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AN EVALUATION OF THE RULES OF STATUTORY INTERPRETATION

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The rules of statutory interpretation are under attack as being worthless and even harmful. The purpose of this article is to consider the value of these rules and possible changes in them and in their use. The importance of the subject is considerable because the primary function of modern appellate courts is the interpretation of statutes, and it is conventional for courts to make use of the rules in the course of interpretation.

I. What Are the Rules of Statutory Interpretation

Our law has gradually developed a vast body of authority pertaining to statutory interpretation.¹ Some of the rules in this law are very ancient, others rather recent. Most of this authority is applicable to statutes in any field; some of it only to one field, such as criminal law or constitutional law. Nearly all of it is entirely judge made, although a few rules of interpretation appear in the general statutes of most states.²

The words "rules of statutory interpretation" are used loosely in this article to include any of the legal principles and concepts devoted to the meaning of statutes. Some of these rules are frequently referred to by the courts as canons of construction. The ostensible purpose of every rule is to clarify statutory meaning. The appellate courts of all the states have used substantially all of these rules at one time or another.

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¹ The leading modern texts on statutory interpretation are SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION* (3rd ed., Horack, 1943), and CRAWFORD, *THE CONSTRUCTION OF STATUTES* (1940). Recently an excellent bibliography of text, casebook, and law review writings on statutory interpretation was published. Sanders and Wade, *Legal Writings on Statutory Construction*, 3 *VAND. L. REV.* 569 (1950). The terms statutory interpretation and statutory construction are used synonymously in this article.

² *KAN. G.S.* 1949, 77-201, *MO. REV. STAT. c. 1* (1949); *ORE. REV. STAT. c. 174*. This and subsequent footnotes are illustrative of authorities, not exhaustive of them.

Most rules of statutory interpretation can be classified in one of two ways: those concerned with relations between the words of a statute; and those concerned with the relation of the words in a statute to outside materials. In addition, there is a scattering of rules that do not fit either of these major categories.³

Examples of rules that fall into the first category are *ejusdem generis*;⁴ *noscitur a sociis*;⁵ *expressio unius est exclusio alterius*;⁶ *casus omissus*;⁷ the purpose of a statute is determined from its words;⁸ all parts of a statute should be considered together;⁹ highly ambiguous statutes are invalid;¹⁰ and only limited effect is given to titles,¹¹ preambles,¹² and punctuation marks.¹³ Examples of rules that fall into the second category are the plain meaning rule;¹⁴ the strong authoritative effect of judicial interpretive opinions that the legislature has ac-

³ A good example of the variety of rules that can be brought to bear on any one statute appears in Professor Tunks' analysis of a section of the Iowa statutes pertaining to real property assessments. Tunks, *Assigning Legislative Meaning: a New Bottle*, 37 IOWA L. REV. 372 (1952).

⁴ *Cleveland v. United States*, 329 U.S. 14 (1946); *State v. Certain Contraceptive Materials*, 126 Conn. 428, 11 A.2d 863 (1940); *Parman v. Lemmon*, 120 Kan. 370, 244 Pac. 277 (1926); *Small v. Small*, 56 Kan. 1, 42 Pac. 323 (1895); *Hammett v. Kansas City*, 351 Mo. 192, 173 S.W.2d 70 (1943). *But cf.* *United States v. Alpers*, 338 U.S. 680 (1949).

⁵ *Patton v. United States*, 159 U.S. 500, 509 (1895); *Behrens v. State*, 140 Neb. 671, 1 N.W.2d 289 (1941); *Application of Spartan Airlines*, 199 Okla. 305, 185 P.2d 925 (1947).

⁶ *Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1, (1898); *Rooney v. Horn*, 174 Kan. 11, 254 P.2d 322 (1953); *Ledwith v. Bankers Life Ins. Co.*, 156 Neb. 107, 54 N.W.2d 409 (1952); *State ex rel. Port of Seattle v. Department of Public Service*, 1 Wash.2d 102, 95 P.2d 1007 (1939).

⁷ *United States ex. rel. Coy v. United States*, 316 U.S. 342 (1942); *Mitchell v. Mitchell*, 312 Mass. 154, 43 N.E.2d 783 (1942); *cf.* *Hunziker v. School District*, 153 Kan. 102, 109 P.2d 115 (1941).

⁸ *United States v. American Trucking Assns.*, 310 U.S. 534, 543 (1940); *People v. Knowles*, 35 Cal.2d 175, 217 P.2d 1 (1950), *certiorari denied* 340 U.S. 879 (1950); *State v. Republic County Commrs.*, 148 Kan. 376, 82 P.2d 84 (1938); *State v. Hawk*, 360 Mo. 490, 228 S.W.2d 785 (1950).

⁹ *Alexander v. Cosden Pipe Line Co.*, 290 U.S. 484, 496 (1934); *Costanzo v. Tillinghast*, 287 U.S. 341 (1932); *People v. Moroney*, 24 Cal.2d 638, 150 P.2d 888 (1944); *State v. Moore*, 154 Kan. 193, 117 P.2d 598 (1941).

¹⁰ *Connally v. General Const. Co.*, 269 U.S. 385 (1926); *Krebs v. Thompson* 387 Ill. 471, 56 N.E.2d 761 (1944); *State v. Gaitskill*, 133 Kan. 389, 300 Pac. 326 (1931); *State v. Humble Oil & Refining Co.*, 55 N.M. 395, 234 P.2d 339 (1951); *cf.* *United States v. Cardiff*, 344 U.S. 174 (1952).

¹¹ *Brotherhood of Railroad Trainmen v. Baltimore & O. R. Co.* 331 U.S. 519, 528 (1947); *Mad River Co. v. Town of Wolcott*, 137 Conn. 680, 81A.2d 119 (1951); *Attorney General v. Goldberg*, 330 Mass. 291, 112 N.E.2d 926 (1953). *But cf.* *In re Estate of Butler*, 159 Kan. 144, 152 P.2d 815 (1944).

¹² *Coosaw Mining Co. v. South Carolina*, 144 U.S. 550, 563 (1892); *State v. Consumers Co-operative Association*, 163 Kan. 324, 345, 183 P.2d 423, 439 (1947); *Milk Control Board v. Gosselin's Dairy*, 301 Mass. 174, 16 N.E.2d 641 (1938); *City of Newark v. Fischer*, 8 N.J. 191, 84 A.2d 547 (1951). *Contra*, *Bricelyn School District v. Board of County Commissioners*, 55 N.W.2d 597 (Minn. 1952).

¹³ *United States v. Shreveport Grain & El. Co.*, 287 U.S. 77 (1932); *In re Coffee's Estate*, 19 Cal.2d 248, 120 P.2d 661 (1941); *Atchison T. & S. F. Ry. v. State Highway Commission*, 123 Kan. 576, 255 Pac. 966 (1927).

¹⁴ *Ex Parte Collett*, 337 U.S. 55 (1949); *Helvering v. City Bank Co.*, 296 U.S. 85 (1935); *In re Estate of Duel*, 161 Kan. 593, 171 P.2d 271 (1946); *McAllister v. Fair*, 72 Kan. 533, 84 Pac. 112 (1906); *City of Wayne v. Adams*, 156 Neb. 297, 56 N.W.2d 117 (1952).

quiesced in by lapse of time without action,¹⁵ and the similar effect of judicial opinions of other states whose statutes have been adopted elsewhere;¹⁶ special acts qualifying general ones;¹⁷ the effect of the common law on statutory meaning;¹⁸ when two statutes are in conflict, the latest in time prevails;¹⁹ the effect of statutes *in pari materia*;²⁰ the use of pre-passage legislative history materials such as bills introduced but amended or defeated,²¹ committee reports,²² committee hearings,²³ floor debate and comment,²⁴ house and senate journals,²⁵ executive reports to the legislature,²⁶ executive committee reports,²⁷ revisors' notes,²⁸ and conditions at the time of enactment;²⁹ the use of post-passage legislative history materials such as administrative interpretations,³⁰ statutory amendments,³¹ and judicial opinions;³² the use of re-

¹⁵ *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940); *Lockhart v. State* 150 Tex. Crim. Rep. 230, 200 S.W.2d 164 (1947).

