1. Ronald Dworkin on Law and Chess


1. Institutional rights

... Institutional rights may be found in institutions of very different character. A chess player has a ‘chess’ right to be awarded a point in a tournament if he checkmates an opponent. A citizen in a democracy has a legislative right to the enactment of statutes necessary to protect his free speech. In the case of chess, institutional rights are fixed by constitutive and regulative rules that belong distinctly to the game, or to a particular tournament. Chess is, in this sense, an autonomous institution; I mean that it is understood, among its participants, that no one may claim an institutional right by direct appeal to general morality. No one may argue, for example, that he has earned the right to be declared the winner by his general virtue. But legislation is only partly autonomous in that sense. There are special constitutive and regulative rules that define what a legislature is, and who belongs to it, and how it votes, and that it may not establish a religion. But these rules belonging distinctly to legislation are rarely sufficient to determine whether a citizen has an institutional right to have a certain statute enacted; they do not decide, for example, whether he has a right to minimum wage legislation. Citizens are expected to repair to general considerations of political morality when they argue for such rights.

The fact that some institutions are fully and others partly autonomous has the consequence ... that the institutional rights a political theory acknowledges may diverge from the background rights it provides. Institutional rights are nevertheless genuine rights. Even if we suppose that the poor have an abstract background right to money taken from the rich, it would be wrong, not merely unexpected, for the referees of a chess tournament to award the prize money to the poorest contestant rather than the contestant with the most points. It would provide no excuse to say that since tournament rights merely describe the conditions necessary for calling the tournament a chess tournament, the referee’s act is justified so long as he does not use the word ‘chess’ when he hands out the award. The participants entered the tournament with the understanding that chess rules would apply; they have genuine rights to the enforcement of these rules and no others.
Institutional autonomy insulates an official’s institutional duty from the greater part of background political morality. But how far does the force of this insulation extend? Even in the case of a fully insulated institution like chess some rules will require interpretation or elaboration before an official may enforce them in certain circumstances. Suppose some rule of a chess tournament provides that the referee shall declare a game forfeit if one player ‘unreasonably’ annoys the other in the course of play. The language of the rule does not define what counts as ‘unreasonable’ annoyance; it does not decide whether, for example, a player who continually smiles at his opponent in such a way as to unnerve him, as the Russian grandmaster Tal once smiled at Fischer, annoys him unreasonably.

The referee is not free to give effect to his background convictions in deciding this hard case. He might hold, as a matter of political theory, that individuals have a right to equal welfare without regard to intellectual abilities. It would nevertheless be wrong for him to rely upon that conviction in deciding difficult cases under the forfeiture rule. He could not say, for example, that annoying behavior is reasonable so long as it has the effect of reducing the importance of intellectual ability in deciding who will win the game. The participants, and the general community that is interested, will say that his duty is just the contrary. Since chess is an intellectual game, he must apply the forfeiture rule in such a way as to protect, rather than jeopardize, the role of intellect in the contest.

We have, then, in the case of the chess referee, an example of an official whose decisions about institutional rights are understood to be governed by institutional constraints even when the force of these constraints is not clear. We do not think that he is free to legislate interstitially within the ‘open texture’ of imprecise rules.\(^1\) If one interpretation of the forfeiture rule will protect the character of the game, and another will not, then the participants have a right to the first interpretation. We may hope to find, in this relatively simple case, some general feature of institutional rights in hard cases that will bear on the decision of a judge in a hard case at law.

I said that the game of chess has a character that the referee’s decisions must respect. What does that mean? How does a referee know that chess is an intellectual game rather than a game of chance or an exhibition of digital ballet? He may well start with what everyone knows. Every institution is placed by its

participants in some very rough category of institution; it is taken to be a game rather than a religious ceremony or a form of exercise or a political process. It is, for that reason, definitional of chess that it is a game rather than an exercise in digital skill. These conventions, exhibited in attitudes and manners and in history, are decisive. If everyone takes chess to be a game of chance, so that they curse their luck and nothing else when a piece *en prise* happens to be taken, then chess is a game of chance, though a very bad one.

But these conventions will run out, and they may run out before the referee finds enough to decide the case of Tal’s smile. It is important to see, however, that the conventions run out in a particular way. They are not incomplete, like a book whose last page is missing, but abstract, so that their full force can be captured in a concept that admits of different conceptions; that is, in a contested concept. The referee must select one or another of these conceptions, not to supplement the convention but to enforce it. He must construct the game’s character by putting to himself different sets of questions. Given that chess is an intellectual game, is it, like poker, intellectual in some sense that includes ability at psychological intimidation? Or is it, like mathematics, intellectual in some sense that does not include that ability? This first set of questions asks him to look more closely at the game, to determine whether its features support one rather than the other of these conceptions of intellect. But he must also ask a different set of questions. Given that chess is an intellectual game of some sort, what follows about reasonable behavior in a chess game? Is ability at psychological intimidation, or ability to resist such intimidation, really an intellectual quality? These questions ask him to look more closely at the concept of intellect itself. . . .

This is, of course, only a fanciful reconstruction of a calculation that will never take place; any official’s sense of the game will have developed over a career, and he will employ rather than expose that sense in his judgments. [Such a] reconstruction [of the questions that the referee must ask] enables us to see how the concept of the game’s character is tailored to a special institutional problem. Once an autonomous institution is established, such that participants have institutional rights under distinct rules belonging to that institution, then hard cases may arise that must, in the nature of the case, be supposed to have an answer. If Tal does not have a right that the game be continued, it must be because the forfeiture rule, properly understood, justifies the referee’s

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intervention; if it does, then Fischer has a right to win at once. It is not useful to
speak of the referee's 'discretion' in such a case.... The proposition that there is
some 'right' answer does not mean that the rules of chess are exhaustive and
unambiguous; rather it is a complex statement about the responsibilities of its
officials and participants....

