Language and the Law

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0. Introduction: Dictionaries and the Law

In a 1994 Lexis search, Kevin Werbach found that the Supreme Court referred to dictionaries some 664 times in the course of some two centuries, though it cited dictionaries only twenty-three times before the Civil War, and a recent study confirmed that Supreme Court justices are relying on dictionaries more than ever to determine the meaning of our laws (Kirchmeier and Thumma 2010). To illustrate that finding, the New York Times reported that Chief Justice Roberts looked up words in five different dictionaries while he was writing an opinion in a patent case (Liptak 2011). When was the last time you used more than one dictionary to look up a word?

But five dictionaries may not always be enough. In a 2012 Supreme Court opinion, Justice Samuel Alito cited ten dictionaries to support his holding that the word interpreter means someone who translates speech, not writing (Taniguchi v. Kan Pacific Saipan [10-1472]). Dissenting in that case, Justice Ruth Bader Ginsburg found four dictionaries supporting the broader view that “interpreter” can refer to a translator of documents as well as speech. Complicating things even more, both justices used definitions in two of the same dictionaries—Webster’s Third and Black’s Law Dictionary—to support their opposing claims.

Why all this consulting of dictionaries? When a word is not defined in a statute, legal convention says that we’re supposed to give that word its ordinary, customary, or plain meaning. But if the number of lawsuits filed annually over matters that range from the very significant to the patently trivial is any guide, the “ordinary meaning” of words is often in dispute. These lawsuits are based on contradictory interpretations of words and phrases.

One common way to check meaning is to go to the dictionary, and that’s exactly what lawyers and judges do. According to Werbach (1994), the use of dictionaries increased significantly after the 1970s, and he notes that dictionary lookups increasingly determine the outcome of cases, as when Justice Alito argues in Taniguchi that the definitions he cites prove that interpreter means “a translator of speech,” even if the word may sometimes refer to “a translator of writing.”

The problem with citing dictionaries as legal evidence is that dictionaries don’t dictate what words mean. Instead, they record what people actually do with words, and lexicographers know that people may use words to mean a variety of things, depending on the context, and they may use them inconsistently as well.

A literal paradox

Speakers of English use the word literally to mean both “literally” and “figuratively,” which is its opposite. That’s the sort of lexical ambiguity that would be intolerable in
a statute or other legal document, but in ordinary use context tells us clearly whether the word is used in one sense or the other.

Although logicians and language purists insist that literally can only mean ‘according to the letter, actually, in a strict or narrow sense,’ as in She took his remarks literally, dictionaries record multiple meanings for literally. Merriam-Webster tells us that literally can also mean ‘virtually, in effect,’ as in He was literally climbing the walls. According to Merriam-Webster, “some people take sense 2 [the figurative use of literally] to be the opposite of sense 1.”

The American Heritage Dictionary (5e) defines literally as ‘word for word, or in a literal or strict sense.’ But the editors acknowledge in a usage note that “for more than a hundred years” people have also used literally figuratively, as an intensifier. The dictionary’s panel of usage experts sees this as problematic in some kinds of examples, but acceptable in others. And the Oxford English Dictionary also recognizes the common, intensive sense of literally, labeling it as “colloquial.”

But although all three dictionaries suggest that the basic, plain, or ordinary meaning of literally is either ‘letter by letter’ or ‘in a strict or literal sense,’ a search of contemporary databases of English suggests that literally rarely occurs in its literal sense, generally serving instead either as an intensifier or in the paradoxical sense of ‘figuratively.’ Fortunately, context typically tells us which meaning of the word pertains.

As lexicographers have always known and legal scholars are gradually acknowledging, although dictionaries do a good job of defining words, recognizing multiple and even conflicting senses, they don’t always give us the information that we need to interpret or disambiguate the law. Even so, dictionaries as a class have a great deal of popular authority—“the dictionary says” is a common way for us to prove a meaning—and it shouldn’t surprise us that this authority carries over into the courtroom.

When we say, “the dictionary says,” we’re suggesting that there’s only one, like the sun or the law. But there are many dictionaries: Justice Alito could have easily found twenty dictionaries to consult in Taniguchi instead of ten.

Above: The definition of interpreter in Webster’s Third New International Dictionary (1961) covers both written text (for example, deciphering hieroglyphics) and, “especially,” oral translation. Both Alito and Ginsberg cite this definition to support their positions in Taniguchi. Below: Although neither justice cites it, the Century Dictionary (1890) entry for interpreter also supports both Alito’s and Ginsberg’s arguments: most interpreters translate speech, that is, “what is said in a different language,” but the citation referring to an “interpreter of the Constitution” confirms that interpreters also explain written text.
Some of these dictionaries are more complete, some less, and they don’t always agree on what words mean. That’s why both Alito and Ginsburg could find definitions that support their conflicting interpretations, not just in different dictionaries, but sometimes in the same dictionary. That doesn’t surprise lexicographers, but lawyers and judges need to keep it in mind when they cite dictionaries in their arguments and opinions.