¹⁶ *Marlin v. Lewallen*, 276 U.S. 58 (1928); *In re Russell's Estate*, 294 N.Y. 99, 60 N.E.2d 823 (1945); *Standard Steel Works v. Crutcher-Rolfs-Cummings, Inc.*, 269 P.2d 402 (Kan. 1954); *Nelson v. Stull*, 65 Kan. 585, 68 Pac. 617 (1902).

¹⁷ *People v. Moroney*, 24 Cal.2d 638, 150 P.2d 888 (1944); *Moody v. Edmondson*, 269 P.2d 462 (Kan. 1954); *Andersen v. Heltzel*, 197 Ore. 23, 251 P.2d 482 (1952).

¹⁸ *Michigan v. Michigan Trust Co.*, 286 U.S. 334, 343 (1931); *State v. Western Union Telegraph Co.*, 12 N.J. 468, 97A.2d 480 (1953); *People v. Dethloff*, 283 N.Y. 309, 28 N.E.2d 850 (1940); *cf. Morissette v. United States*, 342 U.S. 246, 263 (1952).

¹⁹ *Kimminau v. Common School District*, 170 Kan. 124, 223 P.2d 689 (1950); *Antrim County Social Welfare Board v. Lapeer County Social Welfare Board*, 332 Mich. 224, 50 N.W.2d 769 (1952); *United States Steel Co. v. County of Allegheny*, 369 Pa. 423, 86 A.2d 838 (1952).

²⁰ *Harris v. Commr. of Internal Revenue*, 340 U.S. 106 (1950); *City of Wichita v. Wyman*, 158 Kan. 709, 150 P.2d 154 (1944); *State v. Buck*, 262 P.2d 495 (Ore. 1953).

²¹ *Fox v. Standard Oil Co.*, 294 U.S. 87 (1935); *R. S. Blome Co. v. Ames*, 365 Ill. 456, 6 N.E.2d 841 (1937); *State v. Kelly*, 71 Kan. 811, 81 Pac. 450 (1905).

²² *Harrison v. Northern Trust Co.*, 317 U.S. 476 (1943); *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892); *Institute of Living v. Town and City of Hartford*, 133 Conn. 258, 50 A.2d 822 (1946); *City of New Bedford v. New Bedford S.S. Authority*, 330 Mass. 420, 114 N.E.2d 553 (1953).

²³ *Armstrong Paint and Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 331 (1938). *But cf. Guesefeldt v. McGrath*, 342 U.S. 308, 317 (1952).

²⁴ *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384 (1951); *District of Columbia v. Murphy*, 314 U.S. 441 (1941); *Bird v. Plunkett*, 139 Conn. 491, 95 A.2d 71 (1953).

²⁵ *State v. Kelly*, 71 Kan. 811, 81 Pac. 450 (1905); *Liquor Control Commission v. Fraternal Order of Eagles*, 286 Mich. 32, 281 N.W. 427 (1938); *State v. Ohio Turnpike Commission*, 159 Ohio St. 581, 113 N.E.2d 14 (1953).

²⁶ *United States ex rel. Chapman v. Federal Power Commission*, 345 U.S. 153 (1953); *State v. Kelly*, *supra* note 25.

²⁷ *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950).

²⁸ *Western Pacific R. R. Corp. v. Western Pacific R. R. Co.*, 345 U.S. 247, 255 (1953); *Ex Parte Collett*, 337 U.S. 55, 69 (1949).

²⁹ *United States v. Williams*, 341 U.S. 70 (1951); *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892); *State v. Kelly*, 71 Kan. 811, 81 Pac. 450 (1905); *Shapiro v. Butts*, 155 Ohio St. 407, 99 N.E.2d 173 (1951).

³⁰ *Alstate Construction Co. v. Durkin*, 345 U.S. 13 (1953); *Wotton v. Bush*, 261 P.2d 256 (Cal. Sup. Ct. 1953); *Sykes v. Lochmann*, 156 Kan. 223, 132 P.2d 620 (1943), *certiorari denied* 319 U.S. 753 (1943).

³¹ *People v. Sparks*, 312 Mich. 140, 20 N.W.2d 136 (1945); *Chatlos v. McGoldrick*, 302 N.Y. 380, 98 N.E.2d 567 (1951); *In re Dorrance's Will*, 333 Pa. 162, 3 A.2d 682 (1939).

³² *Missouri v. Ross*, 299 U.S. 72 (1936); *State v. One Gaming Table*, 174 Kan. 757, 258 P.2d 225 (1953); *Nyland v. Department of Labor and Industries*, 41 Wash.2d 511, 250 P.2d 551 (1952).

pealed³³ and re-enacted³⁴ statutes; the use of common³⁵ or trade³⁶ meanings of words as disclosed by dictionaries or expert testimony; and the rule that a statute will be given a constitutional interpretation when possible.³⁷ The purpose and intent of the legislature concepts sometimes fall into the first category, sometimes into the second. Examples of rules that fall into neither of the two major categories are the strict interpretation of some kinds of statutes³⁸ and the liberal interpretation of others;³⁹ and the presumption against the retroactive operation of statutes.⁴⁰

The federal courts have made increasing use of legislative history materials until now the Supreme Court of the United States uses this device in most of its statutory interpretation cases. The state courts use legislative history much less frequently, probably because there are far fewer written records of this history than is true of federal legislation. All courts make great use of statutes *in pari materia*, prior judicial

³³ *Kucera v. State*, 160 Kan. 624, 164 P.2d 115 (1945); *Board of Insurance Commrs. v. Texas Emp. Ins. Assn.*, 144 Tex. 543, 192 S.W.2d 149 (1946); *In re Phillips' Estate*, 193 Wash. 194, 74 P.2d 1015 (1938).

³⁴ Re-enactment carries with it the judicial and executive interpretations of the statute made prior to re-enactment. *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 332 (1938); *Wotton v. Bush*, 261 P.2d 256 (Cal. Sup. Ct. 1953); *VanAntwerp v. State*, 334 Mich. 593, 55 N.W.2d 108 (1952).

³⁵ *N.L.R.B. v. Highland Park Mfg. Co.*, 341 U.S. 322 (1951); *Old Colony R. Co. v. Commr. of Internal Revenue*, 284 U.S. 552 (1932); *Hunt v. Eddy*, 150 Kan. 1, 90 P.2d 747 (1939).

³⁶ *Deputy v. Du Pont*, 308 U.S. 488, 498 (1940); *Flour Mills of America v. Burrus Mills*, 174 Kan. 709, 258 P.2d 341 (1953); *Chicago, R. I. & Pac. Ry. Co. v. Ferguson*, 161 Kan. 562, 171 P.2d 274 (1946).

³⁷ *United States v. Shreveport Grain & El. Co.*, 287 U.S. 77 (1932); *State ex rel. Osborn v. Richardson*, 174 Kan. 382, 256 P.2d 135 (1953); *Hunt v. Eddy*, 150 Kan. 1, 90 P.2d 747 (1939); *State v. Thompson*, 57 N.M. 459, 260 P.2d 370 (1953).

³⁸ Criminal statutes are strictly construed against the state. *United States v. Halseth*, 342 U.S. 277 (1952); *State v. Hansen*, 55 N.W.2d 923 (Iowa 1952); *State v. Waite*, 156 Kan. 143, 131 P.2d 708 (1942); *Wanzer v. State*, 97A.2d 914 (Md. 1953). Statutes in derogation of natural property rights are strictly construed. *Babb v. Rose*, 156 Kan. 587, 134 P.2d 655 (1943). Legislative grants of property rights should be construed strictly in favor of the state. *Magnolia Petroleum v. Walker*, 125 Tex. 430, 83 S.W.2d 929 (1935). Tax exemption statutes should be strictly construed against the person seeking the exemption. *Atlantic Coast Line v. Phillips*, 332 U.S. 168 (1947); *Palmer v. Commissioner of Revenue and Taxation*, 156 Kan. 690, 135 P.2d 899 (1943).

