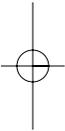
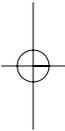
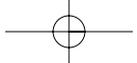
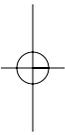
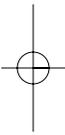


A DICTIONARY OF STATUTORY INTERPRETATION





A DICTIONARY OF STATUTORY INTERPRETATION

William D. Popkin

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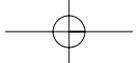
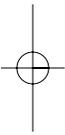
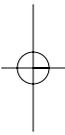
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*To my wife
Prema*



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INTRODUCTION

ABOUT DICTIONARIES AND THIS DICTIONARY

Word-books vs. Encyclopedias

Ordinary dictionaries, we have come to believe, are primarily word-books. They present the reader with one or more ways in which words are or were used. It was not always that way. A rival tradition, at least since the early 17th Century, was for dictionaries to contain “encyclopedic” material,¹ in two senses of the term: (1) many of the entries included biographical sketches of real, fictional, and mythological people, and explanations of geographical locations; and (2) the word definitions themselves often included reference material routinely included in encyclopedias. The 1932 Britannica Encyclopedia’s entry for “Dictionary” acknowledges that “[b]etween the dictionary and the encyclopedia the dividing line cannot be sharply drawn.”²

Ever since the 19th Century, however, the encyclopedic tradition has been on the defensive, reflecting Noah Webster’s view (presented initially in his *American Dictionary of the English Language* in 1828) that definitions are

1. Herbert C. Morton, *The Story of Webster’s Third*, pp. 60–61, 66 (1994) (hereafter “Morton”).

2. *Encyclopedia Britannica*, Vol. 7, p. 339 (14th ed., 1929). The debate within linguistics as to whether there is a theoretical distinction between a dictionary and an encyclopedia is carried on (in part) as a debate over whether semantics and pragmatics can be distinguished. Haiman, *Dictionaries and Encyclopedias*, 50 *Lingua* 329, 342–43 (1980) (“... [S]emantics [is] the relationship between signs and their meanings,” and pragmatics “has been extended so that [it] includes the relationship of signs not only to their users, but to the general nonlinguistic context, and thence to the world at large;” “the intent of dictionaries is semantic while that of encyclopedias is pragmatic;” and “[a]n attack on the separation of dictionaries and encyclopedias is therefore necessarily an attack on the theoretical significance of semantics and pragmatics as mutually independent domains.”).

what dictionaries do best (Morton, pp. 61–66). A similar view was expressed by those undertaking the Oxford English Dictionary:

[A]n English Dictionary ought not to include the technical words of different sciences, as little ought it to attempt to supply the place of popular treatises on the different branches of human knowledge; it must everywhere preserve the line firm and distinct between itself and an encyclopedia. Let the quotations yield as much information as they can be made to yield, in subordination to their primary purpose, which is to illustrate the *word*, and not tell us about the *thing*...³

Legal dictionaries must also decide how encyclopedic to be. The older legal dictionaries, such as Giles Jacob's 1729 English Law Dictionary, and the first U.S. legal dictionary (by Bouvier, in 1839), were much more encyclopedic than modern legal word-books like Black's, Ballentine's, and Mellinkoff's, in part to compensate for weaknesses in legal education.⁴ The title page of Jacob's dictionary stated that it "contain[ed] the interpretation and definition of words and terms used in the law; and also the whole law and the practice thereof, under all the heads and titles of the same. Together with such informations relating thereto as explain the history and antiquity of the law, and our manners, customs, and original government." And the Preface to Jacob's Dictionary (pp. 5–6) stated that the book was a "kind of library," an "elaborate treatise." For example, Jacob's nine column entry for "Parliament" includes material on history, powers, and member selection (pp. 532–35).

Joseph Story's review of Bouvier's Dictionary located it somewhere between a word-book and an encyclopedia: "It supplies a defect in our libraries, ... where the small dictionaries are so brief as to convey little information of an accurate nature to students, and the large ones are rather compendiums of the law than explanatory statements of terms; yours has the great advantage of an intermediate character."⁵ For example, Bouvier's entry for "Congress" contains five columns about legislative powers and how laws are passed.⁶

This dictionary on statutory interpretation is in the older tradition. The entries in Chapter 1 (Definitions) include a discussion of historical back-

3. Richard C. Trench, *On Some Deficiencies in our English Dictionaries*, pp. 60–61 (1857) (published in *Transactions of the Philological Society* (1857)) (hereafter "Trench").

4. Mellinkoff, *The Myth of Precision and the Law Dictionary*, 31 *UCLA L.Rev.* 423, 430 (1983) (hereafter "Mellinkoff, Myth").

5. Frederick Hicks, *Materials and Methods of Legal Research*, p. 253 (Third Revised Edition 1942).

6. Bouvier, *A Law Dictionary*, pp. 208–11 (1839).

ground and contemporary issues in statutory interpretation, as well as definitions and an explanation of why the entry is relevant for understanding how judges determine statutory meaning. Chapter 2 (Quotations) includes commentary about the historical and contemporary significance of the quoted material.

