

COMMENTS

Jurisprudence by Webster's: The Role of the Dictionary in Legal Thought*

"Someone sapped me." I said thickly. "His name was—"

"Webster," grunted Terry. He held up a dog-eared copy of Merriam's Unabridged. "You tripped on a loose board and this fell off a shelf on your think tank."

—S.J. Perelman, *Farewell, My Lovely Appetizer*

"And, of course, the dictionary is a book for reading . . . and a way to spend time enjoyably."

—H. Wiener, *Any Child Can Write*

I.

The United States Supreme Court frequently consults dictionaries,¹ often in order to interpret statutory language. In 1893, the Court in *Nix v. Hedden*² considered dictionary definitions to help determine whether a tomato was a fruit or a vegetable within the meaning of the Tariff Act of 1883.³ More recently, the Court in *Ernst & Ernst v. Hochfelder*⁴ considered dictionary definitions to help determine whether an action for civil

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1. The word "dictionary" occurs in 540 Supreme Court decisions. LEXIS, Genfed library, U.S. file. For example, the Court used the dictionary to define "editor" in *Pennoyer v. Neff*, 95 U.S. 714, 721 (1877), to define "equity" in *Crane v. Commissioner*, 331 U.S. 1, 7 (1947), and to define "indecent" in *FCC v. Pacifica Foundation*, 438 U.S. 726, 740 (1978). Although my analysis is confined to United States Supreme Court decisions, my thesis applies to all courts.

2. 149 U.S. 304 (1893).

3. *Id.* at 306.

4. 425 U.S. 185 (1976).

damages exists under section 10(b) of the Securities Exchange Act of 1934⁵ absent an allegation that the defendant intended to deceive, manipulate, or defraud.⁶

Should courts use dictionaries? If so, what is the proper role of the dictionary in legal thought? Sutherland suggests that dictionary definitions are frequently mentioned in legal opinions which purport to be literal statutory applications.⁷ As Sutherland explains, there is a problem:

This process may give rise to an unreasoned conception of what a statute means without a specific reference to legislative intent or meaning to the general public. Such an interpretation may be suspected of representing nothing more than subjective meaning to the judge alone, which may be different from what either the legislature or the public understood a statute to mean.⁸

The Court is tempted to use the dictionary to resolve statutory and constitutional issues because the dictionary seems to provide easy answers to difficult questions. Does section 10(b) of the Securities Exchange Act of 1934 require intent? Why of course it does! Dictionary *dixit*: The dictionary tells us so.

Unfortunately, difficult questions cannot be answered so easily. And using a dictionary as a source of easy answers gives rise to an unreasoned conception of what language means. As Lief Carter explains, "[t]he judge who approaches statutes wisely . . . knows that he cannot treat the words as a series of Webster's definitions strung together."⁹ Carter continues by warning that "[i]nterpreting words in isolation rather than in context . . ., is a danger because it leads judges into believing they have thought a problem through to its end when they only have thought it through to its beginning."¹⁰ The danger of using a dictionary is either that a judge believes he has thought a problem through to its end; or worse, the judge deliberately uses a dictionary to mask a personal political judgment. Until a judge fully discusses possible meanings of a word and explains his choice, the reader of the opinion cannot decide whether the judge's interpretation based on a dictionary definition is naively incomplete or is the judge's subjective opinion disguised as an objective answer.

5. Securities Exchange Act of 1934, Pub. L. No. 73-291, § 10, 48 Stat. 881, 891 (1934) (codified as 15 U.S.C. § 78(j)(b)).

6. 425 U.S. at 187-88.

7. SUTHERLAND STAT. CONST. § 46.02 (4th ed. 1972, revised 1984).

8. *Id.*

9. L. CARTER, REASON IN LAW 51 (1979). "Judges . . . who cling to the words utterly fail to appreciate that the dictionary staff did not sit in . . . [the] legislature. By sticking to the words, the judges prevent themselves from asking what problem the legislature sought to address." *Id.* at 53.

10. *Id.* at 55.

The thesis of this Comment is that courts should not turn to a dictionary for definitive answers. Judges should admit that dictionaries provide possible meanings, not dispositive resolutions. Judges ought to examine dictionaries only to explain which possible meaning should apply to the issue at hand.

Karl N. Llewellyn wrote that many lawyers have the mistaken idea that precedents:

provide one single correct answer to a disputed issue of law. In fact the available correct answers are two, three, or ten. The question is: *Which* of the available correct answers will the court *select*—and *why*? For since there is always more than one available correct answer, the court always has to select.¹¹

Dictionaries, like precedents, provide many correct answers to disputed issues of law. The question is: Which of the available correct answers will the court select and why?

