> In the end, the Court reached a conservative result, confining implied rights of action under Rule 10b-5 by dismissing the Agency's purposive and deference-based arguments in favor of an "ordinary meaning" analysis derived from its subjective choice of dictionary definitions.

In *Gustafson v. Alloyd Company*, the issue was whether a privately negotiated resale of all corporate stock was covered by section 12(2) of the Securities Act of 1933, which creates a cause of action against sellers who make material misrepresentations "by means of a prospectus."<sup>289</sup> Writing for a five-member majority, Justice Kennedy held that the term "prospectus" referred only to documents describing a public offering of securities, not private

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dissenting with Ginsburg, Sotomayor, and Kagan, JJ.)

285. See *Janus Capital*, 131 S. Ct. at 2312 (Breyer, J., dissenting); Brief for United States as Amicus Curiae Supporting Respondent at 17-18, *Janus Capital*, 131 S. Ct. 2296 (No. 09-525).

286. See generally *SEC v. Zandford*, 535 U.S. 813, 819-20 (2002) (using SEC standards as guideline for interpreting a section 10(b) issue); *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

287. See *Janus Capital*, 131 S. Ct. at 2307-08 (Breyer J., dissenting with Ginsburg, Sotomayor, and Kagan, JJ.).

288. See, e.g., Donald C. Langevoort, *Lies Without Liars? Janus Capital and Conservative Securities Jurisprudence*, 90 WASH. U.L. REV. 933, 933-35 (2013); Colin Talia, Note, *Janus Capital Group: How "Making" a Statement Leads to Insulation from Liability*, 38 J. CORP. LAW 197, 206-16 (2012).

289. 513 U.S. 561, 564 (1995).

agreements to sell securities.<sup>290</sup> In reaching this conclusion, Kennedy relied in important respects on a legal dictionary definition for “prospectus” while discounting Congress’s statutory definition, the statute’s drafting history, and the Agency’s consistent interpretation of the word over decades.

The majority acknowledged that “prospectus” was defined in section 2 of the Act, in terms seemingly broad enough to cover private sales.<sup>291</sup> But the Court, relying on how “prospectus” was understood in certain other parts of the Act, reasoned that section 2’s definition had to be harmonized not only with section 12’s creation of a right of action but also with other sections of the statute.<sup>292</sup> In order to achieve this harmonization, Justice Kennedy looked to the Black’s Law Dictionary definition of “prospectus” at the time of the statute’s enactment.<sup>293</sup> He then used the *dictionary* definition, which referred to public solicitations, along with two language canons to conclude that although the *statutory* definition includes “any ... communication ... which ... confirms the sale of any security,”<sup>294</sup> the covered “communications” must be “prospectus-like” in the sense of relating to an initial public offering.<sup>295</sup>

The majority’s dictionary analysis in *Gustafson* was not as explicitly preclusive as in *Janus Capital*. Nonetheless, the effect of the Court’s reasoning was comparable. In its quest for an “ordinary meaning” resolution narrowing the scope of “prospectus,” the majority effectively ignored the statutory context—an extraordinarily broad definition provided by Congress.<sup>296</sup> Further, the Court’s reliance on the dictionary along with semantic canons enabled it to sidestep other contextual factors. These included extensive drafting history indicating Congress was consciously creating a broad

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290. *See id.* at 584.

291. *See id.* at 573-74. The statutory definition reads as follows: “The term ‘prospectus’ means any prospectus, notice, circular advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security.” 15 U.S.C. § 77b(10) (2006).

292. *See Gustafson*, 513 U.S. at 568-76 (discussing meaning of prospectus in sections 10 and 5 as limited to public offerings).

293. *See id.* at 575-76.

294. 15 U.S.C. § 77b(10).

295. *See Gustafson*, 513 U.S. at 575-76 (relying on *noscitur a sociis* and rule against surplusage).

296. *See id.* at 584-87 (Thomas, J., dissenting, with Scalia, Ginsburg, and Breyer, JJ.).

definition of “prospectus”;<sup>297</sup> a consistent agency position on the meaning of prospectus set forth over a prolonged period administering the Act;<sup>298</sup> and the understanding expressed immediately after the Act’s passage by key legal scholars who had been closely consulted during the drafting process.<sup>299</sup> Once again, the Court’s dictionary reliance contributed to a conservative result that was inconsistent with highly probative evidence of what Congress and the Executive Branch understood and intended the term to mean.

In *Gross v. FBL Financial Services, Inc.*, the issue presented was whether plaintiffs alleging intentional discrimination under the Age Discrimination in Employment Act (ADEA)<sup>300</sup> in a mixed-motive factual setting had to produce direct evidence of discrimination or only circumstantial evidence.<sup>301</sup> The Supreme Court previously addressed the concept of mixed motive discrimination<sup>302</sup> in the closely analogous Title VII setting.<sup>303</sup> The Court construed the Title VII language to mean that if the plaintiff-employee proved an illegitimate factor<sup>304</sup> played *a motivating part* in her adverse employment decision, the defendant-employer was liable unless she established that she would have made the same decision anyway based on non-discriminatory factors.<sup>305</sup> In the 1991 Civil Rights Act, Congress endorsed this two-part test while adding a new section to Title VII, stating that if a plaintiff demonstrated that race, sex, or another listed trait was “a motivating factor,” she established an

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297. See *id.* at 599-600 (Ginsburg, J., dissenting, with Breyer, J.).

298. See Brief for the SEC as Amicus Curiae Supporting Respondents at 12, 40-44, *Gustafson*, 513 U.S. 561 (No. 93-404).

299. *Id.* at 39-42 (citing views expressed by Arthur Dean, Felix Frankfurter, and William O. Douglas); see also *Gustafson*, 513 U.S. at 601 (Ginsburg, J., dissenting) (discussing views expressed by Frankfurter and Douglas).

300. 29 U.S.C. §§ 621-34 (2006).

301. 557 U.S. 167, 169-70 (2009).

302. Mixed motive discrimination involves a challenged employment decision that allegedly consists of both a lawful business justification and an impermissible discriminatory intent.

303. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231-32 (1989). Title VII prohibits employment discrimination “because of” an “individual’s race, color, religion, sex or national origin.” 42 U.S.C. § 2000e-2(a)(1) (2006). The ADEA, enacted three years later, adopted the exact same prohibitory language when employers act “because of” an individual’s age. 29 U.S.C. § 623(a)(1) (2006).