In chess the general ground of institutional rights must be the tacit consent
or understanding of the parties. They consent, in entering a chess tournament, to
the enforcement of certain and only those rules, and it is hard to imagine any other
general ground for supposing that they have any institutional rights. But if that is
so, and if the decision in a hard case is a decision about which rights they actually
have, then the argument for the decision must apply that general ground to the
hard case.

The hard case puts, we might say, a question of political theory. It asks
what it is fair to suppose that the players have done in consenting to the forfeiture
rule. The concept of a game's character is a conceptual device for framing that
question. It is a contested concept that internalizes the general justification of the
institution so as to make it available for discriminations within the institution
itself. It supposes that a player consents not simply to a set of rules, but to an
enterprise that may be said to have a character of its own; so that when the
question is put - To what did he consent in consenting to that? - the answer may
study the enterprise as a whole and not just the rules.

5. Legal rights

a. Legislation

Legal argument, in hard cases, turns on contested concepts whose nature
and function are very much like the concept of the character of a game. These
include several of the substantive concepts through which the law is stated, like
the concepts of a contract and of property. But they also include two concepts of
much greater relevance to the present argument. The first is the idea of the
'intention' or 'purpose' of a particular statute or statutory clause. This concept
provides a bridge between the political justification of the general idea that
statutes create rights and those hard cases that ask what rights a particular statute
has created. The second is the concept of principles that 'underlie' or are
'embedded in' the positive rules of law. This concept provides a bridge between
the political justification of the doctrine that like cases should be decided alike
and those hard cases in which it is unclear what that general doctrine requires.
These concepts together define legal rights as a function, though a very special function, of political rights. If a judge accepts the settled practices of his legal system – if he accepts, that is, the autonomy provided by its distinct constitutive and regulative rules – then he must, according to the doctrine of political responsibility, accept some general political theory that justifies these practices. The concepts of legislative purpose and common law principles are devices for applying that general political theory to controversial issues about legal rights.

We might therefore do well to consider how a philosophical judge might develop, in appropriate cases, theories of what legislative purpose and legal principles require. We shall find that he would construct these theories in the same manner as a philosophical referee would construct the character of a game. I have invented, for this purpose, a lawyer of superhuman skill, learning, patience and acumen, whom I shall call Hercules. I suppose that Hercules is a judge in some representative American jurisdiction. I assume that he accepts the main uncontroversial constitutive and regulative rules of the law in his jurisdiction. He accepts, that is, that statutes have the general power to create and extinguish legal rights, and that judges have the general duty to follow earlier decisions of their court or higher courts whose rationale, as lawyers say, extends to the case at bar. . . .

2. Smith v. United States

508 U.S. 229 (1993)

Justice O'CONNOR delivered the opinion of the Court, in an opinion joined by Justices White, Kennedy, Thomas, Blackmun, and Chief Justice Rehnquist.

We decide today whether the exchange of a gun for narcotics constitutes "use" of a firearm "during and in relation to . . . [a] drug trafficking crime" within the meaning of 18 U.S.C. §924(c)(1). We hold that it does. [18 United States Code §924 is a federal statute that provides for sentence enhancements in certain circumstances.] The trial court had found Smith guilty of the underlying offense

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1 The relevant language of the statute provides:

Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm,
of drug trafficking, and that decision was not before the Supreme Court in this case. The question, instead, was whether conduct such as Smith's met the statutory requirements for an enhanced sentence. If so, thirty years would be added to Smith's sentence.]

I

Petitioner John Angus Smith and his companion went from Tennessee to Florida to buy cocaine; they hoped to resell it at a profit. While in Florida, they met petitioner's acquaintance, Deborah Hoag. Hoag agreed to, and in fact did, purchase cocaine for petitioner. She then accompanied petitioner and his friend to her motel room, where they were joined by a drug dealer. While Hoag listened, petitioner and the dealer discussed petitioner's MAC-10 firearm... The dealer expressed his interest in becoming the owner of a MAC-10...

Unfortunately for petitioner, Hoag had contacts not only with narcotics traffickers but also with law enforcement officials... [S]he informed the Broward County Sheriff's Office of petitioner's activities. The Sheriff's Office responded quickly, sending an undercover officer to Hoag's motel room... [T]he undercover officer presented himself to petitioner as a pawnshop dealer. Petitioner... presented the officer with a proposition: He had an automatic MAC-10 and silencer with which he might be willing to part. Petitioner then pulled the MAC-10 out of a black canvas bag and showed it to the officer... Rather than asking for money, however, petitioner asked for drugs. He was willing to trade his MAC-10, he said, for two ounces of cocaine. The officer told petitioner that he was just a pawnshop dealer and did not distribute narcotics. Nonetheless, he indicated that he wanted the MAC-10 and would try to get the cocaine. The officer then left, promising to return within an hour... [b]ut petitioner was not content to wait. The officers who were conducting surveillance saw him leave the motel room carrying a gun bag... Petitioner eventually was apprehended...

A grand jury... returned an indictment charging petitioner with, among other offenses, two drug trafficking crimes... Most important here, the indictment alleged that petitioner knowingly used the MAC-10 and its silencer

shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle or short-barreled shotgun to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silence or firearm muffler, to imprisonment for thirty years.
during and in relation to a drug trafficking crime. . . . The jury convicted petitioner on all counts.

On appeal, petitioner argued that §924(c)(1)'s penalty . . . covers only situations in which the firearm is used as a weapon. According to petitioner, the provision does not extend to defendants who use a firearm solely as a medium of exchange or for barter. . . . The plain language of the statute, the [appellate] court explained, imposes no requirement that the firearm be used as a weapon. Instead, any use of “the weapon to facilitate in any manner the commission of the offense” suffices. . . .

II

Section 924(c)(1) requires the imposition of specified penalties if the defendant, “during and in relation to any crime of violence or drug trafficking crime[,] uses or carries a firearm.” By its terms, the statute requires the prosecution to make two showings. First, the prosecution must demonstrate that the defendant “use[d] or carry[ed] a firearm.” Second, it must prove that the use or carrying was “during and in relation to” a “crime of violence or drug trafficking crime.”