II.

The Court's use of dictionaries grew out of the concept of judicial notice. In *Brown v. Piper*,¹² for example, Justice Swayne explained that courts may take judicial notice of "the meaning of words in the vernacular language . . . and, if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper."¹³ In *Nix v. Hedden*, Justice Gray explicitly connected using dictionaries to judicial notice. He wrote: "[D]ictionaries are admitted, not as evidence, but only as aids to the memory and understanding of the court."¹⁴

A modern commentator on the use of dictionaries echoes Justice Gray. Contrary to popular belief: "The 'meaning' of a word in the dictionary . . . is not the meaning at all."¹⁵ Although most people expect to find the meaning of words in a dictionary, the reader of a dictionary should come

11. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rule or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 396 (1950) (emphasis in original).

12. 91 U.S. 37 (1875).

13. *Id.* at 42. In *Jones v. United States*, 137 U.S. 202 (1890), the Court also uses permissive language: "[T]he judges may refresh their memory and inform their conscience from such sources as they deem most trustworthy." *Id.* at 216.

14. 149 U.S. at 307. Should courts take judicial notice of dictionary definitions? The purpose of judicial notice is to save courts time. Although it wastes a courts' time to verify that "1 + 1 = 2," perhaps courts need to spend more time discussing a word's meaning. See text accompanying notes 37-41 & 75-94.

15. P. FARB, WORD PLAY 223 (1973).

away from it with what he or she has already brought to it. The dictionary is an aid to the memory and understanding, serving "merely as a reminder to a speaker who already knows his language, has grown up in a speech community that uses the word, and who employs the hints in the dictionary to make a guess at the meaning."¹⁶

The dictionary does not give definitive meanings. The dictionary provides possible meanings from which the reader must choose, and the reader's choice should be based on what he or she already knows. If the reader is not able to make an informed decision based solely on the dictionary, then the reader must investigate further before making a choice. In either case, the dictionary is the beginning, not the end, of thinking through the problem of a word's meaning.

III.

The Supreme Court has not followed the *Nix* rule for the proper role of dictionaries. In fact, even the *Nix* opinion did not use dictionaries merely "as aids to the memory and understanding of the court."¹⁷ The *Nix* Court nixed its own holding, because although the Court looked at dictionaries to aid its memory and understanding, the Court reached its decision by choosing to *forget* the dictionary definitions it had consulted.

At issue in *Nix*, was whether tomatoes were "fruit" or "vegetables" within the meaning of the Tariff Act of 1883.¹⁸ If tomatoes were "vegetables" within the meaning of the Act, plaintiff could not recover the back duties he had paid on tomatoes he had imported. If tomatoes were "fruit," plaintiff could have recovered.

The trial was a veritable battle of dueling dictionaries.¹⁹ Plaintiff's counsel read into evidence dictionary definitions of "fruit," "vegetables," and "tomato." Defendant's counsel countered by reading into evidence dictionary definitions of "pea," "eggplant," "cucumber," "squash," and "pepper." Insisting on having the last word, so to speak, plaintiff's counsel in effect said "Oh, yeh?!" and read into evidence dictionary definitions of "potato," "turnip," "parsnip," "cauliflower," "cabbage," "carrot," and to top it all off, "bean."²⁰

The dictionary definitions appear to support plaintiff's contention that a tomato is a "fruit."²¹ The Webster's Dictionary of the time defined "to-

16. *Id.* at 223-24.

17. 149 U.S. at 307.

18. *Id.* at 306.

19. *Id.* at 305.

20. *Id.* at 305-06.

21. The Court refers to "Webster's Dictionary, Worcester's Dictionary and the Imperial Dictionary," but does not identify the dictionaries' publication dates. *Id.*

mato" as "a plant *and its fruit*" ²² "Fruit" was defined as "the produce of a tree, or other plant . . . the seed of plants or the part that contains the seed." ²³ "Vegetable" was defined as "such plants as are used for culinary purposes and cultivated in gardens, or are destined for feeding cattle and sheep." ²⁴

The most likely meaning of "tomato," based on dictionary definitions of the time, was that a tomato was a fruit. And yet, Justice Gray concluded that a tomato was a vegetable within the meaning of the Tariff Act of 1883. ²⁵ Justice Gray agreed with plaintiff that: "[b]otanically speaking, tomatoes are the fruit of a vine, just as are cucumbers, squashes, beans and peas." ²⁶ He explained that "in the common language of the people . . . , all these are vegetables, which are grown in kitchen gardens, and . . . [are] usually served at dinner in, with or after the soup, fish or meats which constitute the principal of the repast, and not, like fruits, generally, as dessert." ²⁷