304. See *supra* note 302 and accompanying text.

305. See *Price Waterhouse*, 490 U.S. at 244-245 (plurality opinion) (Brennan, J.); *id.* at 258-60 (White, J., concurring); *id.* at 265-67 (O’Connor, J., concurring).

unlawful employment practice allowing for declaratory and injunctive relief.<sup>306</sup>

Against this background, the Court in *Gross* reached out to decide an issue not raised in the petition for certiorari: whether a mixed-motive discrimination claim may be brought under the ADEA at all.<sup>307</sup> Writing for a five-member majority, Justice Thomas held that the answer was no.<sup>308</sup>

Thomas focused on the text of the ADEA and the assumption that the ordinary meaning of this language should be controlling.<sup>309</sup> The ADEA prohibits employment discrimination “because of” an individual’s age, just as Title VII prohibits such discrimination “because of” an individual’s race or sex.<sup>310</sup> Justice Thomas consulted several dictionaries to determine that the ordinary meaning of “because of” was “by reason of” or “on account of.”<sup>311</sup> Accordingly, he concluded that under the plain language of the ADEA, a plaintiff must prove that age was *the reason* or “but-for” cause of any adverse employment action, and that the burden of proof never shifts to defendant employer during this process.<sup>312</sup>

The decision in *Gross* has been sharply criticized, by the four dissenters, by legal scholars, and by commentators.<sup>313</sup> The Court’s determination to address and decide a major issue of statutory interpretation that the parties had not briefed, without considering

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306. Civil Rights Act of 1991, § 107(a)-(b) (codified as amended at 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2006)).

307. See *Gross*, 557 U.S. at 173.

308. See *id.*

309. See *id.* at 175-77.

310. Compare 29 U.S.C. § 623(a)(1)-(2) (2006), with 42 U.S.C. § 2000e-2(a)(1)-(2). See *Lorillard v. Pons*, 434 U.S. 575, 584-85 (1978) (describing how Congress drafted this ADEA language to be precisely identical to Title VII).

311. See *Gross*, 557 U.S. at 176 (quoting 1 WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 194 (1996); 1 OXFORD ENGLISH DICTIONARY 746 (1933); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 132 (1996)).

312. See *id.*

313. See, e.g., *id.* at 180-90 (Stevens, J., dissenting with Souter, Ginsburg, and Breyer, JJ.); *id.* at 190-92 (Breyer, J., dissenting with Souter and Ginsburg, JJ.); Michael Foreman, *Gross v. FBL Financial Services—Oh So Gross!*, 40 U. MEM. L. REV. 681, 682 (2010); Deborah A. Widiss, *Undermining Congressional Overrides: The Hydra Problem in Statutory Interpretation*, 90 TEX. L. REV. 859, 889 (2012); Steven Greenhouse, *Democrats Working to Overturn Justices’ Ruling on Age Bias*, N.Y. TIMES, Oct. 7, 2009, at A20; *Protect Older Workers from Age Discrimination*, AARP (July 2, 2012), <http://www.aarp.org/politics-society/advocacy/info-07-2012/WAARPS-age-discrimination.html>.

the views of the federal agency charged with administering the statute, was attacked as irresponsible activism.<sup>314</sup> More important for our purposes, the majority relied on dictionary definitions while disregarding the Court's well-settled precedent and Congress's evident intent.

The Court in its *Price Waterhouse* decision had construed the identical "because of" phrase in Title VII to mean "a motivating factor."<sup>315</sup> In doing so, the Court expressly concluded that "because of" did *not* mean "solely because of."<sup>316</sup> Although this was a Title VII case, the Court has regularly relied on its Title VII decisions when construing analogous language in the ADEA.<sup>317</sup> Further, the Court's reasoning was entirely consistent with the mixed-motive burden-shifting approach it had adopted over three decades with respect to other statutory employment provisions and workplace constitutional claims as well.<sup>318</sup> Accordingly, federal agencies administering Title VII and the ADEA had long applied this burden-shifting approach. In addition, Congress in 1991 endorsed the Court's burden-shifting test, codifying "a motivating factor" as its standard for determining whether affirmative relief is warranted under Title VII and thereby rejecting the "but-for" causation standard.<sup>319</sup>

The majority in *Gross* attempted to justify its dictionary-based fresh start through a legislative inaction argument, contending that Congress's failure to codify the same standard for the ADEA in 1991 when it modified Title VII indicated an intention to uncouple the meaning of the two "because of" provisions.<sup>320</sup> That argument cannot

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314. See *Gross*, 557 U.S. at 181-82 (Stevens, J., dissenting); Widiss, *supra* note 313, at 890.

315. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240-41 (1989).

316. See *id.* at 241 & n.7 (emphasizing that Congress had rejected an amendment placing "solely" before "because of").

317. See, e.g., *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 143-44 (2000); *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993). See generally *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (noting that substantive provisions of the ADEA "were derived in haec verba from Title VII" (quoting *Lorillard v. Pons*, 434 U.S. 575, 584 (1978) (internal quotation marks omitted)).

318. See *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 394-95, 405 (1983) (construing National Labor Relations Act antidiscrimination provision); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977) (construing First Amendment).

319. See Widiss, *supra* note 313, at 884-85 (describing Congress's codification of "a motivating factor" standard set forth in the earlier Supreme Court decision, and referencing key committee report discussion).

320. See *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175-77 (2009).



withstand scrutiny,<sup>321</sup> but in any event it leaves the majority invoking an ordinary meaning that the Court had squarely rejected in a decision that remains settled law. The case provides yet another illustration of how the Court uses dictionary definitions to ignore or reject larger contextual factors, including congressional intent and its own precedent, in order to reach a conservative result.

Our final case example, *Allentown Mack Sales & Service, Inc. v. NLRB*, involved a challenge to a Labor Board standard regulating employer internal polls that are conducted to determine whether employees support the incumbent union.<sup>322</sup> The Court held that the Board's standard was rational, but the majority then used a dictionary definition to revise the standard's meaning contrary to longstanding agency practice; in doing so, it substantially reduced the burden placed on employers.

Charged with administering the National Labor Relations Act (NLRA), the Labor Board concluded over an extended period that a unionized employer's polling of its own workers regarding their support for the union has the potential to unsettle these employees and to disrupt established bargaining relationships. Accordingly, through a series of decisions, the Board created a standard—that in order to poll, employers must demonstrate “a reasonable doubt, based on objective considerations, that the union continued to enjoy” majority support in the bargaining unit.<sup>323</sup>

Although he held this “reasonable doubt” standard to be rational and consistent with the NLRA, Justice Scalia rejected, on substantial evidence grounds, the Board's factual finding that the employer in the present case lacked such reasonable doubt.<sup>324</sup> The linchpin for

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321. See Widiss, *supra* note 313, at 893-900 (demonstrating in depth how the majority in *Gross* mischaracterized the facts regarding what the 1991 Civil Rights Act did to modify the ADEA and also misapplied relevant precedent).

322. 522 U.S. 359, 361 (1998).

323. *Id.* at 366 (internal quotation marks omitted) (Scalia, J.); *id.* at 389 (Breyer, J., dissenting). Justice Scalia's opinion for the Court had an unusual structure, as it was joined in different parts by separate groups of four Justices. See *id.* at 360. Scalia's conclusion that the Board's “reasonable doubt” standard was rational and consistent with the NLRA was joined by liberal Justices Breyer, Stevens, Souter, and Ginsburg. *Id.* at 360, 365. Scalia's conclusion that the Board's factual finding in this instance was not supported by substantial evidence—based on the proper meaning of “doubt”—was joined by conservative Justices Rehnquist, O'Connor, Kennedy, and Thomas. *Id.* at 360, 371, 380.

