WHAT'S IN A WORD? CAN "MARRIAGE" MEAN SOMETHING IT NEVER MEANT BEFORE?

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> *"Error is never so difficult to be destroyed as when it has its root in language."* —Jeremy Bentham[1]
>
> *"No living language stands still, however much we might wish at times that it would."* —Merriam-Webster's Collegiate Dictionary

INTRODUCTION

No one can dispute the serviceability of lexicography in the legal profession. In this paper I plan to explore the clash of the two disciplines—lexicography and law—when courts and legislatures invoke lexicography to address and solve legal issues that are driven by societal concerns. I will address, specifically, the "marriage" debate. Not since *McCulloch v. Maryland* has one mere word generated so much discussion in legal opinions and treatises.[2]

When it comes to the meaning of the word "marriage," the dictionary may be causing more problems than solving them—or even mitigating them. All good statutory construction should recognize plain meaning. Surely then the dictionary, like a good judge, simply provides the clarification of the law. Unfortunately, that is not what dictionaries are being asked to do. In the attempts to construe "the meaning of marriage"

[1] Quoted in C. K. Ogden and I. A. Richards, *The Meaning of Meaning* <http://ogden.basic-english.org/meaning.html> (accessed April 27, 2005).

[2] 17 U.S. 316 (1819).

much of what results is either meaningless or confusing, while much of the discussion concerning "redefining marriage" is based on misunderstanding. The dictionary becomes the *justification* for the law.

It is said that scholarly legal writing is characteristically both normative (informed by a social goal) and prescriptive (recommending or disapproving a means to that goal) at its core.[3] Dictionary writing, that is lexicography, is also normative—it has a societal goal of aiding understanding of the language, and thus enhancing communication. It is not, however, prescriptive. Dictionary writing is descriptive—it records the language as it is used, not as one would have it used. Lexicographers must not have a social agenda that goes beyond that mandate. In Part One of this paper I will briefly describe the process of dictionary making, some of the basic tenets of lexicography, and the historical role of lexicography in law. I will point out what I perceive as misunderstandings, in judicial opinions and scholarly articles, on the subject of lexicography.[4] I will discuss how words

[3] Elizabeth Fajans & Mary R. Falk, SCHOLARLY WRITING FOR LAW STUDENTS 4 (West 1995).

[4] Numerous other authors have discussed the role of dictionaries in court decisions at much greater length than I intend to or need to for this paper. I am indebted to several of them. See e.g., John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001); Note, *Looking It Up: Dictionaries and Statutory Interpretation,* 107 HARV. L. REV. 1437 (1994); James L. Weis, *Jurisprudence by Webster's: The Role of the Dictionary in Legal Thought*, 39 MERCER L. REV. 961 (1988); Gary L. McDowell, *The Politics of Meaning: Law Dictionaries and the Liberal Tradition of Interpretation*, 44 AM. J. LEGAL HIST. 257 (2000); Samuel A. Thumma & Jeffrey L. Kirchmeier, *The Lexicon Remains a Fortress*, 5 GREEN BAG 2D 51 (2001).

gain new meanings (and how they do not) and how, when, and by whom their definitions are changed.

Whereas the strict dictionary definition was invoked for the interpretation of the word "necessary" by Maryland in *McCulloch*,[5] in the end it was rejected by the Marshall court in favor of "reference…to its use, in the common affairs of the world, or in approved authors."[6] Thus the interpretation of the word, while not aided, was not significantly colored by zealous reliance on that word's dictionary definition.[7] Overly punctilious adherence to a dictionary definition has the potential to create mires, and in Part Two of

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[5] Maryland's argument was that "['Necessary' is] defined 'indispensably requisite;' and, most certainly, this is the sense in which the word … is used in the Constitution." 17 U.S. at 366-367. This definition can be found in Samuel Johnson's DICTIONARY OF THE ENGLISH LANGUAGE (London 1798).

[6] *Id*. at 413-14.

[7] Even today, there is nothing in the dictionary that totally justifies Marshall's broad interpretation. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY [hereinafter WEBSTER'S THIRD] defines "necessary" as "that cannot be done without; that must be done or had; absolutely required; essential, indispensable." (on CD; Merriam-Webster, Inc. 2002). In the end, of course, the argument in *McCulloch* revolved around politics, not lexicography. "The plain question," wrote Virginian John Taylor, "*divested of verbal evolution*, is, whether Congress are invested with the supreme power of altering or mending the Constitution, should they imagine it to be expedient?" [emphasis added] John Taylor, CONSTRUCTION CONSTRUED AND CONSTITUTIONS VINDICATED 21 (The Lawbook Exchange, Ltd. 1998 (1820)), quoted in Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 202 n.109 (2003). See generally Barnett at 188-215; Gary Lawson and Patricia Granger, *The 'Proper' Scope of Federal Power: A Jurisdictional Interpretation of The Sweeping Clause*, 33 DUKE L.J. 267, 288-89 (1993).

this paper I will discuss some of the sticky situations that have been created in courtrooms doing just that.

In Part Three of this paper I will show how the marriage debate is mired down by definitional arguments. I will posit that any attempt to establish a meaning of marriage in a legal context when societal goals are invoked (such as "protecting marriage") should dispense altogether with the dictionary as support. I will point to the inherent conflicts in the current discussion on "defining (or redefining) marriage"—the meaning of the word versus the meaning of the institution; legal definitions versus lay definitions—and address the question of how and by whom marriage can be defined/redefined. I will make a short trek into the land of policy and tradition via *Loving*, *Singer,* and *Baehr*[8] and conclude Part Three with a short discussion of state statutes and the Defense of Marriage Act (DOMA).[9] Throughout the paper I will critique discussions in law review articles of defining marriage and of the courts' use of dictionaries in general. I will also identify valid, helpful, and useful approaches and measures taken by various courts and legislatures.

This paper cannot, nor does it need to, embark on any sort of analysis of the constitutionality or lack thereof of any of the rulings regarding same-sex marriage. However, I believe it can provide some thoughts provoked by what I perceive as circular,

[8] Loving v. Virginia, 87 S.Ct. 1817 (1967); Singer v. Hara, 522 P.2d 1187 (1974); Baehr v. Lewin, 852 P. 2d 44 (1993).

[9] Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 28 U.S.C.A. § 1738C (West Supp. 1998) and 1 U.S.C.A. § 7 (West 1997)).

illogical, or misplaced in the use of the "poor innocent" dictionary when it is cast into the role of a judge and asked to prescribe rather than to describe—a task most unsuitable for a dictionary, and sometimes unsuitable for a judge as well.

I. LEXICOGRAPHY IN GENERAL

I will begin, quite appropriately I believe, with a dictionary definition. *Webster's Third New International Dictionay* (*Webster's Third*) defines "lexicography" (a word that first appears in the written English record in 1680, [10] from Late Greek *lexikographos,* "compiler of a glossary") as "the editing or making of a dictionary" and "the principles and practices of dictionary making."[11] Let us take a look at what these principles and practice are.

A Basic Tenet: Description Versus Prescription

"Dictionaries are not the source of the English language. Rather the English language is the source of the information in …dictionaries."[12] Lexicographers are collectors. They amass thousands upon thousands of examples of word use. When it is time to write or revise a dictionary, they sift through the collection of words and sort out all the different

[10] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY on CD (11th ed., Merriam-Webster, Inc. 2004) (hereinafter ELEVENTH COLLEGIATE).

[11] WEBSTER'S THIRD.

[12] Joshua Guenter, Ph. D. (pronunciation editor at Merriam-Webster, Inc.), in a letter to a correspondent dated May 24, 2004. Merriam-Webster files.

ways a word is being used. From these examples of a word in context, they extrapolate a definition that, in effect, tells the dictionary user how the word is being used. Arriving at a conclusion of entry-worthiness is a matter at some point of making a judgment as to the adequacy of the temporal and geographic uses the lexicographer finds. If the word is widely used by a representative spectrum of society and if a word has been so used for a long enough time to appear to have acquired an established usage, it will probably be entered. It is also up to the discretion of the definers how narrow or how broad to make the definition. If one definition, that is, a single-sense definition, can adequately encompass slight distinctions in the way a word is used, then it is probably a good definition. When there are specific and fairly prominent limiting distinctions, they are better included in one or more subsenses. The entry, new or revised, once written by a definer, is sent up the ladder for review and comments, all the way to the editor in chief. If it is ultimately not considered worthy for entry just yet, it is filed away until the next revision.

Conversely, a word that has not appeared in a context that makes use of its denotative use for a long time—what lexicographers call "ordinary running text"— and was considerably short-lived in the first place, might simply be deleted from the dictionary. Its continued entry-worthiness can be weighed against that of new words clamoring for space in an already pressed-for-space tome. [13]

[13] One such example is "tattletale gray" ("a grayish white"). This word entered the vocabulary by way of an advertising campaign for Fels-Naptha Soap, which included the slogan "Banishes Tattle-Tale Gray." Several citations from the 1940s show the term appearing in contexts other than advertisements for the soap. The term continued in use during the 1950s and 60s, and was introduced into the seventh edition of

Dictionary publishers sometimes get letters from people who think that a word should not be in the dictionary because it is unpleasant. These people get a nice letter from one of the dictionary writers, explaining how the usage criteria for entering words— time and geography—require that the word in question be entered.[14] The dictionary has been likened to a mirror. If people do not like what they see, it is not the dictionary that is at fault unless the mirror is distorting the image. If the mirror's reflection is a faithful one, they have to blame what the mirror is reflecting—the English language, a creation of those who use it.[15]

Likewise, dictionary writers receive letters objecting to, or at least questioning, apparent contradictions within a word's overall definition. A frequent subject of such correspondence is the word "biweekly" and its relatives, "bimonthly" and "biyearly." "Biweekly" has two senses. The first is "occurring twice a week," and the second is "occurring every two weeks."[16] The explanation for this seeming discrepancy is that both

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their COLLEGIATE DICTIONARY (1963) by Merriam-Webster. By the early 70s, it was only appearing sporadically. Then it disappeared. It was finally removed when the tenth edition of MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY came out in 1993, by which time there had been no new citations in nearly 20 years. Merriam-Webster files.

[14] The dictionary writer will most likely also note that inclusion of so-called "bad words" or politically incorrect epithets neither promotes not encourages their use. Such words are typically labeled with warnings such as "considered derogatory," "usually vulgar," etc.

[15] Frederick C. Mish, Ph.D. (editor in chief of Merriam-Webster, Inc.), Merriam-Webster correspondence files (December 5, 1994).

[16] ELEVENTH COLLEGIATE.

meanings exist and have existed for quite some time. In the minds of its users the meaning is clear—but if the user does not convey his or her meaning to the hearer or reader, looking up the word would not be of any use to either of the latter. This then epitomizes the dictionary definition dichotomy—definitions can aid communication only when the parties communicating bring the same information with them to the dictionary. A mathematical definition is useful only to the extent that the reader understands certain mathematical concepts. The definition of "biweekly" is useful, not to clarify, but to alert. The apparent contradiction is a warning—be careful when you use this word. In fact, the dictionary includes this cautionary note: "[I]f you need *bimonthly* or *biweekly*, you should leave some clues in your context to the sense …you mean…."[17]

Dictionary publishers are not infrequently sent a word by a person who claims to be its creator. There is no denying that it is a word. It might be even be a useful word, a nifty word, a clever word. The dictionary people politely write back and suggest that the person try to get the word in print, in running context where it is being *used,* not merely referred to, and try to get others to use it. They invite the person to send the dictionary any such print uses in the future. They give the person hope—not misplaced hope—because that is exactly one way words *do* get in the dictionary. But until the word has met the barest qualifications of time and geography, the letter will simply be the first piece of the collected evidence of the word's existence.

[17] *Id.*at entry for *bi-*.

How arbitrarily can a word be used? How much flexibility is given the user? Mere absence from a dictionary does not preclude using a word, or using a word in a certain way. It does not mean, in other words, that something is not a word. A word is 'legit[imite]' as long as people use and understand it."[18] The hundreds of thousands of words in the English language do not begin to all fit in the dictionary. Not even the twenty-volume *Oxford English Dictionary* [*OED*][19] can handle them all. Just pick up a compilation of slang or regional English, and you will find practically no matches in the *OED*. A typical desk-size dictionary contains some 225,000 words, and a typical one-volume "unabridged" dictionary might contain more than twice that amount.[20]

"Look it up in the dictionary" one says, and the dictionary user leafs through tissue-thin pages (or types a word in a "search" box and clicks) to affirm a spelling, discover a word's origins, find out its pronunciation, learn proper usage,[21] and even get a snapshot

[18] Merriam-Webster correspondence files.

[19] Second Edition, Clarendon Press, Oxford 1989. This edition is a merger of the OED's First Edition (formally titled A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES), James A.H. Murray, ed. (1914) and the SUPPLEMENT TO THE FIRST EDITION, R.W. Burchfield, ed. (1972).

[20] For example, WEBSTER'S THIRD contains 476,000 words.

[21] Some dictionaries contain "usage paragraphs" at entries for certain words that tend to pose problems, and many include "usage notes" to warn readers when a word has negative connotations (such as "squaw"), and most dictionary feature "usage labels" such as "slang."

of a word's evolution.[22] But the one function of a dictionary that supersedes all others is to give the meaning of words.

To d*efine* (a word) means "to *discover* and set forth the meaning of (a word or term); specifically, to formulate a definition."[23] "Lexicographers recognize that definitions can never be perfect, but they seek to achieve the best possible fit to assist the reader."[24] There is more to that challenge than simply determining meaning. For not only must a definition fit usage, it must "fit" in the sense of making an accommodation to available space. Defining requires a mastery of the terse and succinct.[25] Thus, once a meaning has been determined entry-worthy, the definer has to decide how inclusive it ought to be.

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[22] For example, the different meanings, or senses, of words are entered in historical order—oldest to newest—in Merriam-Webster dictionaries. The date of first known use is included for each word entered, a practice first introduced with the tenth edition of the COLLEGIATE.

[23] WEBSTER'S THIRD.

[24] HARV. L. REV., *supra* n. 4 at 1452.

[25] Electronic databases conceivably remove space considerations. But defining is not likely to change much as a result. Many online and electronic dictionaries are merely digital versions of existing paper dictionaries, and it is not economically feasible for a dictionary publisher to create augmented versions merely for the electronic market. Furthermore, accommodating the dictionary user means presenting a definition that can be examined efficiently and quickly, and adding more words would not necessarily enhance this process. Indeed, while it is true that many users would prefer more spelled-out definitions for some words, and resent the appearance within its own definition of the very word being defined (which they perceive as "circular defining"), electronics surmounts some of the drawbacks of the traditional defining style by allowing the user to readily link to other dictionary words.

Language is our tool. The tool can be reshaped to match our needs. If the tool is reshaped, the definition—the description of the tool—will eventually need some changes, some alterations or augmentations, depending on the nature of the tool's change.

The Pace of Change

Samuel Johnson once observed, "[T]here can never be wanting some…who will consider that no dictionary of a living tongue ever can be perfect, since while it is hastening to publication, some words are budding, and some falling away…." [26] Indeed, no dictionary purports to keep apace with language changes up to the minute.[27] The dictionary is a record of *established* language, which in essence means that the words between its covers have proven themselves to have holding power by very dint of their longevity.[28] Nevertheless, the pace of dictionary change has stepped up as words become

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[26] Samuel Johnson, "Preface to the Dictionary," DICTIONARY OF THE ENGLISH LANGUAGE (London, 1755) <http://andromeda.rutgers.edu > (accessed March 28, 2005).

[27] But all that may change someday. In December 2004, Merriam-Webster preceded publication of the annual revision of its COLLEGIATE DICTIONARY with the entry in its online version of the ELEVENTH COLLEGIATE of the word "blog." See www://Merriam-WebsterCollegiate.com. The updated print version was not due out till July of 2005.

[28] Is it disingenuous to expect otherwise? Ellen Aprill's rather harsh assessment that "dictionaries are out of date by the time they are published" surely ignores the fact that dictionary users are not so clueless as to look to a dictionary as if it were reporting stock prices—and often object to the entry of what they perceive as fad words (see e.g., Wilson Follett, "Sabotage in Springfield, " THE ATLANTIC MONTHLY, January 1962). Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L. J. 275, 287 (1998).

disseminated more quickly. As noted above, there are two tests for "established"; besides longevity there is breadth of usage. Thus, a word like "Internet" appears in the dictionary less than a dozen years after its first known usage.[29]

Although even the best dictionaries undergo a full revision every ten years or more, they are nevertheless kept up to date with certain annual revisions and additions. For example, the list of words added to the 2002 copyright of *Merriam-Webster's Collegiate Dictionary*, tenth edition (*Tenth Collegiate*; original copyright 1993), includes "acid snow," "applet," "beta test," "big crunch," "bioremediation," "charter school," "chat room," "cyberspace," "day trader," "DVD," "flatliner," "freeware," "GPS," "home page, 1992" "La Niña," "mad cow disease," "nanotube," "nutraceutical," "snail mail," "soccer mom," "spam," "terabyte," "Webmaster," and "World Wide Web," along with a few hundred other words.[30] These annual updates collectively account for several hundred new entries and senses over ten years (whereas a new edition generally involves the addition of several thousand).