³⁹ Statutes should be liberally construed in favor of veterans. *Fishgold v. Sullivan Corp.*, 328 U.S. 275, 285 (1946). "Beneficial" statutes should be liberally construed in favor of those they benefit. *Denton v. West*, 156 Kan. 186, 131 P.2d 886 (1942). Curative and remedial statutes should be liberally construed. *Cosmopolitan Shipping Co. v. McAllister*, 337 U.S. 783 (1949); *Zehender & Factor v. Murphy*, 386 Ill. 258, 53 N.E.2d 944 (1944). Workmen's compensation statutes are to be liberally construed in furtherance of the purpose for which they were enacted. *Industrial Commission of Wisconsin v. McCartin*, 330 U.S. 622, 628 (1947); *Alexander v. Chrysler Motor Parts Corp.*, 167 Kan. 711, 207 P.2d 1179 (1949). Tax statutes are liberally construed in favor of taxpayers. *United States v. Updike*, 281 U.S. 489, 496 (1930); *Ready-Power Co. v. City of Dearborn*, 336 Mich. 519, 58 N.W.2d 904 (1953); *Appeal of School District of Allentown*, 370 Pa. 161, 87 A.2d 480 (1952).

⁴⁰ *Hassett v. Welch*, 303 U.S. 303, 314 (1938); *In re Estate of Brown*, 168 Kan. 612, 215 P.2d 203 (1950); *Ellis v. Kroger Grocery Co.*, 159 Kan. 213, 152 P.2d 860 (1944); *In re Layman's Estate*, 208 Okla. 174, 254 P.2d 784 (1953). *But cf.* *Fay v. Allied Stores Corp.*, 262 P.2d 189 (Wash. 1953).

opinions, and the plain meaning rule. A court will often apply more than one rule in interpreting a statute involved in a particular case.

The Supreme Court of the United States has in recent years shown greater understanding of statutory interpretation questions than have state appellate courts. Its leadership as a creative force is very apparent in this field. One may disagree with the results in many of its cases, but there is no doubt that the present court has a deep appreciation of judicial obligations and methods in the application of statutes to matters in litigation. On statutory interpretation doctrines, Justices Jackson and Frankfurter are the outstanding spokesmen of the present Court.

II. Major Attacks That Have Been Made on the Value of the Rules

The rules of statutory interpretation have been attacked as inconsistent, uncertain, and undesirable, both in what they say and how they are applied by the courts.⁴¹ Some of these criticisms have been directed at the rules generally, others at only certain types of rules, especially the plain meaning rule and those rules pertaining to the use of extrinsic aids⁴² in the interpretive process. If such attacks are justified, then the effect of statutes is unpredictable, because there is no way of telling in advance what rules of interpretation a court will choose to follow or ignore. The law of statutory interpretation becomes a bag of tricks from which courts can pull respectable-sounding rules to justify any possible result that the judges desire. This law also provides a cover behind which judges can hide to avoid carefully thinking through solutions to the problems before them, or to avoid declaring the real reasons for their decisions. It encourages laziness and hypocrisy on the part of the bench.

Although some of the writers have condemned the rules of interpretation generally, it is unlikely that any of them are opposed to every rule. Even the more severe critics favor the use in statutory

⁴¹ ALLEN, *LAW IN THE MAKING*, pp. 494, 500 (5th ed. 1951); Friedmann, *Statute Law and Its Interpretation in the Modern State*, 26 CAN. B. REV. 1277 (1948); Horack, *Cooperative Action for Improved Statutory Interpretation*, 3 VAND. L. REV. 382 (1950); Horack, *The Disintegration of Statutory Construction*, 24 IND. L. J. 335 (1949); Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A.J. 535 (1948), 8 F.R.D. 121 (1949); Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U. L. Q. 2 (1939); Lattin, *Legal Maxims, and Their Use in Statutory Interpretations*, 26 Geo. L. J. 1 (1937); Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930). Cf. the comments of L. Hand, J., in *Van Vranken v. Helvering*, 115 F.2d 709 (2d Cir. 1940); and Frankfurter, J., in *United States v. Universal C. I. T. Credit Corp.*, 73 Sup. Ct. 227, 229 (1952). *But cf.* Silving, *A Plea for a Law of Interpretation*, 98 PA. L. REV. 499 (1950).

⁴² For a definition of extrinsic aids see SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION*, § 5001 (3rd ed., Horack, 1943).

interpretation of legislative history materials, statutes *in pari materia*, and a modified stare decisis. Most of them also favor some kind of purpose of the legislature approach.

The plain meaning rule has been criticized in recent years, not only because of its inconsistent usage, but also on the grounds that there can be no such thing as plain meaning.⁴³ All words are ambiguous, it is argued, so no statute can be plain; courts resorting to the plain meaning rule are merely rationalizing decisions actually based on other reasons. A somewhat similar idea is that most statutes must be ambiguous to a degree because they refer to broad, general classes of things.⁴⁴ Class terms are uncertain as to their border-line meanings, and hence they are uncertain as to whether or not specified particulars fall in or out of the class. The broader the general class, the greater the area of uncertainty. All the possible particulars that are to be included in the general class rarely can be enumerated in a statute, so most statutes using class terms must be ambiguous. Frequent judicial criticism of the plain meaning rule also can be found in which opposition is expressed to following literal meanings at the expense of the basic purposes of enactments. In these cases the courts indicate that basic purposes of the legislature, if ascertainable, should control over the words used in the statutes.⁴⁵

Attacks on the plain meaning rule sometimes are accompanied by attacks on the concept that the intent of the legislature should be found and followed in interpreting statutes. These attacks are similar to those on the plain meaning rule in that they claim unpredictable use of the intent rule by the courts, and deny that legislative intent is something that exists or can be found if it does exist.⁴⁶

⁴³ ALLEN, *LAW IN THE MAKING*, pp. 482-487 (5th ed. 1951); SUTHERLAND, *STATUTES AND STATUTORY CONSTRUCTION*, § 4502 (3rd ed., Horack, 1943). For a consideration of the varied meanings of words generally, see Williams, *Language and the Law*, 61 L. Q. REV. 71, 384 ff. (1945).

⁴⁴ Jones, *Statutory Doubts and Legislative Intention*, 40 COL. L. REV. 957, 963 (1940); COHEN, *LAW AND THE SOCIAL ORDER*, p. 133 (1933).

Levi argues that ambiguity of rules and concepts is inherent in all law and is necessary to permit the infusion of new ideas by means of changing classifications. LEVI, *AN INTRODUCTION TO LEGAL REASONING*, pp. 1-6 (1949).

⁴⁵ *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892); *City of Mason v. West Texas Utilities*, 150 Tex. 18, 237 S.W.2d 273 (1951); *Natural Gas Pipeline Co. v. Commission of Revenue and Taxation*, 163 Kan. 458, 183 P.2d 234 (1947).

⁴⁶ Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); cf. Jones, *Statutory Doubts and Legislative Intention*, 40 COL. L. REV. 957, 968 (1940).

Gray argues that legislative intent rarely exists on problems that require statutory interpretation. "Interpretation is generally spoken of as if its chief function was to discover what the meaning of the Legislature really was. But when a Legislature has had a real intention, one way or another, on a point, it is not once in a hundred times that any doubt arises

Related to the plain meaning rule and legislative intent controversies is the attack on the use of extrinsic aids to statutory interpretation, especially the use of legislative history materials. Only a very limited use of legislative history materials in the interpretation of statutes is advocated by those who strongly support the orthodox plain meaning rule.⁴⁷ They argue that legislative history materials should not be resorted to in statutory interpretation cases if the language of the statute is clear on its face.⁴⁸ A corollary of this position is that legislative history materials should not be used to show ambiguity of a statute plain on its face.⁴⁹ In recent years, a growing movement counter to this one has developed that strongly advocates the use of extrinsic legislative history materials, and bitterly attacks the plain meaning rule as a device for excluding their use.⁵⁰ The use of extrinsic materials is justified by these advocates as supplying valuable insights into legislative intent and purpose.

The use of some legislative history materials, such as floor debates and statements made during committee hearings, has been opposed because it is claimed they do not show the intent of the legislature, but only the intent of a small number of legislators.⁵¹ Also, attacks have been made on the use of legislative history materials in the interpretations of statutes because these materials are unavailable to most lawyers.⁵²

III. Basic Objectives of Statutory Interpretation

Before considering further the attacks on the rules of statutory interpretation, attention should be given to the basic aims of such interpretation. What principles should control the courts in deciding

as to what its intention was The fact is that the difficulties of so-called interpretation arise when the Legislature has had no meaning at all" GRAY, *THE NATURE AND SOURCES OF THE LAW*, p. 172 (2d ed. 1921).