324. See *Allentown Mack Sales*, 522 U.S. at 364-66 (upholding rationality of standard); *id.* at 366-68 (rejecting application of standard to this record).

this evidentiary determination was Scalia's reliance on dictionaries to establish the meaning of "doubt."<sup>325</sup> The Board had regularly construed its own standard to mean that an employer was required to have reasonable grounds for *disbelief* that the union enjoyed continuing majority support.<sup>326</sup> But Justice Scalia invoked dictionary definitions and concluded that an employer need only have genuine and reasonable *uncertainty* about whether the union retained majority support.<sup>327</sup> Applying this newly revised standard to the direct and circumstantial evidence in the record, Scalia determined that no rational fact-finder could avoid the conclusion that this employer "had reasonable good-faith grounds to doubt—to be *uncertain about*—the union's retention of majority support."<sup>328</sup>

The Board's "reasonable doubt" standard had often been criticized, principally because the Agency required the same factual showing to justify three different types of employer challenges to an incumbent union: an employer poll, an employer decision to seek an election, and an employer determination to withdraw recognition.<sup>329</sup> But having upheld the standard as rational and consistent with the Act, the Court's decision to reject the Agency's own construction and rewrite the standard's meaning is remarkable. Similar to what occurred in *Gross*, the linguistic issue the Court resolved by using a dictionary was not raised at all in the certiorari petition, and neither party discussed dictionary definitions of "doubt" in their briefs.<sup>330</sup> The Court's two-stage analysis generated an illusion of agency deference that disappeared when the majority insisted on its own meaning for a key word, a word that had been chosen by the Agency when formulating its standard. In rejecting the Agency's ability to give content to its own rules, the majority supplanted the

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325. *See id.* at 367, 380.

326. *See id.* at 367.

327. *See id.* (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 775 (2d ed. 1939); NEW SHORTER OXFORD ENGLISH DICTIONARY 754 (1993); AMERICAN HERITAGE DICTIONARY 555 (2d ed. 1992)).

328. *Id.* at 371.

329. *See id.* at 361 (describing challenge by petitioner); *id.* at 380-81 (Rehnquist, C.J., dissenting). *See generally* Joan Flynn, *A Triple Standard at the NLRB: Employer Challenges to Incumbent Unions*, 1991 WIS. L. REV. 653, 653-54 (1991).

330. *See* Brief of Petitioner, *Allentown Mack*, 522 U.S. 359 (No. 96-795); Brief for the NLRB, *Allentown Mack*, 522 U.S. 359 (No. 96-795).

Board's long-recognized technical expertise in labor relations<sup>331</sup> with its preferred dictionary approach.

This group of majority opinions is considerably smaller than the ornament category,<sup>332</sup> but that is hardly surprising. We would expect the Justices to invoke dictionaries far more often in conjunction with heretofore traditional interpretive resources, as opposed to using dictionary definitions to foreclose serious consideration of those resources. At the same time, the Court's reliance on dictionaries as a barrier, its willingness to elevate ad hoc choices of definitions in such a radically acontextual manner, extends beyond the cases reviewed in our dataset.<sup>333</sup> Such decisions would have been inconceivable prior to 1987; they now occur with disturbing frequency.

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331. See generally *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786-87 (1990) (discussing the need to provide deference for Board rules); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) (discussing Labor Board's experience and specialized knowledge).

332. In addition to the four barrier cases addressed at length in this section, we also note from our dataset two criminal law decisions. In *Smith v. United States*, 508 U.S. 223, 225 (1993), the Court held that trading a gun for narcotics constitutes "use" of a firearm during and in relation to a drug trafficking crime and thereby qualifies for a specified mandatory sentence. Justice O'Connor for the majority relied heavily on a dictionary definition of "use" as meaning "convert to one's service" and concluded that this meaning of using a firearm as an article of exchange was sufficiently ordinary and clear so that the rule of lenity did not come into play. See *id.* at 228-29, 239-41. Justice Scalia's dissent, joined by Justices Stevens and Souter, emphasized that the dictionary contains a wide range of meanings for the verb "use," that the most normal meaning in this statutory criminal punishment context is to use as a weapon rather than as an object of barter, and that the majority's restrictive dictionary approach discounted not only lenity, but also Congress's apparent purpose. See *id.* at 241-47 (Scalia, J., dissenting). Because the rigid definitional approach in *Smith* has been thoroughly examined and criticized by other scholars, we limit our treatment here to footnote status. See, e.g., SOLAN, *supra* note 100, at 57-59, 69; Aprill, *supra* note 4, at 319; Hoffman, *supra* note 4, at 420-23; *Looking It Up*, *supra* note 4, at 1443; Rubin, *supra* note 4, at 190-91, 198-200; see also *Deal v. United States*, 508 U.S. 129, 133-37 (1993) (relying on unambiguous dictionary definition of "conviction" to preclude reliance on prior prosecution practices, previous Supreme Court and lower court decisions, and the rule of lenity).

333. Looking at the Court's 2011-2012 Term, see, for example, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2170 (2012) (invoking dictionary definitions to justify rejection of longstanding agency regulations and guidelines); *supra* text accompanying notes 61-71 (discussing *Taniguchi v. Kan Pacific Saipan Ltd.*, 132 S. Ct. 1997 (2012)).

*E. Analysis*

In Part II, we identified two substantial problems that may arise when the Supreme Court utilizes dictionary definitions as an interpretive resource. One problem is extrinsically rooted, deriving from the acontextual nature of dictionaries. There is a real risk that judges, in their search for correct or appropriate definitions, will ignore background understandings about the words in dispute. This larger background context often involves understandings from the Congress that enacted the words, from agencies that have applied the words, and even from the Court itself as it has construed the words in prior decisions. The second problem is intrinsically rooted, stemming from the diverse taxonomy of dictionaries. Given that “[w]hat distinguishes [dictionaries] is more notable than what they have in common,”<sup>334</sup> the risk is that judges will overlook or ignore salient differences and instead engage in selective reliance on the particular dictionary, definition, or edition date that is congenial to their notion of what the word should mean.

Our empirical findings in Part III and our doctrinal review in Part IV demonstrate that the Supreme Court has succumbed to both kinds of risk. Below, we discuss the second problem, involving the Court’s selective reliance on dictionary brands, definitions, and edition dates, in Part IV.E.1. We then address the Court’s disturbing neglect of background understandings about the contested words or terms in Subsection Two.<sup>335</sup> Finally, we explain in Subsection Three why the Court’s misuse of dictionaries is of special concern as

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334. ATKINS & RUNDELL, *supra* note 49, at 21.