The reading and marking program as used by Merriam-Webster has long provided its lexicographers with a database of citational evidence that is its source for all these

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[29] Its first known usage is from 1985. It first appeared in major dictionaries in 1996. See e.g., RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY (1996).

[30] Merriam-Webster files. Typically, words have been around some twenty years before Merriam-Webster editors find them due for entry. In this list, "charter school," "DVD," "home page," "spam," and "Webmaster," like "Internet," had so quickly insinuated themselves into mainstream English that they were entered in record time—within ten years of first recorded use. ELEVENTH COLLEGIATE.

additions. The entire lexicography staff spends many hours per week reading from a broad selection of published works, both general and specialized. This provides a fairly consistent, if not always foolproof, measure of a word's usage frequency. The lexicographers have had a reliable, if somewhat conservative, way of keeping up with language change without cluttering the dictionary with ephemeral fad words or narrowly specialized words. Using this method, the lexicographers cannot target their reading to look specifically for certain words. Now all that has changed, of course, with searchable electronic databases and lexicographers must use caution not to misconstrue the significance of word frequency returns.

For example, the word "metrosexual" first appeared on the scene in 2003. There are examples in the Merriam-Webster citation database created from the reading and marking program from ten different sources, four of which are discussions of the *word* itself.[31] Of the six appearances in running context, two include glosses of the word's meaning (such as the explanation that metrosexuals are "straight men living in urban, metropolitan settings who are embracing their feminine sides"[32]) which, although these can still be considered a use in ordinary running context, certainly point to the word's falling short of the required "widespread usage." In contrast, a NEXIS search resulted in over 4,000 "hits," or occurrences of "metrosexual" (in lowercase) overall. Without examining each

[31] Merriam-Webster files.

[32] Genevieve Roja*, Here Come the Metrosexuals*, THE VALLEY ADVOCATE (Springfield, MA) 14 (October 16-22, 2003).

hit, of course, it is impossible to know in just what context the word is used, and how often it appears in the same publication.

Now compare these numbers with, for example, those of "homeschool" (including inflected forms "homeschools," "homeschooled," and "homeschooling," as well as "homeschooler"). "Homeschool," a word dating from 1980, was added to the *Tenth Collegiate* in 1996, when the Merriam-Webster files contained some ten citations A NEXIS search of lower-case "homeschool***" showed 442 hits for the first three months of 2005—a number virtually equivalent to the 376 occurrences of "metrosexual" in the same time period. And yet "homeschool" is unquestionably a far more established word. At this stage padding the evidence with citations from NEXIS would surely skew the assessment of frequency, which is determined not by tens of numbers but often by a little more than a handful of appropriate citations.[33] But the other side of the coin is that the material in the in-house database is now searchable as well, and those kinds of searches, since they are from the same source material as the traditional reading marking program,

[33] On the other hand, such databases can be invaluable for determining dates of first use. Whereas the in-house Merriam-Webster citation file's first example of "metrosexual" is from 2003, NEXIS permits postdating the word to 1994. Also, databases such as NEXIS can also be very useful in determining a more accurate frequency of spelling variants. For example, the NEXIS database features the spelling "diaphram" for "diaphragm" at a ratio of 1:56. This is lower than that revealed by the reading and marking program which is 1:36. In this case it skews the evidence if editors make a point of collecting examples of the variant while rather naturally tending to ignore the ordinary spelling. Merriam-Webster correspondence files (October 27, 1999).

are helpful in revealing trends that might not have been as readily apparent in the old-fashioned purely paper system.

II. LEXICOGRAPHY AND LAW

Needless to say, important legal considerations can hinge on understanding the meaning of a term. A practitioner of law relies on lexicography every time he or she picks up a dictionary. Judges who write decisions and academics who write treatises utilize lexicographical arts every time they attempt to assign meaning to a term.

Legislators, too, dabble in lexicography, defining terms in statutes. This kind of defining differs from dictionary defining, however.[34] In fact, here we may apply a second way we use "define," in contrast to the dictionary sense: "to fix, decide, or prescribe, clearly and with authority."[35] "Defining" in this sense, though not a strictly lexicographical exercise, *is* a legal one. It can include non-meanings as well as meanings. For example "sponsorship" is defined in the Equal Access Act as "the act of promoting, leading, or participating in a meeting. The *assignment* of a teacher, administrator, or other school employee to a meeting *for custodial purposes does not constitute sponsorship* of the meeting [emphasis added]."[36] If we refer to a dictionary, we find that a sponsor is

[34] This latter type of definition is referred to as a real definition. "Real" defining is what lawmakers, philosophers, theologians, and professional societies do. Real definitions are recorded in laws, textbooks, commentaries, encyclopedias, and technical reference books. Merriam-Webster files.

[35] Sense number two in WEBSTER'S THIRD.

[36] 20 U.S.C. §§ 4071-4074, cited in Board of Educ. v. Mergens 496 US 226, 237-240 (Neb.1990).

"one who assumes responsibility for some other person or thing."[37] Thus "sponsorship" is simply "assumption of responsibility for some other person or thing." Without the statutory definition, a court would be hard put to decide if the dictionary's "assumption of responsibility" encompasses assignment for custodial purposes. The legislature was wise to spell things out.[38]

Yet not even the presence of statutory definitions can solve all the problems. For example, in the field of insurance, the legal consequences are dependent on whether a particular contractual relationship is or is not an "insurance transaction." The elusive definition is sought, despite the unlikelihood of finding one; in the end, the legislators settle for the best they can come up with, plug it into their laws, and hope for the best. [39] Perhaps they have looked to a restatement or a treatise for help. But the ideal restatement-type definition of insurance should be both "precise enough" and "broad enough" to cover all legal aspects—and that is "an elusive goal").[40]

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[37] ELEVENTH COLLEGIATE.

[38] Here's where recourse to a more comprehensive dictionary might prove useful in the absence of a statutory definition. WEBSTER'S THIRD's definition of "sponsor" includes "a teacher acting as adviser to a specified student activity, as in "sponsor to a student council," "homeroom sponsor," "sponsor for a class dance."

[39] "[A]ttempts in the United States to formulate a general definition of insurance in regulatory statutes…have had only limited success because typically such statutes need to respond to a variety of matters and situations with very different characteristics." Robert E. Keeton & Alan I. Widiss, INSURANCE LAW 3 (West Publishing 1988).

[40] *Id.*

Then we have legal dictionaries. Definers for a legal dictionary must needs take a "wait and see" attitude with the courts and legislatures; the legal dictionary may be descriptive in the sense that it describes usage the same way a general usage dictionary does, but much of its description is of uses that are prescribed.[41] In contrast, definers for a general usage dictionary must wait and see what the English-speaking world at large is saying—a far more intricate task. That does not, of course mean that there is not overlap. Article 33 of the U.S.C., § 1362, says "Except as otherwise specifically provided, when used in this chapter . . . The term 'person' means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body." Sense number six of the definition for "person" in the *Eleventh Collegiate* is "one (as a human being, a partnership, or a corporation) that is recognized by law as the subject of rights and duties."

Occasionally a jurisprudential discussion that invokes "lexicography" can provide some insight into how judges apply their understanding of lexicography to interpret the meaning of words. "Lexicography," you will recall, is defined as "the principles and

[41] Thus, when a court resorts to a legal dictionary, it is arguably merely as an "aid to the memory of the Court." See Nix v. Hedden, 13 S.Ct. 881, 882 (1893) (in which "tomato" was the word at issue, which the Court *didn't* try to find in a legal dictionary). Lawrence Solan observes that "BLACK'S LAW DICTIONARY only purports to summarize briefly that which the courts have decided legally significant words to mean." *When Judges Use the Dictionary,* AMERICAN SPEECH 51 (Spring 1993). David O. Stewart notes that in about half of the 54 times (in 38 cases) that the Supreme Court included a dictionary definition in a decision, the definition was from a legal dictionary. By the Book: Looking Up the Law in the Dictionary," ABA JOURNAL, July 1993, at 46.

practices of dictionary making" or "the editing and making of a dictionary." In the hands of a non-dictionary writer, "lexicography" has a tendency to shift somewhat to mean "interpretation of a word."[42] H. L. Mencken, the author of *American Language,* stood on both sides of the bridge, yet he could coyly say, "A martyr, by my lexicography, is on all fours with a fool who risks and loses his life in any other showy but useless way."[43] There, he used the word loosely, but not incorrectly.

On the other hand, the judge in *U.S. v. La Franca* seems to have used "lexicography" to signify "arbitrary assignment of meaning to a word"—something that is anathema to lexicographers. The opinion was a finding that an amount charged for the illegal sale of alcohol could not be termed a "tax," whereby the judge said, "No mere exercise of the art of lexicography can alter the essential nature of an act or a thing."[44] If

[42] Occasionally the court, while relying on the dictionary—on lexicography, in other words—for a definition, has at the same time waxed original in its use of the word "lexicography" itself. For example, "lexicography" means "language/wording" here: "The peculiar capitalization [of 'Replacement Engine,' incorporated by the magistrate judge in his interpretation of the lease at issue, which interpretation the presiding judge is quoting] . . . is derived from the lexicography of the lease." First Security Bank, N.A. v. Northwest Airlines, Inc. 2001 WL 92175 (D. Mass.) (2001). See also Gunning v. Codd, 411 N.Y. S. 2d 280 (1978); Natural Resources Defense Council, Inc. v. Outboard Motor Corp.,702 F. Supp. 690 (1988) (using "lexicography" to mean "lexicon"); *In re* Roberts, 81 B.R. 354 (1987) (using "lexicography" to mean "dictionary definition"); People v. Pieters, 266 Cal. Rptr. 166, 167 (1990) ([W]e find nothing compelling in the lexicography [does this mean "body of lexicographical work"?] to assist our task").

[43] MINORITY REPORT: H.L.MENCKEN'S NOTEBOOKS 270 (Alfred A. Knopf 1956). Merriam-Webster files.

[44] 51 S.Ct. 278, 280 (1931). The court says "A 'tax' is an enforced contribution to provide for the support of government; a penalty, as the word is here used, is an exaction imposed as punishment for an unlawful

we apply the "editing or making of a dictionary" sense of "lexicography," then a "mere exercise of the art of lexicography" would mean in this context assigning to the word "tax" a sense of "an assessment upon an illegal sale," as "penalty" is defined,[45] to justify calling the particular imposition at issue a "tax." For validity, that would require that either 1) the word can be commonly used and understood as such *or* 2) the word has an accepted legal definition as such.

Nevertheless, just as the court says, whether or not the word's usage meets either of these two criteria, if it is a payment imposed as punishment, it remains one; its essential nature is not altered. The judge in *La Franca* completed his thought with the observation that "and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." I agree with the court's statement, although the second does not follow from the first.[46] The second statement refers not to an exercise in

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act. The two words are not interchangeable, one for the other." *Id.* Sixty years later, the judge in *U.S. v. Rock Island Armory, Inc*., plucked these very words from *La Franca* to support his finding that a federal law requiring a fee for registration of firearms was incompatible with a state law imposing a fine on the possession of firearms. The court ruled that the state law superseded the federal law. 773 F. Supp. 117, 123 (C.D. Ill. 1991).

[45] TENTH COLLEGIATE.

[46] It is not altogether clear if the court meant it to follow. However, the use of a semicolon between the two clauses seems to indicate a sequitur. "The semicolon tells you that there is still some question about the preceding full sentence; something needs to be added… with a semicolon there you get a pleasant little feeling of expectancy; there is more to come; read on; it will get clearer." LEWIS THOMAS, NOTES ON PUNCTUATION, in THE NORTON BOOK OF PERSONAL ESSAYS, Joseph Epstein, ed., (W.W. Norton 1997).

the art of lexicography—but merely to an exercise in nomenclature. The court is simply talking about calling a spade a spade—it is saying, "call a penalty a 'penalty'; if it is an assessment upon an illegal sale, don't call it a 'tax.'"

Using the Dictionary

Whether or not one feels that "Justice Scalia has changed the rules of the statutory interpretation game" by "replac[ing] legislative history with dictionary definitions,"[47] or that "textualism" has always been the name of the game,[48] beginning with *Respublica v. Steele*,[49] dictionaries have played a role in courtroom dramas.[50] Thumma and Kirchmeier

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Perhaps, however, more apropos is what a writing manual tells us: "The semicolon…signals that the remainder of the sentence is closely related to the first part…however, it does not imply any following… amplification…" MERRIAM-WEBSTER'S MANUAL FOR WRITERS & EDITORS (Merriam-Webster, Inc. 1998). In any case, the *Rock Island* court's following this quote (see n. 44, *supra*) with another that reiterates it does, I believe, tend to support my notion that in the *La Franca* quote the two clauses are one complete thought. Quoting *Lipke v. Lederer,* the judge in Rock Island said, "The mere use of the word 'tax' in an act primarily designed to define and suppress crime is not enough to show that, within the true intendment of the term, a tax was laid.... When by its very nature the imposition is a penalty, it must be so regarded.... " 773 F.Supp.117 at 123 fn. 11, quoting 42 S.Ct. 549, 550-51 (1922).

[47] Autumn Fox & Stephen R. McAllister, *An Eagle Soaring*, 19 CAMPBELL L. REV. 223, 293 (1997).

[48] See generally Manning, *supra* note 4.

[49] Respublica v. Steele, 2 US 92 (1785). The court, the Supreme Court of Pennsylvania, used a dictionary for the first time, looking up "yeoman" in Johnson's Dictionary.

[50]Stewart calls this emerging phenomenon a "jurisprudence of lexicography," which I envision in its most extreme form as all court decisions becoming litanies of definitions—with (I hope) appropriate citations. *Supra* note 41, at 46.

have identified some 250 words for which dictionary definitions were invoked during the 1990s by the Supreme Court alone.[51]

A closer examination of some of these opinions often raises questions as to why the court needs a dictionary in the first place, when common sense would seem to do just as well—or better.[52] Perhaps it really is a matter of lack of self-confidence.[53] If so, that might explain why the end result seems highly divorced from the dictionary analysis. The dictionary seems to serve as a crutch, even though the judge in the end tosses it aside and lets common usage be his support, as in *Nix v. Heddon,* discussed below. More direly, the judge ends up using the dictionary as a foil. The definition of the word at issue that he or she finally arrives at is ostensibly from an analysis of the dictionary definition. Upon closer examination, it reveals itself to be the meaning the judge had set out to find, as happened in *Chapman* with the word "mixture."[54] Perhaps the judge's decision is

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[51] *Supra* note 4, at 51-52. Survey numbers such as the one in HARV. L. REV., *supra* note 4, at 1437 fn 2, which says, "At the time of this writing, LEXIS listed 664 cases that mention the word 'dictionary' or 'dictionaries,'" must of course be taken for what they are—"admittedly imperfect." *Id*. An example is the Supreme Court's opinion in Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884), in which Justice Miller merely cites "Worcester," in reference to his use of that dictionary's definition of "author." [However, it so happens the word "dictionary" does appear elsewhere in the text, thought not in reference to a definition. The court cites Judge Bouvier's LAW DICTIONARY in its discussion of copyright law.]

[52] James Weis cites as an example Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976), in which he says that Justice Powell quoted dictionary definitions of "device," "contrive," and "manipulate" "without explaining why these definitions supported his opinion." *Supra* note 4, at 966-67.

[53] As suggested by Stewart, *supra* note 41, at 47.

[54] Discussed *infra*.

always, by necessity, arbitrary in the end. "Merely to claim, as Justice O'Connor did in *Smith*, that a definition provides a possible meaning that a typical reader might assign to the statute does not indicate why the Court *should* read the statute that way" [emphasis added].[55]

In any of the scenarios in which a dictionary appears, one may surmise that the court really thinks it is using the dictionary, although it is a bit hard to explain why it is that courts rather baldly ignore their own caveats against doing so.[56] A yet unexamined (as far as I know) possibility is that there are more lawyers citing dictionary definitions in their briefs and the dictionary game really starts with the parties, and not the judge. A judge faced with an argument invoking a definition may not feel that he or she can simply ignore it, so the judge tackles the argument, in turn, with a dictionary definition, has a bit

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[55] HARV. L. REV., *supra* note 4, at 1445-46, citing Smith v. U.S., 113 S. Ct. 2050. The decision in *Smith,* resulting from using a dictionary to determine the meaning of "use," was one of those absurd ones. The majority concluded that "uses a firearm" can mean 'uses a weapon for trade.'"