⁴⁷ How frequently legislative history materials are being used by the United States Supreme Court is indicated by the list of decisions of that court from 1938-1948 in which legislative history was decisive of construction of a particular statutory provision. This list is appended to the opinion in *Commissioner v. Estate of Church*, 335 U.S. 632, 687 (1949).

⁴⁸ *Ex Parte Collett*, 337 U.S. 55 (1949); *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85 (1935); McCaffrey, *STATUTORY CONSTRUCTION*, p. 62 (1953).

⁴⁹ *Wisconsin Railroad Commission v. Chicago B. & Q. R. Co.*, 257 U.S. 563 (1921).

⁵⁰ *United States v. American Trucking Assns.*, 310 U.S. 534, 543 (1939); Crawford, *STATUTORY CONSTRUCTION*, § 175 (1940); De Sloovere, *Extrinsic Aids in the Interpretation of Statutes*, 88 PA. L. REV. 527 (1940); Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U. L. Q. 2 (1939).

⁵¹ *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 493 (1931); *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 318 (1897).

⁵² Jackson, J., concurring opinion in *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 395 (1951); Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A.J. 535 (1948), 8 F.R.D. 121 (1949).

questions of interpretation? What should the courts try to accomplish in the interpretation of statutes that come before them? The following are objectives which it is submitted are desirable, and with which, when stated abstractly, most present-day lawyers and judges would agree:

1. Distribution of power between the legislature and the courts.

The courts should recognize limitations on their powers in interpreting statutes. They should recognize that the legislature is supreme and must be followed to the extent that it has passed laws which are clear and constitutional.⁵³ The courts do not have the right to say: "This is what the statute states, but we do not like it and hence will not follow it." But as to constitutional questions, the courts are supreme over the legislature, and may hold to be invalid legislative enactments which are unconstitutional.⁵⁴ The courts should be controlled by these principles of power distribution and seek to perpetuate them.

2. Distribution of responsibility between the legislature and the courts.

The courts should recognize that the legislature has become the most important lawmaker on major policy questions, except as to constitutional matters. The courts should realize that the legislature is often better equipped than the courts to gather data and hear conflicting arguments on policy matters, especially when the rules that are being advocated involve persons quite differently situated from the litigants before the courts. Courts should encourage the legislature to assume its lawmaking functions, and should discourage at least some legislative efforts to pass these functions on to the courts.

3. Creation of certainty in the law.

Certainty in the law enables planning of human affairs in reliance on the law, and the realization of expectations based on such planning. It makes for uniformity in the administration of justice, and

⁵³ "The extent to which judges should feel in duty bound not to innovate is a perennial problem, and the pull of the past is different among different judges as it is in the same judge about different aspects of the past. We are obligated, however, to enforce what is within the power of Congress to declare. Inevitable difficulties arise when Congress has not made clear its purpose, but when that purpose is made manifest in a manner that leaves no doubt according to the ordinary meaning of English speech, this Court, in disregarding it, is disregarding the limits of the judicial function which we all profess to observe." Frankfurter, J., dissenting in *Commissioner v. Church*, 335 U.S. 632, 677 (1948).

⁵⁴ There are some constitutional areas, however, that the courts have refused to enter. *Colegrove v. Green*, 328 U.S. 549 (1946); Dodd, *Judicially Non-Enforceable Provisions of Constitutions*, 80 PA. L. REV. 54 (1931).

prevents the unbridled discretion of the judiciary. It makes available the tested legal experience of the past.

4. To change and adapt the law to new and unforeseen conditions.

Law must change because social institutions change. And in applying generalized legal doctrine, such as statutes, to the facts of specific cases, uncertainties and unforeseen problems arise. As conditions change with the passage of time, some established legal solutions become outmoded. The courts should resolve these uncertainties and assist in adapting the law to new conditions.

5. To decide the controversies of litigants before the courts.

This is the most obvious function of courts whether the statutory interpretation is involved or not. There are dangers that courts run if they stress too greatly the making of general rules of law and slight the issues between the litigants before them. Either of two results is then likely: undesirable general rules of law or undesirable judgments so far as the particular litigants are concerned.⁵⁵

6. Judges should make law when necessary to the ends of justice.

This is still a shocking idea in some quarters, but is something that has been going on since our legal system began. And the Anglo-American judiciary has a distinguished record of effective lawmaking. Our legal system could not operate without a great amount of judicial lawmaking in all fields of law: constitutional law, common law, and statutory interpretation.⁵⁶

7. To the extent that judges make laws, they should do so with wisdom and understanding.

Judges should be informed on the relevant factual data necessary to good policy making. This includes not only the facts peculiar to the controversy between the litigants before them, but also enough of an understanding of how our society works so that they can gauge the effect of the various alternative legal solutions available in deciding a case. Judges also should realize what their powers, duties, and limita-

⁵⁵ Frank, J., concurring in *Aero Spark Plug Co. v. B. G. Corporation*, 130 F.2d 290 (1942).

⁵⁶ For a thorough discussion of whether or not judges make law, see COHEN, *The Process of Judicial Legislation*, LAW AND THE SOCIAL ORDER (1933). Also see CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, pp. 14-18 (1921).

One judge has expressed himself this way on the question: "This case affords a striking illustration of the task cast upon courts when legislation is more ambiguous than the limits of reasonable foresight in draftsmanship justify. It also proves that when the legislative will is clouded, what is called judicial construction has an inevitable element of judicial creation. Construction must make a choice between two meanings, equally sustainable as a matter of rational analysis, on considerations not derived from a mere reading of the text." Frankfurter, J., concurring in *Andres v. United States*, 333 U.S. 740, 752 (1948).

tions are, as well as those of the legislature. They should know how extensive judicial lawmaking is in this country despite the myth that judges do not make law.

Judges should have an understanding of the basic moral issues of the times and hold convictions concerning them. In a democratic society, these convictions should reflect those held by various segments of contemporary society. This carries the representative nature of government over into the judiciary. In making law, judges should honestly apply their moral convictions.⁵⁷ Some writers have added that judges should decide cases in accord with the general welfare,⁵⁸ or to further the achievement of basic democratic values.⁵⁹

8. When judges make law, they should clearly and honestly set forth what the law is that they are developing and the reasons for it.

Courts should fairly and accurately present the real reasons for their decisions. This makes their opinions more useful as precedent, gives a better basis for healthy and effective criticism, and increases the likelihood that the courts will carefully think through their decisions.

The above objectives and principles are ambiguous, as all generalized statements must be. In addition, some of them conflict with others. This leaves room for considerable variation and controversy in application and in the balancing of those that conflict.

IV. An Analysis of the Attacks on the Rules of Interpretation in the Light of Basic Objectives

It is assumed in this article that the desirability of the rules of statutory interpretation should be determined in the light of the basic objectives discussed in the previous section. Any rules that do not assist in the furthering of these objectives are undesirable.

The objectives can also be decisive of the normative problems involved in the attacks of the rules discussed in section II. But those attacks also involve conclusions of fact on such matters as how courts use authoritative doctrine in the field of statutory interpretation, the ambiguous nature of language, the nature of legislative intent, and

⁵⁷ Cf. CARDOZO, *op. cit. supra* note 56, at pp. 107-109.

⁵⁸ Pekelis, *The Case for a Jurisprudence of Welfare*, LAW AND SOCIAL ACTION (1950).

⁵⁹ Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L. J. 203 (1943).

the nature of legislative history materials. The factual truths implied in these attacks should be verified before solutions are suggested to the normative problems raised by the attacks. Rules of law operate in a factual context, and it is foolish to attempt a normative evaluation of the rules without an understanding of their factual context.

The inconsistent and uncertain use by the courts of rules of statutory interpretation can readily be proven. Examples can easily be found in the opinions of any American or English appellate court.⁶⁰ To a degree this treatment of rules is characteristic of all law, not just the law of statutory interpretation. But in statutory interpretation it is so prevalent as to greatly limit predicability of judicial action in the application of statutes. These are factual statements. Merely because they are true does not mean that the results are undesirable and that this entire body of interpretive authority should be abolished. The undesirability of this uncertainty, inconsistency, and unpredictability becomes apparent, however, when measured by the objectives of statutory interpretation.

The present unpredictable use of statutory-interpretation doctrine seriously impedes the objectives of statutory interpretation in that it greatly lessens the certainty of the law and acts as a cover-up device for avoiding wise decisions and for avoiding clear and honest declarations of what the law is and why. There are no compensating advantages for these abuses.