We see the dictionary as the giver of meaning to words, but in fact it’s the users of a language who give meaning to words. The job of the dictionary is to record those meanings, not to prescribe them or lay down rules for how words should be used. And while some dictionaries try to capture the many contexts in which a word appears, there are always nuances and usages that escape the lexicographer’s net.

Dictionary makers know the fallibility of dictionaries, and some jurists do as well. Yet the courts rely on dictionaries as if their judgements were carved in stone. Judges don’t just look up general words like *interpreter*, or legal terms like *battery*, *lien*, and *prima facie*, which any lawyer should know by heart. They also look up ordinary words like *also*, *if*, *now*, and even *ambiguous*. One of the words Chief Justice Roberts looked up the week the Times checked his work was *of*. These are not words most people would consider worth a trip to the dictionary. Sometimes, they’d be right: in the end, Roberts’ search for *of* didn’t turn up anything surprising.

**The Dictionary Act**

Some laws contain definitions of specific terms—a move intended by legislators both to facilitate their interpretation reduce the number of trips to the dictionary. The first statute of the U.S. Code, 1 USC § 1, called the *Dictionary Act* and reproduced in its entirety below, consists of a short introduction and ten definitions that apply to every federal law unless, of course, specific statutes broaden, narrow, or otherwise modify such definitions, or, as the Dictionary Act says, “unless the context indicates otherwise.”

### 1 USC § 1 — WORDS DENOTING NUMBER, GENDER, AND SO FORTH

In determining the meaning of any Act of Congress, unless the context indicates otherwise—
words importing the singular include and apply to several persons, parties, or things;

words importing the plural include the singular;

words importing the masculine gender include the feminine as well;

words used in the present tense include the future as well as the present;

the words “insane” and “insane person” and “lunatic” shall include every idiot, lunatic, insane person, and person non compos mentis;

the words “person” and “whoever” include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

“officer” includes any person authorized by law to perform the duties of the office;

“signature” or “subscription” includes a mark when the person making the same intended it as such;

“oath” includes affirmation, and “sworn” includes affirmed;

“writing” includes printing and typewriting and reproductions of visual symbols by photographing, multigraphing, mimeographing, manifolding, or otherwise.

The Dictionary Act tells us that in all the federal laws, singular includes plural and plural, singular, unless context says otherwise; the present tense includes the future; and the masculine includes the feminine (but not the other way around—the Dictionary Act does not provide for gender equality in its definitions).

The Act specifies that signature includes “a mark when the person making the same intended it as such,” and that oath includes affirmation. Drafters of the Dictionary Act apparently felt the need to specify the definition of madness in great detail: “the words ‘insane’ and ‘insane person’ and ‘lunatic’ shall include every idiot, lunatic, insane person, and person non compos mentis.”

The Act also tells us that “persons are corporations . . . as well as individuals.” This shouldn’t be surprising. The recent and controversial decision in Citizens United v. Federal Election Commission (558 U.S. 310 [2010]), brought corporate political speech—most notably in the form of campaign contributions—clearly within the First Amendment’s free-speech protections. But there are limits to the personhood of corporate entities. The very next term, in a 2011 case involving the Freedom of Information Act (FOIA), AT&T cited the Dictionary Act in its unsuccessful bid to convince the Supreme Court that the telephone company is a person entitled to “personal privacy.” However, the Court was not convinced. In
rejecting the corporation’s claim to personal privacy protection, Chief Justice Roberts wrote,

We have no doubt that “person,” in a legal setting, often refers to artificial entities. The Dictionary Act makes that clear. 1 U. S. C. §1 (defining “person” to include “corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals”).

But AT&T’s effort to ascribe a corresponding legal meaning to “personal” again elides the difference between “person” and “personal.”

Roberts concluded his opinion with bit of humor not typically found in high court dicta:

We reject the argument that because “person” is defined for purposes of FOIA to include a corporation, the phrase “personal privacy” in Exemption 7(C) reaches corporations as well. The protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations. We trust that AT&T will not take it personally.

[FCC v. AT&T (09-127)]

The Dictionary Act also finds it necessary to define writing. The final provision of the Dictionary Act establishes a blanket definition that includes not just traditional kinds of writing (printing and typewriting), but also writing by means of several technologies that were fairly new at the time:

“writing” includes printing and typewriting and reproductions of visual symbols by photographing, multigraphing, mimeographing, manifolding, or otherwise.
Above: The Multigraph was an important office writing machine back in 1905 but it is virtually unknown today. Multigraphs used strips of raised type inserted into a drum and inked with a ribbon to print form letters that looked like they had been individually typed.

