DICTIONARIES, PLAIN MEANING, AND CONTEXT IN STATUTORY INTERPRETATION

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Years ago, while working in the Solicitor General's Office, I came upon a maxim of constitutional litigation: Whenever anyone urges the Supreme Court to create a new constitutional right, three counter-arguments are always available. The first is: "We've never done it that way." This argument invokes the desire for stability, the attraction of the beaten path, the power of precedent. The second argument is: "Look what would happen if we did it that way." This argument usually takes the form of the slippery slope or the opening wedge, coupled with predictions of horribles. The third argument is: "They don't do it that way in England."

In preparing this article, I applied the maxim to the purely textual approach to statutory construction. This proved quite unsuccessful. Each of the three standard arguments fails. As to strict textualism, we did it that way long ago,[1] we saw what happened,[2] and that is the way they do it in England.

On this side of the Atlantic the tide is coming in again. The Supreme Court's 1989 decision in *United States v. Ron Pair*[3] resurrected *Camminetti v. United States*.[4] Since then, more and more disputes about the meaning of statutes are greeted with citations

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1. *See, e.g.*, Camminetti v. United States, 242 U.S. 470, 485 (1917), which applied the classic textualist approach to interpreting the Mann Act:

> It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms. . . .Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.

2. The Supreme Court's struggle with *Camminetti* in later cases dealing with the Mann Act, 36 Stat. 825 (1910)(codified as amended at 18 U.S.C. §§ 2421-2424 (1988)), is described in the classic text EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 33-57 (1949).

3. United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989).

4. 242 U.S. 470 (1917).

to dictionaries. Old statutes get old dictionaries;[5] new statutes get new ones.[6] There is a legal principle lurking here. More important, the frequency of these citations reflects a tilt toward textualism. Opinion-writers often find it difficult to explain why a text is "plain." There is an almost irresistible impulse to reach for sources outside the statute. If legislative history is off-limits, dictionaries present a tempting alternative.

Yet citing to dictionaries creates a sort of optical illusion, conveying the existence of certainty—or "plainness"—when appearance may be all there is. Lexicographers define words with words. Words in the definition are defined by more words, as are those words. The trail may be endless; sometimes, it is circular. Using a dictionary definition simply pushes the problem back.

Consider the Supreme Court's recent opinion in *Reves v. Ernst & Young*.[7] *Reves* presented the question whether the Racketeer Influenced and Corrupt Organizations Act (RICO)[8] could be applied to an outside accounting firm performing audits of a RICO enterprise. RICO makes it unlawful "for any person employed by or associated with any enterprise . . . to conduct . . . such enterprise's affairs through a pattern of racketeering activity."[9] *Webster's Third New International Dictionary* [10] defines "conduct" as "lead, run, manage, or direct,"[11] which to the Court indicated "some degree of direction."[12] For this reason (and others), the Court rejected petitioners' argument that "to conduct" signified "to carry on."[13] If, however, "conduct" means "run," as the Court and as *Webster's* said, what does "run" mean? The Court did not inquire. Those who do will find that one definition in *Webster's* for "run" is "carry on."[14]

5. *See, e.g.*, Rowland v. California Men's Colony, 113 S. Ct. 716, 720 (1993); Mississippi v. Louisiana, 113 S. Ct. 549, 553 (1992) (both citing WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1945)).

6. *See, e.g.*, Kay v. Ehrler, 111 S. Ct. 1435, 1437 n.6 (1991) (citing THE AMERICAN HERITAGE DICTIONARY (2d college ed. 1982)); John Doe Agency v. John Doe Corp., 493 U.S. 146, 153 (1989) (citing WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1983)); Mallard v. United States Dist. Court, 490 U.S. 296, 301 (1989) (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d ed. 1986)).

7. 113 S. Ct. 1163 (1993).

8. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1988).

9. 18 U.S.C. § 1962(c) (1970).

10. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976).

11. *Id.* at 474.

12. *Reves*, 113 S. Ct. at 1169-70.

13. *Id.* at 1169.