In botany, tomatoes are fruit, but in the common language of people tomatoes are vegetables. The lessons of *Nix v. Hedden* are, first, that most people ²⁸ are probably wrong in thinking that the tomato is a vegetable, and second, that the dictionary does not explain this common misconception. ²⁹ The dictionary in this instance did not explain the "ordinary meaning" ³⁰ of tomato, nor did it explain "the common language of the people." ³¹ If the dictionaries were "aids to the memory and under-

22. WEBSTER'S AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1159 (1860) (emphasis added) [hereinafter *Webster's*]. It may be of general interest that *Webster's* added: "It is called sometimes the LOVE-APPLE." *Id.* This nickname is "in allusion to its supposed power of exciting the tender feelings." THE IMPERIAL DICTIONARY 1027 (1854).

23. *Webster's*, *supra* note 22, at 485.

24. *Id.* at 1228.

25. 149 U.S. at 307.

26. *Id.* Whether tomatoes can speak botanically is a fascinating question for future researchers.

27. *Id.*

28. "Most people" probably includes the Reagan Administration, which classified ketchup as a vegetable. Richard Dawson on the television game show *Family Feud* used to explain frequently that tomatoes really are fruit, but no study to date suggests that his wisdom has spread through the general populace.

29. This not only still continues to be the case, but a modern dictionary even features a picture of a tomato under its definition of "fruit." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 916 (Unabridged, 1961) [hereinafter *Webster's Third*]. Incidentally, *Webster's Third* does not mention that the tomato is also called a love-apple, but does say that a prostitute may be known as a tomato. *Id.* at 2406. While I've never heard "tomato" used this way, there's no telling what might happen to a person's morals if she eats too many love-apples.

30. 149 U.S. at 306.

31. *Id.* at 307.

standing of the court,"³² in *Nix* it was only because the Court promptly chose to ignore the dictionary definitions. The Court properly decided that using dictionaries to define a tomato was not fruitful.

Although the Court in *Nix* did not choose to follow the dictionary definitions, *Nix* is a good decision because it illustrates the proper role of dictionaries in legal thinking. The Court said that words "*must* receive their ordinary meaning,"³³ and that dictionaries are admitted as aids to the memory and understanding of the Court. The Court did not say that it *must* follow the dictionary definition. The dictionary is always a good starting point, but should never take the place of examining all possible meanings of a word. The *Nix* Court properly considered numerous dictionary definitions but decided not to follow them because they did not express the common understanding of the people. The dictionary aided the Court's memory by reminding the Court to ignore its definition of tomato.

In *Nix*, the dictionary definition was permissive, not required, and the Court did not try to hide its rejection of the dictionary definition. By contrast, the Court in the 1976 decision, *Ernst & Ernst v. Hochfelder*, acted as if it had to accept the dictionary definitions it actually ignored.

The issue in *Ernst* was whether an action for civil damages was permitted under section 10(b) of the Securities Exchange Act of 1934 when there was no allegation of intent to deceive, manipulate, or defraud.³⁴ In its amicus curiae brief, the Securities Exchange Commission argued that "nothing in the language 'manipulative or deceptive device or contrivance' [of section 10(b)] limits its operation to knowing or intentional practices."³⁵ Writing for the majority, Justice Powell responded that "[t]he argument simply ignores the use of the words 'manipulative,' 'device,' and 'contrivance'—terms that make unmistakable a congressional intent to proscribe a type of conduct quite different from negligence."³⁶

Justice Powell quoted dictionary definitions of "device," "contrive," and "manipulate,"³⁷ without explaining why these definitions supported his opinion that these terms were limited to intentional behavior. In Justice Powell's cursory discussion of these terms, it appears that the dictionary was mandatory authority, not an aid to the memory and understanding of the Court. Justice Powell incorrectly used the dictionary as an

32. *Id.*

33. *Id.* at 306 (emphasis added). The Court also had to determine the statute's audience. "Tomato" could mean "fruit" in a statute aimed at botanists.

34. 425 U.S. at 187-88.

35. *Id.* at 197-98.

36. *Id.* at 199.

37. *Id.* n.20-21 (quoting WEBSTER'S NEW INTERNATIONAL DICTIONARY (Unabridged, 2d ed., 1945) [hereinafter *Webster's Second*]).

end rather than as a beginning.