335. We have amply dealt with the Court’s use of dictionaries for notice purposes in its criminal law decisions. *See supra* Parts III.A.1, III.C, IV.A. We would add only that for both liberal and conservative Justices, this notice function seems relatively distinct from their ideological profiles. Thus, for example, Justices Ginsburg and Breyer have used dictionary definitions to determine that statutory text is clear enough to support affirming defendants’ convictions. *See Logan v. United States*, 552 U.S. 23, 31-35 & n.3 (2007) (Ginsburg, J., majority); *Muscarello v. United States*, 524 U.S. 125, 127-31 (1998) (Breyer, J., majority). And Justices Scalia and O’Connor have invoked dictionaries to conclude that the statutory scope does not extend to defendant’s conduct, supporting a reversal of their convictions. *See James v. United States*, 550 U.S. 192, 218-19, 230-31 (2007) (Scalia, J., dissenting); *Bailey v. United States*, 516 U.S. 137, 142-43 (1995) (O’Connor, J., majority), *superseded by statute*, Act of Nov. 13, 1998, Pub. L. No. 105-386, 112 Stat. 3469, *as recognized in Abbott v. United States*, 181 S. Ct. 18 (2010).

a normative matter and when compared to criticisms of how the Justices use or misuse other interpretive assets.

*1. Dictionaries and Subjectivity*

Based on findings from our dataset, we demonstrated the Court's highly subjective and ad hoc approach to choosing dictionaries. The Justices typically rely on one, or at most two, dictionaries to define a contested word; they use general and legal dictionaries interchangeably and without any apparent rationale; they lack a predominant practice regarding whether dictionaries chosen were published close to enactment date, to filing date, or neither; and they have adopted individualized yet uneven approaches to their preferred dictionary brands. We found this persistently subjective approach to dictionary use to be characteristic of both liberal and conservative Justices. At the same time, the tendency to cherry-pick dictionaries and definitions seems more casually opportunistic with respect to the Court's ornamental opinions but more purposefully motivated when the dictionary is used as a barrier.

Subjectivity and discretion are admittedly inescapable elements of the interpretive enterprise. But while no judicially invoked resource is immune, certain recognized distinctions among dictionaries—such as general versus legal, collegiate versus unabridged, publication date in relation to enactment versus case filing—have the potential to generate broadly objective constraints on the exercise of judicial discretion. Ironically, dictionaries differ in this particular respect from the judicially-created canons of construction that are celebrated by Justice Scalia and other textualists. The Rehnquist and Roberts Courts have relied on well over 160 different language and substantive canons since 1986<sup>336</sup> without ever developing or even suggesting an intelligible framework of priorities. Moreover, such a framework seems unimaginable given that judicial priorities set forth in the Court's substantive canons promote a vast array of normative values and policy preferences and that Congress's complex statutory schemes, revised

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336. See WILLIAM N. ESKRIDGE, JR. ET AL., 2012 SUPPLEMENT TO CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY, FOURTH EDITION 197-218 (2012) (listing over 160 canons with case citations).

and extended over many years, tend toward indeterminacy on questions of structural coherence or linguistic consistency.<sup>337</sup>

Perhaps even more ironically, dictionaries—as resources created independent of the judiciary and organized in relation to the actual practices of language users—bear some resemblance to legislative history. Notwithstanding Justice Scalia’s critique that legislative history usage is like looking over a cocktail party crowd for one’s friends, the Court has long recognized a general or presumptive authoritative hierarchy among the various resources generated by Congress as part of the enactment process.<sup>338</sup> And that presumptive hierarchy is based on the actual practices of congressional lawmaking. Thus, standing committee and conference committee reports traditionally are accorded the most weight based on the central role played by these committees in drafting, justifying, and negotiating about text.<sup>339</sup> Explanatory floor statements by bill sponsors or managers are deemed almost as reliable.<sup>340</sup> Post-enactment history and legislative inaction have far less authoritative status because they are viewed as shedding little light on what legislators understood a contested text to mean when they voted to enact it.<sup>341</sup>

Comparably distinct systemic choices are available to the Justices regarding identifiable differences among dictionaries. For instance,

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337. See, e.g., Philip P. Frickey, *Faithful Interpretation*, 73 WASH. U. L.Q. 1085, 1089-94 (1995) [hereinafter Frickey, *Faithful Interpretation*] (discussing language canons); Philip P. Frickey, *Interpretive-Regime Change*, 38 LOY. L.A. L. REV. 1971, 1987-90 (2005) [hereinafter Frickey, *Interpretive-Regime Change*] (discussing substantive canons). See generally Brudney, *supra* note 184, at 1202, 1229-30.

338. See, e.g., *Garcia v. United States*, 469 U.S. 70, 76 (1984) (discussing substantial weight ordinarily given to standing committee reports); *Simpson v. United States*, 435 U.S. 6, 17-18 (1978) (Rehnquist, J., dissenting) (discussing substantial weight given to conference committee reports); *Corley v. United States*, 556 U.S. 303, 318 (2009) (discussing weight given to sponsor statements); *Barber v. Thomas*, 130 S. Ct. 2499, 2507 (2010) (discussing minimal weight given to post-enactment legislative history). See generally WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 311-13 (2d ed. 2006); KENT GREENAWALT, *STATUTORY INTERPRETATION: 20 QUESTIONS* 172-75 (1999).

339. See, e.g., *Bank One Chi., N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 276-77 (1996) (Stevens, J., concurring); ESKRIDGE, JR. ET AL., *supra* note 338, at 311-12.

340. See, e.g., *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982); ESKRIDGE, JR. ET AL., *supra* note 338, at 312; GREENAWALT, *supra* note 338, at 173.

341. See, e.g., *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081-82 (2011) (Scalia, J.) (discussing post-enactment history); John Grabow, *Congressional Silence and the Search for Legislative Intent: A Venture into “Speculative Unrealities,”* 64 B.U. L. REV. 737, 740 (1984) (discussing legislative inaction).

the preference for a legal or general dictionary might be based on the nature of the word being defined, or the likelihood that the audience for the statute is the proverbial man-in-the-street as opposed to an attorney counseling regulated corporations or individuals. Reliance on enactment or case-filing publication dates might reflect a broad preference either for how the enacting Congress likely understood the words it enacted or for how current readers likely understand the same words.

These preferences need not be rigid rules. They can be presumptions that are overcome in appropriately identified circumstances, just as the legislative history hierarchy is a presumptive rather than rule-bound framework. For example, it may well be preferable for the Court to make use of a wide range of dictionaries in a given case so as to minimize the risks of biased or arbitrary selection. However, if the Justices are inclined to invoke a more limited number of dictionaries, as has been their current practice, they might follow the example of at least one state supreme court<sup>342</sup> and strive for a greater degree of institutional consistency in their choices—again to minimize subjectivity or cherry-picking.