14. WEBSTER'S, *supra* note 10, at 1988.

Smith v. United States,[15] handed down a few days after *Reves*, supplies another example. The issue was whether the Federal Tort Claims Act (FTCA)[16] applies in Antarctica, a sovereignless region. The Act contains an exemption for torts "arising in a foreign country."[17] Is Antarctica a "foreign country"? Mrs. Smith claimed it was not, arguing that the exemption pertained only to sovereign states.[18] The FTCA is an old act, so the Court pulled out an old edition of *Webster's*. The "commonsense" dictionary definition, the Court said, was against Mrs. Smith. *Webster's*' first definition of "country" was simply a "region or tract of land."[19] Nothing about sovereignty there. But if a "country" is a "tract of land," what is "land"? The same edition of *Webster's* defined "land" as "any portion of the surface of the earth . . . considered as a country."[20] The circle closes. One also cannot help wondering why *Black's Law Dictionary*, which occasionally gets the nod over *Webster's*,[21] did not attract the Court's interest. *Black's* defines "country" as Mrs. Smith did: "The territory occupied by an independent nation or people . . . ."[22]

Dictionary citing in judicial opinions, and the plain meaning rule itself, imply that the meanings of the words used in a statute equal the meaning of the statute. This is demonstrably false or, as Judge Easterbrook puts it, "silly."[23] Of course, one must comprehend the words in a statute in order to comprehend the statute, just as one must comprehend the letters in a word in order to comprehend the word. A statute, however, cannot be understood merely by understanding the words in it. Judge Easterbrook thinks dictionaries are like "word museums."[24] I think they are

15. 113 S. Ct. 1178 (1993).

16. 28 U.S.C. §§ 1346(b), 2674 (1988).

17. 28 U.S.C. § 2680(k) (1948).

18. *See Smith*, 113 S. Ct. at 1181.

19. 113 S. Ct. at 1181 (citing WEBSTER'S NEW INTERNATIONAL DICTIONARY 609 (2d ed. 1945)).

20. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1388 (2d ed. 1945). There are, of course, many other definitions of "land."

21. *See, e.g.*, Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2620 (1992) (plurality opinion); Estate of Cowart v. Nicklos Drilling Co., 112 S. Ct. 2589, 2595 (1992); District of Columbia v. Greater Washington Board of Trade, 113 S. Ct. 580, 583 (1992); Davis v. United States, 495 U.S. 472, 481 (1990). So far as I am aware, the Court has never explained why it sometimes prefers BLACK'S over WEBSTER'S.

22. BLACK'S LAW DICTIONARY 350 (6th ed. 1990). I would have cited an older edition, but one was not handy.

23. Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 67 (1994).

24. *Id.*; *see also* Country Mutual Ins. Co. v. American Farm Bureau Federation, 876 F.2d 599, 600 (7th Cir. 1989).

also like "word zoos."[25] One can observe an animal's features in the zoo, but one still cannot be sure how the animal will behave in its native surroundings. The same is true of words in a text.

To illustrate, consider the following plain statement: "Judge Easterbrook was our speaker." What does this convey? *Webster's* tells us that a "speaker" is a person who delivers a public speech.[26] Apparently, I have just described Judge Easterbrook as a talking machine. That is insulting, and cannot be my message. In light of Judge Easterbrook's eminent credentials and the nature of this conference, my statement should be construed differently, that is, it should be taken in context. In context, when I said, "Judge Easterbrook was our speaker," I meant not only the dictionary definition that he delivered a speech, but also that he wrote the speech he delivered and believes in what he said.[27] On the other hand, another meaning might attach if, for instance, I said, "The President of the United States was our speaker." Then, again because of context, one would not necessarily understand the statement to mean the President wrote the speech. Most people know the White House employs speechwriters.

If one agrees that statutes can be interpreted accurately only in a fairly comprehensive context,[28] and that dictionaries do not provide context, where does this lead? Consider legislative history always, sometimes, or, nevertheless, never? If sometimes, when? What is Judge Easterbrook's answer? If I understand him correctly, he leans strongly toward textualism, but is not as rigid as, say, Justice Scalia. Some powerful points favor his position. When a court uses legislative history to interpret a statute, the court must also interpret that history. This opens a wider vista, with more words and hence more room for judges to maneuver. Better then to restrict judges to the text of the statute than to have them rummaging through committee reports and floor debates, where they are bound to get lost.

