



A COMMENT ON
SCALIA & GARNER'S "READING LAW"

A NOTE ON
"A NOTE ON THE USE OF
DICTIONARIES"

Michel Paradis

READING LAW ADVANCES a jurisprudential tradition that treats legal reasoning as a kind of grammar. Scalia & Garner state their objective as avoiding judicial arbitrariness. To do that, they claim that discretionary judgments about the meaning of a law can be constrained with the rigors of linguistic analysis. Whatever one thinks of their general jurisprudential approach, they come up surprisingly short on what should be their starting point: how do we establish the common linguistic ground for knowing what individual words mean?

This is disappointing. Scalia & Garner clearly love language and Garner is the preeminent legal lexicographer of our time. But their coda, "A Note on the Use of Dictionaries," and their chapter on "plain meaning" simply exalt off-the-shelf dictionaries as an authori-

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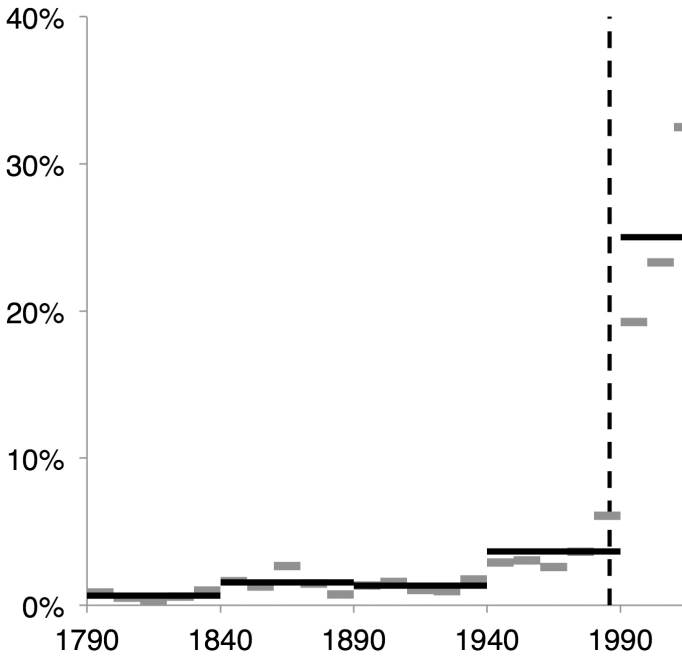
tative solution to this threshold problem. Superficially, this appeals to a sense of hide-bound tradition. But the citation of dictionaries as legal authority, particularly for non-technical words, is something of a modern trend. In the graph below, you can see the result of a Westlaw search for the relative frequency of “dictionary” and its highbrow synonym, “lexicon,” in the decisions of the Supreme Court from 1790-2013. The gray dashes indicate the words’ relative frequency each decade and the horizontal black lines, the average for each five-decade epoch.

Far from traditional, the resort to dictionaries was actually quite rare (0.6% of cases) in the half-century after 1789. While it became more common over the next 150 years, their citation rate hovered around only 2-3% of cases until 1990. Then it shot up, such that 33% of the cases decided since 2010 referenced dictionaries. This trend is also reflected, albeit to a lesser extent, in the decisions of the lower courts, where the citation of dictionaries has doubled over the past three decades. What prompted this abrupt change? The vertical line suggests an obvious guess: the appointment of Justice Scalia in 1986.

The real problem for Scalia & Garner is not this approach’s lack of a historical pedigree. It is that using a dictionary to resolve disputes over the meaning of a word is unjustifiable if one is actually interested in rigorous linguistic analysis. To be sure, Scalia & Garner admonish readers about the quality of various dictionaries, for which they provide a bibliography of authoritative lexicons. But resorting to dictionaries at all is a terribly un-rigorous way of resolving the disputed meaning of any word, past or present.

When we talk about a word’s “meaning,” we are ordinarily describing two concepts. One is the word’s acceptable uses. If I say I am going to “jump into the shower,” you have probably heard other people “jump into the car” or “jump into bed.” You know what I mean when I use the word “jump” instead of “enter” because you have heard these words used interchangeably like this. The other is the cluster of associations a word accumulates in the course of its usage. “Jump” is rarely, if ever, used to describe slow movements. So when I say I am going to “jump into the shower,” you expect me to be quick about it.

THE RATE DICTIONARIES APPEAR IN SUPREME COURT OPINIONS, 1790-2013



A word's definition requires an editorial judgment about its most noteworthy uses and associations as well as how best to convey them with other presumptively well-known words, a process one philosopher described as coming up with a "lame partial synonym plus stage directions."¹ Some uses and associations are included. Others are excluded.

If a legislature makes these editorial judgments by writing a definition into a statute, that may tell you something. But off-the-shelf dictionaries reflect either the lexicographers' personal biases or the arbitrary collection of texts (from Shakespeare to Twitter) that they used to find examples of a word's usage. Samuel Johnson, whose is

¹ W.V.O. Quine, *From a Logical Point of View* 56 (1980).

first on Scalia & Garner's list of authoritative lexicons, relied on his discretion about the words he found in 500 texts from his library. He sought, not to convey how each word was actually used, but to provide "pleasure or instruction, by conveying some elegance of language, or some precept of prudence, or piety."² Or take Webster's. The sense of "jump" as "to enter quickly" is excluded, while violating a bail agreement is included. There is no empirical basis for this choice. A Google search for "jump into the shower" returns 7.5 times as many hits as "jump bail." Instead, it reflects the editors' judgment that "jump bail" is more worthy of their page-space.

All a dictionary can tell you is that one particular use of a word existed when the dictionary was written. It cannot rule out other possible uses or resolve disputes over which known use is the most appropriate in a given context. If a word's meaning is unknown, dictionaries might offer an accessible introduction. But lawmakers presumably know the words they are using and choose them because their use has achieved some desired result in the past. Dictionaries cannot illuminate what motivated those word choices or how society would have understood them any better than other contemporaneous examples of the words' usage might.

What then does a dictionary offer in disputes over meaning? As is clear from *Noel Canning*,³ where Justices Breyer and Scalia sparred over Samuel Johnson's definitions for "recess," "happen," and "the," as if a 1755 dictionary were the Talmud, it is not common linguistic ground. Instead, it offers a rhetorical device for asserting that a preferred interpretation is obvious, a pedantic way of saying, "you're an illiterate idiot." It offers an appeal to authority that casts a discretionary judgment as the compelled result of linguistic rules.



² Samuel Johnson, *The Plan of a Dictionary of the English Language* 42 (1747).

³ 134 S.Ct. 2550 (2014).