What possible solutions are there for this situation? All or part of statutory interpretation law can be abolished, or the practices of the

⁶⁰ If the literal meaning of a statute is plain, extrinsic aids may not be considered. *Helvering v. City Bank Farmers Trust Co.*, 296 U.S. 85 (1935). Extrinsic aids may be considered even though the literal meaning of a statute is plain. *United States v. American Trucking Assns.*, 310 U.S. 534 (1940).

Ejusdem generis was applied in *Cleveland v. United States*, 329 U.S. 14 (1946). *Ejusdem generis* was not applied; it is merely an aid to construction and is not final or exclusive. *Helvering v. Stockhoms Enskilda Bank*, 293 U.S. 84 (1934).

Penal statutes should be strictly construed. *Prussian v. United States*, 282 U.S. 675 (1931). The rule was not applied. *United States v. Brown*, 333 U.S. 18 (1948).

Words should not be omitted or added in interpreting statutes. 62 Cases of *Jam v. United States*, 340 U.S. 593 (1951). A qualifying or expanding expression will be read into an act to effectuate legislative purpose. *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (8th Cir. 1945).

This inconsistency is well brought out by the selection of cases in READ AND McDONALD, *CASES AND OTHER MATERIALS ON LEGISLATION* (1948).

Additional examples appear in Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed*, 3 VAND. L. REV. 395 (1950); Friedmann, *Statute Law and Its Interpretation in the Modern State*, 26 CAN. B. REV. 1277 (1948); and ALLEN, *LAW IN THE MAKING*, pp. 494-500 (5th ed. 1951). Allen, an English writer, discloses the common law lawyer's antipathy to statutes, a feeling that apparently is now much more strongly held by the legal profession in England than in the United States.

courts in the use of this authority can be changed. Perhaps the latter is not likely without the former, through codification or restatement.⁶¹

Much of this law is logically inconsistent as doctrine, apart from the way it is applied. For the sake of consistency, perhaps some of it should be abolished. If, as will be argued, some of these inconsistent rules are based on dubious policies, even a stronger case for their abolition exists. The rules most deserving of abolition are those concerned with the relations between the words of a statute, such as *ejusdem generis*, and the strict-liberal interpretation rules.

Attacks on the plain meaning rule are likewise founded on provable factual observations; and this rule too, as it actually operates, should be measured by the objectives of statutory interpretation. A strong case can be made for the proposition that all words are inherently ambiguous, and that no statute or other statement in words can be absolutely free of ambiguity. Statutes, furthermore, are particularly ambiguous because they usually deal with classes of people, things, and activities; and class words are fuzzy and imprecise on the borderlines as to what is and is not included in the class. Statutes also are ordinarily directed to a large number of persons, each of whom may understand the words used in a slightly different way.

If no statute can be perfectly plain, should the plain meaning rule be abolished? Not necessarily. Although no statute may be absolutely unambiguous, the degree of ambiguity in most statutes is very slight when applied to most situations. The degree of ambiguity is likely to be substantial only in limited peripheral sets of situations.⁶² The result

⁶¹ Justice Jackson has suggested a restatement of the basic statutory interpretation principles. Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A.J. 535 (1948), 8 F.R.D. 121 (1949).

⁶² This point can be illustrated by almost any statute. Workmen's compensation statutes are good examples. They affect hundreds of thousands of employees, but in only a very small percentage of claims is there any doubt as to how the law should be applied. To the extent that appellate litigation occurs in the workmen's compensation field, it is likely to involve the meaning of such statutory language as "personal injury by accident arising out of and in the course of employment." In the ordinary case the meaning of this language is clear, but doubts may arise in borderline situations as to whether or not the cases fall in or out of the statutory class of cases to which the act applies. Examples of such borderline situations appear in a series of recent Kansas workmen's compensation cases: mechanics employed by a Chevrolet dealer were held to be in the course of their employment when killed returning from another town where they had taken a mechanic's examination given by the Chevrolet Division of General Motors, *Blair v. Shaw*, 171 Kan. 524, 233 P.2d 731 (1951); loss of an eye caused by an assault of one employee on another during working hours held not to be an accident arising out of and in the course of employment, *Johnson v. Guggenheim Packing Co.*, 168 Kan. 702, 215 P.2d 178 (1950); an oilwell drilling employee held injured out of and in the course of his employment when injured while repairing his own automobile during a slack work period, *Hilyard v. Lohmann-Johnson Drilling Co.*, 168 Kan. 177, 211 P.2d 89 (1949); a guard whose hearing was gradually impaired from pistol practice over a period of months at a company range was held to have been injured by an accident, *Winkelman v.*

is that to a large extent statutes are substantially plain, so plain that except in marginal situations it would be a ridiculous forcing of a statute to put more than one meaning on the statutory language. For purposes of interpretation, a vast area of plain meaning exists. If the term plain in the plain meaning rule is understood as plain beyond reasonable question,⁶³ then the rule makes sense, although admittedly a problem arises as to what is reasonable doubt or substantial lack of ambiguity.

To deny that the plain meaning rule has any force or validity opens the door to violation of a fundamental objective in statutory interpretation. This position leads to a denial of legislative supremacy in the statutory field. Under such a view, statutes never are binding on a court as they never are clear. A court can always make whatever rule it wishes and decide cases in any way it wishes, despite statutory meanings because it cannot be restricted by statutory language.

Another focal point for attack on statutory interpretation doctrine, the rules concerned with intent of the legislature, also deserves further analysis. This attack involves the question of what is meant by the term legislative intent, a phrase used very loosely. The idea of intent

Boeing Airplane Co., 166 Kan. 503, 203 P.2d 171 (1949); horseplay or sportive acts during working hours from which injuries resulted held not to be injuries arising out of employment, *Neal v. Boeing Airplane Co.*, 161 Kan. 322, 167 P.2d 643 (1946); an employee injured while going to his ration board during working hours to inquire about securing a rationed tire for his automobile that he used to commute to work in held not to have sustained an injury arising out of employment, *Brandon v. Lozier-Broderick & Gordon*, 160 Kan. 506, 163 P.2d 384 (1945); frostbite caused by working outdoors in cold weather held to be an accidental injury, *Murphy v. I. C. U. Const. Co.*, 158 Kan. 541, 148 P.2d 771 (1944); an acute attack of coronary thrombosis incurred while doing heavy unloading work held to be an accidental injury, *Peterson v. Safeway Stores*, 158 Kan. 271, 146 P.2d 657 (1944); an employee of a construction company at an ordnance plant struck by an automobile on the premises of the ordnance plant held not injured in the course of his employment because at the time of injury he was on his way to work and had not yet reached that part of the premises where his work was to be performed, *Harrison v. Lozier-Broderick & Gordon*, 158 Kan. 129, 145 P.2d 147 (1944); effects of occupational diseases, such as poisoning from refinery gases, held not to be accidental injuries, *El Dorado Refining Co. v. United States Fidelity & G. Co.*, 157 Kan. 198, 139 P.2d 369 (1943).

An English writer has expressed the matter this way: ". . . the words we use, though they have a central core of meaning that is relatively fixed, are of doubtful application to a considerable number of marginal cases." Williams, *Language and the Law*, 61 L. Q. REV. 71, 191 (1945).

⁶³ The standard of reasonable certainty has recently been applied by the Supreme Court of the United States in deciding that a regulation was not void for vagueness. The regulation was one promulgated by the Interstate Commerce Commission, and violators were subject to criminal sanctions. In the opinion of the Court, Mr. Justice Clark said: "A criminal statute must be sufficiently definite to give notice of the required conduct to one who would avoid its penalties, and to guide the judge in its application and the lawyer in defending one charged with its violation. But few words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently, no more than a reasonable degree of certainty can be demanded." *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952).

is always troublesome to the law. It is particularly so in the law of statutory interpretation because a legislature consists of a group of persons acting collectively. If legislative intent is defined to be what was actually in the minds of all the members of the legislature as to the meaning of a particular statute, then the concept is useless to the interpretation of the statute.⁶⁴ Apart from the hopeless problem of proving such mental content, if it could be proven, it would consist of a vast miscellany varying from nothing to a most disparate collection of ideas, hardly the sort of source material to straighten out ambiguity.