A

Petitioner argues that exchanging a firearm for drugs does not constitute “use” of the firearm within the meaning of the statute. He points out that nothing in the record indicates that he fired the MAC-10, threatened anyone with it, or employed it for self-protection. In essence, petitioner argues that he cannot be said to have “use[d]” a firearm unless he used it as a weapon, since that is how firearms most often are used. . . . [W]e confine our discussion to what the parties view as the dispositive issue in this case: whether trading a firearm for drugs can constitute “use” of the firearm within the meaning of §924(c)(1).

When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning. . . . Surely petitioner’s treatment of his MAC-10 can be described as “use” within the every day meaning of that term. Petitioner “used” his MAC-10 in an attempt to obtain drugs by offering to trade it for cocaine. Webster’s defines “to use” as “[t]o convert to one’s service” or “to employ.” . . . Black’s Law Dictionary contains a similar definition: “[t]o make use of; to convert to one’s service; to employ; to avail oneself of; to utilize; to
carry out a purpose or action by means of.” . . . Petitioner’s handling of the MAC-
10 in this case falls squarely within those definitions. By attempting to trade his
MAC-10 for the drugs, he “used” or “employed” it as an item of barter to obtain
cocaine; he “derived service” from it because it was going to bring him the very
drugs he sought.

In petitioner’s view, §924(c)(1) should require proof not only that the
defendant used the firearm but also that he used it as a weapon. But the words “as a
weapon” appear nowhere in the statute. Rather, §924(c)(1)’s language sweeps
broadly, punishing any “use[ ]” of a firearm, so long as the use is “during and in
relation to” a drug trafficking offense. . . . Had Congress intended the narrow
construction petitioner urges, it could have so indicated. . . .

Language, of course, cannot be interpreted apart from context. The
meaning of a word that appears ambiguous if viewed in isolation may become
clear when the word is analyzed in light of the terms that surround it. Recognizing this, petitioner and the dissent . . . contend that the average person on
the street would not think immediately of a guns-for-drugs trade as an example of
“use[ ]” a firearm.” Rather, that phrase normally evokes an image of the most
familiar use to which a firearm is put – use as a weapon. Petitioner and the
dissent therefore argue that the statute excludes uses where the weapon is not . . .
employed for its destructive capacity . . . . Indeed, relying on that argument – and
without citation to authority – the dissent announces its own, restrictive definition
of “use.” “To use an instrumentality,” the dissent argues, “ordinarily means to
use it for its intended purpose.” . . .

There is a significant flaw to this argument. It is one thing to say that the
ordinary meaning of “uses a firearm” includes using a firearm as a weapon, since
that is the intended purpose of a firearm and the example of “use” that most
immediately comes to mind. But it is quite another to conclude that, as a result,
the phrase also excludes any other use. . . . In any event, the only question in this
case is whether the phrase “uses . . . a firearm” in §924(c)(1) is most reasonably
read as excluding the use of a firearm in a gun-for-drugs trade. The fact that the
phrase clearly includes using a firearm to shoot someone, as the dissent contends,
does not answer it. . . .

We are not persuaded that our construction of the phrase “uses . . . a
firearm” will produce anomalous applications. . . . Although scratching one’s
head with a gun might constitute “use,” that action cannot support punishment under §924(c)(1) unless it facilitates or furthers the drug crime.

In any event, the “intended purpose” of a firearm is not that it be used in any offensive manner whatever, but rather that it be used in a particular fashion – by firing it. The dissent’s contention therefore cannot be that the defendant must use the firearm “as a weapon,” but rather that he must fire it or threaten to fire it, “as a gun.” Under the dissent’s approach, then, even the criminal who pistol-whips his victim has not used a firearm within the meaning of §924(c)(1), for firearms are intended to be fired or brandished, not used as bludgeons.

To the extent there is uncertainty about the scope of the phrase “uses . . . a firearm” in §924(c)(1), we believe the remainder of §924 appropriately sets it to rest. Just as a single word cannot be read in isolation, nor can a single provision of a statute. As we have recognized:

Statutory construction . . . is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme. . . . United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd. . . .

Here, Congress employed the words “use” and “firearm” together not only in §924(c)(1), but also in §924(d)(1), which deals with forfeiture of firearms. . . . Under §924(d)(1), any “firearm or ammunition intended to be used” in the various offenses listed in §924(d)(3) is subject to seizure and forfeiture. Consistent with petitioner’s interpretation, §924(d)(3) lists offenses in which guns might be used as offensive weapons. . . . But it also lists offenses in which the firearm is not used as a weapon but instead as an item of barter or commerce. . . . Unless we are to hold that using a firearm has a different meaning in §924(c)(1) than it does in §924(d) – and clearly we should not . . . – we must reject petitioner’s narrow interpretation. . . .

The dissent suggests that our interpretation produces a “strange dichotomy” between “using” a firearm and “carrying” one. . . . We do not see why that is so. Just as a defendant may “use” a firearm within the meaning of §924(c)(1) by trading it for drugs or using it to shoot someone, so too would a defendant “carry” the firearm by keeping it on his person whether he intends to exchange it for cocaine or fire it in self-defense. The dichotomy arises, if at all, only when one tries to extend the phrase “uses . . . a firearm” to any use “for any purpose whatever.” . . .
Finally, it is argued that §924(c)(1) originally dealt with use of a firearm during crimes of violence; the provision concerning use of a firearm during and in relation to drug trafficking offenses was added later. . . . From this, the dissent infers that “use” originally was limited to use of a gun “as a weapon.” . . . [But] because the phrase “uses . . . a firearm” is broad enough in ordinary usage to cover use of a firearm as an item of barter or commerce, Congress was free in 1986 so to employ it. . . . Accordingly, we conclude that using a firearm in a guns-for-drugs trade may constitute “us[ing] a firearm” within the meaning of §924(c)(1).