[56] For example, the court in *Stamm Theatres, Inc. v. Hartford Casualty Ins. Co*., having pontificated that dictionary definitions cannot be applied simplistically, and that words in an insurance policy are "to be construed in their ordinary meaning, " proceeded to use MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (online) to conclude that cracks in support trusses caused by stress factors constituted "decay" that was covered by the insurance policy. The court says (wrongly) that the "more general definition" is first (actually, the *oldest* is first), and there being no justification (that the court found) to apply a narrower definition, the first definition should apply. (In an unusual expression of zeal, the court quotes the *entire* definition of the noun "decay" from three dictionaries, including WEBSTER'S THIRD, not even omitting obsolete-labeled sense number seven: "failure of payment or rent; arrears"). 93 Cal.App.4th 531,539-46 (2001).

of a tussle, and then moves along to a decision—regardless of whose dictionary argument came out on top. That certainly seems to have been the case in *Nix v. Hedden,* as well as *Nixon v. U.S*. and *Liebshcher v. Boothroyd,* discussed below.[57] Nevertheless, I will put aside those jurisprudential questions for now, in favor of examining the courts' use of dictionaries from a lexicographical point of view. Later, I will explore how, in the context of the same sex-marriage debate, the two sometimes merge inextricably and then veer off to a third, far less scientific path—one that is paved with the bedrock of tradition and moral values.

Confusing Webster's

One thing stands out in the frequent courtroom and other legal uses of non-legal dictionaries: There is confusion in the legal community as to the name "Webster's." Because of the non-exclusive nature of the name Webster, it is used by many publishers. In fact, probably the best-kept secret in lexicography as a whole is the non-proprietary status of the name "Webster's."

Noah Webster published his first dictionary, *An American Dictionary of the English Language,* in 1828. After Webster's death in 1843, the printer G. & C. Merriam Company in Springfield, Massachusetts, owned by the brothers George and Charles Merriam, bought the rights to create a revised edition of his dictionary from Noah's heirs, which they published in 1847. Over the years, the Merriam Company published

[57] Discussed *infra* at pages 17, 19, and 21, respectively.

subsequent editions with titles bearing the Webster name. But the copyright on Merriam-Webster's 1847 edition expired in 1889, and in the meantime the company had sold the rights to some of their abridged dictionaries. Numerous lawsuits have followed, perhaps the most famous being *Saalfield v. Merriam*, resulting in an injunction against the plaintiff company's using the title "Webster's Dictionary" without a notice showing themselves to be the non-original publishers of Noah's works. The decision was based on the finding that the name "Webster's" had acquired secondary meaning as a trademark for the G. & C. Merriam Co.[58] But later the door was opened to using the name "Webster" without such notice, although use of certain other identifying marks with the name was forbidden.[59] In an attempt to reduce the obfuscation, the company changed its name to Merriam-Webster, Inc. in 1982 and in 1991 began using the identifying trademark-registered statement "Not just Webster. Merriam-Webster."[60]

Lawmakers seem no more privy to the secret than the public at large. This confusion often leads courts to neglect naming a dictionary's publisher.[61] Here is a typical

[58] 238 F.1 (1917).

[59] The plaintiff in *Saalfield* was barred from using the name "Intercollegiate" in conjunction with "Webster's" because it infringed on G. & C. Merriam Company's trademark in the name WEBSTER'S COLLEGIATE. *Id.*

[60] Most of this history is taken from a flyer published by Merriam-Webster, Inc.

[61] This is so even when they would not treat other non-periodicals that way. For example in *Ososki v. St. Paul Surplus Lines*, A PRIMER OF OILWELL DRILLING, is cited with edition, publisher, and date. 156 F.Supp.2d 669, 672 (E.D. Mich 2001). The same court , in quoting *definitions*, cites its and the plaintiff's sources as WEBSTER'S DELUXE UNABRIDGED DICTIONARY [publisher and date omitted]; MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY [publisher and date omitted]; NEW WEBSTER'S DICTIONARY OF THE

example: In *Office of Public Defender v. Delaware State Police*,[62] the court refers to "*Webster's Dictionary*" (used to define "citizen"), and in a footnote cites that "Webster's" as *Webster's Unabridged Dictionary Of The English Language* (2001). The dictionary is indeed a "Webster's"—though not a Merriam-Webster. The footnote does not even cite the publisher of this particular *Webster's* (which happens to be Random House), as if any such distinction is irrelevant. [63]

In the realm of scholarly legal writing, the confusion takes on a different aspect. Ellen Aprill notes that the Supreme Court Justices "look to large numbers and kinds of dictionaries, including the *OED, Webster's* unabridged dictionaries, abridged versions of *Webster's* and college dictionaries…"[64] Thumma and Kirchmeier, discussing dictionary use by the Supreme Court, write, "[V]arious versions of *Webster's* continue to be the most frequently cited general usage dictionaries."[65] That is a bit like saying "various familiar kinds of fruit are the most frequently used fruit for fruit pies." All it says is that

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ENGLISH LANGUAGE (deluxe Encyclopedic ed. 1981) [publisher omitted]; WEBSTER'S II NEW COLLEGE DICTIONARY (Houghton Mifflin Co. 2001); and WEBSTER'S NEW WORLD DICTIONARY, MODERN DESK EDITION (The World Publishing Co.1971). *Id.*at 716-17.

[62] Del.Super. (2003)

[63] One quoted definition is "a native or naturalized member of a state or nation who owes allegiance to its government and is entitled to its protection (distinguished from alien)." The correlating sense in WEBSTER'S THIRD is "a native or naturalized person of either sex who owes allegiance to a government and is entitled to reciprocal protection from it and to enjoyment of the rights of citizenship—compare *alien, subject*."

[64] Aprill, *supra* n. 28, at 300.

[65] *Supra* n. 4, at 52.

dictionaries with the name "Webster" in their title constitute the general usage dictionaries most frequently used by the courts—which is not saying much.[66] In contrast, the courts have only one *Black's*. "Various versions of *Black's* continue to be the most frequently cited law dictionaries"[67] *does* make sense, because it means various editions by one author and publisher are used more than any other legal dictionary by any other publisher.[68] (Thus, in cookery talk, it is equivalent to saying "various kinds of *apples* are the most popular ingredient for fruit pies.")

David Stewart, writing about "dictionary shopping" in the court, expresses puzzlement over Justice White's use of "various versions of Webster dictionaries." Ironically, Stewart is making a reverse error from that of Aprill above. Stewart names two dictionaries used by the Justice: the 1983 *Webster's Ninth Collegiate Dictionary* in one opinion, and the "1961 version" of *Webster's Third* in another.[69] The choice is not as

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[66] On the Amazon.com Web site I found a total of eighteen publishers who had affixed the name "Webster's" to their English-language dictionaries. Some even use the phrase "by Webster's" or "by Webster." Two major dictionaries, RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY and WEBSTER'S NEW WORLD DICTIONARY (IDG Books Worldwide Inc.), use the name Webster's. But chances *are* the dictionary is a Merriam-Webster, because, according to Merriam-Webster, Inc. president and publisher John M. Morse, Merriam-Webster dictionaries hold more than fifty per cent of the market share.

[67] Thumma & Kirchmeier, *supra* n. 4, at 52.

[68] Again, however, this is not surprising since there is not a lot of competition out there. Nor are courts are any better about giving full citations for editions of BLACK'S, authored by Henry Campbell Black and published by West. If anything they are worse.

[69] Stewart, *supra* note 41, at 47. The Justice's opinions in the two cases Stewart refers to do not include the dictionaries' publisher. See CSX Transp., Inc. v. Easterwood, 113 S. Ct. 1732 (1993) (using WEBSTER'S

"random" as Stewart would have it. Although it is not clear whether Stewart even knows that the Webster name is non-proprietary, he apparently does not see that the Justice's choice is really between a more comprehensive "unabridged" dictionary (*Webster's Third*) and a "desk" dictionary (the *Ninth Collegiate*) by the same publisher.[70]

I conducted a search, concededly far from perfect, on Westlaw to determine the frequency of "Webster's dictionary defines" and "according to Webster's" with the goal of determining how often these allusions are made without citation. In order to accomplish this I excluded as many phrases as I could think of that might be citational evidence of the Webster's in question.[71] The following are my results:

THIRD for definition of "cover"); Pioneer Inv. Services Co. v. Brunswick Assoc. Ltd. Partnership, 113 S. Ct. 1489 (1993) (using the ninth edition of MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY for the definition of "neglect.")

[70] Few people seem to realize that for the most part, the main body of WEBSTER'S THIRD contains the same material as the original 1961 copyright. Additions are contained in an Addenda Section which is updated every few years, thus leading to a renewal of copyright. It would not have behooved Justice White to pick up a newer copyright for the definition of the verb "cover." Revising WEBSTER'S THIRD will take a battalion of lexicographers several years—it is not something done at the drop of a hat. Furthermore, even making small revisions in the main body poses big problems having to do with the dramatic changes in typesetting in the last 40 years.

[71] Thus my two searches were for "Webster's dictionary defines" % "New International" % Merriam-Webster % Collegiate % Int'l % "Webster's II" % "New World" % "Random House" % "International Dictionary" % Unabridged % "Webster's New" % "Webster's Third" % "American Heritage" % "Webster's Desk" and for "According To Webster's" % "New International" % Merriam-Webster % Collegiate % Int'l % "Webster's II" % "New World" % "Random House" % "International Dictionary" % Unabridged %

Search term	Number of cases overall	Number of overall cases since 1900	Number of federal cases
"Webster's dictionary defines"	330 Dates:1852-2005	316	67 Dates:1948-2004
"According to Webster's"	146 Dates:1836-2004	129	35 Dates:1949-2002

But the confusion may be abating—at least in the general media. Merriam-Webster has noted a marked increase in name recognition over the last ten years.

The Court and "Collapse"

Attempts to introduce lexicography into the law can transform a seemingly ordinary exercise into an esoteric one. The district judge in *Ososki v. St. Paul Surplus Lines Ins. Co.* was asked to decide an insurance case where the policy covered an oil rig's collapse.[72] Straightforward-seeming, except that it wasn't a question of simply deciding if the oil rig had fallen down. The judge had to determine what "collapse" *meant.* The question was whether the failure of bearings which were part of the block-and-tackle assembly constituted a "collapse" of the mast of the rig. The court concluded that none of the dictionary definitions of "collapse" could include the failure of the pulley—thus the incident was not a collapse and not covered by the policy.[73] Somewhat testily, we imagine, the judge said that "ambiguity exists only when a term is susceptible to two or

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"Webster's New" % "Webster's Third" % "American Heritage" % "Webster's desk." Without the exclusions, "Webster's dictionary defines" showed up in 760 cases 1852-2005 (746 since 1900).

[72] *Ososki* v. St. Paul Surplus Lines, 162 F.Supp.2d 714 (E.D. Mich 2001).

[73] *Ososki*, 162 F.Supp.2d at 718.

more *reasonable* interpretations" [emphasis in original].[74] The dictionary can be an aid—but there is that ever-present "reasonable" lurking in the shadows and someone must still decide what is reasonable.

In the original action under the district court, the judge had turned to one dictionary definition of "collapse," in the absence of any in the insurance policy.[75] In his motion for a rehearing, the plaintiff offered definitions of "collapse" from two dictionaries in his brief.[76] The court itself quotes definitions from three other dictionaries.[77] All the definitions use the term "breakdown."[78] According to the court, the plaintiff essentially goes wrong when he finds, in turn, that the definition of "breakdown" is "a failure to function."

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[74] *Id* at 717, citing City of Wyandote v. Consol. Rail Corp, 262 F.3d 581, 584-85 (6th Cir. 2001). The plaintiff also brings up the rule of *contra proferentem*, and that the court must accept his "conjured" definition of the disputed term. *Id.*

[75] *Ososki*, 156 F.Supp.2d at 669. Apparently the plaintiff Ososki did not approve of the judge's having relied solely on the OED (online, 2nd edition, 1989) to decide that the incident was not a collapse. The judge thinks that that dictionary could well suffice but nevertheless defers to the plaintiff's desire to use a less historically-oriented and less "British" dictionary.

[76] *Id.*at 716, naming MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY and *Webster's* DELUXE UNABRIDGED DICTIONARY. The court does not cite the edition, publisher, or date in the opinion.

[77] See n. 61 *supra*.

[78] For example, the definition of collapse in MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, tenth edition, is "a sudden failure; breakdown, ruin" (sense 3).

The court observes that "the secondary and tertiary definitions of terms are not synonyms."[79] Here the court is not precisely accurate. In the *Tenth Collegiate,* one of the sources used by the appellant, words in small capital letters (as are "breakdown" and "ruin") constitute a "synonymous cross reference." In effect they *are* synonyms, contrary to what the court says.[80] In fact, the Explanatory Notes in the *Tenth Collegiate* tells the dictionary user that he may substitute the definition at the entry cross-referred to if he so desires.[81] The applicable sense in the *Collegiate* has two parts: the "binding substitute" ("a sudden failure"), followed by the synonymous cross reference, "breakdown, ruin." The court, offers the caveat that the inclusion of such terms as "breakdown" and "ruin" is "intended to expand, not distort the sense of the defined term,"[82] While certainly the terms are not there to distort, as to expanding, the opposite is true. The synonyms serve to give more precision to the definition at that particular sense. Each of the two parts relate to each other, so we know that it is a certain *kind* of failure ("failure" itself is defined as

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[79] 162 F.Supp.2d at 717.

[80] On the other hand, I do not agree that "dictionaries offer synonyms, not meanings." Weis, *supra* note 4, at 969. A dictionary offers both—in stark contrast to a thesaurus. Weis describes as "a circular journey" the search for the meaning of a word like "beauty," as the dictionary user travels from "pleasing quality" to "pleasing" to "agreeable," which is defined as "pleasing. " That may be, but when Weis includes as well among the "synonyms" the sense of "beauty" that is defined as "a trait or combination of traits calling forth admiration, praise, or respect" (WEBSTER'S THIRD), his point loses punch—one could hardly consider a dozen-word phrase to be a synonym. In fact, lexicographers have a name for this type of definition to specifically distinguish its use in defining from the "synonymous cross reference." It is called a "binding substitute."

[81] At 22a in print version.

[82] *Ososki*,162 F.Supp.2d at 717.

"a fracturing or giving way under stress") that is referred to—one that is "sudden" and one that constitutes a "breakdown" and "ruin." Thus, the court's observation that the "exercise of linking definitions as one trips through the pages of the dictionary is interesting but neither useful nor illuminating" is less than accurate.[83]

Path #1	*Path* #2
• collapse *n*.= breakdown, ruin • breakdown *n*. = the action or result of breaking down, as a failure to function • ruin *n*.=damage, injury • break down *vb.* =to stop functioning because of breakage or wear* **Webster's Third* gives as an example: "The old truck *broke down* on the hill."	• collapse = breakdown, ruin • breakdown= the action or result of breaking down, as a physical ….collapse • ruin= physical…collapse • break down=to cause to fall or collapse by breaking or shattering *Webster's Third* gives as an example: "[Someone is] *breaking down* the door."

[84]

If we choose Path #1 we still have a possible case for the broken pulley. So why not choose it over any others? The court does not choose it. The court, for that matter does not choose any of the definitions of "breakdown" but simply *declares* that a collapse is a type of breakdown, but not every breakdown is a collapse.[85] Remember the judge has already made it clear that he thinks using the dictionary would be a mistaken endeavor.

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[83] *Id.* Gary McDowell writes, "Another critic sees dictionaries as simply creating an endlessly circular exercise: 'Lexicographers define words with words. Words in the definition are defined by more words, as are those words.' As a result, relying on a dictionary 'simply pushes the problem back.'" *Supra* note 4, at 258, quoting A. Raymond Randolph, *Dictionaries, Plain Meaning, and Context in Statutory Interpretation,* HARVARD JOURNAL OF LAW AND PUBLIC POLICY 17 (1994).

[84] Definitions from the TENTH COLLEGIATE.

[85] *Ososki,* 162 F.Supp.2d at 717.

The court points out that one alternative definition given in *Webster's New World Dictionary*[86] at "breakdown" is "decomposition," and that "no serious student of language …would argue that 'decomposition' and 'collapse' have the same or similar meanings."[87] But it need not have been such a mistaken endeavor—for one has to keep in mind one's starting point each time one trips through the pages. In this case, according to the insurance policy, the mast itself must collapse. But it was the bearing that had stopped functioning because of breakage or wear. Thus, arguably, the bearing "collapsed." The mast did indeed stop functioning, but that structure did not break. It seems the court was perfectly correct in finding that the occurrence was not covered by the policy.

In the end, the court reaches the only valid conclusion—the incident is not a collapse. Despite the presence of five dictionaries, the court accomplishes this without the dictionary. For, after all, all the dictionary will let us do is look at all the ways we ordinarily use "collapse." In the end, the court reigns supreme not because it understands dictionaries better, but because—let's face it—it gives a better argument for the commonly understood meaning of "collapse."

The Court and "Tomato"

It is one thing to mistakenly use a dictionary to try to "prove" a common understanding of a word, but what happens when a common understanding of a word is

[86] Modern Desk Edition [further cite omitted].