The term legislative intent has a more ascertainable meaning if it is held to be what certain key legislative members have expressed concerning the meaning of a statute. Thus, the use of some legislative history materials, such as committee reports, comment during committee hearings, and floor comment during house or senate sessions by a committee chairman or sponsor of a bill, may be based on the idea that some key members have the right to speak for the entire legislature. This right may be derived from an implied agency.⁶⁵ While such a theory makes the intent easy to find, the authorization of such an agency is hard to find; and, if the agency is implied in law, the rule is difficult to justify.

The term legislative intent is sometimes used to express the meaning of a statute as disclosed from the language of the act itself, as well as from all admissible extrinsic aids, including legislative history materials.⁶⁶ In this sense it has no relation to the mental processes of the legislators other than constituting a body of determinable expressions, mostly written, which were available to the legislators when

⁶⁴ "We agree that the issue is not free from doubt The issue involves the baffling question which comes up so often in the interpretation of all kinds of writings: how far is it proper to read the words out of their literal meaning in order to realize their overriding purpose? It is idle to add to the acres of paper and streams of ink that have been devoted to the discussion. When we ask what Congress 'intended,' usually there can be no answer, if what we mean is what any person or group of persons actually had in mind." L. Hand, J., in *United States v. Klinger*, 199 F.2d 645, 648 (2d Cir. 1952). To the same effect as to legislative intent see KOCOUREK, *AN INTRODUCTION TO THE SCIENCE OF LAW*, pp. 201-202 (1930), and ARNOLD, *THE SYMBOLS OF GOVERNMENT*, p. 37 (1935).

⁶⁵ *S.E.C. v. Collier & Co.*, 76 F.2d 939 (2d Cir. 1936).

⁶⁶ "Legislative intention' is useful as a symbol to express the gloss which surrounds the enacting process—the pre-legislative history, the circumstances and motivations which induced enactment. Legislative intention thus described becomes a rule of relevancy. Time and the necessity for decision limit the capacity of inquiry into all the possible data relevant to any given social phenomenon. Termination of inquiry is inevitable in all investigation, and the concept of legislative intention is merely a guide to the kind of source material which seems relevant to the meaning of the statute legislative intention becomes not what the legislature in fact intended, but rather what reliable evidences there are to satisfy the need for further understanding of the legislative action." Horack, *The Disintegration of Statutory Construction*, 24 *IND. L. J.* 335, 340 (1949).

they enacted the statute being interpreted. Closely related to this meaning of legislative intent is the purpose of the statute approach to statutory interpretation. Currently, this is an approach strongly advocated in the most respectable quarters.⁶⁷ At times, purpose appears to be just another name for legislative intent, with the courts seeking to discover what position some or all of the legislators actually took on a question.⁶⁸ At other times, a purpose or intent is "found" under circumstances indicating judicial invention when it would be better if the courts candidly admitted that they were making law.⁶⁹

The legislative intent or purpose concept is the usual device applied to cancel out the effect of some other rule of interpretation that gives a contrary result.⁷⁰ This frequently creates a difficult problem of logic and adds greatly to the unpredictability and confusion in statutory interpretation because the other rules of statutory interpretation are also supposed to be the product of legislative intent.⁷¹ Why and when one expression of intent is supposed to control over another is a hard question that often cannot be explained on any other grounds than that the courts, in their unrestricted discretion, think it should, and for reasons not disclosed.

The terms legislative intent and legislative purpose are so loosely used in the law and represent so much confused thinking, that they are better omitted from the legal vocabulary.⁷² In this respect, they resemble such other common symbols of legal confusion as proximate cause, comity, and *res gestae*. Eliminating the terms would not solve

⁶⁷ S.E.C. v. Joiner Corp., 320 U.S. 344, 350 (1943); United States v. American Trucking Assns., 310 U.S. 534 (1940); Helvering v. New York Trust Co., 292 U.S. 455, 464 (1934); Federal Dep. Ins. Corp. v. Tremaine, 133 F.2d 827 (1943); City of Mason v. West Texas Utilities Co., 150 Tex. 18, 237 S.W.2d 273 (1951); Rogers v. Board of Public Utilities, 158 Kan. 693, 149 P.2d 632 (1944); Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COL. L. REV. 527 (1947); Jones, *Statutory Doubts and Legislative Intention*, 40 COL. L. REV. 957, 974 (1940); LENHOFF, COMMENTS, CASES AND OTHER MATERIALS ON LEGISLATION, pp. 626, 630 (1949).

The ascertainment of purpose is often made difficult by the fact so many statutes are the result of compromises between conflicting policies. LENHOFF *id.* at p. 631.

⁶⁸ United States v. American Trucking Assns., 310 U.S. 534 (1940), where the words intent and purpose appear to be used synonymously.

⁶⁹ Caminetti v. United States, 242 U.S. 470 (1917), where legislative intent was found by applying the plain meaning rule to ambiguous statutory language; Schwegmann Bros. v. Calvert Corp., 341 U.S. 384 (1951), in which Congressional intent was found from uncertain and conflicting legislative history; Clifford v. Eacrett, 163 Kan. 471, 183 P.2d 861 (1947).

⁷⁰ S.E.C. v. Joiner Corp., 320 U.S. 344, 350 (1943); United States v. American Trucking Assns., 310 U.S. 534 (1940).

⁷¹ *Ibid.*; Hassett v. Welch, 303 U.S. 303 (1938); United States v. Jackson, 280 U.S. 183 (1930).

⁷² Mr. Justice Frankfurter has expressly indicated that he refrains from using the words "legislative intent." But he does use "legislative purpose." Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COL. L. REV. 527, 538 (1947). "Use of the expression 'intention of the legislature' is misleading and entirely unnecessary." KOCOUREK, AN INTRODUCTION TO THE SCIENCE OF LAW, p. 201 (1930).

any problems, but it might make it more difficult to avoid solving them.

Whether or not the concept of finding legislative intent by referring to extrinsic aids is a desirable one depends on the value of the plain meaning rule, which has already been discussed, and on the value of the rules for using extrinsic aids.

In deciding when and how to make use of extrinsic aids, the courts should consider the power implications involved. Extrinsic aids may be the medium by which the courts improperly allocate power. By treating expressions of a few legislators as authoritative, the courts may be giving undue power to those not entitled to it. On the other hand, when the plain meaning rule is ignored in favor of one of several conflicting records of legislative history, the courts may be assuming too much power for themselves.⁷³ In the latter type of situation, the courts are in addition likely to be engaged in another evil practice, rationalizing their own unstated preferences.

A strong argument can be made against courts being bound by legislative history materials that are not based on expressions of the entire legislature. Treating such materials as authoritative may be undemocratic and inconsistent with our ideas of representative government. The case against these materials is strongest if they have been planted in hearings or reports for the express purpose of binding courts in case the statute itself is not clear.⁷⁴ The judiciary should be supreme in lawmaking over any but the entire legislature.

Although it is doubtful if courts should consider themselves bound by all extrinsic aids, they can obtain valuable ideas from them as to what the law should be and why. Such materials can aid in the

⁷³ Jackson, J., concurring in *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 396 (1951).