B

. . . [P]etitioner insists that the relationship between the gun and the drug offense in this case is not the type of connection Congress contemplated when it drafted §924(c)(1). With respect to that argument, we agree with the District of Columbia Circuit’s observation:

“It may well be that Congress, when it drafted the language of §924(c), had in mind a more obvious use of guns in connection with a drug crime, but the language [of the statute] is not so limited[,] nor can we imagine any reason why Congress would not have wished its language to cover this situation. Whether guns are used as the medium of exchange for drugs sold illegally or as a means to protect the transaction or dealers, their introduction into the scene of drug transactions dramatically heightens the danger to society.” Harris. . .

C

Finally, the dissent and petitioner invoke the rule of lenity. . . . The mere possibility of articulating a narrower construction, however, does not by itself make the rule of lenity applicable. Instead, that venerable rule is reserved for cases where, “[a]fter seiz[ing] every thing from which aid can be derived,” the Court is “left with an ambiguous statute.” United States v. Bass. . . . This is not such a case. Not only does petitioner’s use of his MAC-10 fall squarely within the common usage and dictionary definitions of the terms “uses . . . a firearm,” but Congress affirmatively demonstrated that it meant to include transactions like petitioner’s as “us[ing] a firearm” by so employing those terms in §924(d).

Imposing a more restrictive reading of the phrase “uses . . . a firearm” does violence not only to the structure and language of the statute, but to its purpose as well. When Congress enacted the current version of §924(c)(1), it was
no doubt aware that drugs and guns are a dangerous combination. In 1989, 56 percent of all murders in New York City were drug related; during the same period, the figure for the Nation’s Capital was as high as 80 percent. The American Enterprise 100 (Jan.-Feb. 1991). The fact that a gun is treated momentarily as an item of commerce does not render it inert or deprive it of destructive capacity. Rather, as experience demonstrates, it can be converted instantaneously from currency to cannon. We therefore see no reason why Congress would have intended courts and juries applying §924(c)(1) to draw a fine metaphysical distinction between a gun’s role in a drug offense as a weapon and its role as an item of barter; it creates a grave possibility of violence and death in either capacity.

We have observed that the rule of lenity “cannot dictate an implausible interpretation of a statute, nor one at odds with the generally accepted contemporary meaning of a term.” Taylor v. United States. That observation controls this case. Both a firearm’s use as a weapon and its use as an item of barter fall within the plain language of §924(c)(1), so long as the use occurs during and in relation to a drug trafficking offense; both must constitute “uses” of a firearm for §924(d)(1) to make any sense at all; and both create the very dangers and risks that Congress meant §924(c)(1) to address. We therefore hold that a criminal who trades his firearm for drugs “uses” it during and in relation to a drug trafficking offense within the meaning of §924(c)(1). Because the evidence in this case showed that petitioner “used” his MAC-10 machine gun and silencer in precisely such a manner, proposing to trade them for cocaine, petitioner properly was subjected to §924(c)(1)’s 30-year mandatory minimum sentence. The judgment of the Court of Appeals, accordingly, is affirmed.

It is so ordered.

[Short concurrence by Justice Blackmun omitted.]

Justice SCALIA (joined by Justices Stevens and Souter), dissenting.

Section 924(c)(1) mandates a sentence enhancement for any defendant who “during and in relation to any crime of violence or drug trafficking crime . . . uses . . . a firearm.” . . . The Court begins its analysis by focusing upon the word “use” in this passage, and explaining that the dictionary definitions of that word are very broad. . . . It is, however, a “fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is
used.” *Deal v. United States.* . . . That is particularly true of a word as elastic as “use,” whose meanings range all the way from “to partake of” (as in “he uses tobacco”) to “to be wont or accustomed” (as in “he used to smoke tobacco”). . . .

In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning. . . . To use an instrumentality ordinarily means to use it for its intended purpose. When someone asks “Do you use a cane?” he is not inquiring whether you have your grandfather’s silver-handled walking-stick on display in the hall; he wants to know whether you walk with a cane. Similarly, to speak of “using a firearm” is to speak of using it for its distinctive purpose, i.e., as a weapon. To be sure, “one can use a firearm in a number of ways,” . . . including as an article of exchange . . . but that is not the ordinary meaning of “using” the one or the other.¹ The Court does not appear to grasp the distinction between how a word can be used and how it ordinarily is used. It would, indeed, be “both reasonable and normal to say that petitioner ‘used’ his MAC-10 in his drug trafficking offense by trading it for cocaine.” It would also be reasonable and normal to say that he “used” it to scratch his head. When one wishes to describe the action of employing the instrument of a firearm for such unusual purposes, “use” is assuredly a verb one could select. But that says nothing about whether the ordinary meaning of the phrase “uses a firearm” embraces such extraordinary employments. It is unquestionably not reasonable and normal, I think, to say simply “do not use firearms” when one means to prohibit selling or scratching with them. . . .

Given our rule that ordinary meaning governs, and given the ordinary meaning of “uses a firearm,” it seems to me inconsequential that “the words ‘as a weapon’ appear nowhere in the statute,” . . . they are reasonably implicit. Petitioner is not, I think, seeking to introduce an “additional requirement” into the text . . . but is simply construing the text according to its normal import.