[87] *Id.* The court might well have chosen sense two of "breakdown" in that dictionary, "a fast shuffling dance," to better make its point.

not in the dictionary? A classic example comes from the tomato: is it a fruit or a vegetable? We all know it is a vegetable, but classified as a fruit—or is it a fruit classified as a vegetable? The Supreme Court has actually wrestled with that one, discussing dictionary definitions in the oft-ridiculed proceedings of *Nix v. Hedden*.[88] The definition of tomato calls it a "fruit." But quite arguably it is both a fruit ("the ripened ovary of a seed plant and its contents") and a vegetable ("a usually herbaceous plant grown for an edible part that is usually eaten as part of a meal; also, such an edible part").[89] Problems only arise when it becomes necessary to separate fruits from vegetables, and someone has to decide which bin to put the tomatoes in—and when there is slavish reliance on a dictionary definition.

In *Nix,* the plaintiff tried to argue that the tariff for vegetables should not apply to tomatoes because they are fruit. Counsel for the plaintiff read dictionary definitions of "fruit" and "vegetable" from three dictionaries, and then had two witnesses testify that in trade or commerce the two words meant the same things.[90] There ensued a veritable food

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[88] 13 S.Ct. 881 (1893). See e.g., Zechariah Chaffee, ridiculing *Nix v. Hedden,* and citing ARNOLD, SYMBOLS OF GOVERNMENT (1935) 78, for ridiculing *Nix*, in *The Disorderly Conduct of Words*, 41 COLUM. L. REV. 381, 393 (1941); Weis, *supra* note 4, at 964-66 (waxing quite humorous).

[89] ELEVENTH COLLEGIATE.

[90] I am not sure the first witness was much help. The question put to him by counsel for the plaintiff was whether these words had "any special meaning in trade or commerce, different from those read [in the dictionary]." "Well" (the witness answered), "it does not classify all things there, but they are correct as far as they go. It does not take all kinds of fruit or vegetables; it takes a portion of them… I understand that the term 'fruit' is applied in trade only to such plants or parts of plants as contain the seeds. There are more vegetables than those in the enumeration given in Webster's Dictionary under the term 'vegetable,' as

fight as plaintiff's counsel read the three dictionaries' definitions of "tomato," and defendant's counsel tossed back with the definitions of 'pea,' 'egg plant,' 'cucumber,' 'squash,' and 'pepper' from one of the dictionaries, and the plaintiff, in turn, read from two of the dictionaries the definitions of yet seven additional vegetables. The Judge had no choice—he had to talk about dictionaries.[91] Wisely, Justice Gray concluded: "These definitions have no tendency to show that tomatoes are 'fruit,' as distinguished from 'vegetables,' in common speech, or within the meaning of the tariff act. There being no evidence that the words 'fruit' and 'vegetables' have acquired any special meaning in trade or commerce, they must receive their ordinary meaning," allowing simply that

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'cabbage, cauliflower, turnips, potatoes, peas, beans, and the like,' probably covered by the words 'and the like.'" *Nix*, 13 S.Ct. at 882.

[91] James Weis suggests (quite *un*humorously) that the OED, with its thirty-six examples of use of the word "vegetable," ranging from 1582 to 1980, would be a good dictionary to decide the tomato question today. *Supra* note 4, at 974. I counted only 29. One sense of vegetable is "a living organism belonging to the vegetable kingdom" which is too broad to be of any use and another is "a plant cultivated for food; esp[ecially] an edible herb or root used for human consumption and commonly eaten, either cooked or raw, with meat ot other article of food." Unfortunately that does decide the tomato question. A tomato is "a plant" grown for food but so is a banana, and it is neither an herb nor a root. (The five examples which accompany the latter definition are from 1767 to 1875 and don't mention tomatoes and seem to exclude potatoes with this quote from 1840: "To supply the cottager's family … with vegetables, potatoes, and faggots." Citing JOHN C. LOUDON, THE COTTAGER'S MANUAL OF HUSBANDRY, ARCHITECTURE, DOMESTIC ECONOMY, & GARDENING. The only applicable definition of "plant" in the OED merely distinguishes "plant" from "animal" and in narrower use distinguishes "the smaller, esp. herbaceous plants, to the exclusion of trees and shrubs."

"dictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court." [92]

The first witness in *Nix* also made a point of saying "I think the words 'fruit' and 'vegetable' have the same meaning in trade to-day [sic] that they had on March 1, 1883,"[93] referring to the ten-year-old tariff act. It would be difficult to contend with the theory that "the terms of any legal document must be understood as they were understood 'at the time when it was written,'"[94] that is, that "there is an obligation to define words in such a way "as the party whose words we interpret probably had in contemplation.'"[95]

The Court and "Try"

A hundred years later, in *Nixon v. U.S.*[96] the court's struggle was with a more elusive opponent, the meaning of "try" in the Constitution's Impeachment Trial Clause.[97]

The petitioner[98] in *Nixon* argued that the word "try" implicated something in the nature of a judicial trial and that it required that the Senate proceedings against him be

[92] 13 S.Ct. at 882.

[93] *Id*.

[94] McDowell, *supra* n. 4, at 280, quoting Emerich de Vattel THE LAW OF NATIONS 249, ed. J. Chitty (London: S. Sweet, 1834).

[95] *Id,* quoting Vattel at 250.

[96] 113 S.Ct. 732 (1993).

[97] The "Senate shall have the sole Power to try all Impeachments." Art. I, § 3, cl. 6.

conducted as such. "'[T]ry' means more than simply 'vote on' or 'review' or 'judge.' In 1787 and today, trying a case means hearing the evidence, not scanning a cold record."[99] Because the petitioner offered in support of his contention a 1796 definition of "try," the court acceded to a purported dictionary analysis. The court chose "[t]o examine" or "[t]o examine as a judge"[100] from a 1785 dictionary and concluded that the word had broader meanings even in the 18th century than those to which the petitioner limited it. The court thus rejected the more limiting offering of the petitioner from the 1796 dictionary: "to examine as a judge; to bring before a judicial tribunal."[101] The court then inexplicably turned to a modern dictionary and cited from among the greater variety of meanings there ("to examine or investigate judicially"; "to conduct the trial of"; "to put to test by experiment, investigation, or trial")[102] to conclude illogically that "[b]ased on the variety of definitions…we cannot say that the Framers used the word 'try' as an implied limitation on the method by which the Senate might proceed in trying impeachments."[103] The next sentence reveals all—the court didn't care one iota what the dictionary said. "As a rule the Constitution speaks in general terms, leaving Congress to deal with

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[98] After the petitioner, Nixon, the Chief Judge of a Federal District Court, was convicted of federal crimes and sentenced to prison, the House of Representatives adopted articles of impeachment against him and presented them to the Senate. *Id.*at 732-3.

[99] *Id.*at 736 citing Brief for Petitioner 25.

[100] *Id.*citing 2 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (1785).

[101] *Id.*citing T. SHERIDAN, DICTIONARY OF THE ENGLISH LANGUAGE (London, 1797).

[102] *Id.*citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2457 (1971).

[103] *Id.*citing Dillon v. Gloss, 41 S.Ct. 510, 512-513.

subsidiary matters of detail as the public interests and changing conditions may require...."[104]

The Court and "Mixture"

Typically, statutes include definitions of terms that the legislature anticipates at some time may need to be clarified and not of those construed to be generally understood and essentially unchanging. "Mixture" would seem an unlikely candidate as one of the former.

In *Chapman v. U.S.*,[105] the issue was whether the accused was deserving of the five-year mandatory sentence prescribed for the offense of distributing more than one gram of a "mixture or substance containing detectable amount" of LSD. The argument ended up revolving around the dictionary definition of "mixture."[106] Should the weight of blotter paper infused with LSD, no matter how infinitesimal a dose, be included?[107] The court

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[104] *Id.*

[105] 111 S.Ct. 1919 (1991).

[106] See HARV. L. REV., *supra* note 4, at 1440, citing *Chapman* at 1926 for "using a dictionary definition of 'mixture' despite the awkward results it could create"; Solan, *supra* note 41, at 51-52.

[107] In 1990 Congress proposed the following amendment: "Clarification of 'mixture or substance.' Section 841(b)(1) of title 21, United States Code, is amended by inserting the following new subsection at the end thereof: (E) In determining the weight of a 'mixture or substance' under this section, the court shall not include the weight of the carrier upon which the controlled substance is placed, or by which it is transported."136 Cong.Rec. 12454 (1990). The amendment still had not passed in 2002. Westlaw.

tried to make out a piece of blotter paper infused with LSD as a "mixture" based on two definitions. Unfortunately, the court was invoking two different senses as if they are one.

The defendant argued that "the terms 'mixture' or 'substance' cannot be given their dictionary meaning because then the clause could be interpreted to include carriers like a glass vial or an automobile in which the drugs are being transported, thus making the phrase "nonsensical." The court's response was that "such nonsense is not the necessary result of giving the term 'mixture' its dictionary meaning."[108] Indeed, it is not. But it is the necessary result of construing that meaning to include blotter paper infused with LSD, as the court finally did. The court's reasoning went thus: "The term does not include LSD in a bottle, or LSD in a car, because the drug is easily distinguished from, and separated from, such a 'container.' The drug is clearly not mixed with a glass vial or automobile; nor has the drug chemically bonded with the vial or car. It may be true that the weights of containers and packaging materials generally are not included in determining a sentence for drug distribution, but that is because those items are also clearly not mixed or otherwise combined with the drug."[109]

The court uses the *Webster Third* definition of mixture: "a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence."[110] This

[108] *Chapman,* 111 S.Ct. at 1926. Despite the fact that the paper is termed even by the court a "carrier," the court specifically rejects the defendant's contention that that being so it cannot be a mixture. *Id.* at 1923.

[109] *Id* at 1926.

[110] *Id* at 1921. This is sense 2a in WEBSTER'S THIRD.

sense, however is not the correct sense of mixture to apply. It is a very specialized sub-application of the more general sense given at sense two: "a product of mixing; combination." The general sense is followed by a lightface colon, which means that the subsenses are subsumed by the preceding definition, which is simply "a product of mixing; combination."[111] The sense used by the court is one used to distinguish a "mixture" from a "complex" and a "compound," both terms referring to very specific types of chemical substances. But that is not enough. The court goes on to say that "A 'mixture' may also consist of two substances blended together so that the particles of one are diffused among the particles of the other," citing the *OED*.[112]

In effect, the court's reasoning is circular. Instead of asking whether, in the case of blotter paper and LSD, there is an act or instance of mixing (which would be required, to form a mixture), the court simply concludes that there is. "LSD is applied to blotter paper in a solvent, which is absorbed into the paper and ultimately evaporates. After the solvent evaporates, the LSD is left behind in a form that can be said to 'mix' with the paper."[113] But what is the likelihood that anyone would say that ink on blotter paper has mixed with

[111] This type of defining mechanism is called in dictionary writer's language a "binding substitute." The presence of "as" before the first subsense indicates that the subsenses are not exhaustive. See ELEVENTH COLLEGIATE (print version) 19a.

[112] 9 OXFORD ENGLISH DICTIONARY 921 (2d ed.1989).

[113] *Chapman,* 111 S.Ct. at 1926.

the paper?[114] Even if the ink is so like in color as to be indistinguishable from the paper, it is the "mixing" of the ink with the dye in the paper that we might refer to at most. However, having concluded that there is a mixing the court then explains how this "fits" the definition. In fact, the court uses a very clever method of matching parts of definitions to a pseudo-scientific analysis: 1) "The LSD crystals are inside of the paper, so that *they are commingled with it*" [*Webster's Third*], but the LSD does not chemically combine with the paper. Thus, it *retains a separate existence* [*Webster's Third*], and can be released by dropping the paper into a liquid or by swallowing the paper itself. The LSD is *diffused among* (*OED*)[115] the fibers of the paper. Like heroin or cocaine mixed with cutting agents, the LSD cannot be distinguished from the blotter paper, nor easily separated from it."[116]

The court in *Chapman*, with the "help" of its dictionary, reached a rather absurd conclusion. Indeed, thirty years earlier, in *Liebshcher v. Boothroyd,* a judge had warned

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[114] Interestingly, the dissent in *Chapman,* while disagreeing with the majority that the blotter paper infused with LSD is a "mixture," could as well have disagreed that the LSD can be said.to "mix" with the paper, instead of conceding that point. *Id.*at 1930.

[115] What's worse, this is not actually from the definition of "mixture" but from the OED's definition of "mix" which gives at one sense "to put together or combine (two or more substances or things) so that the constituents or particles of each are interspersed or diffused more or less evenly among those of the rest…" Apparently the court couldn't find precisely what it needed in the OED's treatment of the noun.

[116] *Chapman,* 11 S. Ct at 1926. Is this the kind of "exercise" Justice Scalia was referring to when he said "Stretching language in order to write a more effective statute than Congress devised is not an exercise we should indulge in"? Smith v. U.S., 113 S. Ct. 2050, 2063 fn. 4 (1988) (Scalia, J., concurring in part and dissenting in part).

against just such an exercise: "Indiscriminate reliance on definitions found in dictionaries can often produce absurd results. Words are used in many senses and often have diametrically opposed meanings, depending upon the sense in which they are used … One need not arbitrarily pick and choose from the various accepted definitions of a word to decide which meaning was intended as the word is used…"[117] We will see if that judge followed his own advice.

The Court and "Effectively"

In *Boothroyd* the Court of Customs and Patent Appeals reversed the Patent Office Board's decision in favor of the appellee respecting a color television screen. The question was as to how broadly the phrase "effectively luminescent" could be construed. The appeals court in making its rather technical analysis relied on a dictionary definition of the word "effect"—introduced by the appellant—to determine that the appellant's claim was broad enough so as not to infringe on the appellee's patent.[118]

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[117] 258 F.2d 948, 951 (1958).

[118] *Id*. I should perhaps note here that now, at least, "[i]t is black letter law that a patentee can 'choose to be his or her own lexicographer by clearly setting forth an explicit definition for a claim term that could differ in scope from that which would be afforded by its ordinary meaning.'" (Astrazeneca Pharmaceuticals, LP v. Mayne Pharma (USA) Inc.,352 F.Supp.2d 403, 412 (SDNY 2004) (quoting Jack Guttman, Inc. v. Kopykake Enters., Inc., 302 F.3d 1352, 1360 (Fed.Cir.2002); Rexnord Corp. v. Laitram Corp., 274 F.3d 1336, 1342 (Fed.Cir.2001)), I do not think the *Boothroyd* court ever even considered that "effectively" should be treated that way, and correctly so, because a corollary to that is that "'a patentee may choose to be his own lexicographer and use terms in a manner other than their ordinary meaning, as long as the

The issue was whether the appellant's screen was distinguishable from the appellee's, and the conflict centered around the phrase "color representative phosphors effectively luminescent in different colors" (on the television screen). The Board had viewed the word "effectively" as "connoting actuality, substantiality, or decisiveness" and did not see how the word's inclusion made the description of the appellant's screen any different from the appellee's television screen.[119] The appeals court said, in effect, then why even use the word? "It would have been sufficient for appellant merely to describe the screen …as 'luminescent in different colors,' …[W]e are constrained to conclude that the board's relegation of the word 'effectively' to a position of redundancy was erroneous. The only realistic conclusion we can reach is that …which appellant urges, viz.,—that the word, in its present context, means 'a mental state or attitude resulting from observation or external impression, …; as, the effect of a picture; ….' This is one of the definitions of the noun 'effect,' from which the adverb 'effectively' stems."[120]

The appeals court drew on the rule that "all express limitations in an interference count are to be deemed material and cannot be ignored".[121] The judge decided that "effectively" had something to do with the effect, and if the appellant could argue that the

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special definition of the term is clearly stated in the patent specification or file history.'" *Id,* quoting Vitronics v. Conceptronic, Inc., 90 F.3d 1576 at 1582 (1996).

[119] *Boothroyd*, 258 F.2d at 951.

[120] *Id*, citing FUNK & WAGNALL'S NEW STANDARD DICTIONARY (1938 ed.).

[121] *Id*, citing Ernest J. Sweetland v. Don Cole, 19 C.C.P.A. (Patents) 751, 53 F.2d 709, 11 U.S.Pat.Q. 174; William E. Moore v. Albert E. Greene, 18 C.C.P.A. (Patents) 1317, 48 F.2d 960, 9 U.S.Pat.Q. 198.

same effect could be produced in more than one way, then it didn't completely overlap the appellee's invention.

The judge seemed highly impressed by the appellant's argument. One is led to wonder if the mere fact that the appellant "cite[d] numerous dictionary definitions in support of his contentions" swayed the judge, whose conclusion in the appellant's favor immediately follows that observation. I am not equipped to determine who was right as to the technical decision that was made. But the board was closer to getting it right when it came to using the dictionary.

I suspect that the board used the first edition of the *OED* [*OED1*] as one of its sources, though we are told merely that while the board "did not quote from any standard dictionary, it did cite several in the course of its opinion."[122] The *OED1* entry for "effectively" defines the word thus: "in effect" (which is itself a phrase defined at the *OED1* entry for the noun "effect" as meaning "virtually, substantially, so far as the result is concerned") and "so as to produce an effect." The definition elaborates on that last sense with "Often [used] emphatically [to mean] "with powerful effect; decisively, completely."[123]

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[122] *Id.*

[123] A NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 49 (James A.H. Murray, ed., Clarendon press, Oxford 1914) (OED 1).