⁷⁴ "To attribute to Congress familiarity with, let alone acceptance of, a construction solely by reason of the fact that our research reveals its presence among the 60,000 word memoranda which the Chairman of the Senate Committee permitted the General Counsel of the O.P.A. to file, is surely to defy the actualities of the legislative process. Is there the slenderest ground for assuming that members of the Committee read counsel's submission now relied upon by the Court? . . . It is hard to believe that even the most conscientious members of the Congress would care to be charged with underwriting views merely because they were expressed in a memorandum filed as was the O.P.A. brief, on which so much reliance is placed in the Court's opinion. If the language of a statute is to be subjected to the esoteric interpretive process that the suggested use of the O.P.A. brief implies, since it is the common practice to allow memoranda to be submitted to a committee of Congress by interests, public and private, often high-minded enough but with their own axes to grind, great encouragement will be given to the temptations of administrative officials and others to provide self-serving 'proof' of congressional confirmation for their private views through incorporation of such materials. Hitherto unsuspected opportunities for assuring desired glosses upon innocent-looking legislation would thus be afforded." Frankfurter, J., dissenting in *Shapiro v. United States*, 335 U.S. 1, 46 (1948).

function of supplying understanding for wise judicial lawmaking, without any mandatory requirements that the courts follow the preferences expressed in them.⁷⁵ Both pre-passage and post-passage extrinsic aids are likely to include thorough considerations of interpretive problems as well as keen observations on statutory effect and meaning. Resort to extrinsic aids increases the chance that the courts will weigh all relevant data and ideas in interpreting statutes, and not miss anything of importance. If most extrinsic aids are to be used as sources of ideas and information rather than as authorities, then restrictions on judicial consideration of such aids as debates should be removed. This view also makes it less important that states do not have extensive records of pre-passage legislative history.⁷⁶

Any broad evaluation of the rules of statutory interpretation should consider the merits of two other classes of these rules: those concerned with the relationships between the words of a statute and the strict-liberal interpretation rules. It has been indicated earlier that these rules are inconsistent in policy and uncertain in application. But leaving such factors aside, do they have any merit? Their purpose is to increase the certainty of statutory language by arbitrary rules of association not inherent in the words or their sentence structure. This is a worth-while objective, and a carefully prepared set of rules no doubt could eliminate some ambiguity if they were well understood by all persons who read statutes and if the courts would be willing to follow the rules rigorously. But their purpose of increasing certainty is defeated by the fact that they are not widely understood, and the courts will not apply them rigorously. They contribute to the very

⁷⁵ Mr. Justice Jackson, in his opinion of the court in *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944), a Fair Labor Standards Act case, indicated approval of this position:

"There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions. And, while we have given them notice, we have had no occasion to try to prescribe their influence They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case"

"We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

⁷⁶ Professor Horack puts great stress on the need for better state legislative records in order to improve the interpretive process. Horack, *The Disintegration of Statutory Construction*, 24 IND. L. J. 335, 348 (1949).

thing they are designed to eliminate. Fortunately, there is another and better way of developing as much certainty as these rules seek to create: more careful and complete drafting.⁷⁷

It is sometimes said by the courts that rules of statutory interpretation are not binding on them, but are merely aids or guides.⁷⁸ Is it desirable to use the rules in such a restrictive manner? Ordinarily not. Such a restriction on the plain meaning rule violates proper legislative supremacy. And if a rule such as *ejusdem generis* is designed to increase certainty of meaning, holding it to be a guide defeats its purpose by permitting indiscriminate departure from it. Also, those rules that have no merit are not made more meritorius by being converted from rules to guides. But some of the rules, including most of those pertaining to pre-passage legislative history, can profitably be used as guides if by guides is meant non-authoritative suggestions of solutions to interpretive problems before the courts. Guides of this sort should be stated in a non-authoritative way and not as rules.

V. The Relative Merits of Legislatures and Courts as Lawmakers

The lawmaking functions of legislatures and courts are closely interrelated. The more clear and detailed statutes are when passed by the legislatures, the less scope there is for judicial lawmaking by interpretation. The more law that is codified, the less opportunity for common law development by the courts. The more satisfied the legislatures are with judge-made law, the less chance for new statutory enactments.

Due to the interrelations between legislative and judicial lawmaking, it is important to consider the relative merits of legislatures and courts as lawmakers. This matter is of special significance when it is realized that to a considerable degree legislatures can decide how much law they are going to make and how much they are going to leave to the courts to make. To a lesser extent, the courts have a similar choice. Insofar as legislators and judges are motivated by the desire to have the best possible laws, they should be concerned with the capac-

⁷⁷ Excellent suggestions for improved drafting appear in Conard, *New Ways to Write Laws*, 56 *YALE L. J.* 458 (1947).

⁷⁸ *S.E.C. v. Joiner Corp.*, 320 U.S. 344, 350 (1943); *United States v. Dickerson*, 310 U.S. 554, 561 (1940); *Texas v. United States*, 292 U.S. 522, 534 (1934); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 462 (1892); *Johnson v. Hensley*, 150 Kan. 96, 102, 90 P.2d 1088, 1092 (1939); *State v. Miller*, 90 Kan. 230, 233, 133 Pac. 878, 879 (1913).

Confusion is added by those courts that draw a distinction between "rules of law" and "rules of interpretation." *Illinois Central R. R. Co. v. Franklin County*, 387 Ill. 301, 56 N.E. 2d 775 (1944); *City of Lexington v. Edgerton*, 289 Ky. 815, 159 S.W.2d 1015 (1942).

ities of both legislatures and courts as lawmakers. A consideration of these capacities should influence the kinds of laws that each makes.

Good lawmaking is more likely if the lawmaker has knowledge of facts, facts about the problem under consideration and the probable effect of possible solutions. Legislatures have better fact-finding facilities and procedures available to them for lawmaking than have courts.⁷⁹ How often they take advantage of these facilities is another question. The judicial system is highly skilled at discovering the truth of what happened in controversies between parties to litigation. It is deficient in securing the facts needed to make abstract rules of law pertaining to factual situations substantially different from the ones before the courts. When the abstract rule is declared, rarely does a court consider facts other than those involved in the litigation being decided. Nor when such rules are declared does there often appear to be any concern by the court as to the effect of the rule on other persons. Courts concentrate their attention on deciding controversies between the parties before them. This is true even though they fully understand that their opinions will be used in future cases involving other parties. On the other hand, when legislatures make laws, they frequently concentrate on the question of what persons under how many different kinds of situations will be affected by the new law and how they will be affected. Their fact-finding techniques are then directed to answering this question.

Occasionally attorneys will submit data to a court for the purpose of showing how typical or atypical are the facts at bar and to show what effect, good or bad, a requested ruling or law will have on others than the parties to the litigation before the court. But this is rare, and it is equally rare for courts on their own to seek out such data from secondary sources. The judiciary is dependent on the advocates to produce applicable facts as well as law. Even courts that have law clerks rarely have their clerks do any research on non-legal matters, such as the effect that a particular ruling will have on persons other than the parties to the litigation. Law clerks work only on legal materials: on records, statutes, cases, and regulations.

What has been said is not intended as a condemnation of judicial lawmaking, but rather to point up a handicap in their lawmaking that

⁷⁹ This has been recognized recently by the United States Supreme Court. *Halcyon Lines v. Haenn Ship Corp.*, 342 U.S. 282 (1952).

courts have but which legislatures do not have, at least to the same extent. As has been stated, much judicial lawmaking is inevitable and desirable. Legislatures cannot and will not pass unambiguous statutes that can be applied to all factual situations without controversy. They cannot anticipate all situations that may arise; and they often cannot secure approval of a majority of their members on anything but a compromise measure which is vague and abstract in its terms.⁸⁰ The courts must fill these gaps in the law when applying statutes. Also, courts are superior to legislatures in some aspects of lawmaking. They give great care and much time to the cases they handle; and by the appellate device, at least two courts and frequently more than two are available to give this careful attention to each case. In addition, courts are so highly skilled at the use of precedent, especially judicial precedent, that by analogy to similar decisions the wisdom and experience of many other judges can be brought to bear on almost any conceivable controversy that comes before them. Courts also have a tradition of impartiality unprecedented in government. With rare exceptions, courts cannot be influenced or pressured. In fact, they cannot even be reached for the consideration of matters before them, either formally or informally, but by the parties and through the regular procedural channels of pleading, motions, trials, briefs, and oral arguments.

Although legislatures do not operate as impartially as courts, the pressures that they are subject to contribute in one respect to making them better lawmakers. The multitude of lobbying forces that seek to influence every legislature provides a wonderful store of information without which modern legislatures would find it difficult to function. This information consists not only of suggested solutions to problems, but also of facts, including facts that could not readily be secured in any other manner. The courts completely exclude these sources of information; legislatures feed off them.

Lobbying forces, acting for the most part informally, are supplemented by an important group of formal organizations and procedures that combined make legislatures potentially the most effective fact-gathering bodies in government. These organizations and procedures include committee hearings and investigations, legislative reference services, legislative councils, legislative drafting services, reports to

⁸⁰ LEVI, AN INTRODUCTION TO LEGAL REASONING, p. 22 (1949).

the legislature by executive agencies, and legislative debate.⁸¹ The courts cannot match this. Unfortunately, the full potential of legislative fact-finding is often unrealized due to the great volume of work facing every session, the shortness of most state legislative sessions, the recent tendency to use investigations for the purpose of causing political embarrassment rather than as the basis for new enactments, and the tactics that kill many measures before much of any inquiry has been made.