¹ The Court asserts that the “significant flaw” in this argument is that “to say that the ordinary meaning of ‘uses a firearm’ includes using a firearm as a weapon” is quite different from saying that the ordinary meaning “also excludes any other use.” The two are indeed different – but it is precisely the latter that I assert to be true: The ordinary meaning of “uses a firearm” does not include using it as an article of commerce. I think it perfectly obvious, for example, that the objective falsity requirement for a perjury conviction would not be satisfied if a witness answered “no” to a prosecutor’s inquiry whether he had ever “used a firearm,” even though he had once sold his grandfather’s Enfield rifle to a collector.
The Court seeks to avoid this conclusion by referring to the next subsection of the statute, §924(d), which does not employ the phrase “uses a firearm,” but provides for the confiscation of firearms that are “used in” referenced offenses which include the crimes of transferring, selling, or transporting firearms in interstate commerce. The Court concludes from this that whenever the term appears in this statute, “use” of a firearm must include nonweapon use... I do not agree. We are dealing here not with a technical word or an “artfully defined” legal term... but with common words that are... inordinately sensitive to context. Just as adding the direct object “a firearm” to the verb “use” narrows the meaning of that verb (it can no longer mean “partake of”), so also adding the modifier “in the offense of transferring, selling, or transporting firearms” to the phrase “use a firearm” expands the meaning of that phrase (it then includes, as it previously would not, nonweapon use). But neither the narrowing nor the expansion should logically be thought to apply to all appearances of the affected word or phrase. Just as every appearance of the word “use” in the statute need not be given the narrow meaning that word acquires in the phrase “use a firearm,” so also every appearance of the phrase “use a firearm” need not be given the expansive connotation that phrase acquires in the broader context “use a firearm in crimes such as unlawful sale of firearms.” When, for example, the statute provides that its prohibition on certain transactions in firearms “shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes,” 18 U.S.C. §§ 922(a)(5)(B), (b)(3)(B), I have no doubt that the “use” referred to is only use as a sporting weapon, and not the use of pawning the firearm to pay for a ski trip. Likewise when, in §924(c)(1), the phrase “uses... a firearm” is not employed in a context that necessarily envisions the unusual “use” of a firearm as a commodity, the normally understood meaning of the phrase should prevail.

Another consideration leads to the same conclusion: §924(c)(1) provides increased penalties not only for one who “uses” a firearm during and in relation to any crime of violence or drug trafficking crime, but also for one who “carries” a firearm in those circumstances. The interpretation I would give the language produces an eminently reasonable dichotomy between “using a firearm” (as a weapon) and “carrying a firearm” (which in the context “uses or carries a firearm” means carrying it in such manner as to be ready for use as a weapon). The Court’s interpretation, by contrast, produces a strange dichotomy between “using
a firearm for any purpose whatever, including barter,” and “carrying a firearm.”
... [footnote omitted]

Finally, although the present prosecution was brought under the portion of §924(c)(1) pertaining to use of a firearm “during and in relation to any . . . drug trafficking crime,” I think it significant that that portion is affiliated with the pre-existing provision pertaining to use of a firearm “during and in relation to any crime of violence,” rather than with the firearm-trafficking offenses defined in §922 and referenced in §924(d). The word “use” in the “crime of violence” context has the unmistakable import of use as a weapon, and that import carries over, in my view, to the subsequently added phrase “or drug trafficking crime.” Surely the word “use” means the same thing as to both, and surely the 1986 addition of “drug trafficking crime” would have been a peculiar way to expand its meaning (beyond “use as a weapon”) for crimes of violence.

Even if the reader does not consider the issue to be as clear as I do, he must at least acknowledge, I think, that it is eminently debatable – and that is enough, under the rule of lenity, to require finding for the petitioner here. “At the very least, it may be said that the issue is subject to some doubt. Under these circumstances, we adhere to the familiar rule that, ‘where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.’” Adamo Wrecking Co. v. United States . . .

For the foregoing reasons, I respectfully dissent.

3. Notes and questions on Smith v. United States

1. Compare two ways of stating the issue to be decided in Smith.

   a. Formal issue statement: Is a defendant who trades a firearm for drugs (X)
      “using a firearm during and in relation to a drug trafficking offense” (Y)
      within the meaning of 18 U.S.C. §924(c)(1)?

   b. Normative issue statement: Should a defendant who trades a firearm for
      drugs receive a 30 year sentence enhancement?

Which is the better issue statement: the formalized issue statement, or the more explicitly normative issue statement? Why?

2. Justice O’Connor, writing for the majority, begins her opinion by stating the issue to be decided. This issue states a question of law because the answer to the
question will state a general rule applicable to cases that are relevantly similar in their facts. (By contrast, the jury that convicted Smith decided questions of fact, such as: did Smith offer to sell his MAC-10 for drugs?) Notice that Justice O’Connor, for the Court, states the question of law in the formal way (adopting the formal, not the normative, issue statement). “We decide today whether the exchange of a gun for narcotics constitutes ‘use’ of a firearm ‘during and in relation to . . . [a] drug trafficking crime’ within the meaning of 18 U.S.C. §924(c)(1). We hold that it does.” Notice that the two units, labeled X and Y in note one above, that O’Connor builds into her issue statement, are also the units in which she states the rule that the case announces. “We hold that it does” means that the Court holds that X (exchanging a gun for narcotics) counts as Y (“use” of a firearm “during and in relation to . . . [a] drug trafficking crime” within the meaning of 18 U.S.C. §924(c)(1).” The Court spells this out in the last paragraph of its opinion: “We therefore hold that a criminal who trades his firearm for drugs “uses” it during and in relation to a drug trafficking offense within the meaning of §924(c)(1).”

3. Should all activities that match dictionary definitions of “use” [a firearm] satisfy the “use” element of the sentence-enhancement statute? Are you persuaded by Justice Scalia’s reasons for giving the phrase “use a firearm” its “ordinary meaning” in “context,” rather than applying the dictionary’s definitions of “use”? (Is Justice O’Connor, for the majority, committed to the position that all activities that fit the dictionary’s definition of “use” satisfy this element of the sentence-enhancement statute?) Consider the following fact-patterns.

(a) Defendant Don arranges to meet Buyer in the woods, to sell marijuana to Buyer. But police intercede before the exchange, causing Don to flee with his baggie filled with marijuana. Don sprints by the shore of a lake. He can toss the marijuana into the lake — but it will float! Don looks around for something he can use as a sinker, but there is no time to stop. Then he remembers the MAC-10 in his pocket! Don quickly places the gun in the baggie and tosses the whole thing into the lake. Under the statute and Smith, has Don “used a firearm” during and in relation to a drug-trafficking offense?