In the end, an articulated and transparent set of presumptions is possible with respect to dictionaries, and, over more than a decade, scholars have proposed that some such framework might help diminish the subjective element of the Court's dictionary jurisprudence.<sup>343</sup> The Court, however, has steadfastly refused to adhere to any set of preferences, much less announce such an approach. By declining to identify a principled basis for its dictionary selections, the Justices continue to pursue an opaque strategy with regard to an interpretive resource that possesses a range of objectively

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342. The Missouri Supreme Court has adopted a practice of using Webster's Third when attempting to define a word in its customary usage. The Court's approach is not based on any formal rule or guideline, but its practice of using one dictionary as "standard" is understood to limit the possibility of seeking out a dictionary that supports a preferred outcome. See E-mail from Bill Thompson, Clerk of Missouri Supreme Court, to James Brudney (March 20, 2013, 12:03 PM) (on file with authors).

343. See Rubin, *supra* note 4, at 192-97 (recommending that the Court justify choice of dictionary and definition, use multiple dictionaries, and account for weaknesses in older dictionaries); see also Stephen C. Mouritsen, Note, *The Dictionary Is Not a Fortress: Definitional Fallacies and a Corpus-Based Approach to Plain Meaning*, 2010 BYU L. REV. 1915, 1951-66 (2010) (recommending that the Court adopt a corpus method approach using electronic databases).

distinguishable features. In so doing, the Court exacerbates the subjective element of its dictionary practices.

## *2. Ornaments, Barriers, and the Ideology of the Justices*

Turning to dictionaries' more general functions in the Court's opinions, we focus on the affirmative roles that dictionary definitions play in reaching a result, whether as ornaments or as barriers.<sup>344</sup> As discussed in Part III, we found no statistically meaningful relationship between the Justices' ideological positions and their use of dictionaries. But our review of majority opinions in cases where the dictionary functions as an ornament or a barrier suggests the presence of interesting differences between liberals and conservatives.<sup>345</sup>

Ornament opinions constitute the bulk of dictionary-using majorities, and liberal justices appear to author approximately two-thirds of these opinions.<sup>346</sup> Moreover, liberal justices did not author any barrier majority opinions we identified from our dataset. Upon reflection, this distribution is not surprising given liberals' philosophical approach to statutory interpretation.

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344. The Court's use of dictionary definitions as a way station is similar to its dictionary use as an ornament in certain respects. The Court consults dictionaries for both types of cases and it typically does so early in a majority opinion, thereby elevating the importance of dictionaries as a resource. But because dictionary definitions are explicitly deflected or bypassed in these way station cases, their role is less influential than in the ornament decisions.

345. This discussion of apparent differences between majorities authored by liberals and conservatives is not based on the kind of empirical analyses presented in Part III. In our examination in Part IV of the four distinct functions that dictionaries serve, we reviewed and categorized fifty majority opinions—more than two-fifths of the majorities in our dataset. As we reported, thirty-one fall into the ornament category and six are classified as barrier opinions. *See supra* note 273. We drew our substantial sample from a cross-section of Justices and time-periods, but it would take considerable additional time and effort to review all 117 majorities in this way. *See supra* note 273.

346. We discuss five of these majorities in the text accompanying notes 230-71 *supra*, and list six others in note 272 *supra*. The remaining twenty Court opinions that we have classified as using the dictionary for ornamental purposes are on a list available from the authors. *See* notes on file with authors. Of the thirty-one majorities in the ornamental category, twenty were authored by liberals and eleven by conservatives; two of those eleven by Justice White, who was a more moderate conservative than Justices Scalia, Thomas, Alito, and Roberts. *See supra* note 144.



The liberals in our dataset are not textualists in the mold of conservatives such as Justices Scalia, Thomas, and Kennedy.<sup>347</sup> Instead, these liberal Justices generally follow a legal process approach. They begin with textual analysis but then also consider legislative history and purpose, agency deference, practical consequences, and other factors—either to confirm and reinforce their conclusions about textual meaning, to resolve what they regard as inconclusive statutory language, or occasionally to supersede the apparent meaning of text.<sup>348</sup> For liberal Justices like Breyer, Stevens, Souter, or Blackmun, semantic tools such as the dictionary and language canons are more supplemental than primary. They serve as part of a broader web of interpretive resources, allowing the Court to derive meaning from legislative and pragmatic contexts as well as from literal text.<sup>349</sup>

The liberals' approach to dictionary usage appears to comport with the position expressed by Professors Henry Hart and Albert Sacks in the famous teaching materials they prepared.<sup>350</sup> Hart and Sacks, the progenitors of the legal process school, insisted that even an unabridged dictionary “never says what meaning a word *must* bear in a particular context.”<sup>351</sup> Rather, as “an historical record, not necessarily all-inclusive, of the meanings which words in fact *have* borne,”<sup>352</sup> a dictionary's more modest function is “simply [to] answer the question whether a particular meaning is linguistically permis-

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347. We include Justice Kennedy as a textualist, even though he is not unalterably opposed to consulting legislative history, because he tends to foreclose consideration of such history or congressional purpose materials when he concludes that the text, as illuminated by dictionaries and/or language canons, is sufficiently clear. *See, e.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001); *Public Emps. Ret. Sys. v. Betts*, 492 U.S. 158, 168 (1989) *superseded by statute*, *Older Workers Benefit Protection Act*, Pub. L. No. 101-433, 104 Stat. 978, *as recognized in* *Meachem v. Knolls Atomic Power Lab.* 554 U.S. 84 (2008).

348. For examples of liberal justices using this broader legal process approach outside the dictionary context, see *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 429-56 (2008) (Breyer, J.); *N.Y. Conf. of Blue Cross & Blue Shield v. Travelers Ins. Co.*, 514 U.S. 645, 655-57 (1995) (Souter, J.); *Crandon v. United States*, 494 U.S. 152, 160-64 (1990) (Stevens, J.).

349. Compare Brudney & Ditslear, *supra* note 28, at 45-47 (analyzing how liberal Justices Stevens and Blackmun use language canons differently from conservative Justices Scalia and Thomas), *with id.* at 113-16 (noting that Scalia and Thomas rely on fewer interpretive resources overall to explain and justify their results than do Stevens and Blackmun).

350. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS, BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey, eds., 1994).

351. *Id.* at 1190.

352. *Id.* at 1191.

sible, *if the context warrants it*.<sup>353</sup> Like Hart and Sacks, the liberal Justices in our dataset regularly consult the dictionary to establish a linguistically permissible definition while relying on the larger statutory context to arrive at what they consider the correct or appropriate result.<sup>354</sup> Liberals in these majority opinions recognize that the broader and more complex statutory setting is ultimately determinative of textual meaning; their use of dictionary definitions is affirmatively probative but in the end adds only supplemental or marginal value.