The frequent failure of legislatures to take advantage of their fact-finding facilities and the handicaps under which the courts operate as fact finders are partial explanations for the growth of administrative agencies and administrative law.⁸² Similarly, the courts' limitations as fact finders may be an important reason why they are so reluctant to admit that they make law.⁸³ It may also help to explain why in statutory interpretation they will rely on any kind of legal rule to decide a case rather than frankly assume their responsibility for making law when the statutes before them are ambiguous. It may answer in part why the federal courts have developed their fetish for legislative history in solving statutory questions. The courts seem to feel their limitations for making abstract rules of law. They also seem to feel that these limitations would be too apparent if they admittedly decided ambiguous questions of statutory interpretation on what they thought was the best solution without leaning so heavily on conceptual crutches.

VI. Conclusions and Recommendations

The law of statutory construction can never operate with mathematical precision. One of the difficulties in this field has been that the rules and principles of statutory interpretation have been phrased too exactly and have been expected to operate too precisely. The inevitable result has been confusion and uncertainty. The application of statutes to cases in litigation involves an arena in which there are so many

⁸¹ WALKEK, *THE LEGISLATIVE PROCESS*, ch. 16 (1948); *Guild, Achievements of the Kansas Legislative Council*, 29 AM. POL. SCI. REV. 636 (1935); Jones, *Bill-Drafting Services in Congress and the State Legislatures*, 65 HARV. L. REV. 441 (1952); Lindsey, *The Texas Legislative Council*, 2 BAYLOR L. REV. 303 (1950); Ruud, *The Ohio Legislative Service Commission*, 14 OHIO S. L. J. 393 (1953).

⁸² This point as to courts is made in PEKELIS, *LAW AND SOCIAL ACTION*, p. 13 (1950). And see the language in *Skidmore v. Swift*, *supra* Note 75.

⁸³ Another explanation that has been advanced for the reluctance of courts to admit that they are lawmakers is fear of popular denunciation. Frank, *Words and Music: Some Remarks on Statutory Interpretation*, 47 COL. L. REV. 1259, 1269 (1947). For a discussion of the danger to those in power from frankly and publicly explaining what they are doing see PEKELIS, *op. cit. supra* note 82, at pp. 30-33.

conditions operating and so many power and judgment conflicts to be resolved and compromised that close adherence to verbal formulas as to interpretation cannot be expected. In addition, the inherently ambiguous nature of language greatly restricts the amount of precision possible.

Although statutory interpretation can never become a simple, easy art, there are changes that can be made in the rules of law and the practices of legal institutions to more fully carry out its basic objectives. It is suggested that the following changes will have that effect.

(1) When interpreting statutes, the courts should be far more cognizant of the basic objectives in statutory interpretation. Judicial discretion and rules of interpretation in statutory cases should always be applied with such objectives in mind as those set forth above in part III of this article.

(2) Efforts should be made to develop greater understanding by the bench and bar of the interpretative process. In particular the profession should realize the extent to which the courts must be law-makers, and how this lawmaking is now so frequently shrouded in arbitrarily applied rules that hide the lawmaking nature of judicial action. When appellate courts are making law in applying statutes, they should frankly say so rather than claiming to be finding legislative intent or applying a canon of construction when other canons could be applied just as well to reach the opposite result.⁸⁴ The realist movement in modern jurisprudence has done much to increase this understanding, but more is needed. Perhaps bar associations in their post-admission education programs should give attention to the problem. State courts have been particularly backward in failing to provide intellectual leadership in the law of applying statutes. A change in this situation is highly desirable. An encouraging development is the recent addition by many law schools of courses in legislation that concentrate on statutory interpretation. As a result, the younger members of the bar are probably less naive about the interpretive process than are their seniors.

(3) A revision should be made of the law of statutory interpretation. A statutory or restatement revision would have the best chance

⁸⁴ Frank, *supra* note 83, at 1271.

⁸⁵ See note 81 *supra*.

of acceptance by the courts. The revision should eliminate from the law those rules of interpretation that have contributed little but confusion. Removal of the doctrinal underbrush should make the law clearer and more predictable and make it more difficult for courts to give unreasoned, rationalized decisions. Most of the rules concerned with the relations between the words of a statute should be completely eliminated, including such rules as *ejusdem generis*, *expressio unius*, and *noscitur a sociis*. In addition, both the strict and liberal interpretation rules should be eliminated. Any revision of the rules should clarify the plain meaning rule and make it applicable whenever a statute is reasonably unambiguous. Such a revision should also omit reference to the term "legislative intent," due to the confusion and misconceptions that surround its use.

(4) Courts should consider themselves absolutely bound by some kinds of precedents and authorities whether they like the results or not. But other kinds of precedents and authorities should be used only as sources of ideas for judicial lawmaking, and the courts should feel free to follow them or ignore them as they think best. Reasonably unambiguous statutes should be absolutely binding on courts. This guarantees legislative supremacy. Judicial precedent, within the limits of *stare decisis*, should also be absolutely binding. The plain meaning of a statute should never be departed from unless some expression of the entire legislature, such as a statute *in pari materia* or a defeated bill or repealed act, indicates a qualification of the statute. This too guarantees legislative supremacy. Other extrinsic aids to statutory interpretation, including pre-passage legislative history, should not be binding on the courts. They should be suggestive of solutions, and also occasionally given weight if there has been reliance on them which it would be unfair to disturb.

(5) If the courts believe that the legislature can do a better job of lawmaking than the courts, the courts should decide their cases on the narrowest possible grounds, thereby reducing to a minimum the authoritative scope of their decisions. But this should be done only when the courts feel that the legislature will make use of its superior lawmaking facilities if the courts refuse to act. At times, legislatures have failed to enact adequate laws realizing that the courts will fill the need by judicial lawmaking. The legislature is thus saved the embarrassment of passing unpopular legislation. In this kind of situ-

ation, it makes no difference whether a court or legislature makes a needed law, unless the courts are not equipped to make good law but the legislature is. One device, little used by the courts, should be used more extensively by them to force legislatures to make better laws. This extremely effective device, applicable whenever a statute is highly ambiguous, is to declare the statute invalid or unconstitutional because of its ambiguity.

(6) There is still room for better lawmaking by legislatures so as to reduce the number of interpretive problems. Skilled drafting can eliminate much ambiguity. Great strides have been made in this during recent years, aided greatly by the development of legislative drafting offices;⁸⁶ but more needs to be done. Careful legislative revisions, such as the recent ones in Kentucky and Oregon,⁸⁶ also are needed to eliminate some of the poor drafting and inconsistent provisions in existing codes. State legislatures should preserve and publish more written records of legislative history. In particular, detailed committee reports and transcripts of floor debates and committee hearings should be available. Extrinsic aids of this sort are almost non-existent for state legislative proceedings. There is a need for legislatures to assume greater responsibility in lawmaking due to their superior lawmaking resources as compared to the courts. One institutional change that might help in this is the development of a service to consider all appellate court interpretations of statutes, shortly after the opinions are handed down, with the object of recommending to the legislature statutory changes that should be made in the interpretations.⁸⁷ This would give much more force to the concept of legislative acquiescence. The agency that does this work should have a staff qualified to study all appellate decisions in the state in question, and make recommendations on those interpretations needing change. It should also consider the express recommendations for legislation that are occasionally made by courts, guaranteeing that the courts will receive a hearing on their recommendations. An existing legislative service agency, such as the revisor of statutes, could be given this judicial screening duty; or it could be assigned to the attorney general or counsel for some legislative committee.

⁸⁶ Cullen, *Revision of the Oregon Statutes*, 28 ORE. L. REV. 120 (1949); Cullen, *Mechanics of Statutory Revision—A Revisor's Manual*, 24 ORE. L. REV. 1 (1944).

⁸⁷ A detailed plan for this type of service has recently been proposed by Professor Ruud. Ruud, *A Legislative Audit of Judicial Opinions—A Proposal*, 32 TEX. L. REV. 539 (1954).

(7) Judges should be selected with greater care. They should not only be good lawyers, but also persons whose value judgments fairly reflect contemporary opinion. This latter is of particular importance in a political democracy because of the extensive lawmaking functions of judges. Governors who appoint judges and politicians who support the candidacy of judges should give greater attention to the kind of lawmakers they are selecting.