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25. I recognize that the word "zoo" is no longer universally favored. New York City, fearing that the word had taken on a new meaning outside of the city's zoological gardens, banished it. New York no longer has zoos; it has "Wildlife Conservation Parks." *See* Francis X. Clines, *What's 3 Letters and Zoologically Incorrect?*, N.Y. TIMES, Feb. 4, 1993, at A1.

26. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2185 (1986).

27. *See* ERVING GOFFMAN, FORMS OF TALK 167 (1981) (presenting a similar example).

28. In everyday life we of course use context to interpret what others are saying and we trust that our remarks will be construed in the same manner. Otherwise, we can find ourselves in much difficulty. For instance, "[t]he beauty pageant host who gushes, 'Each girl is prettier than the next,' is literally saying that they're getting uglier." JOHN A. PAULOS, BEYOND NUMERACY: RUMINATIONS OF A NUMBERS MAN 112 (1991).

I wonder, however, whether this imputes the fault to the negligence of the performers, rather than to the nature of the undertaking. When interpreting the Constitution, judges may consult the *Federalist Papers*,[29] Madison's notes,[30] Blackstone's *Commentaries*,[31] the private correspondence of the Framers, early State constitutions, reports of the ratifying conventions, and so forth. Talk about room to maneuver. Yet, this mode of interpretation—this theory of original intent—is promoted by Judge Robert Bork and many other thoughtful judges and scholars as a means of constraining the judiciary.[32] Why should that be so with respect to the Constitution, but not federal legislation? How can it be consistent with the Constitution to use history to interpret it, but somehow inconsistent with the Constitution to follow the same course with respect to statutes?

One response is that committee staffers insert material into legislative reports to influence courts when they later interpret the legislation. The courts' presence thus distorts the product and so the courts ought to withdraw, thereby removing any incentive to cook the books. There are problems with this theory, not the least of which is its lack of empirical support.[33] The Supreme Court has not bought it, yet.[34] The theory also contains the seeds of its own destruction. Suppose it took hold. What, then, of committee reports on statutes enacted during the period when courts were refusing to consult legislative history? Those reports could be expected to be as pure as driven snow. The rationale for refusing to look at the legislative history would not, therefore, prevent a court from looking at those reports. The theory thus encourages the distressing tendency of legal doctrine to oscillate from one extreme to the other over time.

After last Term, I thought the Supreme Court's answer to the question whether judges should consult legislative history was "sometimes." The Court's decision in *Connecticut National Bank v.*

29. THE FEDERALIST PAPERS (Clinton Rossiter ed., 1961).

30. JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 (1966).

31. WILLIAM A. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1769).

32. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 159-60 (1990).

33. *See* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 437-52 (1988). *See also* Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in* BENCHMARKS 216 n.114 (1967).

34. *See, e.g.*, Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476, 2485 n.4 (1991) ("Legislative history materials are not generally so misleading that jurists should never employ them in a good faith effort to discern legislative intent.").

Germain,[35] for instance, contains the *Camminetti*-like pronouncement that "[w]hen the words of a statute are unambiguous . . . 'judicial inquiry is complete.'"[36] *Barnhill v. Johnson*[37] is to a similar effect: "appeals to legislative history are well-taken only to resolve 'statutory ambiguity.'"[38] In other words, if the meaning is plain, stop there; take the next step and consult the legislative history only if the statute is ambiguous. Judge Friendly criticized this mode of analysis as "[i]llogical" because it holds that a plain meaning "shut[s] off access to the very materials that might show it not to be plain at all."[39]

I have another problem. Nearly every brief I see in cases involving issues of statutory construction contains a discourse on legislative history. This is a wise precaution on the part of appellate advocates. Counsel can never be sure that the court will find the words plain, and stop there. To be safe, in the event the court takes two steps instead of one, counsel must include a backup argument addressing the meaning of the statute in light of the legislative history. Judges read those briefs from cover to cover, or at least they are supposed to. I do. Somewhere during the reading, preliminary views begin to form. When the reading is done and the case has been analyzed and argued, how can it be said that the judge turned to the legislative history only after finding the statutory language ambiguous? The judge himself often cannot identify exactly when his perception of the words actually jelled. Through self-discipline, judges might be able to skip past the legislative history portion of the briefs. To put some real teeth into the two-step plain meaning rule, however, perhaps the portions of the briefs discussing legislative history ought to be placed under seal—to be opened if, and only if, the judge certifies that the statute appears ambiguous after three readings.