Prescription vs. Description

There is another major dispute about dictionaries that is relevant to a dictionary of statutory interpretation—whether the dictionary should be *descriptive* or *prescriptive*. This debate is well known in the context of ordinary dictionaries, where the dispute is over whether to be relatively tolerant about what entries to include (the descriptive approach), or to purge unacceptable definitions and/or attach critical usage labels (the prescriptive approach). The issue is as old as Samuel Johnson (in the 18th Century), who tilted toward the prescriptive in order to slow down the pace of linguistic change (Morton, p. 205). Johnson equated such change with cultural and political decline: “Tongues, like governments, have a natural tendency to degeneration; we have long preserved our constitution, let us make some struggle for our language.”⁷

The descriptive vs. prescriptive dispute was later taken up in connection with the Oxford English Dictionary (OED) by Trench, who tilted toward the descriptive. Trench argued that the lexicographer “is an historian of [the language], not a critic” (Trench, p. 5). Recently, the controversy reached fever pitch in the United States with the 1961 publication of Merriam-Webster’s Third New International Dictionary of the English Language Unabridged (hereafter “Webster’s Third”), which included many words without (in the view of many) attaching appropriately derogatory labels.⁸ Webster’s Third dis-

7. Quotation from Johnson’s Preface, cited in Bishop, Good Usage, Bad Usage, and Usage in The American Heritage Dictionary of the English Language, p. xxii (1969) (hereafter “Bishop, AHD”).

8. A criticism of Webster’s Third to which I can personally relate concerns its definition of “Hoosier,” as it evolved during Senate colloquies before and after the 1987 NCAA Basketball Championships. (Though a New Yorker by birth, I suppose I am a Hoosier by virtue of living in Indiana longer than any other place.) The Los Angeles Times of November 10, 1988, in an article by Paul Dickson, reports the following:

On March 30, 1987, Sen. Alfonse M. D’Amato of New York took the Senate floor to predict that his alma mater, Syracuse University, would win the NCAA basketball championship by beating the Indiana University Hoosiers that night. Good-natured sports chauvinism is common on Capitol Hill; hundreds of such

continued the “colloquial” label, used the “slang” label less often, and adopted the mildly disapproving labels “substandard” and (less often) “nonstandard” (Morton, pp. 135–38). The Explanatory Notes at the front of Webster’s Third had a somewhat “in your face” tone, explaining that the “substandard” label referred to a “status conforming to a pattern of linguistic usage that exists throughout the American language community but differs in choice of word or form from that of the ‘prestige group’ in that community,” a characterization, which suggested that snobbery rather than good linguistic judgment favored a particular usage. As for slang, the Notes say that “[t]here is no completely satisfactory objective test for slang, especially in application to a word out of context.”⁹

The 1969 American Heritage Dictionary of the English Language (AHD) took a different approach from Webster’s Third (Bishop, AHD, pp. vi, xxi–xxiii & p. 692). It adopted the perspective of the “educated adult,” although it cautiously straddled the descriptive vs. prescriptive debate. An introductory essay called “Good Usage, Bad Usage, and Usage” eschewed any appeal to authority such as the King’s English (referring to 16th Century England) or the authority of the French Academy (traceable to 1635), and acknowledged actual usage as the principal guide. Nonetheless, the essay noted that the AHD properly rejected “the ‘scientific’ delusion that a dictionary should contain no value judgments,” explaining that the AHD lexicographers relied on a usage panel of about one hundred people as “enlightened members of the community” to determine “cultivated usage.” The panel also drafted usage notes for some AHD entries—for example, “irregardless” was not merely labeled nonstandard, as Webster’s Third had also done (Webster’s

speeches have been delivered there. But in this case D’Amato invoked a word sacred to Indiana: Hoosier. The New York Republican noted that Webster’s Third New International Dictionary defined the word not only as meaning an Indiana native, but also “an awkward, unhandy or unskilled person, especially an ignorant rustic.” There also was a verb—“to hoosier”—which the dictionary defined as “to loaf on or to botch a job.” D’Amato used this verb to predict the defeat of the Indiana team; if they hoosiered the game, he said, “Syracuse will be victorious.”

After the Hoosiers beat Syracuse, 74–73, Senator Dan Quayle congratulated the team on the Senate floor, but went further. He asked that the derogatory definition of Hoosier in Webster’s Third be removed from the dictionary, and he suggested replacement with his own version: “(Be) it resolved that a Hoosier is someone who is smart, resourceful, skillful, a winner, unique and brilliant.” The article does not note whether Quayle was aware of the pun in his definition. The last name of the player who hit the winning shot was “Smart,” who (I might add) is my son-in-law.

9. Webster’s Third, Explanatory Notes, sec. 8.2.1, p. 19a.

Third, Explanatory Notes, sec. 8.2.3, p.19a), but was further described as “never acceptable except when the intent is clearly humorous.”