Below, left: ad for Ralph Wedgwood’s Patent Manifold Writer, invented in 1806, which employed “carbonified” paper, or carbon paper as it came to be known, to duplicate a letter as it was being written; and right, an ad for Edison’s mimeograph, patented in 1876, which promised to make 3,000 copies from a single stencil.

Federal law can’t be expected to keep up with every writing technology that comes along, but the newest of the six kinds of writing that the Dictionary Act does refer to—the multigraph—was invented around 1900 and has long since disappeared. No one speaks of multigrapbing, or uses it, or of manifolding, an even older technology that involves copying by means of carbon paper, though in the digital age, with carbon paper no longer necessary, the phrase carbon copy has come to mean ‘clone,’ and its abbreviation, c.c., remain in common use thanks to the popularity of email. And for most of us, the mimeograph is at best a dim memory. But it was important to include all of these technologies under the banner of writing at the time of the Dictionary Act, perhaps because some people might have questioned whether what were then innovative technologies actually constituted writing.

But the Act was never updated to include other writing technologies: Braille, for example, or photocopying, which replaced photography as a means of copying text (though the cell phone camera is popularizing that literal act of photo-copying once again), not to mention the writing we do on computers and mobile phones, devices which seem now to be the primary means of transmitting text, though presumably these newcomers, along with Facebook and Twitter and all the writing
technologies that have yet to appear, are covered by the Dictionary Act’s blanket phrase, “or otherwise.”

In any case, given that revision is an integral part of writing, it may seem odd that Congress never thought to revise its definition to drop the references to dead technologies and include some of the newer ones.

Actual dictionary definitions of writing tend to be more general than the definitions we find in the Dictionary Act, and, though recently dictionaries have made an effort to include the new technologies of writing, these definitions aren’t written with the courts in mind. Nathan Bailey (1736) defines writing simply as “the art or act of signifying and conveying our ideas to others by letters or characters visible to the eye.” Samuel Johnson (1755) is a bit more specific about the technology involved: writing is “a legal instrument; a composure; a book; a written paper of any kind.” These are the kinds of definitions the Framers of the Constitution would have been familiar with, but they’re not much help once the telegraph comes along, and the digital computer complicates the notion of writing still further.

The American lexicographer Noah Webster (1828) considers both the technologies of writing and the purpose of writing in his definition:

the act or art of forming letters and characters, on paper, wood, stone or other material, for the purpose of recording the ideas which characters and words express, or of communicating them to others by visible signs.

Like the Dictionary Act, Webster enumerates some, though not all, of the possible kinds of writing. But Webster adds, “We hardly know which to admire most, the ingenuity or the utility of the art of writing.” This sort of editorializing does not
occur in dictionaries today, though it occasionally makes its way into the writing of statutes.


*Webster’s Third* (1961) preserves much of Noah Webster’s original, without the editorializing: writing is “the act or art of forming letters on stone, paper, wood, or other suitable medium to record the ideas which characters and words express or to communicate the ideas by visible signs.” The *American Heritage Dictionary* (2011) gives a more general definition, with the visible and communicative aspects of writing implied rather than directly expressed. It’s a definition that easily encompasses the writing done on computers, cell phones, and tablets: “The act or process of producing and recording words in a form that can be read and understood.” The *Oxford English Dictionary* adds to the conventional view of writing as a visible medium the nonvisible writing done when computers transfer keystrokes to digital memory: “The process of causing an item of data to be entered into a store or recorded in or on a storage medium.” As if to drive the point home, the *OED*’s latest definitions are only available online.
The Dictionary Act’s attempt at cutting-edge defining now seems odd: all of the technologies that the Act names have been replaced—typewriters in America are more likely to be museum pieces or attic junk than writing machines, and even printing is now more likely to be digitally-mediated—and the act is silent on the new technologies that replaced them.

With more writing done with silicon chips than pen and ink, we’re shifting away from mechanically reproducible text to writing on screen. The advent of text-to-speech and speech-to-text technologies promises to blur the traditional distinctions between speech and writing. And the forms which writing takes are not just visible representations of our ideas, but machine-readable strings of 1’s and 0’s, charged particles, nanoswitches flipping on and off, LEDs, pixels, and things not yet dreamt of in our philosophy. Writing is becoming less and less a physical object which can be grasped, or whose physical location can be fixed in time and space, and more and more something that can be coded and streamed, fragmented and rematerialized, zipped and expanded, mashed and remixed, and moved around with the fingertips on a touch screen.