Several Supreme Court opinions this past Term cast doubt on whether the two-step plain meaning rule has, in fact, taken root. In *Reves v. Ernst & Young*,[40] the case already mentioned, the Court did not stop with the dictionary but went on to review the legislative history, which it thought confirmed its textual analy-

35. 112 S. Ct. 1146 (1992).
36. *Id.* at 1149.
37. 112 S. Ct. 1386 (1992).
38. *Id.* at 1391. This is an old idea. *See* Wisconsin R.R. Comm'n v. Chicago, Burlington & Quincy R.R. Co., 257 U.S. 563, 589 (1922) (stating that legislative history is "admissible to solve doubt and not to create it").
39. Friendly, *supra* note 33, at 206.
40. 113 S. Ct. 1163 (1993).

sis.[41] The Court followed the same approach in *Negonsott v. Samuels*,[42] prefacing its discussion with the statement that the "legislative history . . . supports our construction."[43] In neither case did the Court indicate that it viewed the statutory language as ambiguous. In both cases, Justices Scalia and Thomas joined the opinion except the portion discussing secondary materials.[44] Legislative history in these opinions could be viewed as mere surplusage. But, there may be more going on.

Rigorous textual analysis, which to my mind is essential, can lead to a tentative conclusion about the meaning of statutory language. If a judge is doing his job, however, he tests his conclusion before it is finalized. Judges cannot do this like scientists. Experiments are not possible. Rather, the testing must be performed by trying to look ahead, by attempting to discover problems raised by the tentative interpretations. The judiciary's familiar practice of asking hypothetical questions during oral argument illustrates the process at work.[45] It is easier for the judge to perform this task when he can draw from everyday experience and accumulated knowledge. Yet this may not be possible for many of today's intricate statutes dealing with complex subjects. What does the judge do when faced with the question whether the Bevill Amendment to Subtitle C of the Resource Conservation and Recovery Act applies to lightweight aggregate air pollution dust?[46] Legislative history may be useful in filling the gap. The history can supply information about how the statute is expected to operate, what subjects it addresses, what problems it seeks to solve, what objectives it tries to accomplish, and what means it employs to reach those objectives—all of which the judge may draw upon in testing his tentative construction of the statutory language.[47]

41. *Id.* at 1170-72.

42. 113 S. Ct. 1119 (1993).

43. *Id.* at 1123-25.

44. Justices Scalia and Thomas joined the majority opinion in both cases without filing separate opinions. *Negonsott*, 113 S. Ct. at 1121; *Reves*, 113 S. Ct. at 1165.

45. I am tempted to call the process vicarious trial and error, but unfortunately the phrase was "pre-empted long ago by rat psychologists." RICHARD DAWKINS, THE SELFISH GENE 58 (1989).

46. *See* Solite Corp. v. U.S. Environmental Protection Agency, 952 F.2d 473 (D.C. Cir. 1991).

47. I recognize the danger of using legislative history to determine purpose and then extrapolating from the purpose to the meaning of statutory language. Purpose tells the end, the objective. Implementing the objective is another matter. How far does the legislation go toward accomplishing the objective? Only so far as the language takes it.

This process, then, may mark the difference between a blind decision and a decision made with one's eyes open.

Some may believe that if there is a problem with construing statutes by looking only at the text, the fault lies with Congress. All Congress has to do is be precise.[48] But greater precision in the use of language may not lead to greater clarity. It can lead to longer and longer statutes, and less clarity. Read the Clean Air Act.[49] If one had to define one's terms before speaking, no one would be able to talk about anything important. The reason has been explained by the philosopher of science, Sir Karl Popper.[50] Requiring terms to be defined, like requiring all premises to be proven, leads to infinite regression. It replaces a short story with an infinitely long one.

48. *See* Note, *Why Learned Hand Would Never Consult Legislative History Today*, 105 HARV. L. REV. 1005, 1022 (1992); *but see* William N. Eskridge, Jr., *The New Textualism*, 37 U.C.L.A. L. REV. 621, 677 (1990), expressing considerable doubts about this proposition.

49. 42 U.S.C. §§ 7401-7642 (1988).

50. KARL POPPER, *Two Kinds of Definitions*, *in* POPPER SELECTIONS 96 (D. Miller ed., 1985).