Yet, in one respect the liberal Justices' ornamental approach goes beyond what Hart and Sacks contemplated. By consulting dictionary definitions at the *outset* of their analysis, liberal Justices have subtly conveyed the impression that dictionaries have the capacity not only to identify what is linguistically permissible but to shape what is linguistically preferable. That impression elevates the status of dictionaries, suggesting that they perform a special role in determining ordinary meaning. To be sure, liberal Justices occasionally refer to dictionaries as confirmatory after having established the proper meaning of a contested term based on illustrative common usage or larger context.<sup>355</sup> This post-hoc approach seems truer to the Hart and Sacks formulation described above, but it is not the primary way in which liberal Justices invoke dictionaries for ornamental purposes.

One empirical finding that arguably reinforces the link between liberals and the ornamental function involves the liberal Justices' unwillingness, compared with their conservative colleagues, to use dictionaries in their dissenting opinions when the majority opinion invokes dictionaries. Liberal Justices, especially Breyer and Stevens, who were frequent dissenters in this setting, invoke

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353. *Id.* at 1191 (emphasis added).

354. *See, e.g.*, *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2642 (2010) (Stevens, J.) (consulting the dictionary to establish permissible definition of "quorum" while emphasizing that the definition does not resolve central issue regarding exercise of delegated authority); *supra* text accompanying notes 249-57 (discussing Justice Souter's choice of one dictionary definition of "oppose" over another as appropriate based on contextual factors in *Crawford v. Nashville*); *supra* text accompanying notes 264-71 (discussing Justice Breyer's choice of a dictionary definition of "otherwise" as appropriate in light of larger context in *Begay v. United States*).

355. *See, e.g.*, *Begay v. United States*, 553 U.S. 137, 142-44 (2008) (Breyer, J.); *Watson v. United States*, 552 U.S. 74, 79-80 n.7 (2007) (Souter, J.).

dictionaries significantly less often than conservatives, notably Justices Scalia and Alito, who are also frequent dissenters.<sup>356</sup> Perhaps liberals contesting a majority opinion that features dictionary usage regard this definitions element as simply not important enough to warrant rebuttal. By contrast, conservatives authoring a dissent are inclined to see dictionary-based ordinary meaning as a central part of their disagreement with the majority.<sup>357</sup>

All of this is not to suggest that the use of dictionary definitions for ornamental reasons is confined to liberal Justices, or that their majorities using dictionaries as ornaments invariably reach liberal results. Conservatives also author ornamental majority opinions as we demonstrated in analyzing Justice Alito's opinion in *Mac's Shell* and Justice Scalia's opinion in *Dastar*. For conservative Justices, the larger context tends to involve not legislative history or agency deference but rather judicially derived factors such as linguistic canons, structural analyses of statutes, common law developments, and precedent.<sup>358</sup> Still, their primary reliance on a larger statutory setting in these cases resembles the liberals' approach in reducing dictionary definitions to a marginal role.

On the other hand, the six barrier cases we identified were all authored by conservative Justices: two by Justices Thomas and Scalia, and one by Justices Kennedy and O'Connor.<sup>359</sup> With the

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356. See *supra* Part.III.A.4 (finding that conservatives cited dictionaries in 41.2 percent of their thirty-four dissenting opinions while liberals cited dictionaries less than half as often—in 19.6 percent of their forty-six dissents).

357. An alternate, more strategic, hypothesis is that liberals tend to use dictionaries when drafting majorities to help solidify consensus or retain their more textualist colleagues, but they feel no comparable need to do so when authoring a dissent. See *supra* note 147 (suggesting that the alternate hypothesis may help explain Justice Breyer's heavy dictionary use in majority opinions). This strategic account also suggests that dictionaries may serve more of a supplemental or marginal function for liberals than conservatives.

358. See *Mac's Shell Serv., Inc v. Shell Oil Prod.*, 130 S. Ct. 1251, 1253 (2010) (relying on technical meaning of "constructive" from analogous employment and housing fields and on the judicial manageability of a standard); *Dastar Corp. v. Twentieth Century Fox Film*, 539 U.S. 23, 33-34 (2003) (relying on structural relation of trademark to copyright and on Court precedent).

359. Thomas authored *Janus Capital* and *Gross*; Scalia authored *Allentown Mack* and *Deal*; Kennedy authored *Gustafson*, and O'Connor authored *Smith*. All six of these decisions also reached conservative results. See *supra* Part IV.D. The two additional barrier opinions from the 2011-12 Term, were authored by Justice Alito; each reached a conservative result. See *supra* note 333.

exception of Justice O'Connor, these Justices are textualists in addition to being conservatives. It is hardly surprising that textualists are likely to invoke dictionary-based ordinary meaning to foreclose consideration of factors such as legislative history or agency deference. For a textualist, once the meaning of disputed statutory language is clear on its face, the result is effectively settled and those additional contextual resources need not be consulted. Using a dictionary to help establish the text's lack of ambiguity is wholly consistent with this approach.

Conservative and textualist Justices are not unaware of the risk that dictionaries may function as barriers in the Court's opinions. Indeed, cases from our dataset illustrate that Justices Thomas and Scalia are at times sensitive to the problem of such dictionary misuse. Justice Thomas in his *Gustafson* dissent excoriates the majority for allowing a dictionary definition to trump the "extraordinarily broad" meaning that Congress provided in its own statutory definition.<sup>360</sup> Justice Scalia in his *Smith* dissent criticizes the Court for failing to distinguish between permissible dictionary meanings and the appropriate statutory meaning drawn from a larger context.<sup>361</sup> In his recent book, he also cautions against judicial carelessness in ignoring basic principles of dictionary organization.<sup>362</sup>

Despite such expressions of concern, however, it is Scalia, Thomas, and other conservative Justices who have authored the barrier decisions that we identified. Moreover, these barrier opinions reflect a traditional textualist methodological perspective that has been evident elsewhere in the Court's more recent statutory jurisprudence.<sup>363</sup> The Court reaches conservative results by using dictionary-based analysis to arrive at "ordinary meaning" while refusing to consider contextual resources—notably resources

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360. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 585 (1995) (Thomas, J., dissenting). Justice Thomas also has shown a willingness to bypass dictionary definitions as unhelpful when they fail to address the issue in dispute. See *supra* text accompanying notes 207-213 (discussing Thomas's majority opinion in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997)).

361. See *Smith v. United States*, 508 U.S. 223, 241-42 (1993) (Scalia, J., dissenting).

362. See *supra* notes 117-20 and accompanying text.

363. See Brudney & Ditslear, *supra* note 28, at 77-94 (examining a series of Rehnquist Court decisions that assigned elevated status to language and substantive canons, allowing canons-based reasoning to foreclose consideration of potentially probative evidence on congressional intent).

derived from the politically accountable branches that reflect either what the enacting Congress might have intended or what the implementing agency understood the text to mean.