Interestingly, the Board, in reference to "effectively," had referred to "the verb it modifies."[124] But the terse descriptive syntax employed in the patent claim leaves out verbs; we have instead a listed series of what the TV screen constitutes, namely, "[first] means for producing an electron beam…, [second] a screen containing color representative phosphors effectively luminescent in different colors… …, [third] means for scanning the electron beam... ,and [finally] means responsive to control signals…"[125]

The board had apparently applied "effectively" to the *understood* verb in the phrase in question; fleshing out the phrase it would read thus: "a screen containing color representative phosphors [which are] effectively luminescent in different colors…" The board, in other words, applied the adverb to the verb "to be."

Funk and Wagnall's, the court's reference, on the other hand, does not define "effectively."[126] The adverb is simply given at the end of the definition for the adjective "effective"—a method of entry often resorted to in abridged dictionaries when the meaning of the so called "run-on" term can be fairly easily inferred from the definition of the main entry. But the court, for some reason, purported to be relying on the definition

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[124] *Boothroyd*, 258 F.2d at 951.

[125] *Id.*at 949.

[126] I did.not have access to a 1938 edition but used instead a slightly later, and, if anything, more comprehensive edition, FUNK & WAGNALL'S STANDARD DICTIONARY, International Edition (1958). This could also raise another point—that the court was unwisely relying on a twenty-year-old dictionary, except that, in 1958, both Funk & Wagnall's and Merriam-Webster dictionaries still confined "effectively" to run-on status.

of the noun "effect" (as did the appellee). And the court, in the absence of a verb, perhaps, assumed "effectively" modified the adjective "luminescent," which might have been logical if any sense could be made out if it that way. What is significant is that in the end the court's chosen definition has little usefulness. It is not even clear what meaning the court has ascribed to "effectively," derived from its chosen definition of "effect." One could perhaps arrive at something unhelpful like "in a manner that causes a mental state or attitude resulting from observation or external impression."

Nor do we know precisely how the Board arrived at its interpretation of "effectively" because all we are told is the *connotation* it ascribed to the word. I suspect the Board drew from the adjective's definition. Surely an adverb definition is more immediately, and usefully, derived from the related adjective, rather than a related noun. In the dictionary used by the court, "effective" is defined as "[p]roducing a decided, decisive, or desired effect; as effective measures."[127] An adverb derived from that might be defined as "in a manner that produces a decided, decisive, or desired mental state or attitude." And although we haven't in this way arrived at the *OED*'s adverb definition, we are a bit closer and we can see the Board's "actuality, substantiality, or decisiveness" connotation.

[127] FUNK & WAGNALL'S STANDARD DICTIONARY (1958).

What was really going on with the word "effectively" was that the adverb had taken on a life of its own. The Board, though lacking the precise definition, seems aware of this.[128] And that is precisely, as well, what happened to the word "marriage."

III. THE CLASH OF TWO DISCIPLINES

The "Marriage" Definitional Argument

Now that we have seen what dictionaries and the definitions can and cannot do we're ready to take a look at the how this affects the marriage defining marriage debate. Thus far we have focused on the sense of define that is "to formulate a definition." But there is yet another "define": "to determine or identify the essential qualities or meaning of [a thing]," as in "whatever defines us as human."[129] Here, a word's "meaning" refers, not to a dictionary definition—the word's denotative meaning—but to its connotation—as when we say "the meaning of love." Which of the two "define"s is meant when courts and legislatures refer to "defining marriage"?

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[128] Significantly, three years later, the definers of *Webster's Third* saw fit to enter "effectively" as a main entry with a definition: "in an effective manner; with great effect; also, completely." Ultimately, the definition was further modified by an addition to the *Addenda* section of *Webster's Third*: "in effect : virtually."

[129] WEBSTER'S THIRD, sense 5b.

These dual senses cause a lot of trouble—and get some writers, or at least their readers, in trouble.[130] "[T]he present *definition* of marriage requiring one man and one woman is not based on some arbitrary *definition* but is the very essence of what marriage is and should be" [emphasis added], writes Anne Brown, thus, surely using two distinct senses of "definition"[131] to tell us that she thinks the present *denotative* definition is not based on an arbitrary *connotation* of marriage.[132] Ellen Aprill, discussing in 1998 prescription versus description in lexicography in general, comments on the definition of "marriage," noting that "if same-sex marriages became common, lexicographers would revise the dictionary definition to reflect the new usage of the word." Not exactly true, of

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[130] Not precisely "in trouble," but surely confused, is James Weis in a footnote: "Apparently, the *meanings* of words change but the *meaning* of 'discrimination' does not" [emphases added]. Weis is making reference to Justice Powell, who having quoted, "A word is not a crystal, transparent and unchanged…" (Cal. Regents v. Bakke, 438 U.S. 265 (1978), quoting Towne v. Eisner, 245 U.S. 418, 425 (1918)), ultimately concludes that "racial classifications are inherently suspect." Weis, *supra* note 4, at 973. (Or if Weis is punning, it is not a good pun, because he has nowhere referred to the different ways we use "meaning.")

[131] This is known as "utraquistic subterfuge." The Utraquists believed that even the laity should receive the cup as well as the bread in the Christian Communion service. The word is from Latin "uterque," "each of two." WEBSTER'S THIRD.

[132] Anne B. Brown, *The Evolving Definition of Marriage*, 31 SUFF. U. L. REV. 917, 943 (1998). Arguably Brown could be referring to a statutory definition, as contained in the Defense of Marriage Act, 28 U.S.C. § 1738C; 1 U.S.C. § 7 (DOMA), but this seems doubtful as the comment is merely footnoted with a citation to Adams v. Howerton, 486 F. Supp 1119, 1124 (C.D. Cal. 1980), which was decided long before DOMA. See also *infra* n. 204.

course—it is the *usage of the word* to mean same-sex marriage that has to become more common, not the marriages. She is equating the term with the act.[133]

The marriage debate often begins with the dictionary, even if it doesn't end there. In that respect, it is not unlike the question in *Chapman*, which was initially whether to apply a general dictionary meaning of "mixture" to the words of the statute. As the court itself noted, there seemed no logical reason to do otherwise.[134] The alternative, of course, is whether, despite the dictionary definition, a term at issue *might* be construed to mean something else—the conclusion in *McCulloch*.[135] Where the *Chapman* court went wrong was not in slavishly adhering to the definition, but in misconstruing the definition itself, leading to the conclusion that something that is not really a mixture is. If the court had applied the definition of "mixture" correctly, the substance would not have been found to fit that definition. The *Chapman* court seems to have really thought it had hit on something—and found the justification for its position. Given the choices we had for meanings of "marriage" when the debate began one could hardly argue that the courts were misconstruing the dictionary definition there. So where is the error in using the definition? Perhaps error lies in their *not* following *McCulloch* or *Nix v. Heddon.* The

[133] She also says that the old (unrevised) definition did not render the phrase "same-sex marriage" a "contradiction in terms." But didn't it? Aprill, *supra* n. 28, at 283.

[134] "Neither the statute nor the Sentencing Guidelines define the terms 'mixture' and 'substance,' nor do they have any established common-law meaning. Those terms, therefore, must be given their ordinary meaning." *Chapman,* 111 S.Ct. at 1925-1926, citing *Moskal v. United States,* 111 S.Ct. 461, 465, (1990).

[135] "Does it always import an absolute physical necessity, so strong, that one thing to which another may be termed necessary, cannot exist without that other? We think it does not." *McCulloch*, 17 U.S. at 413.

court in *Nix* (the tomato case) avoided falling into a dictionary trap by snapping the dictionary shut at the crucial moment and asking the simple question, "What does this mean when we say it?"[136] That would not have worked either, because a sense of "marriage" as a union between two members of the same sex is not "its use in the common affairs of the world."[137]

The "definition of marriage" issue is a hot potato tossed between proponents and opponents of same-sex marriage. The opponents invoke the definition of "marriage" as it has been long unchanged: "a union between a man and a woman." Proponents accuse opponents of circularity or tautology, of saying something "is because it is"—when marriage is allowed to change, thus will the definition of "marriage" rightfully change as well. Opponents see such accusations as ignoring "the critical point" that "the definition of marriage as a cross-gender union is not merely a matter of arbitrary definition…; it is fundamental to the concept and nature of marriage itself."[138] The potato that gets tossed back to the proponents is now one with a different sense of "definition" attached: the opponents are referring to "essentials qualities or meaning" of marriage, the institution. This inevitably involves morals[139] or social attitudes.[140]

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[136] 13 S.Ct. at 882.

[137] *McCulloch*, 17 U.S. at 413.

[138] Lynn D. Wardle, *A Critical Analysis Of Constitutional Claims For Same-Sex Marriage*, 1996 B.Y.U. L. REV. 1, 38-39.

[139] "All this rhetoric . . . is an attempt to evade the basic question of whether the law of this country should treat homosexual relationships as morally equivalent to heterosexual relationships. . . ." 142 Cong. Rec. H7441 (daily ed. July 11, 1996) (statement of Rep. Canady), quoted in Charles J. Butler, *The Defense of*

Legislatures saw the storm clouds on the horizon and scurried to make certain there would no longer be any need for courts to invoke *Moskal* (see note 134, *supra*) and ordinary meaning; they set about including the definition of "marriage" as "a union between a man and a woman" in their statutes. [141] And lo, they portended correctly. The dictionary definition of marriage *has* changed.

Reshaping the Tool

As of this writing, a number of major dictionaries have revised their marriage definitions to include same-sex couples.[142] Thus all propositions such as "dictionary

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Marriage Act: Congress's Use of Narrative in the Debate Over Same-Sex Marriage, 73 N.Y.U. L. REV. 841, 841 (1998).

[140] "Our society has a compelling interest in respecting [the definition of marriage]. The breakdown of traditional marriage is our central social crisis—the cause of so much anguish and suffering, particularly for our children." 142 Cong. Rec. S4947-03 (daily ed. May 9, 1996) (statement of Sen. Coats), quoted in Butler, *supra* n. 139, at 873 n. 174.

[141] Highlighted, of course by DOMA (federal legislation enacted to define marriage as a union between a man and a woman and to create an exception to the Constitution's full faith and credit clause).

[142] ELEVENTH COLLEGIATE (2003), sense 1a (2): "the state of being united to a person of the same sex in a relationship like that of a traditional marriage" [as in] "same-sex marriage"; AMERICAN HERITAGE DICTIONARY, 4th edition (Houghton Mifflin 2000), sense 1d: "A union between two persons having the customary but usually not the legal force of marriage" [as in] "a same sex-marriage"; ENCARTA (St. Martin's Press 1999) sense 1: "LEGAL RELATIONSHIP BETWEEN SPOUSES: a legally recognized relationship,

definitions of 'marriage' …exclude the possibility of same-sex marriage"[143] are utterly deflated.

Lexicographers writing the old "marriage" definition could be faulted for being too specific. It is an understandable error, as, perhaps they could not envision anything different, and one for which they might escape reproach.[144] Perhaps it is the kind of thing Samuel Johnson was referring to when he lamented: [T]hings may be not only too little, but too much known, to be happily illustrated.[145]

But it would not be derelict defining if "marriage" were defined, even a hundred years ago, as "a legal union between two usually cohabitating people creating certain rights." The choice of including the sex of the partners should be perceived of as made, in a general dictionary, on the basis of general, rather than legal, usage. Including the sex of the two people does not create an unchanging absolute usage. The definition of "hero" as "a man of courage and nobility famed for his military achievements," as the word was

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established by a civil or religious ceremony, between two people who intend to live together as sexual and domestic partners." One major dictionary that has not changed its "marriage" and "marry" definitions is WEBSTER'S NEW WORLD DICTIONARY, 4th edition (IDG Books Worldwide Inc. 2001), with the exception of the phrase "husband and wife" being changed to "spouses." "Spouse" is defined in the 4th edition as "a partner in a marriage; (one's) husband or wife."

[143] Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights,* 57 UNIV. OF MIAMI L. REV. 101, 116. n. 83 (2002).

[144] "Every other authour may aspire to praise; the lexicographer can only hope to escape reproach, and even this negative recompence has been yet granted to very few." Johnson, *supra* n. 26.

[145] *Id*.

once used, did not preclude a change to "one that shows great courage," as the word is now used.[146] Even more to the point, one definition of "couple" has changed, based on usage, from "a man and woman married, engaged, or otherwise paired"[147] to "two persons married, engaged, or otherwise romantically paired."[148]

Nor should the fact that the term "marriage" is a reference to a legal relationship constrain the scope of the definition. The source of any legal definition is the law, and law is decided by people—the same people who speak the language in which the law is rendered. So, whereas legal status dictates on the one hand that the marriage definition in a general dictionary include a legal reference (in much the same way that "partnership" is described as "a legal relation"[149]), the definition is not per se a legal one.

We can define "marriage" as a legal union between two persons of the same sex if 1) the word can be commonly understood as such *or* 2) the word has an accepted legal implication as such. Simply legalizing same-sex marriages does not automatically alter

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[146] ELEVENTH COLLEGIATE.

[147] TENTH COLLEEGIATE.

[148] ELEVENTH COLLEGIATE. The Merriam-Webster definers first considered changing the definition in 2002, when citations for same-sex couples began appearing in the citation file, but decided to delay making the change until there was more evidence. The broader sense 1b, "two persons paired together," was thought to suffice at the time to cover other than married couples of any sex. Merriam-Webster citation files.

[149] In full, "a legal relation existing between two or more persons contractually associated as joint principals in a business." ELEVENTH COLLEGIATE.

the *lay* definition of marriage. Nor does lay usage dictate what is legal. The first legally valid same-sex marriages in this country took place in Massachusetts in May 2004. Yet the first definition change occurred in 1999. Previously, of course, we had seen issuance of marriage licenses to same-sex couples elsewhere in the U.S.—but for marriages not recognized by their respective states.[150] Even the Netherlands, the first modern Western government to legalize same-sex marriages did not do so until 2001, and the first legal same-sex marriage in the modern Western world took place in Toronto on January 14, 2001.[151]

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[150] San Francisco and Oregon had issued same-sex marriages licenses earlier in 2004, not legally recognized. The Oregon appeals court took the case on an expedited basis in April that same year and commanded the state registrar to register within thirty days those same-sex marriages that had already taken place. Li v. State, 2004 WL 1258167 (Or. Cir. Ct. Apr. 20, 2004). On March 14, 2005, a California Superior Court declared the marriage statute unconstitutional. William Wise claims to have allowed issuance in March 1975, when he was an assistant Colorado district attorney, of what he believes was the first same-sex marriage license in the United States. "'The Colorado marriage law had an age requirement … but it just didn't say anything about it having to be a man and a woman,'" he tells us, recalling as well one man's "unusual request" to marry his horse. (The horse was ruled to be underage.) Elizabeth Aguilera and David Olinger, "Gay marriage enjoyed brief honeymoon in Colo. in '75," THE DENVER POST, February 17, 2004.

[151] R. Douglas Elliott, *The Canadian Earthquake: Same-Sex Marriage in Canada*, 38 NEW ENG. L. REV. 591, 592. The legality of Toronto marriages was not, however, immediately recognized by Canadian officials. It was subsequently validated by judicial mandate. *Id.*at 592 n 4, citing Halpern v. Canada, 60 O.R.3d 321 (Ont. Div. Ct. 2002).

Thus factors controlling the timing for changing the legal and lay definitions are independent of each other *lexicographically*, but there is an overlap *socially.* The lay definition—and ultimately the non-legal-dictionary definition—depends on a gradual infiltration of the term "marriage" into everyday language used to mean the legal union of a same-sex couple. As we have seen, the change in the dictionary requires a waiting period. But the definition's presence in the dictionary is an indication of adequate infiltration—that the word *had*, by 1999, come to be understood this way. The legal definition, on the other hand, can change in one fell swoop—by a show of hands, in effect.[152] The social trends that power either change are the ones we deal with when we talk about that other changing definition of "marriage"—using "definition" in its connotative sense to refer to changes in people's conceptions, beliefs, and mores about a thing called "marriage." The latter type of definition still poses problems as long as society remains divided on the issues. But the changed dictionary definition indicates that there is broad consensus that the word "marry" can be used correctly to say, for example, "an advocate of marriage for gay couples" and that it refers to a union recognized by law. In the meantime we have to defer to the statutory definitions to know that we can correctly say "Meg married Mindy in Massachusetts" (where same-sex marriage is legal)

[152] Whether a legal definition then becomes part of a definition in a general usage dictionary depends on how common it is. For example, as noted earlier the legal sense of "person" is entered as sense number six in THE ELEVENTH. This use is first found in the fifteenth century in the ROLLS OF PARLIAMENT*:* "Any persone Temporell, corporat or not corporat." OED Online. In the case of "marriage," however, the very sense at issue is a legal sense, both in the hands of lay people and in the eyes of the law, so we don't see any division of senses.

but not correctly say "Tod married Tomas in Texas" (where same-sex marriage is not legal).[153]

Defining "Marriage" and Redefining "Marriage"—What, Exactly, If Anything, Is the Difference Between the Two?