The real problem with the *Ernst* decision, however, is not that Justice Powell followed the dictionary definitions of "device," "contrivance," and "manipulate." These words most probably are restricted to intentional conduct, and dictionary definitions properly reminded the Court of the meaning of these words in the common language of the people. The weakness of the decision is that section 10(b) makes unlawful the use or employment of "any manipulative or deceptive device or contrivance."³⁸ Justice Powell used the dictionary to define virtually every word in the section except "deceptive." The dictionary Justice Powell used defines "deceptive" as "tending to deceive; having power to mislead; as, a *deceptive* appearance."³⁹ "Deception" is defined as the "act of deceiving or misleading; fact or state of being deceived or misled."⁴⁰ One easily could be deceived without someone intentionally deceiving him. For example, a mirage could have the deceptive appearance of being an oasis even though no one was intentionally deceived.

Justice Powell believed that the statute did not "impose liability for wholly faultless conduct where such conduct results in harm to investors."⁴¹ He should have said that although something can be intentionally or unintentionally deceptive, in this context liability should be imposed only for intentional conduct.

Section 10(b) made unlawful "any manipulative or deceptive device or contrivance."⁴² As in *Nix*, the Court in *Ernst* ignored a dictionary definition. In *Nix*, the Court openly rejected dictionary definitions in order to interpret a meaning in the common language of the people. In *Ernst*, on the other hand, the Court's approach was: "Look up some words in the dictionary—especially if they support your opinion, don't look up others—especially if they don't support your opinion." The *Ernst* Court, pretending to accept dictionary definitions, covertly ignored them. Justice Powell used the dictionary to disguise, not explain, the basis of his decision. As a result, the meaning of section 10(b) is inconsistent with the common language of the people. In *Ernst*, Justice Powell improperly used the dictionary.

38. Securities Exchange Act of 1934 § 10(b) (emphasis added).

39. *Webster's Second*, *supra* note 37, at 679.

40. *Id.*

41. 425 U.S. at 198. Justice Powell also improperly used the dictionary in *Parratt v. Taylor*, 451 U.S. 527 (Powell, J., concurring). Justice Powell used *Webster's Second* to conclude that a negligent act cannot cause a constitutional deprivation. 451 U.S. at 548. Justice Powell cites the dictionary definition of "deprive." *Id.* at n.4. If he had looked up "deprivation," the word he was claiming to define, he would have seen "state of being deprived." *Webster's Second*, *supra* note 37, at 703. A person can be in the state of being deprived even though no one intentionally caused the deprivation.

42. Securities Exchange Act of 1934 § 10(b) (emphasis added).

IV.

In some instances, like *Nix v. Hedden*, dictionary definitions are so insignificant that the Court is better off ignoring them. A modern example would be if the Court were called on to decide the meaning of the word "buxom." Everyone knows that "buxom" means "having large breasts." And yet, *Webster's Second* defines "buxom" as: "Having the characteristics of health, vigor, and comeliness; plump and rosy; jolly."⁴³ The Court should ignore this definition entirely and instead use *Webster's Third* because its definition of "buxom" includes "full-bosomed."⁴⁴

If there is a conflict between *Webster's Second* and *Webster's Third*, which definition should the Court choose? The answer is not as simple as it may appear. It is tempting to draw the obvious chronological distinction between the two editions and decide that *Webster's Third* be used to find the modern definitions of words. The problem is that *Webster's Third*, which the Court often consults, was considered, in the words of one critic, "a very great calamity,"⁴⁵ "a scandal and a disaster,"⁴⁶ and indeed "a fighting document."⁴⁷

And the enemy it is out to destroy is every obstinate vestige of linguistic punctilio, every surviving influence that makes for the upholding of standards, every criterion for distinguishing between better usages and words. In other words, it has gone over bodily to the school that construes traditions as enslaving, the rudimentary principles of syntax as crippling, and taste as irrelevant.⁴⁸

The author concluded that people expect dictionaries to provide solutions for difficult problems of usage. *Webster's Third*, he complained, "seems to make a virtue of leaving [these problems] in flux, with the explanation that many matters are subjective and that the individual must decide them for himself"⁴⁹

Webster's Third was not without its defenders. Bergen Evans argued that "a dictionary is good only insofar as it is a comprehensive and accu-

43. *Webster's Second*, *supra* note 37, at 366.

44. *Webster's Third*, *supra* note 29, at 306. Another example is the word "nubile," which *Webster's Second*, *supra* note 37, at 1671 defines as "marriageable," and *Webster's Third*, *supra* note 29, at 1547 defines as "physically suited for or desirous of sexual relationship." There is no telling what the Court would do if it were called on to define a "nubile, buxom" woman.

45. Follett, *Sabotage in Springfield*, *THE ATLANTIC MONTHLY* (May 1962), reprinted in *EXPLORING LANGUAGE* 47, 48 (Goshgarian ed., 2d ed. 1980).

46. *Id.* at 49.