Of course no legal definition that fits into a single clause can hope to define writing, but at some point Congress might bring the Dictionary Act into the twenty-first century by dropping out the antique writing technologies and accommodating the newest ones. For now, though, the Federal Code treats writing as the province of multigraphs, manifolds, typewriters, and mimeos, and possibly an internet that is little more than a series of tubes. While legal definitions are important, redefining writing is not a high-priority issue for our representatives. Perhaps by the time Congress gets around to revising 1 USC § 1, Facebook and Twitter will be long gone, the digital age will have given way to the next big thing, and writing itself may have become nothing more than an obsolete series of tubes. In any case, though, in the absense of legal precedents, what dictionaries say about writing is likely to become more important in cases where writing is a legal issue.

But another lesson we can learn from the Dictionary Act is that, even when statutes define their own terms, those definitions may be ambiguous, inaccurate, out of date, or otherwise inadequate, necessitating a trip to the dictionary. Unfortunately, dictionary definitions don’t always do the trick either.
Barnhart v. Peabody Coal

In the case of Barnhart v. Peabody Coal Co. (2003), the Supreme Court had occasion to consider the meaning of a single, pivotal word, *shall*: if the verbal *shall* in the Coal Act functions as a command, what happens if the Social Security Commissioner carries out the duties prescribed by the command, but does so *after* a deadline imposed by the law has passed?

Justice Souter summarizes the question at the start of his opinion:

The Coal Industry Retiree Health Benefit Act of 1992 . . . includes the present 26 U. S. C. § 9706(a), providing generally that the Commissioner of Social Security “shall, before October 1, 1993,” assign each coal industry retiree eligible for benefits to an extant operating company or a “related” entity, which shall then be responsible for funding the assigned beneficiary’s benefits. The question is whether an initial assignment made after that date is valid despite its untimeliness. We hold that it is.

*Barnhart v. Peabody Coal*, 537 U.S. 149 (2003, emphasis added)

The Court’s majority decided that sometimes circumstances may excuse the delayed fulfillment by the Commissioner of what the Coal Act requires: in other words, better late than never. But in his dissent, Justice Thomas insisted that the verb *shall* allows no wiggle room: a command that is not fulfilled on time cannot be fulfilled once time is up. Reminding the Court that the words in statutes must be understood in their “ordinary and or natural meaning,” Thomas quoted the *American Heritage Dictionary* to support his claim that *shall* is a “mandatory command”:

[shall aux. v.] (1) a. Something that will take place or exist in the future.... b. Something, such as an order, promise, requirement, or obligation.

Although sense 1(a) of the definition that Thomas cited shows that sometimes *shall* is simply an indicator of the future tense, all the justices agreed that *shall* functions as an imperative in the Coal Act. What they disagreed about was just how much latitude the use of imperative *shall* permits.

The *American Heritage* definition doesn’t actually support Thomas’ claim that imperative *shall* must be absolute: it’s an order, promise, requirement, or obligation, to be sure, but the dictionary, like the law in question, doesn’t say what happens if the order is not carried out, the promise is broken, the requirement or obligation is not fulfilled. Checking other dictionaries won’t resolve the problem: they too remain silent on the matter. The Coal Act is similarly silent, imposing no penalty for failure to act, or for acting after the stated deadline. Justice Thomas argues that this is not consistent with the ordinary meaning of *shall*, and he concludes that if the mandated action is not performed on time, then it cannot be performed after the deadline has passed:

If Congress indicates a lesser penalty for noncompliance (i.e., less than a loss of power to act), we will administer it; but if there is no
lesser penalty and shall stands on its own, we will let government officials shirk their duty with impunity.

Rather than depriving the term shall of its ordinary meaning, I would apply the term as a mandatory directive to the Secretary. The conclusion then is obvious: The Secretary has no power to make initial assignments after October 1, 1993.

The ordinary meaning of shall is clear both to Justice Thomas and to the other justices. But Thomas and his colleagues don’t agree on what that ordinary meaning is. And in this case, the dictionary does not help to resolve the issue.

**U.S. v. Costello**

Recently the prominent legal scholar Richard Posner, chief judge of the U.S. Seventh Circuit Court of Appeals, challenged the judicial reliance on dictionaries for word meaning. *U.S. v. Costello* (2012) depends in large part on the meaning of the word harboring, and in his ruling in the case, Posner found the government’s reliance on the dictionary definitions of harboring to be misguided and inadequate. Posner warned, “Dictionaries must be used as sources of statutory meaning only with great caution.”

Costello deals with a violation of the Immigration Act. Since the passage of the 1917 Immigration Act, it has been illegal to shield, conceal, or harbor illegal aliens:

> Any person who . . . (iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation . . . shall be punished as provided in subparagraph (B).