(b) Suppose that police officer Jones brandishes his service revolver while arresting Mr. Smith. Prosecutors seek a five-year sentence enhancement for Officer Jones, who literally “used a firearm during and in relation to a drug trafficking offense.” Is there anything in the language of §924(c)(1) that makes it clear that this provision does not apply to Officer Jones’ use of his firearm? Or
would a court need to go outside the language of the statute, to common sense or to an interpretation of the statute’s purpose, in order to hold for Officer Jones?

4. Does Justice O’Connor base her decision on the ordinary language meaning of the word “use”? Or on Congress’s intent in enacting the statute? Or on the social policy claim that trading a gun for drugs brings about an increase in dangerousness comparable to that caused when guns are used as weapons during drug deals? Of these possible grounds of decision, which are strongest? (Do all three of these grounds of decision point in the same direction? If not, how are the conflicting indications to be resolved?)

5. Justice Scalia is usually considered a conservative justice, and conservatives usually favor more severe criminal punishment. What does Justice Scalia’s opinion in this case suggest about the relationship between legal decisionmaking and judge’s political view or policy preferences?

6. Justice Scalia’s views of statutory interpretation have been called a kind of “textualism.” (For a discussion, see Note, “The Ambiguity of Plain Meaning: Smith v. United States and the New Textualism,” 68 S. Cal. L. Rev. 259 (1994). This student Note was written by John Polich when he was a second-year law student here at the U.S.C. Law School. Writing such a note gives you an opportunity to think through a current legal topic to your own satisfaction, testing and revising your views as you work through them.) There are two dimensions to Scalia’s “textualism.” First, Scalia believes that the law governing the decision in a statutory case is the language of the statute, not the intentions of the legislature as revealed (for example) in the committee reports, hearings, and other records of legislative debate (the “legislative history”). Second, Scalia believes that the language of the statute is be interpreted in context and in the light of ordinary usage (except when there are special reasons to give statutory words and phrases a technical meaning), and not by directly applying definitions such as those found in dictionaries. Scalia’s textualism is motivated, in part, by a view of the judicial role, the legislative role, and the dynamic relation between the processes of enacting and judicially interpreting statutes. If legislators learn from experience that judges will construe statutes in light of statements made in committee hearings and reports, and in floor debate, legislators might reasonably predict that they can have it both ways: vote for a bill whose languages says one thing (thereby pleasing constituencies that want such a bill), all the while knowing that the bill as actually judicially interpreted and applied will be quite different (thereby pleasing other interests – perhaps lobbyists who have helped fund their
election campaigns). Scalia’s textualism can be seen as a judicial intervention, meant to reform the law-making process so that legislators are held politically accountable for the bills they visibly enact into law (that is, the visible language of the statutes), thus making the legislative process more democratically responsive.

7. In part II.B. of her opinion for the Court, in a passage omitted from your excerpt, Justice O’Connor sides with the dissent rather than with the majority in the Ninth Circuit case, United States v. Phelps. The facts of Phelps were similar to those of Smith, in that defendant traded a MAC 10 gun for drugs. While the Phelps majority held that trading a gun for drugs is not “using” a gun within the meaning of the federal sentence-enhancement statute, Judge Kozinski, dissenting, argued that such transactions clearly satisfied the federal statutory requirements for an enhanced sentence. As it happens, Judge Kozinski, who shares many of Justice Scalia’s beliefs on matters of law and legal policy, also shares his “textualist” commitment. Kozinski and Scalia agree that judges ought to apply statutes in light of their ordinary meaning in context, rather than look to arguments of social policy, legislative history, or dictionary definitions. What reasoning might Judge Kozinski advance, within the limits of textualist methodology, for his Phelps dissent? What explains how two leading judges, both “conservative,” both “textualist,” reach opposite conclusions?

8. Justice Scalia accuses the majority of taking the meaning of the word “use” (or of the phrase “use a firearm”) out of context. Is Justice O’Connor guilty or innocent of the charge? Might Justice O’Connor turn Scalia’s critique against him? (Look closely at Scalia’s “thought experiments” that test our linguistic intuitions about the phrase “uses a firearm.”)

9. Justice O’Connor points to §924(d)(1), which provides that firearms “intended to be used” in the commission of various crimes, including illegal selling or trading of firearms, are forfeited to the federal government. She says that because the word “use” encompasses trade or barter in §924(d)(1), it should also be read to include trade or barter in §924(c)(1). Here the majority opinion clearly offers a reason that supports its conclusion that trading a firearm for drugs counts as “using a firearm” within the meaning of §924(c)(1). How weighty is that reason? On the one hand, giving words or phrases consistent meaning across parallel statutory provisions would seem to be fair and principled. On the other hand, consider the different consequences that attach to §924(d)(1) (forfeiture of the firearm) and §924(c)(1) (up to thirty additional years of prison time). Might “use”
include barter when the consequence of use is forfeiture, but not include barter when the consequence of use is a very long prison term? Recall that not only Scalia dissenting, but also O'Connor for the majority, affirm that words and phrases are sensitive to their context. Might the word “use” have a somewhat wider meaning in the context of forfeiture than in the context of sentence enhancement? (Suppose that at T1, a state court has held that a skateboard is not a “vehicle” subject to a statutory tax on “vehicles.” At T2, the court is considering whether a statute prohibiting “vehicles” in the public parks applies to skateboards. Does the purpose of the park regulation differ enough from the purpose of a tax to defeat the argument that consistency requires the word “vehicle” to have the same meaning in both statutes?) As we read our next main case, and as we consider other cases and hypotheticals in the weeks ahead, attend closely to the context-sensitivity of statutory words and phrases.

10. What is the purpose of 18 U.S.C. §924(c)(1)? Which interpretation of that provision is most in accord with its purpose? Does either the majority or dissenting opinion refer to the statute’s purpose?