Whatever the merits of the descriptive vs. prescriptive debate regarding ordinary dictionaries, the task for a specialized legal dictionary is clear. It must be both descriptive and prescriptive. It must be descriptive in order to provide a complete picture of contemporary disputes about the judicial role. At the same time, the Dictionary cannot help but be drawn into a prescriptive stance when presenting material about the historical and contemporary context of statutory interpretation.¹⁰ I deemed it better to make these critical judgments explicit rather than allow them to creep surreptitiously into the descriptive material. For example, it will become obvious in reading this dictionary that I am suspicious of the modern textualist’s reliance on the plain meaning of a statutory text, but I hope that I succeed in doing “descriptive” justice to the views I critique. In other words, I hope to do for statutory interpretation what Arthur Leff was trying to do with his *Legal Dictionary*, only a small portion of which he completed before his untimely death: “What I conceive is a ‘dictionary’ in which one cannot only look up the ‘meaning’ of a word or phrase, but in addition, in many cases, get a commentary on it, albeit the author’s personalized one.”¹¹

Comparison to Current Legal Dictionaries

Contemporary legal dictionaries are primarily descriptive word-books that do not deal adequately with statutory interpretation. For example, *Black’s Law Dictionary* tells us little about the canons of construction (“Canon of construction. A rule used in construing legal instruments, esp. contracts and statutes.”), or “legislative intent” (“The design or plan that the legislature had at the time of enacting the statute.”).¹² *Ballentine’s Law Dictionary* contains no listing at all for “canons of construction,” and provides a vacuous definition of “legislative intent” (“The vital part, heart, soul, and essence of statutory law; the guiding star in the interpretation of a statute.”).¹³ These dictionaries provide little help in understanding the complex issues underlying

10. Cf. Sidney Landau, *Dictionaries: The Art and Craft of Lexicography*, p. 20 (1989) (subject-field dictionaries are often normative and tend to be more encyclopedic).

11. Leff, *A Letter from Professor Leff to a Prospective Publisher*, dated 22 November 1976, 94 *Yale L.J.* 1852, 1852 (1985).

12. *Black’s Law Dictionary*, pp. 219, 900 (8th ed., 1999).

13. *Ballentine, Law Dictionary* p. 723 (3d ed., 1969).

these definitions, which would enable the reader to decide what is at stake in using either the canons of construction or legislative intent to interpret statutes.

The shortcomings of Black's and Ballentine's Dictionaries are apparent when compared to the more complete entry in Arthur Leff's legal dictionary for "Canons of construction," which is both more descriptive and unabashedly prescriptive:¹⁴

Canons of construction. Fundamental rules for the interpretation of legal writings both private and public, *e.g.*, the doctrine of *eiusdem generis*. In fact, any legal system which in theory seeks to figure out the meanings attached to words by their writers, and then carry out those intentions, *i.e.*, any system in which words are to function as anything but incantations, will find canons of construction deeply unsatisfactory.... One may be aided by the theory that they too knew the canons of construction and sought the meaning their applications would bring, but the job commanded of the judges is still to determine what the draftsmen meant. But in situations where the writers may not even be presumed to know that canons of construction exist, it is hard, with a straight face, to find that they meant the meanings the canons would produce. Hence modern interpretation is far less dependent upon canons of interpretation, *i.e.*, upon a reasonably small number of *rules* of meaning than on a less structured attempt to figure out what these words might have meant to their users. The canons are now used, or at least ought to be, only when the language is so ambiguous and opaque as to defy understanding, but *some* decision has to be made. Then the fiction, of "*the* meaning" may have to be indulged.

The fundamental problem with contemporary legal dictionaries is, as Mellinkoff explains, their lack of "any consistent sense of purpose" (Mellinkoff, *Myth*, p. 437), which led him to advocate and later to write a *Dictionary of American Legal Usage*. His *Dictionary* would expose "the swarming imprecisions of the law [which] give only an illusion of precision," although he specifically opted for "a word dictionary, not a short legal encyclopedia."¹⁵ My *Dictionary of Statutory Interpretation* has sufficient space for encyclopedic material because its specialized focus lacks the breadth of Mellinkoff's effort.

14. Leff, *The Leff Dictionary of Law: A Fragment*, 94 *Yale L.J.* 1855, 2241 (1985).

15. Mellinkoff's *Dictionary of American Legal Usage*, p. viii (1992).

Using This Dictionary

My tilt toward the encyclopedic and prescriptive leads to the following outline. Chapter 1 contains a brief definition of a word or phrase followed by materials explaining its history (historical note), its relevance for statutory interpretation, and the contemporary issues that the definition raises. However, these subheadings appear selectively—only when they help us to understand statutory interpretation.

Chapter 2 presents quotations about statutory interpretation from cases, books and articles, along with explanatory and critical comments. The quotes were chosen because they highlight a significant point about statutory interpretation and are important either historically or in contemporary debates about how to determine the meaning of statutes.

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- William N Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* (3d ed., 2001).
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Treatise

Norman J. Singer, *Sutherland on Statutory Construction* (6th rev. ed., 2000).

Comparative Law

Interpreting Statutes: A Comparative Study (MacCormick & Summers eds., 1991).

Note to Reader

The references in Chapters 1 and 2 are based on my research over the last few decades and information received from students, including many judges in the Virginia LL.M. program. I invite readers to provide additional citations (or comments of any kind) for inclusion in future editions of this Dictionary.