In a bench trial, Costello was found guilty of violating that law by harboring her live-in boyfriend, a convicted drug dealer from Mexico who had been deported after serving a prison sentence, but who had subsequently returned to the United States illegally and resumed living with Costello. She was fined $200 and sentenced to two years probation. She appealed this verdict.

In its response to her appeal, the government argued that Costello knew her boyfriend was in the country illegally—Costello does not contest this—and that by letting him live with her, she harbored him in violation of the law. The government claimed that dictionaries current in 1952, when the relevant statute was enacted, defined to harbor simply as ‘to house a person, to provide shelter.’ But Posner found this definition wanting: “Sheltering” doesn’t seem the right word for letting your boyfriend live with you.”

Citing *Black’s Law Dictionary*, Posner concluded that harboring must imply concealment or secrecy (the government acknowledged that Costello never hid her boyfriend but lived with him openly), and googling the word, he found thousands of hits about harboring fugitives, enemies, refugees, criminals, slaves, Jews, or others
sought rightly or wrongly by the authorities. It’s true that a harbor can provide shelter for a boat, and that occasionally one finds citations about harboring flood victims, but a Google search does not return many examples of harboring in the sense of ‘openly sheltering or housing someone.’ This demonstrates to Posner that ‘providing shelter openly’ cannot be the ordinary meaning of harboring.

According to Posner, the problem with dictionaries is that their “definitions are acontextual, whereas the meaning of sentences depends critically on context, including all sorts of background understandings.” He cites Learned Hand’s advice “not to make a fortress out of the dictionary” and Frank Easterbrook’s assertion that dictionaries are museums of words, “historical catalog[s] rather than a means to decode the work of legislatures.”

Lexicographers agree: Jesse Sheidlower, of the Oxford English Dictionary, told the New York Times, “Dictionary definitions are written with a lot of things in mind, but rigorously circumscribing the exact meanings and connotations of terms is not usually one of them.”

Dictionaries aren’t designed to be legal authorities, or even authorities on language, though many people, including the justices of the Supreme Court, seem determined to think of them that way. What dictionaries are, instead, are records of how some speakers and writers have used some words some of the time. Dictionaries don’t include all the words there are, and except for an occasional usage note, they don’t tell us what to do with the words they do record. There are many dictionaries and they don’t always agree. And sometimes dictionaries don’t cover the specific context whose meaning is in doubt.

The image of the dictionary is that of an absolute law-giver, when it comes to language. But the reality of dictionaries is that they are tentative, inconsistent, and, from a legal perspective, alarmingly incomplete.

**Language is ambiguous, and that’s a problem for the law**

The problem of specifying the meaning of a word or phrase goes well beyond lawyers using dictionaries. Ordinary language is full of ambiguity. It’s common for people to misunderstand one another when we’re speaking or writing anything. Here’s a routine example: My wife asks me to stop for bread on the way home, but when I proudly offer her an artisan sourdough, she says, “I wanted whole wheat.”

We adapt our communications to minimize such misunderstanding, and for shopping, a mobile phone proves a lot more useful than a dictionary for resolving ambiguity—that’s why so many people in grocery stores are calling or texting to make sure that this time they’re buying the right thing.

It’s hardly news that literature is ambiguous, and literary critics spend their time debating whether a poem or novel means this or that. The response of both specialist and nonspecialist readers of fiction and poetry depends in part on shared cultural ideas (Shakespeare is paramount, or he’s just another dead white man), in part on experience and individual taste (The Great Gatsby is the great American novel—though surely not the 3-D version—no, it’s For Whom the Bell Tolls; no, it’s Moby Dick, or Huckleberry Finn, or Catcher in the Rye).

Like it or not, our sacred texts are ambiguous as well: the history of religions shows that scholars, zealots, and partisans haven’t just debated the slippery meanings
of the various holy writs, sometimes they fight or even slaughter one another over readings that they defend as dogma or attack as heresy.

It turns out that no matter the context, language is slippery, and interpretation is always up for grabs. Even the notion that the laws are an exception, that legal meaning is more transparent or precise, turns out to be a polite fiction. If legal texts were crystal clear, then instead of arguing and weighing competing interpretations of statutes and contracts, judges and lawyers would have a lot more time for golf or Facebook.