47. *Id.*

48. *Id.*

49. *Id.* at 55.

rate description of current usage."⁵⁰ In Evans' opinion, a dictionary must be descriptive rather than prescriptive because "the full truth about any language, and especially about American English today, is that there are many areas in which certainty is impossible and simplification is misleading."⁵¹ A dictionary *cannot* provide desired answers because "[i]n all the finer shades of meaning . . . the user is on his own, whether he likes it or not."⁵²

Although the Follett-Evans debate took place in 1962, even now some writers believe that *Webster's Third* is a great calamity, which should not be consulted.⁵³ In many cases, when the two dictionaries conflict, the reader must choose between them. In making that choice, the reader may be forced to choose between such abstractions as desire for order versus acceptance of flux; desire for stability versus acceptance of tension; and a desire to receive standards from the past versus an ability to create the future.

And the Court must choose, if not between dictionaries, then at least between alternative definitions within one dictionary. The court in *Northern Pacific Railway v. Soderberg*,⁵⁴ for example, decided that "the word 'mineral' is used in so many senses, dependent upon the context, that the ordinary definitions of the dictionary throw but little light upon its signification in a given case."⁵⁵ Even a word more specific than "mineral" usually has two or three definitions and the Court must choose to accept one and reject the rest. In other words, the Court must use one meaning to aid its memory and forget the rest.

V.

The Court's attempts to use the dictionary to discover the meanings of words have been unsatisfactory partly because dictionaries, contrary to popular assumptions, do not give the meanings of words. "[B]ecause words are defined in terms of other words, and these, in turn, are defined in terms of still other words, . . . [a] person can energetically explore a dictionary and still be left with other words, not with 'meanings.'"⁵⁶ Dictionaries offer synonyms, not meanings. In searching for the "meaning" of

50. Evans, *But What's A Dictionary For?*, THE ATLANTIC MONTHLY (May 1962), reprinted in EXPLORING LANGUAGE 58, 60 (Goshgarian ed., 2d ed. 1980).

51. *Id.* at 61.

52. *Id.* at 67.

53. See, e.g., W. ZINSSER, ON WRITING WELL (2d ed. 1980). "Careful writers . . . cling to their copy of any Webster dictionary based on the superb Second Edition because the Third Edition is too permissive." *Id.* at 37.

54. 188 U.S. 526 (1903).

55. *Id.* at 530.

56. P. FARB, *supra* note 15, at 223.

a word like "beauty," for example, someone can make the circular journey from "beauty" as "pleasing quality" to "pleasing" as "agreeable," only to find that "agreeable" is defined as "pleasing."⁸⁷ When we discover that "beauty" means "pleasing quality," "[w]e hardly notice that actually we choose among many synonyms, relating to the different senses of the questioned word, so that a proffered or selected synonym may be a subtle persuasion or manipulation."⁸⁸ Dictionaries usually do define "beauty" as "pleasing quality;" however, dictionaries offer many other definitions of "beauty." "A trait or combination of traits calling forth admiration, praise, or respect"⁸⁹ is but one of many possible choices. Selecting one synonym among many may be a form of manipulation rather than discovering the meaning of the word.

Why, then, does the Court persistently treat dictionaries as repositories of meaning? Perhaps the Court has a mistaken notion about language. Professor James Boyd White has written that:

When we look at particular words, it is not their translation into statements of equivalence that we should seek but an understanding of the possibilities they represent for making and changing the world Their meaning resides not in their reducibility to other terms but in their irreducibility; it resides in the particular ways each can be combined with other words in a wide variety of contexts.⁹⁰

In looking for one meaning of a word in a dictionary, the Court seeks to translate the word into a statement of equivalence, a one-to-one correspondence between words and meanings. Instead, the Court should try to understand the possibilities the word represents for making and changing the world. At the very least, the Court should admit that a dictionary offers a range of possible meanings for virtually every word at issue in a legal dispute. Otherwise, the reader of an opinion can never be sure whether the Court is ignorant about a word's meaning or whether the Court is deliberately ignoring aspects of a word's meaning in order to reach a desired, though underhanded, result. The Court should examine the possible meanings of the word, and explain why it selected one meaning in a particular context.⁹¹

57. *Id.* See also C. OGDEN & I. RICHARDS, *THE MEANING OF MEANING* (1953): "The dictionary is list of substitute symbols. It says in effect: 'This can be substituted for that in such and such circumstances.' . . . The Dictionary thus serves to mark the overlaps between the references of symbols rather than to define their fields." *Id.* at 207.

58. W. PROBERT, *LAW, LANGUAGE, AND COMMUNICATION* 28 (1972).

59. *Webster's Third*, *supra* note 29, at 194.