11. Suppose you are on the Smith court. Council for Mr. Smith offers uncontested evidence that mandatory sentence enhancement statutes contribute to prison overcrowding, which in turn causes early release of prisoners (especially during economic downturns). Thus, the more broadly courts construe the phrase “uses a firearm,” the more prisoners will be released early. Do you regard this social consequence as a reason that is relevant to the legal issue in Smith? Why/not?

12. For a brief period after the French Revolution, French judges were forbidden to “interpret” statutes. If doubt about the meaning of a statute arose during a case, judges were supposed to petition the legislature to interpret the statute and then apply the legislature’s interpretation to the case. The procedure was known as référe législatif. Do you think that’s a good procedure? Should we adopt it in the United States? Can you guess why it was abandoned in France?

13. At the end of his opinion, Justice Scalia refers to the rule of lenity, which requires ambiguous statutes to be interpreted in favor of criminal defendants. The rule of lenity is one of a large number of “canons of construction” which courts sometimes use in interpreting statutes. In this context, “canon” means rule. Here are some other examples of canons of construction.
• Interpret statutes so that they are constitutional and to avoid difficult constitutional questions
• Interpret federal statutes so that they do not preempt (conflict with) state laws
• Interpret statutory provisions with reference to the whole statute
• Avoid interpreting a statutory provision in a way that would render other statutory provisions superfluous, redundant, or unnecessary.
• Statutes in derogation of the common law should be interpreted narrowly.
• Remedial statutes should be interpreted broadly.

Canons of construction are usually used when the statute itself is ambiguous. Most, like methods of interpretation more generally, were created by judges in the process of interpreting statutes. While the canons are sometime helpful, they often complicate statutory interpretation. For example, the last two canons seem to contradict each other, as most remedial statutes (and in fact nearly all statutes) change the common law, and therefore can be seen as “in derogation of the common law.”

4. Stating issues and holdings at different levels of generality

Recall that O’Connor begins her majority opinion in Smith by stating the issue as follows: “We decide today whether the exchange of a gun for narcotics constitutes ‘use’ of a firearm . . . within the meaning of 18 U.S.C. §924(c)(1).” Recall too that this is what we are terming the “formal” way of formulating an issue. In such a formal issue statement, the question to be decided takes the form: Is a particular kind, X, an instance of that more general kind, Y, where X is supplied by some description of the facts, and Y is supplied by the language of a legal rule. Notice now that the facts of a case can be described truthfully at many different levels of generality. Stated at a very low level of generality: Smith offered to trade a MAC-10 for cocaine. Stated at a somewhat higher level of generality: Smith offered to trade a gun for drugs. Notice that under this description, the distinction between a completed and uncompleted transaction (recall that Smith was arrested before the exchange of guns for drugs was completed) washes away. Notice also that under this description, it does not matter whether the drugs were cocaine or some other drug. It also doesn’t matter, in relation to the “use” issue, whether the gun was a MAC-10 or some other gun, though this will affect the sentence triggered by the statute’s application (since, as
an automatic weapon with a silencer, the MAC-10 will trigger the statute’s top sentence increment of 30 years). Notice, then, that in its formulation of the issue, the majority opinion in Smith chooses among various possible levels of generality at which X (the relevant facts) can be stated.

Suppose a post-Smith case in which defendant committed the crime of trading (or offering to trade) drugs for a gun. Everyone agrees that defendant in this case, whose facts are the reverse of Smith’s, will do prison time for the underlying drug crime. But should the defendant also receive a mandatory sentence enhancement under §924(c)(1)? More specifically: does the holding in Smith require an interpretation of the statute such that the defendant in the reverse-facts case also receives a sentence enhancement?

What was the holding in Smith? The parties in the reverse-facts case – the prosecution and defendant – will offer competing interpretations of Smith’s holding. The prosecution will state the holding in Smith at a very high level of generality. From the standpoint of social danger and culpability, the prosecution will argue, it makes little difference whether defendant had the gun and offered to trade it for drugs, or had the drugs and offered to trade them for a gun. Since the Smith court looked to the statute’s general intention as one reason for concluding that Mr. Smith’s action came within the “use” prong of the statute, it is appropriate to read Smith as standing for the proposition that when defendant participates in an exchange of guns and drugs, a sufficient increase in danger has occurred to merit a sentence enhancement.

The defendant in the reverse-facts case will state the holding in Smith at a lower level of generality, reading it to apply only when the defendant had the gun and traded it for the drugs. O’Connor was concerned to demonstrate that trading a gun for drugs can be described as “using” the gun. But in ordinary language, one would not describe someone who traded drugs for a gun as “using” the gun. Because language was the touchstone or ground of decision in Smith, defendant in the reverse-facts case argues, Smith should be read narrowly to apply only to defendants who trade guns for drugs, not those who trade drugs for guns.

The reverse-facts case reached the Supreme Court in Watson v. United States. If you represented defendant Watson, or if you represented the government seeking a sentence enhancement, how would you argue for your interpretation of the statute and of Smith? Consider these excerpts from oral
argument before the Supreme Court in *Watson*. (The excerpt is from Laurel Newby’s account in Law.com.)

Attorney Karl J. Koch, representing Watson, argued that under the “plain and ordinary” meaning of the word “use,” the “receipt of a thing is not the use of that thing.”

However, Assistant to the Solicitor General Deanne E. Maynard, on behalf of the government, argued that “use” can mean “receipt” when “you’re talking about using something as a medium of exchange.” Maynard offered examples: “The subway system uses tokens”; and “company stores use script.”

But Justice David Souter told Maynard that she had a “linguistic problem.” “[T]hat’s not usually the way we talk,” Souter said. “I mean, if I buy a car, and pay money for it, I do not ‘use’ the car in the transaction.”

Maynard answered that by buying the car, one would “have ‘used’ the car as an item of trade or commerce during or in relation to that commercial transaction.” She continued: “We don’t usually talk that way but we do – and one can –”

“It’s enough to say we don’t usually talk that way,” Justice Antonin Scalia told her.