### 3. *Why Dictionaries are Different*

Dictionaries were virtually never cited by the Court before 1986, whereas in 2013 they may well be invoked by the Justices as often as canons or legislative history. Indeed, Justice Scalia's complaint about the 1940s "invasion of legislative history into judicial interpretation"<sup>364</sup> would seem to apply in spades to the tsunami of dictionary definition references starting in the late 1980s. The apparent justification for this new dictionary culture is the role of dictionaries as a means of identifying ordinary meaning. We say "apparent" because there has been relatively little explanation from the Justices themselves for why the Court has embraced dictionary definitions.

Assuming that discerning ordinary meaning is a key goal sought by the new dictionary-laden jurisprudence, two hard questions arise. One is whether ordinary meaning is the right lodestar from which to chart an interpretive path for statutory language. Setting aside criminal laws for present purposes, it is far from self-evident that the legislators who enact statutes and the entities or individuals who seek to abide by them rely primarily on their own linguistic judgments as to what constitutes statutory meaning.<sup>365</sup> Most laws in our modern regulatory state are written to be interpreted and understood not by laypersons but instead by legal experts: lawyers, regulators, and individuals, governments, or businesses subject to rules drafted by lawyers and regulators.<sup>366</sup> This group of specialists

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364. SCALIA & GARNER, *supra* note 6, at 374.

365. As the Justices implicitly recognize, criminal statutes may be something of a special case principally because the cohort of potential criminals is less likely to receive advance legal counsel than individuals or businesses in the civil context, and because the severity of criminal punishment leaves individuals more vulnerable if the law's prohibitions are not sufficiently clear and understandable. *See supra* Part IV.A. However the distinction should not be overdrawn. For many white collar crimes, attorneys may effectively serve as translators *ex ante* as well as defenders *ex post*.

366. *See generally* Robert K. Rasmussen, *Why Linguistics?* 73 WASH. U. L.Q. 1047, 1051-54 (1995); Stephen F. Ross, *The Limited Relevance of Plain Meaning*, 73 WASH. U. L.Q. 1057, 1057-58 (1995); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM.

develops the meaning of statutory prohibitions, directives, or entitlements based on background legislative understandings, current pragmatic considerations, and evolving societal circumstances. Emphasis on ordinary meaning as a core, presumptively valid, legal construct seems seductively simplified, in that the legal interpretive community's attribution of meaning to a statute is both "complex and normatively driven."<sup>367</sup>

The second question is whether, assuming *arguendo* that ordinary meaning is an interpretive end worth striving for, dictionaries are a useful means of getting there. As Hart and Sacks observed, dictionary definitions are an extensive but not exhaustive historical record of how words have been used in the past.<sup>368</sup> Dictionaries do not purport, in a current statutory setting, to select a particular meaning as "ordinary," much less to identify the meaning that is most appropriate to this current setting. Even definitions that identify the prototypical use for a word also list a series of other common or acceptable uses. In order to decide whether a dictionary definition signifies a usage that is common enough to be "ordinary," one must know more about the word's contextual reference points. Notably, this includes what members of Congress may have had in mind when they drafted, negotiated, and enacted the provision containing the word, and also who the intended audience is for the statutory provision.<sup>369</sup> Moreover, if, as Hart and Sacks contend, a dictionary's basic role should be no more than to *confirm* that the meaning of a word as it is commonly or ordinarily employed with reference to a certain statutory setting is also linguistically permissible,<sup>370</sup> then the Court's up-front invocation of dictionary definitions risks undermining this contextually oriented framework.

The Court's dictionary jurisprudence has not sought to answer either of these questions. Yet the Justices over the past twenty-five years have come to embrace dictionaries as worthy of regular consultation when they begin substantive analysis in their majority opinions.<sup>371</sup> Our findings make clear that this development encom-

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L. REV. 369, 381, 383 (1989).

367. Frickey, *Faithful Interpretation*, *supra* note 337, at 1094.

368. *See supra* notes 351-52 and accompanying text.

369. *See supra* notes 56-59 and accompanying text.

370. *See supra* notes 350-53 and accompanying text.

371. *See, e.g., supra* Parts III.A. and IV.C.

passes liberals and conservatives, purposivists and textualists.<sup>372</sup> We also noted that differences in levels of use between individual Justices have declined over time, as the entire Court has become comfortable invoking dictionary definitions.<sup>373</sup>

The broad-based and unquestioning endorsement of dictionaries distinguishes them from legislative history and the canons. Those two high profile interpretive factors have been subject to searching critiques or vigorous defenses from individual Justices<sup>374</sup> as well as from other judges and legal scholars.<sup>375</sup> This set of critical perspectives has apparently influenced the Court's patterns of reliance.<sup>376</sup> By contrast, the Justices seem to regard dictionaries as less controversial than other resources, perhaps in part because they perceive definitions as essentially "closer" to the text itself. The perceived closeness may explain why dictionary discussion almost always occurs at or near the start of the Court's analysis—before

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372. See, e.g., *supra* Part III.A.

373. See *supra* notes 138-40 and accompanying text.

374. On legislative history, compare, for example, ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 29-30 (1997) (criticizing use of legislative history), with STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE'S VIEW 100 (2010) (defending use of legislative history). See also Brudney & Ditslear, *supra* note 7, at 161-62 (discussing extended and intense disagreement between Justice Scalia and Justices Breyer, Stevens, Souter, and White regarding the value of legislative history as an interpretive resource). On canons, compare, for example, SCALIA, A MATTER OF INTERPRETATION, *supra*, at 25-26 (praising the language canons for their relative clarity and common sense virtues) and SCALIA & GARNER, *supra* note 6, at 51-339 (celebrating and defending the value of scores of language and substantive canons), with *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 138 (2001) (Souter, J., dissenting) (discounting language canons as a fallback that should be put aside when there are good reasons not to apply them), and *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 260-61 (1991) (Marshall, J., dissenting) (criticizing substantive canon being applied as a "clear statement rule," thereby relieving a court of its obligation "to give effect to all available indicia of legislative will"), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in* *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006).

375. On legislative history, see for example, Brudney & Ditslear, *supra* note 7, at 125-28; Easterbrook, *supra* note 141, at 444-45; and Kozinski, *supra* note 141, at 811-14. On canons, see, for example, RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 277-82, 285-86 (1985); John F. Manning, *Legal Realism and the Canons' Revival*, 5 GREEN BAG 2D 283, 289-95 (2002); Stephen F. Ross, *Where Have You Gone Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 562, 572 (1992); Rubin, *supra* note 11, at 580.

376. See Brudney & Ditslear, *supra* note 146, at 222-24 (reporting decline in use of legislative history among newly arrived conservative Justices and also some long-serving liberal Justices); Brudney & Ditslear, *supra* note 28, at 44-51 (reporting rise in use of canons among newer conservative Justices and also some continuing liberal Justices).

canons, legislative history, precedent, agency deference, or other resources.