60. J. WHITE, *WHEN WORDS LOSE THEIR MEANING* 11 (1984).

61. At the very least, if the Court refers to a dictionary meaning, it should cite a dictionary definition. Justice Rehnquist has the habit of referring to "ordinary dictionary" definitions without citation. See, e.g., *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983); *Wain-*

Professor White has described this method of reading as "profoundly *antibureaucratic*."⁶² The judge is not "merely a voice of authority."⁶³ "The judge is always a *person* deciding a case the story of which can be characterized in a rich range of ways; and he (or she) is always responsible both for his choice of characterization and for his decision."⁶⁴ The meaning of a word can also be characterized in a rich range of ways. The judge, as reader of the dictionary, "must create his own language."⁶⁵ A dictionary offers a rich range of meanings, and a judge is always responsible for his or her choice.

The problem with the way the Court uses the dictionary is what White calls the "great vice of theory in the law":⁶⁶ "[I]t disguises the true power that the judge actually has, which it is his true task to exercise and to justify, under a pretense that the result is compelled by one or another intellectual system."⁶⁷ Here, the "intellectual system" is the belief that the dictionary is a source of meaning. A more honest method of reading the dictionary would define the work of law, not as found in the dictionary, but "as the work of individual minds, for which individuals are themselves responsible."⁶⁸

In Professor White's view, good legal writing acknowledges inconsistency, tension, ambiguity, and uncertainty.⁶⁹ Indeed, good writing welcomes these challenges. At bottom, the greatest vice of the Court's use of the dictionary is that it betrays a fear of tension and a fear of uncertainty. The Court pretends that dictionaries contain meanings, which provide answers, because the Court is afraid to grapple with the tension within a word's rich possibilities. The heart of White's philosophy suggests a better way for courts to use dictionaries. White would say that courts desire to find mathematical equivalences between words and meaning, and that courts desire to use these meanings to reach legal results approaching scientific certainty. These ideals are not only impossible to realize, but White believes that tension and uncertainty are ultimately more desirable than mathematical equivalences and scientific certainty.⁷⁰ As White metaphorically puts it, when we accept the radical

wright v. Witt, 469 U.S. 412, 433 (1985).

62. J. WHITE, HERACLES' BOW, ESSAYS ON THE RHETORIC AND POETICS OF LAW 123 (1985) (emphasis in original) [hereinafter HERACLES' BOW].

63. *Id.*

64. *Id.* (emphasis in original).

65. WHEN WORDS LOSE THEIR MEANING, *supra* note 60, at 135.

66. HERACLES' BOW, *supra* note 62, at 123.

67. *Id.*

68. *Id.* at 123-24.

69. *Id.* at 124.

70. See *id.* at 39-40. "The rhetorician, like the lawyer, . . . [must] accept the condition of radical uncertainty in which we live" *Id.* "[W]hile we cannot have the certainties

uncertainty in which we live, "[w]hen we discover that we have in this world no earth or rock to stand and walk upon, but only shifting sea and sky and wind, the mature response is not to lament the loss of fixity, but to learn to sail."⁷¹ When a reader is forced to learn that the meaning of words is radically uncertain and that words are filled with the tension of possible meanings, then the reader discovers that he, as an individual, must create his own language.

For White, reading becomes an act of reconstitution.⁷² Recognizing that words represent a range of possible meanings, rather than a mathematical equivalence, leads to a loss of certainty. At first this recognition leads to a loss of meaning. It may seem that if dictionaries do not give a word's meaning, then the word is meaningless. White responds, "[w]ords are made to lose their meaning so that they may be given a meaning of a new and deeper kind."⁷³ Words lose their singular meaning so that all their

we yearn for, we ought not on that account be afraid, for we have in fact always lived, and can only live, with radical uncertainty." *Id.* at 128.

71. *Id.* at 95. This quotation is the heart of White's philosophy. Joseph Conrad similarly wrote:

"A man that is born falls into a dream like a man who falls into the sea. If he tries to climb out into the air as inexperienced people endeavor to do, he drowns . . . the way is to the destructive element submit yourself, and with the exertions of your hands and feet in the water make the deep, deep sea keep you up."

J. CONRAD, *LORD JIM* 153 (Riverside ed. 1958). White's writings attempt to prove that uncertainty is a positive source of creativity, not something to be overcome. *See also* R. SENNETT, *THE USES OF DISORDER: PERSONAL IDENTITY & CITY LIFE* (1970). "The great promise of city life is a new kind of confusion possible within its borders, an anarchy that will not destroy men, but make them richer and more mature. *Id.* at 108. R. BARTHES, *THE PLEASURE OF THE TEXT* (Farrar, Straus & Giroux ed., Miller trans. 1975). "Text of bliss: the text that imposes a state of loss, the text that discomforts . . . brings to a crisis his relation with language." *Id.* at 14.