> *Since reckless judges in Massachusetts took the liberty of redefining marriage last November, the threat of gay 'marriage' has energized Americans* —Wendy Wright[154]

"Redefining marriage" is a phrase fraught with fearsome aspects to those who don't want the marriage institution to encompass same-sex unions, even if it is intended in its purest lexicographical sense—which it usually is not. The word "marriage" in the phrase is almost always a reference to the institution, thus requiring one to interpret "define" to mean "identify the essential qualities of a thing." (Or else the user means both things in virtually the same breath.) That there is no lexicography involved when a writer asserts, "Petitioning the courts to drastically redefine the 'current' definition of marriage raises troubling fundamental issues,"[155] or our President maintains, "I'm concerned about activist judges redefining the definition of marriage"[156] comes as no great revelation.

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[153] However, the speaker might accurately say "John 'married' Bill in Texas." See discussion of quote marks *infra*.

[154] Of Concerned Women for America Legislative Action Committee., quoted in U.S. Newswire, October 14, 2004 (NEXIS).

[155] Anne Brown, *supra* n. 132, at 939.

[156] George W. Bush, Presidential Debate, October 13, 2004. Heard by the author on NPR.

The definition of "redefine" is "to define (as a concept) again; reformulate"; "to reexamine or reevaluate especially with a view to change;" "to change in character or condition"; "transform, convert." It does not merely say "define anew." If it did, we could conceivably apply our lexicographical sense of "define," though you can see how even that would be awkward: "to discover and set forth the meaning of a word anew."

The bottom line is that dictionary definers don't typically use "redefine"; if anything, they use it simply to mean "word differently." They "define" words, or they might "rewrite" or "rework" or "reexamine" a definition, by which they attempt to make it more accurate or clearer or more user-friendly.[157] They definitely do *not* "redefine definitions." When they add new senses as usage requires, the word's overall definition is expanded, but the word has not been redefined. That, as we have observed, has already happened in many dictionaries with the addition of a "marriage" sense such as "the state of being united to a person of the same sex in a relationship like that of a traditional marriage."[158] While so-called "redefining marriage" (by judges or legislatures) *results* in expanding on the old dictionary definition of "marriage," "redefining" is not what the lexicographers are up to.

William Duncan, criticizing the judicially-driven nature of the same-sex marriage debate, makes much use of "define" and "redefine." Though laudably abstaining from any reference to an actual dictionary definition, he uses the words "definition,"

[157] For example by changing all the occurences of "one who" to "a person who" wherever appropriate.

[158] ELEVENTH COLLEGIATE, sense 1 a (2).

"redefinition," "define," or "redefine" 36 times in his 5,000 word article; one or the other occurs on average five times per page. His usages are appropriate in themselves; but his *juxtaposition* of all these terms keeps the reader bouncing between reference to the meaning of the marriage institution, and reference to the meaning of "marriage," the word. His usages of "define" and "definition" run the gamut. They include "determining the essential qualities," as when he writes, "[T]he definition of marriage as it relates to same-sex couples emerged for the first time three decades ago."[159] And they encompass "setting forth the meaning of a word," as when he writes "…a new legal definition of marriage… 'the voluntary union of two persons as spouses'…"[160] He does seem to confine "redefine" and "redefinition" to its meaning "reformulating a concept": he writes of "the judicially-driven nature of the effort to redefine marriage"[161] and asks "How will a redefinition of marriage affect the cultural understanding of the institution?" [162] But it is not altogether clear that *he* sees the difference. For example, he writes:

> That changed in November 2003 when the Massachusetts Supreme Judicial Court changed the Commonwealth's longstanding *definition* of marriage to "the voluntary union of two persons as spouses, to the exclusion of all others." [cite omitted] Since then, two trial courts have ruled in favor of claims to *redefine* marriage…[emphasis added][163]

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[159] *Id.*at 114.

[160] *Id.*at 116.

[161] *Id.*at 114.

[162] *Id.*at 126.

[163] *Id.*113.

So much talk about "defining" and "redefining" adds nothing to (and in my opinion it detracts from) the crux of Duncan's discussion—simply the issue of who should be the one to decide that same-sex couples can have all the benefits and rights of legal marriage, and even to call it "marriage."

Yes, to call it "marriage"—now let us take a closer look at how the definition of "marriage" has expanded—from a purely lexicographical point of view.

The Evolving Definition of "Marriage"

For the word "marriage" alone to include both sexes, in lay terms, requires a test of time, an evolution. Here we speak, not of the contest of values, but of an evolution of word use. As already noted, the change in the dictionary must be based on usage. Lexicographers look for usages that allow them to say that in this context the word "marriage" does not fit any of the current definitions. They look for widespread evidence of the new usage and they subject this usage to a temporal analysis. Then, with enough evidence, they can justify adding it as a new sense to the dictionary.

Examples of the use of "marriage" in the same-sex sense that are in the context of a discussion of the meaning of "marriage" are of little utility in determining new use. They are not the strictly contextual uses required to qualify as "usage." Similarly, a word placed within quotation marks, even in running text, is stigmatized. The writer is saying, in effect, I am using the word here because it is what the other party has offered me; I do

not necessarily subscribe to the other party's use. The definer must determine whether the user is indicating that he or she does not really "mean" what the bare-faced word implies—in which case the definer cannot conclude that the word is being used newly. [164] For example, the judge writing the opinion in *Shahar v. Bowers* used quotation marks around "marry" and "marriage" throughout.[165]

It is also possible that rather than expanding the definition of marriage, usage instead gives rise to a whole new term—"same-sex marriage."[166] Compare, for example the term "common-law marriage," describing a kind of legal marriage relationship that is not (ordinarily) referred to without the qualifier "common-law." Thus, "common-law marriage" has a separate dictionary entry. [167] The same goes for "morganatic

[164] Ultimately, once the word has taken hold adequately to justify its entry in a dictionary, lexicographers feel justified in harking back to those early quotation-enclosed uses for determining a word's or sense's date of introduction into the language.

[165] 114 F.3d 1097.

[166] Ellen Aprill puts it a bit wrongly when she notes that "same-sex marriage" in the absence of a revised definition in dictionaries (she is writing in 1998) "simply reflects the current common usage of the word." Aprill, *supra* n. 28, at 283. It actually reflects an uncommon, but up-and-coming, usage of the word, the "word" being "marriage" alone.

[167] THE AMERICAN HERITAGE DICTIONARY gives "common-law marriage" as sense 1c at its "marriage" entry. This implies that the word "marriage" is used alone to mean "common-law marriage." The evidence, however does not sustain this entry. Merriam-Webster files.

marriage."[168] But there are too many variations in the ways same-sex unions as marriages are qualified—and there *is* usually, though not always, a qualifier.

On the other hand, just because we frequently, or even usually, qualify a word, we do not preclude its ability to stand alone. Including a qualifier is a way of adding context—not so terribly different from, say, glossing your use of "biweekly." Just as with "biweekly," given that word's history, your use might be misconstrued if you use it without something additional, so it is with "marriage." The user of "marriage" can be using the term correctly, that is, in a sense established by usage, and still not have made his or her meaning plain. Thus using the word "marriage" alone to mean same-sex marriage is taking a chance—the hearer's first mental response to the word may well be "a union between a man and a woman." The fact that the word requires a qualifier no more disqualifies a newly-arisen use then the fact that "bi-weekly" requires some context.

"Marriage" has had other qualifiers in the past. "Mixed marriage" for a marriage between persons of different races or religions goes back to 1699.[169] More recently, "biracial marriage" was introduced, [170] the word "biracial" itself having appeared on the

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[168] This is a term that hails from the 1740s and refers to "a marriage between a member of a royal or noble family and a person of inferior rank in which the rank of the inferior partner remains unchanged and the children of the marriage do not succeed to the titles or entailed property of the parent of higher rank." ELEVENTH COLLEGIATE.

[169] OED online.

[170] People v. Nichols, 308 N.E.2d 848, 853 (Ill.App. 1974).

scene only four decades earlier.[171] These were all marriages of one sort or another. A notable exception is the euphemistic "Boston marriage"—not perceived as a marriage at all.[172] Along the way we have also had "purported marriage" and "illegal marriage" to deal with bigamy and other non-marriages, whereas "non-traditional marriage" is usually only in contrast to "traditional marriage" as a version of heterosexual marriage with some non-traditional arrangement, such as one in which the husband stays home to raise the children, (a concept that may have seen its demise in the 21st century).[173] The term "non-traditional marriage" only appears rarely in opposition to heterosexual marriages in general. [174] "Civil marriage" came to be a term only in the mid-nineteenth century, when

[171] OED online.

[172] "…a term for certain long term relationships between unmarried or widowed women…[T]he women involved typically shared homes, traveled together , and slept in the same bed." Bryan H. Wildenthal, *To Say I Do,* 15 GA. ST. UNIV. L. REV. 381, 431 n. 234 (1998). Wildenthal calls it "a term commonly used in late-19th century New England." That may well have been—but scholars have been unable to find any evidence of its use until the 20th century, and that only hearsay evidence. We find the word in print for the first time in 1965, when Helen Howe, in a memoir of her parents' generation, recorded the following: "There were, in my parents' circle of friends in Boston, several households consisting of two ladies, living sweetly and devotedly together. Such an alliance I was brought up to hear called a 'Boston marriage.' [The author was born in 1905.] THE GENTLE AMERICANS, 1864-1960: BIOGRAPHY OF A BREED 83 (Harper & Row, NewYork 1965), from Merriam-Webster Files, correspondence with Professor Marjorie Pryse, Departments of English and Women's Studies, University at Albany, SUNY.

[173] See e.g., *In re* Marriage of Bethke*,* 484 N.W.2d 604 (Iowa App. 1992) (describing as nontraditional a marriage where wife is doctor with "a demanding and financially rewarding career" and husband "has assumed substantial responsibilities for the parties' child, their home and family").

[174] In one of those rare appearances "nontraditional marriage" is used to refer to a domestic partnership. "Case Developments—Domestic Partners," 13 No. 7 Fair$hare 41 (1993).

certain protestant sects sought to have their marriages conducted outside the Church of England recognized by law, and the English Parliament magnanimously passed the Marriage Act of 1836.[175] Thus, it is used in contrast to "religious marriage," although that latter term, unlike the former, is usually not entered in general dictionaries. One might even imagine that "civil marriage" could today be used in contrast to a church-related marriage that has not been recognized as legal, although in general that has not been the case. The alternative has been simply to enlist the more realistic "commitment service" or "commitment ceremony." On the other hand, "civil marriage" has been used in contrast to "civil union."[176]

Now we get to the terms that have been spawned by the marriage debate. First to hatch may have been "gay marriage," at least according to a secondary source. The court in *McConnell v. Anderson* refers to a news article headlined "'Gay' Marriage Refusal Fought," found in the *St. Paul Pioneer Press* of May 27, 1970.[177] Close on its heels came "same-sex marriage." The first evidence of its use anywhere that I could find was in *Baker*, a 1971 gay marriage license denial appeal.[178] This, in effect, spawned the whole

[175] Hazel D. Lord, Husband and Wife: English Marriage Law From 1750: A Bibliographic Essay," 11 S. Cal. Rev. L. & Women's Stud. 1, 10 (2001).

[176] "[A] system of civil unions does not bestow the status of civil marriage."Burns v. Burns, 560 S.E.2d 47, 49 (2002), quoting 15 Vt, Stat. Ann. § 1201(4).

[177] 451 F.2d 193, 195 (1971). The issue in the case was indeed the legality of a homosexual marriage.

[178] Baker v. Nelson, 191 N.W.2d 185, 186 (1971).

marriage definition debate.[179] The first-ever use I could find of "homosexual marriage" and "lesbian marriage" is in *Singer*, which, in turn, gives us a quotation from a source that had used those two terms two years earlier, a 1972 statement against the proposed ERA in the Voters Pamphlet published by the Secretary of State: "Homosexual and lesbian marriage would be legalized…"[180] "Same-gender marriage" shows up first in a letter reprinted in the April 23, 1989, *New York Times*.[181]

The first use I could find without an *attributive* qualifier (but with a qualifier nevertheless) is actually pretty early into the debate: "In recommending the discharge on June 24, the review board composed of two men and two women said the Army does not recognize marriages between persons of the same sex."[182]

Interestingly, these terms have given rise to contrasting qualifiers. Now we quite commonly see "heterosexual marriage," a term which was not invoked until 1971,[183] and "traditional marriage," a combination which until recently merely referred to anything

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[179] William C. Duncan, *The Role of Litigation in Gay Rights: The Marriage Experience*, 24 ST. LOUIS U. PUB. L. REV. 113, 114 (2005).

[180] *Singer,* 522 P.2d at 1191 fn 5. Ironically, the *Singer* court's evidence was thereby contributing to the changing definition.

[181] NEXIS.

[182] Associated Press, July 20, 1977.

[183] *Baker,* 191 N.W.2d at 186.

along the lines of *Leave It to Beaver*,[184] but which since 1992, at least, is contrasting heterosexual and same-sex marriages.[185]

The qualifiers tell us that the same-sex marriage issue—of the *nature* of the institution— is rarely divorced from the *word*. In the meantime, the verb "marry" is having a better time of it, virtually ignored in the debate. Same sex-couples are getting married where it is legal—no qualifier added. Since "marry" and "marriage" definitions are correlative, this "marry" use indirectly—but only indirectly— substantiates the expanded "marriage" definition. On the other hand, "marry" may be used when the union is not legal but simply when a same-sex couple undergoes a ceremony, which does nothing for expanding the denotation of "marriage" in its legal union senses.[186]

"Marriage" is not the only word with important social significance that has come under inspection in recent years. Less than fifty years ago, the definition of "family" as a

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[184] E. J. Graff's remark, that [t]he phrase "traditional marriage," which she notes is bandied about a lot by the press, "really should be used only to mean marriage for money" (*What is Marriage For?* 38 NEW ENG. L. REV. 541, 542 (1999)) is not quite upheld by the evidence, but it is true to the degree that up until the marriage definitional debate began it had nothing to do with the sex of the partners. It usually meant a marriage in which the man was the bread winner and the woman stayed home. There is also evidence of its use in contrast to "common-law marriage."

[185] Used this way by the court in John C. v. Martha A., 156 Misc.2d 222, 225 (1992).

[186] For example: "At the Elmira hospital where he was treated a week ago, [the patient's] doctor asked him if he was married. He told him he was. To a man named Toshav." THE POST-STANDARD (Syracuse, N.Y.) July 9, 1995. (In reality the patient and Toshav were "registered domestic partners" in the state of New York and had participated in a commitment ceremony performed by a rabbi.)

basic unit in society said it was one "having as its nucleus two or more adults living together and cooperating in the care and rearing of their own or adopted children."[187] Now, a more fitting description of the basic social unit is one "traditionally consisting of two parents rearing their children; also, any of various social units differing from but regarded as equivalent to the traditional family."[188] The New York Court of Appeals saw fit in 1974 to recognize this extension, concluding that a group home consisting of a married couple, their two children, and ten foster children qualifies as a single family unit, under a zoning ordinance,[189] and in 1989 to encompass same-sex partners.[190] On the other hand, the Connecticut Appellate Court decided that partners in a Vermont civil union were not entitled to "family" law adjudication in Connecticut.[191]

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[187] WEBSTER'S THIRD.

[188] ELEVENTH COLLEGIATE. Sherri Toussaint tells us a Harris survey found only three per cent of those polled defined "family" as the traditional nuclear family." *DOMA: Isn't it Ironic…Don't You Think? A Little Too Ironic*? 76 NEB. L. REV. 924, 934 (1997).

[189] The zoning ordinance defines "family" as "one or more persons limited to the spouse, parents, grandparents, grandchildren, sons, daughters, brothers or sisters of the owner or the tenant or of the owner's spouse or tenant's spouse living together as a single housekeeping unit with kitchen facilities." City of White Plains v. Ferraioli, 313 N.E.2d 756, 757-58 (1974), cited in Toussaint, *supra* n. 188 at 934.

[190] Braschi v. Stahl Assoc. Co., 543 N.E.2d 49 (1989), cited in People v. West, 4 Misc.3d 605, 607 (2004), cited in Duncan, *supra* n. 179, at 113 n 5.