“I don’t think so, Your Honor,” Maynard said. “As long as –”

“That’s the end of it,” Scalia said. “We don’t talk that way. We don’t say ‘use a car’ when you buy a car.”

At one point in Koch’s argument, Breyer asked the attorney: “What do you have besides the linguistic argument?”

As Koch began discussing the Court’s precedent in the 1995 case *Bailey v. U.S.*, Scalia interjected, addressing a remark to Koch that may also have been intended for Breyer.

“We sometimes . . . rely on linguistics, don’t we?” Scalia asked.

“Yes, sir,” Koch replied.

“And sometimes we try to –” Breyer said.

“And sometimes the words of the statute,” said Scalia.
Koch started to speak again, looking back and forth between the two justices.

"I don’t want to put you in a whipsaw here,” Breyer told Koch, to laughter from the spectators.

Breyer took the opportunity to offer a counterpoint to Scalia’s insistence on plain meaning: “Sometimes policy seems relevant, too, to figure out what Congress wanted.”

The Court handed down its decision in Watson, 128 S.Ct. 579 (2007), ruling for the defendant. The Watson court stressed that in Smith “[w]e rested primarily on the ‘ordinary or natural meaning’ of the verb in context.”

With no statutory definition or definitive clue, the meaning of the verb “uses” has to turn on the language as we normally speak it. [T]here is no other source of a reasonable inference about what Congress understood when writing or what its words will bring to the mind of a careful reader. So, in Smith we looked for “everyday meaning,” revealed in phraseology that strikes the ear as “both reasonable and normal.” This appeal to the ordinary leaves the Government without much of a case.

The court in Watson rejected the government’s argument that normative considerations of social policy – the equivalence in culpability and danger between the one who trades guns for drugs and the one who trades drugs for guns – “trump” ordinary language meaning. The court dismissed this argument as an “atextual policy critique,” and insisted that “law depends on respect for language.” “Policy-driven symmetry” between trading guns for drugs and trading drugs for guns cannot override the fact that in ordinary language, one who trades the gun for drugs is “using” the gun but who trades the drugs for guns is “using” the drugs (not the gun). Policy symmetry “would be served better by statutory amendment . . . than by racking statutory language to cover a policy it fails to reach.”

Recall that in Smith, the court stated the issue such that X (the fact-description part of the formal issue statement) = “the exchange of a gun for narcotics.” The court used similar X-language in stating its conclusion: “We therefore hold that a criminal who trades his firearms for drugs ‘uses’ it during and in relation to a drug trafficking offense within the meaning of §924(c)(1).” Notice that the coverage or domain of the holding tracks that of the issue statement. Suppose that the Smith court framed the issue as: “We decide today
whether transactions involving the exchange of guns and drugs constitute ‘use’ of a firearm within the meaning of §924(c)(1).” Suppose that the Smith court had answered this question in the affirmative. In what ways would this alternative version of Smith, in which the issue and thus the holding is stated at a higher level of generality, affect the arguments you would make if you were representing defendant and government in Watson? Would the government’s position be considerably stronger than it was under the “actual” holding stated in Smith? Or would the government’s position still suffer, more or less to the same extent, from the linguistic problem that concerned the Court at oral argument?

5. In the Matter of David G. Blanchflower and Sian E. Blanchflower

Supreme Court of New Hampshire


Nadeau, J. [Opinion of the Court (Majority opinion) joined by Dalianis and Duggan, JJ.]

...[T]he respondent, Sian E. Blanchflower, challenges an order of the Lebanon Family Division (Cyr, J.) denying her motion to dismiss the petitioner's amended ground for divorce of adultery.... We accepted this matter as an interlocutory appeal under Supreme Court Rule 8 [an appeal before the case is decided on the merits], and now reverse and remand.

The record supports the following facts. The petitioner [David Blanchflower] filed for divorce from the respondent [Sian Blanchflower] on grounds of irreconcilable differences. He subsequently moved to amend the petition to assert the fault ground of adultery under RSA 458:7, II. [RSA is the Revised Statutes Annotated of the State of New Hampshire.] Specifically, the petitioner alleged that the respondent has been involved in a “continuing adulterous affair” with the co-respondent, [Robin Mayer], a woman, resulting in the irremediable breakdown of the parties’ marriage. The co-respondent sought to dismiss the amended petition, contending that a homosexual relationship between two people, one of whom is married, does not constitute adultery under RSA 458:7, II. The trial court disagreed, and the co-respondent brought this appeal.
Supplement 4. Descriptions of what Mr. Smith did with the gun.

In the X/Y (formal) issue formulation, X is a description of the facts. All of the following are descriptions of what Mr. Smith did with the gun. Which description is the best description, for purposes of stating the X (fact-description) element of the issue?

1. Smith attempted to trade his MAC-10 for 2 oz of cocaine.
2. Smith attempted to exchange his MAC-10 for cocaine.
3. Smith tried to trade his MAC-10 for cocaine.
4. Smith bought cocaine and attempted to trade his gun in exchange for cocaine.
5. Smith bartered his gun for cocaine.
6. Smith used the gun in exchange for cocaine.
7. Smith attempted to trade the gun for cocaine.
8. Smith attempted to exchange his gun for a drug.
9. Smith used his gun to trade for drugs.
10. Smith used his gun as currency and traded it for drugs.
11. Smith tried to trade his gun for drugs.
12. Smith tried to trade his gun (use it as barter) to obtain drugs.
13. [1-12 above plus:] which he hoped to resell at a profit.
15. Smith pulled his gun out of a black canvas back and showed it to the undercover officer.
16. Smith created a dangerous combination of drugs and gun by:
   a. Openly having a gun at the scene of a drug crime.
   b. Having a gun at the scene of a drug crime.

Should X include something like: Smith travelled from Tennessee to Florida to buy cocaine that he hoped to sell at a profit? Why/not?