In addition, and relatedly, the Justices seem attracted to dictionaries based on their objective and non-ideological framework. Legislative history is created by Congress and there is concern that it can be strategically inserted or adjusted by legislators.<sup>377</sup> Canons are created by the courts and there are similar concerns about judicial manipulation.<sup>378</sup> By contrast, dictionaries are promoted as an independently constituted source of meaning, removed from the possibly insidious influences of either the legislative or judicial branch.

Further, notwithstanding occasional expressions of warning from Justice Scalia,<sup>379</sup> the Court in developing its dictionary culture has essentially ignored the range of concerns persistently expressed over two decades about the validity of dictionaries as a resource.<sup>380</sup> Taking account of these criticisms might lead the Justices to reduce or modify their reliance on dictionary definitions, and it almost surely would result in a more careful and defensible approach to dictionary use.

In the end, a combination of factors doubtless helps to explain the Justices' new and still-rising appetite for dictionaries as an aid to determining statutory meaning. Whether consciously or not, the Justices seem to have reached a consensus that dictionaries are objective or authoritative guides to statutory meaning.<sup>381</sup> As we have demonstrated at length, however, the image of dictionaries as an objective source of authority or a pathway to ordinary meaning is a mirage. At the same time, despite its subjectivity in practice, the Court's burgeoning reliance on dictionary definitions has inevitably shaped the perceptions and practices of the attorneys who present legal arguments to the Justices. These lawyers predictably choose

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377. See, e.g., *Blanchard v. Bergeron*, 489 U.S. 87, 99 (1989) (Scalia, J., concurring); Kenneth W. Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371, 376-77.

378. See, e.g., POSNER, *supra* note 375, at 277-82; Ross, *supra* note 375, at 562; Rubin, *supra* note 11, at 586.

379. See *supra* notes 117-20 and accompanying text.

380. See *supra* Part II.A-B.

381. See *supra* paragraph in text following note 48; *supra* paragraph in text following note 122.



dictionary definitions calculated to advance their positions in response to the Court's surging and standardless use of those definitions.<sup>382</sup>

Moreover, when dictionaries are granted an exalted status, courts find it easier to invoke them in ways that discount or ignore other more contextual resources. The elevation of dictionary-based ordinary meaning analysis raises serious concerns about the failure to consider relevant statutory context, concerns repeatedly voiced by scholars and appellate judges. Those concerns are exacerbated by the Justices' highly individualized approach to dictionary usage. Given the Court's institution-wide embrace of this resource, it is predictable that dictionary-based analysis will at times preempt review of other contextual factors. Yet the Court continues to grow its appetite for dictionary definitions while making no attempt to answer critics' concerns or to provide an explanation for its own selective practices.

#### CONCLUSION

In this Article, we have shown that, in the Rehnquist and Roberts eras, dictionaries have become a principal resource for determining the meaning of statutes. Dictionary usage has risen from 3.3 percent of all decisions during the final five years of the Burger Court to 33.7 percent of our dataset decisions for the last three Roberts Court Terms in our study.<sup>383</sup> Throughout this period of dramatically higher usage, the Court has failed to engage with interested legal audiences who have expressed skepticism regarding the Justices' subjective, standardless, and seemingly impulsive dictionary practices. The Justices also have not engaged with one another on the increased role played by dictionaries. In the case of legislative history, the Court's decline in usage has featured a spirited

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382. See generally *supra* Part III.B (reporting that fewer than half the words cited to a dictionary in parties' briefs had dictionary citations in the Court's opinion). We plan to explore in a future research project the degree of congruence between parties' dictionary citations and the citations in Roberts Court opinions, and to compare this degree of congruence with evidence regarding parallel patterns between party briefs and Roberts Court opinions for the canons and legislative history.

383. See *supra* note 28 for discussion of 3.3 percent figure; see also *supra* text following note 128 for discussion of 33.7 percent figure.

debate—in judicial opinions and outside writings—between Justice Scalia and various colleagues who defend recourse to such pre-enactment materials.<sup>384</sup> By contrast, the growth in dictionary usage has not been accompanied by any dialogue between the Justices as to whether the Court's practices are furthering or undermining its interpretive objectives.

We have attempted to document the scope of the subjectivity problem, and to develop a functional analysis that highlights some disturbing doctrinal consequences associated with dictionary use. Against this background, we invoke our metaphor of the cocktail party in a fourth and final form, now with due regard to the party's lingering effects.<sup>385</sup> We believe dictionary usage may add value to the Court's analyses in certain limited circumstances.<sup>386</sup> We also appreciate the counterargument: dictionary definitions are surplusage that should be replaced by evidence or illustrations of common usage.<sup>387</sup> However, because we do not expect the Justices to stop using dictionaries, we recommend that the Court consider adopting a three-step plan in order to foster a healthier approach to its dictionary habit.

First, the Court should recognize the existence of a problem. After a dramatic increase in dictionary usage, unaccompanied by the development of standards despite persistent and persuasive critiques, the Justices need to acknowledge that they are operating with virtually unbridled discretion in the dictionary domain. Assuming *arguendo* that the search for ordinary meaning can contribute to the resolution of interpretive disputes, the dictionary approach adopted by the Court does not enhance the prospects for

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384. See sources cited on legislative history disagreements among the Justices *supra* note 374.

385. For the record, "cocktail party" has been used in four different senses in this Article: as a setting for ordinary conversation, *see supra* note 2 and accompanying text; as a milieu that encourages selective listening, *see supra* note 18 and accompanying text; as a location where one looks for friends to vindicate personal preferences, *see supra* note 183 and accompanying text; and now as the scene of risky, habit-forming behavior.

386. *See generally supra* Part IV.A (discussing notice function in criminal law cases); *supra* notes 198-214 and accompanying text (discussing two way station cases in which Court candidly recognized that dictionary definitions were inconclusive and other interpretive factors were essential to reach a decision).

387. *See supra* note 196 and accompanying text.

developing a reasonable or responsible sense of what meaning is ordinary.

Second, in order to begin imposing limits on its current seemingly unlimited discretion, the Court should adjust its patterns of usage to make them more transparent and principled. We offer no specific preferred approach ourselves, but we believe the Court should embark on at least some of the following efforts: (a) reduce dictionary cherry-picking by identifying one or more general dictionaries as presumptive sources and explaining the basis for their selection; (b) consult a presumptive minimum number of dictionaries for every contested word or phrase, probably at least four rather than the current one or two; (c) develop a rationale for when it is appropriate to use a general dictionary, a legal dictionary, or both; (d) similarly, develop a rationale for when to use enactment date, filing date, both, or neither.

Finally, we recommend that the Court make every effort to avoid invoking the dictionary as a barrier to larger contextual considerations, including especially factors that reflect the thinking of Congress and the Executive. Dictionary definitions are records of a word's past uses that are devoid of statutory context. Relying on these definitions to limit or foreclose inquiry into background factors—such as how Congress likely meant to use the word and how agencies have regularly applied it—undermines informed judicial review. It also disrespects the interpretive resources contributed by the politically accountable branches.