Where does this leave us when we’re trying to establish the meaning of a statute, or more important, the meaning of the Constitution itself? It’s fine to acknowledge that the spoken or written word may yield multiple interpretations, and that meaning may be said to reside more in the mind of the hearer or reader than in the text. But we expect a degree of stability from our laws that we don’t demand of literature or shopping lists, and that is where the courts come in. When it comes to literature, there is no court of arbitration, no authoritative body which tells us exactly what Hamlet means when he says, “To be or not to be, that is the question.” Some religions endow a particular person, or a priestly group, with doctrinal power, others leave meaning in the hands of the faithful. But laws are interpreted by judges, and if judges use dictionaries to arrive at meaning, or if they reject dictionaries as less reliable than massive online database searches, or they simply decide to trust their native-speaker intuition—“I speak English, so I know what this means”—then that is their prerogative. The question for us is not how judges should determine meaning, but rather how they do determine it.

Taniguchi gives us some insight into this process. Although jurists like Richard Posner are correct to question the usefulness of dictionaries in determining statutory meaning, most judges and lawyers, like most ordinary people, accept the authority of dictionaries, though in the case of judges, many cite only those definitions which support their interpretation, or they spin that definition to bolster their argument.

In Taniguchi, Justice Alito cites, among others, the Oxford English Dictionary definition of interpreter, “One who translates the communications of persons speaking different languages; spec. one whose office it is to do so orally in the presence of the persons.” Alito notes that the OED labels an earlier sense of interpreter, “A translator of books or writings,” as obsolete. The word once meant a person who explained things to others, a commentator, someone who unraveled “laws, texts, mysteries.” Consistent with this sense, interpreter was once a common name for an English dictionary. The goal of the first dictionaries was to explain foreign or difficult words, and Henry Cockeram titled his 1623 lexicon, The English Dictionarie: or, an Interpreter of hard English Words.
The respondents in Taniguchi cite Webster’s Third New International Dictionary, which defines interpreter as, “one that translates; esp: a person who translates orally for parties conversing in different tongues.” An interpreter typically translates speech, but the word can refer to written translation as well. That argument convinced the trial court to award interpreters’ expenses for document translation to Kan Pacific Saipan, and it’s the interpretation that the Ninth Circuit Court of Appeals accepted in affirming that award. But Justice Alito interprets Webster’s definition differently, arguing that the “sense divider” esp (‘especially’) points us to the ordinary meaning of the word. According to Alito, “That a definition is broad enough to encompass one sense of a word does not establish that the word is ordinarily understood in that sense.” In other words, interpreters sometimes translate writing, but the word most commonly refers to oral translation.

Alito adds, “The fact that the definition of ‘interpreter’ in Webster’s Third has a sense divider denoting the most common usage suggests that other usages, although acceptable, might not be common or ordinary.” Nailing down the dictionary argument, Alito concludes, “It is telling that all the dictionaries cited above defined “interpreter” at the time of the statute’s enactment as including persons who translate orally, but only a handful defined the word broadly enough to encompass translators of written material.” The ordinary meaning of interpreter is indicated by the definitional modifier especially, and by the fact that more dictionaries speak only of oral translation in their definitions. Alito does not cite it, but the American Heritage Dictionary defines interpreter solely as ‘One who translates orally from one language into another’ (5th ed., 2011, s.v.).

In her dissent, Justice Ginsberg reads the same evidence differently: “‘interpreters’ is more than occasionally used to encompass those who translate written speech as well.” For Ginsburg, “employing the word ‘interpreters’ to include translators of written as well as oral speech, if not ‘the most common usage’ . . . is at least an ‘acceptable’ usage.” Words can have more than one ordinary sense. And as Justice Scalia argued in Washington, D.C., v. Heller, “The fact that the phrase was commonly used in a particular context does not show that it is limited to that
context” (Washington, D.C., v. Heller, 15; we’ll talk more about Heller in the next chapter).

The upshot of Tanigubo is that majority rules, and when both sides draw opposite conclusions from the same lexical data, the majority’s reading of the dictionary evidence trumps the minority reading of that same evidence. That confirms that since even dictionary evidence can be ambiguous, it is the Court that has the ultimate authority in matters of definition, and not the dictionary. And that’s how interpretation works, not just with legal language, but with language in general: meaning is determined by the reader or the listener, not by the text.

**An exercise in defining marriage**

When it comes to the meaning of the word *marriage*, dictionaries and statutes don’t always agree, and neither the word book nor the law book may fully reflect the “ordinary” meaning of the word.