72. *See, e.g.*, *WHEN WORDS LOSE THEIR MEANING*, *supra* note 60, at 95.

73. *Id.* at 136. White's linguistic model is theological. Words fall into meaninglessness, but are redeemed with richer meaning. This theological character of White's thought distinguishes him from the deconstructionists. As White explains, although his theory has affinities to deconstruction, unlike most deconstructionists he believes "in the accessibility of the text to the mind of the reader and in the possibility of a coherent and shared reading of it." *Id.* at 290. The deconstructive philosophy of Jacques Derrida is more radical. For Derrida, a coherent and shared reading of a text is impossible; there is only play. J. DERRIDA, *OF GRAMMATOLOGY* (Johns Hopkins ed., Spivak trans. 1976). "One could call *play* the absence of the transcendental signified as limitlessness of play, that is to say as the destruction of ontology and the metaphysics of presence." *Id.* at 50. Another way to explain White's departure from deconstruction is to say that for White, the possibility of a coherent and shared reading of a text is the center of the text. White explains, "[t]he true center of value of a text, its most important meaning, is to be found in the community that it establishes with its reader." *WHEN WORDS LOSE THEIR MEANING*, *supra* note 60, at 17. Deconstructionists, on the other hand, agree with William Butler Yeats, who wrote in "The Second Coming": "Things fall apart; the center cannot hold."

possible meanings can be explored.

VI.

Hart and Sacks suggested that a good judge must be "linguistically wise and not naive."⁷⁴ According to Professor White, a person becomes linguistically wise by learning to acknowledge tension and in struggling toward "the comprehension of contraries."⁷⁵ The good judge speaks in "a double voice;"⁷⁶ the best judge, "like Socrates, exposes himself to refutation."⁷⁷ Judges should not hand down meanings of words from on high. Instead, lawyers as part of the adversarial process should always be arguing about the meaning of words. Each lawyer should be armed with dictionaries, novels, poems, and anything else that might convince the judge. The best judge, when consulting a dictionary, or any other source a lawyer might bring to his attention, recognizes a multiplicity of meaning, acknowledges that a choice of meaning must be made, explains his or her choice, and realizes that another judge or lawyer might be able to find a better choice.

The best judge also appreciates the complex, multifaceted nature of words. As Justice Holmes explained, "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."⁷⁸ The best judge not only appreciates this complexity, but he also loves this complexity because the best judge, like the best lawyer, loves words.

As corny as it sounds, judges will be better judges when they learn to love words. How can a judge learn to love words? First, judges should study "the disorderly conduct of words."⁷⁹ As Carter explains, words are often ambiguous, and because the dictionary can reveal a multitude of conflicting meanings, dictionaries create rather than resolve ambiguity.⁸⁰ Judges would be better judges if they enjoyed this multiplicity of meaning rather than pretending it does not exist. Second, a judge should learn that "words, like human beings, are sometimes better understood when

74. H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1412 (Tentative ed. 1958).

75. WHEN WORDS LOSE THEIR MEANINGS, *supra* note 60, at 269.

76. *Id.*

77. *Id.*

78. *Towne v. Eisner*, 245 U.S. 418, 425 (1918). It is interesting to note that in *University of Cal. Regents v. Bakke*, 438 U.S. 265 (1978), Justice Powell quotes Justice Holmes' remark, but then concludes that racial classifications are inherently suspect. *Id.* at 284, 291. Apparently, the meanings of words change but the meaning of "discrimination" does not.

79. L. CARTER, *supra* note 9, at 62.

80. *Id.* at 63.

the reader knows the company they keep."⁸¹ Dictionaries usually give an example of how a word is used in context, and often provide illustrative examples from literature.⁸² If today a judge had to decide whether a tomato was a fruit or vegetable, perhaps consulting the *Oxford English Dictionary* (*OED*) would help. As Donald Hall explains, the *OED* includes thirty-six contexts for the word vegetable as a noun from 1582 and includes many shades of meaning.⁸³

Critics might defend the Court's current approach to the dictionary by arguing that the *OED* needlessly complicates the judicial task. Why not simply consult a readily accessible dictionary and pick the meaning that seems best? The response is that the judge's approach to deciding the meaning of words *should* be complicated because meaning is difficult to find. Judges need to know more, not less, about meaning. As Donald Hall concludes, "the more you know, the more you respect the integrity of the word; integrity means wholeness; a word's wholeness includes all its possibilities: its family, its insides."⁸⁴

Judges also could become linguistically wiser by reading good prose.⁸⁵ Good writers immerse themselves in language.⁸⁶ As James Boyd White would say, if you want to know what "toleration" means, don't look in a

81. P. FARB, *supra* note 15, at 223.

82. "Unabridged dictionaries are historical records . . . of the meanings with which words have in fact been used by writers of good repute." H. HART & A. SACKS, *supra* note 74, at 1412.