[191] Rosengarten v. Downes, 802 A. 2d 170 (2002). The plaintiffs sought to have their civil union dissolved in Connecticut. The court concludes that the legislature could not have intended "family matters" to include civil unions, and thus the court had no jurisdiction. In contrast, a proposed bill establishing civil unions in Hawaii provides that "it shall be necessary that the parties…consider themselves to be members of each

Earlier I mentioned changes to "couple." The definitions of "husband" and "wife"—which some gay couples use to refer to each other—may not actually need tweaking; new meanings kick in automatically along with those of "marriage" because "husband is defined as "a male partner in a marriage" and wife as "a female partner in a marriage."[192]

In the senate Judiciary Committee report for DOMA, its author notes with relish how, shortly before passage of the Family and Medical Leave Act of 1993 (which requires that employees be given unpaid leave to care for a "spouse" who is ill), an amendment was attached defining "spouse" as "a husband or wife, as the case may be." The amendment, says the Report, "proved essential when the regulations were written." [193] As indeed I am sure it did—the concern then was that domestic partners would assert themselves to be "spouses"—but had its creators realized that legalized same-sex marriage was just around the corner one can imagine that they would have felt compelled to define "husband" and "wife" as well. [194]

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other's family," 2005 Hawaii House Bill No. 1231. New York law provides that a surviving partner from a same-sex Vermont Civil Union is recognized as a "spouse" (and thus, one assumes, a member of the family). Langan v. St. Vincent's Hospital of New York, 196 Misc.2d 440 (2003), cited in *West*, 4 Misc. 3d at 607.

[192] ELEVENTH COLLEGIATE.

[193] 142 Cong. Rec. H104-664 (daily ed. July 9, 1996) (statement of Rep. Canady).

[194] As did.the U.S. Immigration Service in February 2005, updating its "marriage" definition thus: "'Marriage' is defined as the legal union of one man and one woman, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife." IMMLS2D § 7:10.

Some proponents of same-sex marriage posit the value of looking at broader cultural understandings of the institution. Of course, such discussions point to the *act,* and do little or nothing for the *word*. Nevertheless, foreign cultural norms themselves might have potentially semantic repercussions—if the English language is employed to use "marriage" to refer to these same-sex marriages in running context, such as in the following:

> A Kenyan magistrate granted a divorce to a Kikuyu woman from her female companion on the grounds of 'cruelty and negligence,' the *Daily Nation* reported yesterday … In ordering the dissolution of the marriage, the magistrate said under Kikuyu law there was no dispute to the legality of a marriage between two women."[195]

Writers of American dictionaries, however, must put less value on citations culled from foreign sources than they put on strictly American sources.

Circular Reasoning: Defining A Word By The Way It's Defined

We allow Mary and Joe to get married but Mary and Joan may not. What's the problem? The "problem"is the definition. They cannot enter into marriage because of the definition of marriage, we hear. So, instead of calling a spade a spade, we're willing to entertain giving it a different name: "civil union." But isn't "a rose by any other name…."

[195] Deutsche Presse Agency, reported in THE TORONTO STAR, January 1, 1987 (NEXIS).

Who hasn't had a little argument of a sort about what something is called? We've struggled with meanings through the ages, and we get particularly touchy in certain areas. In seventeenth century England, religious intolerants narrowed the meaning of "church" from its earliest (from before the twelfth century) meaning of "a building for public Christian worship." According to them, only members of the Church of England worshipped in "churches." The rest of the (not so) faithful was relegated to "chapels." Apparently the constrained usage caught on—for a time. The *OED* tells us that in England

> the name *has been only recently and partially extended* to places of worship other than those of the national or 'Established' Church, as those of Roman Catholics (since *c*1830-40) and some Nonconformist Protestants. At present, its application is partly a question of social or individual taste, or of ecclesiastical principle or theory…. [G]enerally speaking, in England the question 'Is this a church or a chapel?' would at present be understood to mean 'Does it belong to the Church of England or to some other religious denomination?' [emphasis added][196]

We jump forward to the twentieth century. In *Singer v. Hara*, the plaintiffs, two males, sought to have the denial of their marriage license overturned by arguing their entitlement to marriage pursuant to the equal rights amendment of the Washington state constitution and the 14th amendment to the U.S. Constitution.[197] That state's appeals court found any argument for same-sex marriage based on *Loving*, where the denial of

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[196] OED online. Another more clear-cut, and less sensitive, example of a church definition changing is found in the word "cathedral"—beginning in the sixteenth century, the word originally referred to the principal church of a diocese, containing the bishop's cathedra, or throne; now, any important, large, or imposing church might be termed a "cathedral" without misusing the word. (It started, apparently, with Glasgow Cathedral in 1823.) *Id.*How could a church that did *not* contain a cathedra be a cathedral if cathedral was defined as….? Because people simply began using the term that way.

[197] *Singer,* 522 P.2d at 1188-89.

marriage rights was based on an unlawful racial classification, inapplicable because "marry" refers to a union between a man and a woman. The Washington court noted that the courts of the state had not previously even found it necessary to specifically define what constitutes a marriage, the definition of marriage as the legal union of one man and one woman being "so obvious as not to require recitation."[198] The court further noted, "We need not resort to the quotation of dictionary definitions to establish that 'marriage' in the usual and ordinary sense refers to the legal union of one man and one woman."[199]

Thus, in 1830's England, when the recognized meaning of "church" was "place of worship of the Church of England," the *Singer* court would have declared that the non-Anglican who said she went to church, didn't go to church—it cannot be a "church" she went to because of the recognized definition of church [= the same-sex couple *cannot* be "married" because of the recognized definition of marriage]. This is circular reasoning; that is, it using the definition to *justify* forbidding the non-Anglican from calling *her* place of worship a "church."

Unfortunately, circular arguments in the marriage debate abound, both in court decisions and in scholarly legal articles. Most are expressly invoking the definition of

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[198] *Id*. at 1191-92.

[199] And indeed the court does not. In contrast, the court in *Baker* (in which two male plaintiffs appealed denial of a marriage license invoking the 14th amendment) three years earlier did, citing WEBSTER'S THIRD and BLACK'S LAW DICTIONARY to back its assertion that the Minnesota statute governing marriage "employs that term as one of common usage, meaning the state of union between persons of the opposite sex." 191 N.W. 2d at 185-86.

marriage,[200] though there are other ways to spin the wheel and arrive back at the starting point as well, such as this "impossible" argument used in *Slayton v. State*: "In Texas, it is not possible for marriage to exist between persons of the same sex, as they may not marry one another, either with or without formalities of law."[201] Or there is the more cleverly spun "uniqueness" argument: Only the heterosexual relation should be labeled "marriage," because the relation is unique.[202] This assertion implies that the word "marriage" is somehow predisposed to mean only the one thing—heterosexual unions—and including same-gender unions would somehow compromise the word's applicability to the more traditional unions. The "logical" conclusion follows that once you allow "marriage" to refer to both heterosexual unions and unions that are in every other way

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[200] For example: Adam Wolf writes, "In addition to judicial precedent and statutes, dictionary definitions of 'marriage' similarly exclude the possibility of same-sex marriage." *Supra* n. 143, at 117(citing definitions from two editions of BLACK'S, from WEBSTER'S THIRD, and from a 1902 WEBSTER'S MODERN DICTIONARY [Pub.?]); Anne Brown posits that "in *Baker* the court *relied* [emphasis added] on the traditional definition of marriage." Brown, *supra* n. 132, at 931, citing *Baker*, 191 N.W.2d at 185-86; *Jones v. Hallahan* quotes dictionary definitions from three dictionaries to conclude that the "appellants are prevented from marrying … by their own incapability of entering into a marriage as that term is defined." 501 S.W. 2d 588, 589 (1973), cited in Wolf, *supra* n. 143, at 116 n. 83.

[201] 633 S. W. 2d 934 (1982).

[202] This is the reasoning set forth by Wardle, *supra* n. 138, at 38-39. Jennifer Wriggins attacks Wardle as well: "Despite his insistence, there is no reason why claims for marriage by same-gender couples 'must lead to a rejection' of 'traditional male-female marriage.'" I find just a bit too disingenuous, however, her footnote aside that "Given the historical evidence about changes in the functions, laws, and customs surrounding marriage, it is not at all clear what, if anything, 'traditional male-female marriage' means" citing generally E.J. Graff, *What Is Marriage For? supra* n. 184; E.J. Graff, *Marriage Law and Family Law: Antonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. REV. 265, 316 (2000).

like heterosexual unions with the only difference being the gender of the partners, all hell breaks loose: "If the sanctity of one man and one woman is not protected, if we keep expanding the definition, then where's it going to lead? …One man and ten women? A man and a child?[203] The uniqueness of a heterosexual relation should not be conflated with the uniqueness of the marriage relation.

The first court that declared same sex marriages within the boundaries of the law decried such circularity. The Hawaii Intermediate Court of Appeals' reaction in *Baehr v. Lewin* to the defendant Lewin's assertion that "the right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman[204] was to say the argument was "circular and unpersuasive."[205] The dissent in *Baehr* followed a strictly definitional view

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[203] Margaret Talbot, "The Struggle", NEW YORKER 42, November 8, 2004, quoting man at an anti-gay marriage rally in Washington D.C. The author tells us that others present added "A Man and a dog?" Similarly Anne Brown queries : "If the government extends the definition of marriage to include same-sex partners, will it also define 'marriage' to include more than one spouse?...To allow a homosexual institution changes the very nature of the institution and unequivocally empties it of its *unique meaning*." [emphasis added]. Brown, *supra* n. 132, at 943.

[204] *Baehr,* 852 P.2d at 61, quoting Lewin's answering brief.

[205] *Id*. Other legal articles, too, have recognized circularity: "A definitional justification to an equal protection or due process challenge offers no support because the definition of marriage itself is being challenged." Toussaint, *supra* n. 188, at 941. "The state cannot defend its prohibition of same-sex marriages simply because it does not believe them to be marriages." William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1432. Actually, Eskridge's criticism goes beyond mere

of marriage and in consequence recommitted the *Singer* circularity crime. Echoing *Singer*, the dissent postulated that "the operative distinction lies in the relationship which is described by the term 'marriage' itself, … the legal union of one man and one woman" and "[The two men] are not being denied entry into the marriage relationship because of their sex…[but because] of the recognized definition of that relationship."[206]

To what extent does misunderstanding the role of dictionary-making affect the "marriage" definitional debate? In the "marriage" discussion, an exercise of the "art of lexicography" means assigning to the word "marriage" a sense of "a union between same-sex partners"—precisely what opponents have not wanted to see happen. Indeed, if there is an argument to be made that some union is under no circumstances a marriage, then a marriage it is not. To rephrase *La Franca's* second statement: "If a union be clearly *something other than a marriage*, it cannot be converted into a *marriage* by the simple expedient of calling it such." It is fairly easy to envision such a non-marriage (two Weimaraners all decked out for a photo session in wedding garb).

In fact, that latter argument is precisely what the court in *Knight v. Schwarzenegger*[207] presented. "The title of 'marriage' is much more than just a word …" the California Superior Court judge intoned, arguing that nothing the government can say or do can change marriage "in name or nature." The court had just asserted unequivocally that

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cicularity because he says that "the definitional argument is factually wrong" because it conflicts with the real history of same-sex marriage.

[206] *Baehr,*852 P.2d at 589 (J. Heen, dissenting).

[207] 2004 WL 2011407 (Cal.Superior Sep 08, 2004).

"'marriage' is … essentially defined currently by the one historically constant element, i.e. the union between man and woman."—asserted this, despite the fact that *dictionary* definitions have changed.

"Marriage" *has* taken on new senses via actual usage; not only is there evidence of widespread use of "marriage" to refer to other than heterosexual unions, some such unions are legal. In *La Franca*, calling what has been traditionally a penalty a "penalty" works. The court in *La Franca* could plausibly decide that the fee should not be called a "tax," because "tax" *hadn't* been redefined —and no one was asserting that it ought to be. But since the marriage debate is about calling something other than the traditional union between a man and a woman "marriage," simply asserting that the union is *clearly* something other than marriage is dancing circles around the debate.

The art of lexicography requires, since the exercise of the art is merely a recordation of the real-life change, that "marriage" be given a new sense. Do we have an argument that a same-sex union is clearly something other than a marriage even when the dictionary definition has *validly* been changed, based on usage? Do we have the opposite argument? The upholders of the uniquely heterosexual institution of marriage held forth the old definition in order to argue *for* the nature of the institution they promote. They were thus *in effect,* whether they realized it or not, also wishful thinkers for the definition staying the same. Conversely, proponents of legalizing same-sex marriage wanted, in effect, a new dictionary sense of "marriage"[208]—or at least a less limited sense. In the

[208] But the new sense they really want is a gender neutral sense.

meantime, apace with the same-sex marriage debate, the dictionary definition was evolving.

The courts and legislatures have favored the definitional approach as long as they could, for one reason because it avoided any intimation that the union is "marriage" albeit illegal, offering a safe harbor from *Loving*. *Loving* was never a definitional issue, but it brought into focus the institution of marriage in a way that is often equated with the current debate.[209] It wasn't definitional because antimiscegenation statutes used prohibitive rather than definitional, positive wording—that is, "such-and-such marriage is *unlawful*"[210] versus "marriage *is* such-and-such." But the fact is, there are parallels:

[209] Toussaint notes how the "marriage" definition was essentially a non-issue in *Loving* because "the traditional definition of marriage that was *in vogue at that time*" [emphasis added] was simply "an insufficient government interest to support the burden of a constitutional right. *Supra* n. 188, at 963 (arguing that prohibition of same-gender marriages is unconstitutional at both the federal and state levels). I would agree that *Loving* was not a definitional issue, but in speaking of the role of the definition of "marriage" in *Loving*, I would distinguish senses of "definition." If we are still talking about the definition of marriage as the union between one man and one woman, it was a non-issue in that, as Toussaint herself observes, the marriage in question in Loving fit that definition. *Id.*at 962. But Toussaint's statement quoted just above uses the "essential quality of something" sense of the word "definition," because she is incorporating what at the time of *Loving* included the preservation of the purity of the race. While that connotation was not normally couched in terms of a "definition" in the way the man and woman aspect is, this connotational "definition" of "marriage" at the time of *Loving* had the same persuasive value in regard to miscegenation as today's connotational "meaning of 'marriage'" does regarding same-sex marriage. Therefore, definitionally speaking, the Lovings should have lost.

[210] "All marriages between a white person and a colored person shall be absolutely void…." Va. Code Ann. S 20-57 (1960 Repl Vol.); "It shall be hereafter be unlawful for any white person in this State to marry any

references to the "purity" of the marriage institution,[211] sound dangerously close to "maintaining the purity of the races"[212] and "preserve the integrity of marriage"[213] harks back to preserving "racial integrity.

Recall what the judge said in *Knight*—that the current definition of marriage in essence must rely on what history has told us about marriage.[214] This "traditional meaning" argument is offered as a counterpoint to circularity criticisms.[215] Scott Fruehald takes the circularity criticism to task when he writes that "[t]he fact remains that this [a union between a man and a woman] is the traditional meaning of marriage, and there is no reason to assume that the Court had any other definition in mind when it used the term."[216] He is referring to the court in *Zablocki,* which reaffirmed that marriage is of

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save a white person…. " Va. Code Ann. S 20-54 (1960 Repl Vol.). Lest you are skeptical as to the extent to which our esteemed judicial forefathers could hold forth on this belief, here is what the trial judge said: Almighty God….for the races to mix." *Loving* at 1819

[211] Knight v. Schwarzenegger*,* 2004 WL 2011407 at 6 (Cal.Superior Sep 08, 2004).

[212] State v. Brown, 108 So.2d 233, 234 (1959).

[213] MT ST 40-1-101 (Montana, 2003). An "underlying purpose" of the chapter on marriage which includes "marriage is required to be between a man and a woman." MT ST 40-1-103.

[214] See page 37, *supra.*

[215] "Consistently in our legal tradition, the very nature and essential meaning of marriage is heterosexual. Some proponents of same-sex marriage dismiss this point as merely a tautological argument, a definitional or semantic substitute for meaningful analysis. Such a response misses the critical point that the very concept and reality of the relationship between man and woman that we call marriage fundamentally differs from the nature of the relationship between two persons of the same sex." Wardle*, supra* n. 138, at 38.

[216] Scott Fruehald, *Choice of Law and Same-Sex Marriage*, 51 FL. L. REV. 799, 846 (1999).

fundamental importance to all individuals.[217] Fruehald sees a direct link between *Loving* and the present marriage question. But this assertion by a writer opposing same-sex marriage ignores what we said above about *Loving*. Earlier cases that explored whether marriage was a fundamental right didn't revolve around the one man and woman definition. The circularity criticism does not come from them. It comes from referring to the *present* definition of marriage. Which, indeed, is what Fruehald subsequently does; he offers current dictionary definitions: "the state of being united to a person of the opposite sex as husband or wife . . . the mutual relation of husband and wife"[218] and "the legal union of man and woman as husband and wife."[219] And while he cannot precisely be accused of using outdated dictionaries, a year later he would have had to slightly change his argument—or choose a different dictionary, for the latter definition was changed to read "A union between two persons having the customary but usually not the legal force of marriage" [as in] "a same sex-marriage."[220]

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[217] Zablocki v. Redhail, 434 U.S. 374, 384-85 (1978).

[218] Fruehald, *supra* n. 216, at 846, quoting WEBSTER'S THIRD 1384 (1971).

[219] *Id,* n. 281, quoting THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1102 (3d ed. 1992).