Definitions of marriage have been in the news as states consider or enact laws barring same-sex unions, and suits are filed contesting those laws. The federal Defense of Marriage Act (DOMA, passed in 1996), is typical in establishing a legal definition of marriage:

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SEC. 3. DEFINITION OF MARRIAGE.
IN GENERAL.—Chapter 1 of title 1, United States Code, is amended by adding at the end the following:

“§ 7. Definition of ‘marriage’ and ‘spouse’ “In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”
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When a statute defines a term, we should not need to look it up in a dictionary. But legal challenges to bans on same-sex marriage sometimes cite dictionary definitions to buttress their claims. As Ben Zimmer (2012) notes, a 2007 Rhode Island Supreme Court ruling held that the state’s Family Court had no jurisdiction over a same-sex couple married in Massachusetts because at the time of the Family Court’s creation, in 1961, dictionaries defined *marriage* as a union between a man and a woman. This ruling, relying on a definition that seems to exclude same-sex marriage, seemed to provide legal support for gay or lesbian marriage, but in most cases, such definitions are deployed in arguments to ban same-sex unions.

As we have seen, dictionary definitions can influence legal interpretation, and because of this one activist, Mike Raven, began an online petition drive to get dictionary.com, a widely-used site whose definitions are based on those of the now-defunct *Random House Dictionary*, to change its definition of *marriage* so that same-sex marriage gets equal treatment.
Dictionary.com currently defines *marriage* as

a. the social institution under which a man and woman establish their decision to live as husband and wife by legal commitments, religious ceremonies, etc.

b. a similar institution involving partners of the same gender: gay marriage.

Many dictionaries have added a definition of same-sex marriage to their entry for *marriage* by appending an additional, secondary, or less-common meaning. Raven would like to see this two-part definition rewritten into a single, gender-neutral one that doesn’t relegate gay marriage to what he regards as second-class status:

A civil, social and legal institution under which two consenting adults establish their life-long relationship based on love and commitment.

This petition drive is not the first attempt to change a dictionary definition, and it raises the possibility that word meanings could be decided by popular vote or political pressure. But it should also make us wonder whether changing the definition of *marriage* would change people’s attitudes toward marriage in any way. After all, language expresses what people want to say; altering definitions, whether through laws or by revising dictionaries, can’t really repress those sentiments. An important question, for us, though, is whether dictionary definitions of marriage can influence statutory interpretation.
That will be determined in the Spring of 2013. The Supreme Court has taken up two challenges concerning marriage laws: *Hollingsworth v. Perry* is an appeal of the Ninth Circuit’s ruling on California’s Prop 8 banning same-sex marriage, and *U.S. v. Windsor* challenges the Defense of Marriage Act, which specifies a heterosexual definition of marriage, and which the Justice Department has announced it will no longer enforce. The justices may well consult dictionaries as they rule on these two cases. While they deliberate, here are some definitions of *marriage* taken from major dictionaries from the 18th century to the present. Many of these definitions may figure in the justices questions and opinions. What we may ask, at this point, is, how would they help or harm an argument favoring, or opposing, the legalization of same-sex marriage?

Samuel Johnson, an 18th-century dictionary-maker often quoted by judges, defines *marriage* as “the act of uniting a man and a woman for life” (*A Dictionary of the English Language*, 1755).

In his *American Dictionary of the English Language* (1828), Noah Webster, a lawyer by training, defines *marriage* as a specifically heterosexual union and expatiates at some length on its religious aspects:

*MARRIAGE, n. . . . The act of uniting a man and woman for life; wedlock; the legal union of a man and woman for life. Marriage is a contract both civil and religious, by which the parties engage to live together in mutual affection and fidelity, till death shall separate them. Marriage was instituted by God himself for the purpose of preventing the promiscuous intercourse of the sexes, for promoting domestic felicity, and for securing the maintenance and education of children.*
Joseph Emerson Worcester, who worked for Webster and later became his chief rival in dictionary making, skips Webster’s moralizing but copies his definition word for word in the Comprehensive Pronouncing and Explanatory Dictionary of the English Language (1830): “the act of uniting a man and woman for life.” Stung by charges of plagiarism, Worcester later expanded his definitions of marriage, and other words, in the Universal and Critical Dictionary of the English Language (1846):

MAR'RIAGE, (mar’rij) n. [mariage, Fr.] The act of marrying, or uniting a man and woman for life; matrimony; wedlock; wedding; nuptials. It is sometimes used as an adjective, and it is often used in composition; as, marriage-articles, marriage-bed, &c.

The Century Dictionary (1891), the first to be produced on scientific, linguistic principles, defines marriage as “the legal union of a man with a woman for life,” but it is also the first lexicon to recognize that marriage is defined differently in different cultures. Marriage may include both common law marriage and “plural marriage,” or polygamy (not just abroad, but even in the United States, as practiced by Mormons) as well.

marriage (mar'āj), n. [L. marriātio, a marriage, M.L. mariātum, marriage, < marīius, a husband, marīta, a wife: see marital, marry1.] 1. The legal union of a man with a woman for life; the state or condition of being married; the legal relation of spouses to each other; wedlock. In this sense marriage is a status or condition which, though originating in a contract, is not capable of being terminated by the parties’ rescission of the contract, because the interests of the state and of children require the affixing of certain permanent duties and obligations upon the parties.