83. D. HALL, *WRITING WELL* 68-69 (3d ed. 1979).

84. *Id.* at 69.

85. Justice Frankfurter said "The best way to prepare for the law is to come to the study of the law as a well-read person." *Advice to a Young Man Interested in Going Into Law* in *OF LAW AND MEN* 103 (1956) (quoted in Edwards, *Lawyers are Becoming Illiterate, Broad-Based Training is Needed*, NATIONAL LAW JOURNAL, Oct. 26, 1987, at p. 15). Ms. Edwards begins her article by defining "illiteracy" from a dictionary. *Id.* See also Snyder, *The Great Authors and Their Influence on the Supreme Court*, 7 LEGAL REFERENCE SERVICES Q. 285 (1987).

86. "Such a language can be learned only by immersion in its processes." WHEN WORDS LOSE THEIR MEANING, *supra* note 60, at 276. Writers enjoy thinking about words. See, e.g., J. JOYCE, *A PORTRAIT OF THE ARTIST AS A YOUNG MAN* (Penguin, 1978), in which Joyce's hero, the young Dedalus, thinks about the word "suck":

Suck was a queer word. The fellow called Simon Moonan that name because Simon Moonan used to tie the prefect's false sleeves behind his back and the prefect used to let on to be angry. But the sound was ugly. Once he had washed his hands in the lavatory of the Wicklow Hotel and his father pulled the stopper up by the chain after and the dirty water went down through the hole in the basin. And when it had all gone down slowly the hole in the basin had made a sound like that: suck. Only louder.

Id. at 11. See also G. KEILLOR, *LAKE WOBEGON DAYS* 223 (Penguin, 1985) ("One word I liked was popular. It sounded good, it felt good to say, it made lights come on in my mouth.").

dictionary, read Edmund Burke.⁸⁷ If Justice Powell had wanted to know the meaning of "deceptive," perhaps he should have read Henry Fielding's *Joseph Andrews*, which explains that:

The story of the miser, who, from long accustoming to cheat others, came at last to cheat himself, and with great delight and triumph picked his own pocket of a guinea to convey his hoard, is not impossible or improbable. In like manner it fares with the practisers of deceit, who, from having long deceived their acquaintance, gain at last a power of deceiving themselves, and acquire that very opinion (however false) of their own abilities, excellencies, and virtues, into which they have for years perhaps endeavoured to betray their neighbours.⁸⁸

Then Justice Powell could have said that although section 10(b) prohibited "deceptive" devices, someone who deceives himself should not be protected. By using literary sources, a judge could acknowledge the existence of a word's multiple meanings and be in a better position to explain his or her choice in a particular context.

And judges can become better judges by reading the dictionary for its own sake.⁸⁹ As one writer explains, the only way to be a good writer "is to care deeply about words . . . [n]otice the decisions that other writers make in their choice of words and be finicky about the ones that you select from the vast supply."⁹⁰ The writer tells us to "get in the habit of using dictionaries . . . Master the small gradations between words that seem to be synonyms."⁹¹

At the end of *Heracles' Bow*, James Boyd White explains that his purpose has been to identify "the largely untapped power"⁹² of law to achieve justice and to criticize our culture, "a power that can be realized as judges and lawyers come to accept their individual responsibility for what they say and do and learn to make their official voices more fully their own."⁹³ Dictionaries also may well contain an untapped power if

87. WHEN WORDS LOSE THEIR MEANING, *supra* note 60, at 217-18 (quoting E. Burke, REFLECTIONS ON THE REVOLUTION IN FRANCE AND ON THE PROCEEDINGS IN LONDON RELATIVE TO THAT EVENT 258-59 (Penguin ed. 1969)).

88. H. FIELDING, *JOSEPH ANDREWS AND SHAMELA* 256 (Riverside ed. 1961).

89. H. WIENER, *ANY CHILD CAN WRITE* 91 (1978).

90. W. ZINSSER, *supra* note 83, at 37. See also D. HALL, *supra* note 83. "It helps to love words, and a love of words is something that we can develop. The growing writer finds pleasure in becoming a word collector, picking up, examining, and keeping new words (or familiar . . .) like seashells or driftwood." *Id.* at 68.

91. W. ZINSSER, *supra* note 53, at 37.

92. *HERACLES' BOW*, *supra* note 62, at 242.

93. *Id.*

only judges and lawyers come to accept their individual responsibility for determining the meaning of words.

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