[220] THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000). Jennifer Brown offers a refreshing diversion from the circularity criticism when she notes quite sensibly—and simply—that with legalized same-sex marriages must come revised definitions of marriages—and that referring to any unrevised dictionary is simply an exercise of anachronism. Jennifer Gerarda Brown, *Sweeping Reform from Small Rules? Anti-Bias Canons as a Substitute for Heightened Scrutiny*, 85 MINN. L. REV. 363, 385 n. 88. (2000).

The circularity discussion itself has been going around in circles. The *Goodridge* court accused the "traditional" argument of being circular reasoning as well.[221] To say that something *is* (present tense) a traditional meaning merely asserts that it has been the meaning in the past.

Policy and Tradition

> *The only element of 'marriage' that has remained constant and immutable throughout our nation's history—until recently—has been that the legal union has consisted only of a man and a woman.* —Thomasson v. Shwarzenegger[222]

Invoking tradition in the marriage debate raises the spectre of our venerable forefathers turning over in their graves if we allow the institution of marriage—and, thereby, the word "marriage"—to include same-sex-unions.[223] But would they be so disturbed? I do not think that our lexicographical forebears, at least, would object to a changing definition of marriage. More than 250 years ago, the British lexicographer Samuel Johnson observed:

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[221] "But it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that is what it historically has been." Goodridge v. Dept. of Public Health, 440 Mass. 309, 332 (2003).

[222] 2004 WL 2011407 (Cal.Superior), noting the one exception created by *Baehr* in Hawaii was subsequently overturned by that states' passing a constitutional amendment.

[223] "If a social issue of such importance is consigned solely to the courtroom, the specter of disenfranchisement will be raised. … Justice Andrew J. Kleinfeld's comment is entirely apposite: 'The Founding Fathers did.not establish the United States as a democratic republic so … all great questions would be decided by the judiciary.'" Duncan, *supra* n. 179 , at 127. I wrote my remark before Duncan's article was even published on Westlaw.

> The language most likely to continue long without alteration, would be that of a nation raised a little, and but a little, above barbarity, secluded from strangers, and totally employed in procuring the conveniencies [*sic*] of life…[A]s any custom is disused, the words that expressed it must perish with it; as any opinion grows popular, it will innovate speech in the same proportion as it alters practice…vicissitudes of fashion will enforce the use of new, or *extend the signification of known terms* [emphasis added].[224]

Nevertheless, we are told at every turn of the marriage debate that we must protect our traditions and morals.[225] In *Williams v. Atty. Gen. of Alabama* the court stated, "[T]he Supreme Court has noted on repeated occasions that laws can be based on moral

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[224] Johnson, *supra* n 26.

[225] For example, the proposed Defense of Marriage Act (H.R. 3396) was argued for thus: This judgment entails both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality. …It is both inevitable and entirely appropriate that the law should reflect such moral judgments. H.R. 3396 serves the government's legitimate interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws." H.R. REP. 104-664 at 16 (1996). Toussaint sees parallels in the current marriage debate with the moral arguments against mixed-race marriages, in that at the time of *Loving* as now, the "moral arguments conclude that marriage is defined by nature and hence cannot be defined differently." S*upra* n. 188, at 936. While homosexual marriage is unquestionably a moral issue today, Toussaint's argument that "history repeats itself" is weakened somewhat because she states that "today, it is assumed that heterosexuals are superior to homosexuals" *Id*. I see a parallel lacking between prevailing attitudes of heterosexual "superiority" based on the notion that heterosexuals adhere to a higher moral standard and old beliefs that white "superiority" justified protections against "corrupting white blood" and "creating a mongrel breed." *Loving,* 87 S.Ct. at 1821.

judgments."[226] The *Williams* court reiterates that "a legislature could legitimately act…to protect 'the social interest in order and morality,'"[227] despite, as the court notes, Justice Scalia's "predication that public morality may no longer serve as a rational basis for legislation after *Lawrence*."[228]

The counterargument is not a denial of the tradition and morals view but one that would seem able to sit on its own high plane: the fundamental right argument. The basis for that is built on the contention that "tradition …must crumble under our evolving understanding of liberty."[229] Nevertheless, the tradition and morals view can be used to knock down the fundamental right argument. Courts must look to whether the right to marry is deeply rooted in the nation's history and tradition. [230]

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[226] 378 F.3d 1232, 1238 (2004), holding there is no fundamental right to engage in private intimate sexual conduct.

[227] *Id*., quoting Barnes v. Glen Theatre, 501 U.S. 560, 569 (upholding a public indecency statute, quoting, in turn, Roth v. United States, 77 S.Ct. 1304, 1309 (1957)).

[228] *Id.* See Lawrence v. Texas, 123 S.Ct. 2472, 2490 (2003) (J. Scalia, dissenting), which held that the Texas anti-sodomy statute was an illegal exercise of the police power because it did.not further a legitimate state interest.

[229] Standhart v. Superior Court, 77 P.3d 451, 458. This, at least, is how the court paraphrased the petitioners' argument.

[230] As did the court, e.g., in *West*: …I understand the historical, cultural and religious opposition to same-sex marriage, but find that none of the reasons stated in opposition to same-sex marriage is paramount to the equal protection guarantees enshrined in the state and federal constitutions." 4 Misc.3d at 608, cited in Duncan, *supra* n. 179, at 113 fn. 5; and in *Goodridge*: "As … *Loving* make[s] clear, the right to marry means little if it does not include the right to marry the person of one's choice…" 440 Mass. at 327-28.

One problem, the *Williams* court notes, is over-broad framing of the right in question.[231] One can see how that affects the marriage question. If the issue is a marriage between same-sex couples, a court could frame the issue as the broad question: Is there a deeply rooted fundamental right to marry? If the court finds that the answer is yes, it *must* include the same sex couple. But if the court has framed the question more narrowly—is there a deeply-rooted fundamental right for same-sex couples to marry?—the court's analysis and conclusion would potentially be quite different.

In 2003, the Arizona court, in *Standhart v. Superior Court*, had no problem reframing the right asserted by the two male plaintiffs—the right to marry—as the right to enter opposite-sex marriages,[232] and concluded that there is a fundamental right to enter opposite-sex marriages (from *Loving*),[233] but no fundamental right to enter same-sex marriages (noting explicitly that *Lawrence* did *not* establish that right).[234] To support its

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[231] *Williams*, 378 F.3d 1232 at 1239. The court's analysis was this: The issue of whether there is a fundamental right to sell and purchase sexual devices should not have been generalized into asking whether there is a right to sexual privacy. Answering the second question in the affirmative can allow the first to be answered the same way because by so framing the issue we must accept that the selling and purchase is an exercise of sexual privacy.

[232] Standhardt 77 P.3d at 454.

[233] Interestingly, the *Loving* court acknowledged that its holding was contrary to tradition to "some degree," but actually there was vast contrary tradition in state law. The *Loving* court acknowledged that as recently as fifteen years prior, thirty states had enacted antimiscegenation laws. 87 S.Ct. at 1821, noted in Wolf, *supra* n. 143, at 117.

[234] *Standhardt,* 77 P.3d at 457-58.

conclusion, the court reminds us that "no state in this Nation has enacted legislation allowing same-sex marriages," noting at the same time that more states than not have legislated expressly to exclude same-sex marriages.[235] The *Williams* court rejected the district court's analysis (and its finding for the plaintiff) which was based on *contemporary practice*.[236] "The fact that there is an emerging consensus scarcely provides justification for the courts … to be swept up with the tide of popular culture."[237] (Was this a reaction to *Goodridge*?) *Standhardt*, in contrast to the *Williams* court, leaves aside the moral argument and even concedes that "many traditional views of homosexuality have been recast over time in our state and Nation,"[238] but in the end decides that the choice to marry a same-sex partner has "not taken sufficient root" to receive constitutional protection as a fundamental right.[239]

Thus we see how it is virtually impossible to divorce policy considerations from any discussion of the meaning of marriage—as well as of the meaning of "marriage." It would be derelict to do so, in fact. It serves to underline the insignificance of the dictionary definition and the inappropriateness of using it to determine law.

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[235] *Id.*at 459.

[236] *Williams*, 378 F.3d 1232 at 1243.

[237] *Id.*at 1244.

[238] E.g., *Bowers*, which had used tradition to uphold its holding against sodomy, was overturned in *Lawrence*. Bowers v. Hardwick, 478 U.S. 186, 216 n.9 (1986) (Stevens, J., dissenting) (citing John G. Hawley & Malcolm McGregor, The Criminal Law 287, 288 (3d ed. 1899)), noted in Wolf, *supra* n. 143, at 117.

[239] *Standhardt,* 77 P.3d at 465.

Marriage Statutes and Constitutional Amendments

According to the House Report for DOMA, the word "marriage" appears in more than 800 sections of federal statutes and regulations, and the word "spouse" appears more than 3,100 times (neither is typically defined).[240]

Until recently same-sex couples weren't forbidden to marry—they weren't even mentioned in the marriage statutes. A marriage ceremony undergone between same-sex couples is a failed attempt at entering into a legal marriage wherever such an act it does not fit the legal definition of marriage. Same-sex marriage is forbidden due to express exclusion, implied exclusion, or lack of inclusion. After *Baehr*, this lack of inclusion seemed risky and legislators soon remedied it. Perhaps the best sign that history is repeating itself[241] is the inclusion in revised marriage statutes of antimiscegenation style prohibitive wording.[242]

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[240] 142 Cong. Rec. H104-664 (daily ed. July 9, 1996) (statement of Rep. Canady).

[241] See n. 225 *supra*.

[242] The Louisiana Civil Code, in a 1996 revision, offers one such example: "Persons of the same sex may not contract marriage with each other…a purported marriage contracted in contravention of this article is an absolute nullity." 17 Louisiana Civil Code Title IV Art. 89. See also AR ST §9-11-107; FL ST §741.212; OH ST §3101.01; 23 Pa. C.S.A. §1704; SC ST §20-1-15; Texas Family §2.001; WA ST 26.04.010; GA Const. Art 1, §4, ¶1(ratified Nov. 2004); ME ST T. 19-A § 701.

As the same-sex marriage issue plays out, we have, in the meantime, domestic partnerships and civil unions, with there own definitional issues. A dictionary entry for "domestic partner" was added to the *Tenth Collegiate* in 1998,[243] and "domestic partnership" was added as a run-on to the "domestic partner" entry in the *Eleventh Collegiate* in 2003. These words first appeared in our vocabulary in 1975 and 1977, respectively.[244]

"Civil union," on the other hand, has not found its way into general dictionaries. It remains, appropriately enough, in the hands of legal definers. That does not automatically put the legal community in agreement as to what a civil union means—"means," that is, in the non-lexicographical sense of the essence of the thing. As noted above, the Connecticut Court in *Rosengarten* found that partners in a civil union do not constitute a family—at least in one narrow legal application. This the court determined after arriving at the more facile conclusion that, since the Connecticut marriage statute states that marriage is limited to a man and a woman, the civil union is not a marriage under Connecticut law, and for that matter, it is not a marriage under Vermont law, either, so Connecticut law which provides for jurisdiction over dissolution of marriages cannot apply. Even if it could, Connecticut could invoke DOMA.[245] The court makes clear that

[243] "Domestic partner is defined as "either one of an unmarried heterosexual or homosexual cohabiting couple especially when considered as to eligibility for spousal benefits." ELEVENTH COLLEGIATE.

[244] ELEVENTH COLLEGIATE.

[245] *Rosengarten*, 802 A. 2d at 174-75.

"Connecticut does not… endorse or authorize or civil unions."[246] The same year, the Georgia Court of Appeals refused to interpret a plaintiff's civil union status in Vermont to allow visitation rights where her visitation agreement provided that she must be married to an adult with whom she cohabited. The court went straight to the Vermont statute's definition of "marriage" (and thus, like the *Rosengarten* court, need not have invoked DOMA, but did anyway).[247]

The DOMA House Report informs as that by July 1996, fourteen states had enacted laws to "protect marriage" and legislation was pending in seven states.[248] The states enacting this anti-same-sex marriage legislation have been variously creative in their wording—and in their use of "define" and related words, from Tennessee's "Any policy, law or judicial interpretation that purports to *define* marriage as anything other than the … contract between one man and one woman is contrary to the public policy of Tennessee,"[249] to Utah's "marriage consists only of the legal union between a man and a woman….No other domestic union, however *denominated*, may be recognized as a marriage…"[250] and Florida's "For purposes of interpreting any state statute or rule, the

[246] *Id.*at 177. The *Rosengarten* court digresses as well into common law uses of the terms "husband" and "wife." But, as I noted earlier, like "marriage," "husband" and "wife" are not words which in themselves are determinative of sex of *both* partners in the marriage.

[247] *Burns,* 560 S.E.2d at 49.

[248] H.R. REP. 104-664 at 9-10.

[249] TN ST § 36-3-113.

[250] U.C.A. 1953, Const. Art. 1, § 29.

term 'marriage' *means* only a legal union between one man and one woman…"[251] [emphases added] There are states that lump same-sex marriages and civil unions together (the state may not give effect to a … public act, record, or judicial proceeding that recognizes or validates a marriage or civil union between persons if the same sex…"),[252] and those that don't.[253] There are states that are blunt: "Marriage between persons of the same sex is void and prohibited,"[254] and those that are oblique, such as West Virginia with its almost quaint requirement that "[e]very application for a marriage license must contain the following statement: 'Marriage is designed to be a loving and lifelong union between a man and a woman.'"[255]

Wording, as always in legislation, can be tricky. DOMA is worded thus: "No state shall be required to give effect to any public act…of any other state . . . respecting a relationship between persons of the same sex that is treated as a marriage. . ."[256] The act creates this definition: "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."[257] It would not be unreasonable to conclude that civil unions are not encompassed by DOMA.

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[251] FL ST § 741.212 (Florida 1997).

[252] V. T. C. A., Government Code § 810.001 (Texas 2001).

[253] See, e.g., R. C. § 3101.01(C)(1) and (C)(3) (Ohio 2004).

[254] A.R.S. § 25-101 (Arizona).

[255] W. Va. Code, § 48-2-104 WV ST § 48-2-104.

[256] § 2(a), 28 U.S.C.A. § 1738C (West Supp. 1998).

[257] § 3(a), 1 U.S.C.A. § 7 (West 1997).

CONCLUSION

For more than twenty years now, English speakers in the U.S. having been using the word "marriage" to refer to a union between two people of the same sex in a relation that matches marriage between to people of opposite sex in every way. There is no disputing it—"marriage" has a new definition. Wisely, judges who seek support for their decisions against same-sex marriage are leaving off looking to dictionary definitions of marriage[258]—now when they open any *current* dictionary they must know they are likely to see "marriage: the state of being united to a person of the same sex…" That is one sense; there are others, obviously. Users of the word "marriage" use whatever sense is applicable in the context of their use. No longer can the dictionary definition be invoked to justify what the *nature* of the marriage institution is. If the definition were the only issue, the solution has been arrived at--simply enough. It is not, of course, the only issue--or even really, for that matter, *an* issue. In many aspects, as we have seen, the same-sex marriage debate has come a long way since, nearly a decade ago, Senator Coats, making no bones in the DOMA proceedings, remarked: "The definition of marriage is not created by politicians and judges, and it cannot be changed by them. It is rooted in our history,

[258] I found but one judge still holding out within the last three years. In Shields v. Madigan, 5 Misc.3d 901, 904 (N.Y. S. 2d 2004), the judge invoked BLACK'S LAW DICTIONARY (7th ed. 1999), in which "marriage" is defined as "the legal union of a man and woman as husband and wife" in a case where a same-sex couple sought to attain a valid marriage license in New York. Search of Westlaw, ALLCASES database (March 28, 2005) (search for records within the last three years and with "'SAME-SEX MARRIAGE' & (DICTIONARY /S MARRIAGE)").

our laws, our deepest moral and religious convictions, and our nature as human beings."[259]

But much is still the same. On March 14, 2005, San Francisco Judge Kramer ruled that California's gay marriage ban is unconstitutional, a decision that elicited such newsorthy comments as "We knew Judge Kramer was under tremendous political pressure to redefine marriage but we were hopeful …."[260]

This is disturbing in a way. Because it is not a question of asking the courts or the legislators to "redefine marriage." It is asking the courts to *allow* same-sex marriage--a decision which must be based on the courts' perception of constitutionality. When the time is due, legal dictionaries will recognize this. In the meantime, general dictionaries, describers of the way we use language, are not dependent on this.

It behooves us to be mindful of one further thought expressed by Samuel Johnson regarding language: "There are … causes of change, which, though slow in their operation, and invisible in their progress, are perhaps as much superiour to human resistance, as the revolutions of the sky, or intumescence of the tide."[261]

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[259] 142 Cong. Rec. S4947-03 (daily ed. May 9, 1996) (statement of Sen. Coats).

[260] David.Kravets, "Judge in gay marriage case is a Catholic Republican appointee," The Associated Press, March 14, 2005, quoting Robert Tyler, an Alliance Defense Fund attorney (NEXIS).

[261] Johnson, *supra* n. 25.