2. The formal declaration or contract by which a man and a woman join in wedlock. In this sense marriage is a civil contract, implying the free and intelligent mutual consent of competent persons to take each other, as a present act, as husband and wife; and according to the modern and most prevalent view no formalities other than such as the law of the jurisdiction may expressly impose are necessary to prevent either from subsequently repudiating the other or denying the legitimacy of their issue. The formalities provided for by the law of some of the United States are optional, being intended chiefly to enable the parties to preserve authentic evidence of the contract. When a man and a woman live and cohabit together, and conduct themselves as man and wife in the society and neighborhood of which they are members, till the belief and reputation that they are married become general, their marriage is presumed, without other evidence, for purposes of enforcing rights and liabilities of third persons.

O, Hamlet, what a falling off was there!
From me, whose love was of that dignity
That it went hand in hand even with the vow
I made to her in marriage. Shak., Hamlet, 1. 5. 50.

Marriage is an engagement entered into by mutual consent, and has for its end the propagation of the species.

Hume, Of Polygamy and Divorces.
Above: The *Century Dictionary* defines *marriage* as heterosexual, but its definition also recognizes the fluidity of wedlock practices across cultures. See below, *plural marriage*, both “among the Mormons” and in “Oriental countries” (a reference not to the Far East, but to Islam):

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*Plural marriage*, the marriage of a man with two or more women; *polygamy*: applied especially to the kind of polygamy existing among the Mormons, without the accompaniment of the harem of Oriental countries, each wife usually living in a separate house. — *Polygamous marriage*.

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*Black's Law Dictionary* (2nd ed., 1910), confirms earlier definitions specifying one man and one woman:

Marriage . . . is the civil status of one man and one woman united in law for life, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex.

While only the *Century* acknowledges various kinds of marriage, all discuss only *heterosexual* marriage. But times and mores change, and as same-sex marriage gains traction, dictionaries take notice, not because they’re written by social revolutionaries, but because their charge is to record language as people use it, and even the opponents of marriage equality use the word *marriage* to refer to those same-sex unions they oppose. In 2003, *Merriam-Webster's Collegiate Dictionary* (11th ed.) added same-sex unions to its definition of *marriage*:

1a (1) the state of being united to a person of the opposite sex as husband or wife in a consensual and contractual relationship recognized by law (2): the state of being united to a person of the same sex in a relationship like that of a traditional marriage.
The *Oxford English Dictionary*, another favorite with judges, has also added same-sex marriage to its definition:

a. The condition of being a husband or wife; the relation between persons married to each other; matrimony. The term is now sometimes used with reference to long-term relationships between partners of the same sex (see *gay marriage* n. at *gay* adj., adv., and n. Special uses 2b).

The *OED* also adds this definition of *gay marriage* (s.v., *gay*), tracing the first use of the term back to 1971:

**gay marriage** n. a relationship or bond between partners of the same sex which is likened to that between a married man and woman; (in later use chiefly) a formal marriage bond contracted between two people of the same sex, often conferring legal rights; (also) the action of entering into such a relationship; the condition of marriage between partners of the same sex.

And in 2011, the *American Heritage Dictionary* (5th ed.) added both same-sex marriage and polygamy to its definition of *marriage*:

a. The legal union of a man and woman as husband and wife, and in some jurisdictions, between two persons of the same sex, usually entailing legal obligations of each person to the other.
b. A similar union of more than two people; a polygamous marriage.
c. A union between persons that is recognized by custom or religious tradition as a marriage.
d. A common-law marriage.
Assignment: Craft an argument supporting or challenging the role of dictionary definitions in the legal interpretation of marriage.

Here are some specific questions for you to consider:

1. Since the Defense of Marriage Act defines marriage as a heterosexual union, is it necessary, or even possible, for the courts to consider the “ordinary meaning” of marriage in interpreting the law?

2. Marriage is not the only dictionary definition that people have tried to change by pressuring dictionary editors and publishers. Research some of the others. How useful are petition drives or other kinds of external pressure in getting dictionary makers to change their definitions?

3. What are the strengths and shortcomings of dictionary definitions (the ones cited above, as well as others that you find) used to support legal interpretation?

Taniguchi is a minor case involving dueling dictionaries. In the next chapter, we will look at the landmark decision in Washington, D.C., v. Heller (2008), in which the Supreme Court interpreted the Second Amendment to guarantee an individual right to own a gun. The case hinged in part on dictionaries and grammar books, both those current in the Framers’ day, and those which describe the English language today. Heller furnishes an object lesson in how courts weigh linguistic evidence as they determine legal meaning.