The Use of Extrinsic Aids to Statutory Construction in Oregon

Quintin Johnstone
Yale Law School

Follow this and additional works at: http://digitalcommons.law.yale.edu/fss_papers
Part of the Law Commons

Recommended Citation
http://digitalcommons.law.yale.edu/fss_papers/1923

This Article is brought to you for free and open access by the Yale Law School Faculty Scholarship at Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship Series by an authorized administrator of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
THE USE OF EXTRINSIC AIDS TO STATUTORY CONSTRUCTION IN OREGON

QUINTIN JOHNSTONE*

The practice of law today is largely a matter of using and interpreting statutes. Most fields of law have been codified and the practitioner is faced daily with the problem of determining the exact meaning of legislative enactments when he seeks to apply them to factual situations concerning which he must give advice.¹ The success of today's lawyer depends in large part upon how able he is at interpreting statutes, in reaching decisions on the meaning of statutory language so that courts will hold with him in litigated cases and opposing counsel will agree with him in nonlitigated matters.

But oftentimes statutory interpretation² is not an easy matter. Language has limitations in fully expressing ideas, and the general, rather condensed expression of ideas characteristic of statutes inevitably results in uncertainty of meaning in borderline situations, even with well-drafted statutes. Since most of our words have varying meanings or varying shades of meaning, these basic units of language carry uncertainty of meaning with them. Groupings of words in statutory sections merely multiply the inherent uncertainty of words. The problem of the legislator is further complicated by the fact that he can rarely contemplate in advance all of the possible factual situations to which statutory language may be applicable. Then, of course, there is the problem of the

* Associate Professor of Law (on leave), Willamette University; Sterling Fellow, Yale Law School; member of the Oregon and Illinois bars.

¹ The recent decisions of the Oregon Supreme Court illustrate how important statutory interpretation has become. Out of the 190 opinions of the Oregon Supreme Court printed in volumes 182 to 201, inclusive, of the Pacific Reporter, second series, 123 opinions, or 65 per cent, involve the interpretation of statutes. These volumes include Oregon cases decided in the period from June 1947 to January 1949. In the above computation, rehearings and consolidated cases were not considered as additional cases. Of course, few of the 123 cases were exclusively concerned with problems of statutory interpretation, but they included such problems in addition to others.

² In this article the term "statutory interpretation" and "statutory construction" are used synonymously, a usage approved in 2 SUTHERLAND, STATUTORY CONSTRUCTION sec. 4504 (3d ed. 1943).

[1]
poorly drafted statute. The inevitable difficulties in the way of certainty of expression are greatly increased when care is not taken in drafting.\(^3\)

There are three major approaches to statutory construction: determination of meaning exclusively from the language of the particular statute; use of canons or rules of construction to assist in a determination of meaning; and use of materials other than the particular statute, outside or extrinsic materials, in reaching a determination of the meaning of the particular statute. Similar approaches exist in the construction of wills, contracts, and other types of legal documents. The first approach has obvious limitations. There may be ambiguities within the four corners of the act which cannot be resolved without aid from canons or outside materials; or the outside materials may throw doubt on the meaning of a statute which on its face is clear. The second approach, using canons of construction to assist in reaching a decision on statutory meaning, has declined in importance, in part because in operation canons conflict and a canon can be found to justify almost any result, and in part because canons too often lead to constructions clearly contrary to the intent of the legislature as disclosed by extrinsic materials showing such intent. The third approach, using extrinsic aids in statutory construction, although recognized by the law since early times, is used more extensively now than ever before because of the increase in the amount of extrinsic materials indicating legislative intent, and because of the increased faith being placed by the courts in such materials at the expense of canons of construction.

In this article, the term "extrinsic aids" will be used in its broad sense to include any materials, other than the statute itself, the use of which

---

\(^3\) The trend is toward better drafting of statutes. This is due to such factors as the assignment of counsel by the Federal government and some of the states to the legislature or its committees for the purpose of drafting statutes; an increase in the amount of legislation prepared by executive departments and agencies which, whatever evil there has been in the practice, has resulted in better drafted statutes because of the study usually given in the preparation of such legislation; the preparation and adoption of uniform laws; the preparation of bills by law-revision bodies and judicial councils. In Oregon, the provisions of Or. Laws 1949, c. 317, charge the newly created statute reviser's office with the responsibility of advising and assisting members of the Legislature in the preparation of legislation and reporting to the Legislature any deficiencies of form or substance in proposed legislation. Heretofore, following a statutory directive in O. C. L. A. sec. 90-409 (1940), the attorney general's office has been very active in drafting bills; during the last session of the Oregon Legislative Assembly, this office drafted about 40 per cent of all bills filed, plus numerous amendments, memorials, and resolutions. Bills drafted by the attorney general's office were prepared at the request of members of the Legislature and incorporated such provisions as were desired by the members requesting drafting service. During the sessions of the Legislative Assembly, the attorney general maintained a special office in the Capitol Building to facilitate the preparation of these requested bills. Considerable overtime work was performed by members of his staff assigned to legislative drafting and, on occasion, the Legislature provided added compensation to these staff members for this overtime work. See H. C. R. 12, 1947 session of the Oregon Legislature.
is sanctioned by the courts in determining the meaning of a statute. A broad definition of this type includes materials widely used in statutory construction, such as other related statutes, judicial opinions interpreting such statutes, and common-law authorities giving the common-law meaning of words in the statute under consideration.

**Types of Extrinsic Aids That Have Been Recognized by the Oregon Supreme Court**

It is surprising how many types of extrinsic aids have been recognized by the courts in statutory-interpretation cases. Some are so well accepted as to merit little comment. Thus, the Oregon courts have recognized, since territorial days, that, in interpreting an Oregon statute, previous Oregon statutory enactments on similar or related matters, so-called statutes *in pari materia*, can be taken into consideration. Then, of course, on principles of *stare decisis*, previous Oregon judicial opinions interpreting a statute will be given great weight in later judicial proceedings involving similar matters. There also are Oregon cases following the principle that, if an Oregon statute has been borrowed from another state, the interpretations which that state has given its legislation will be given weight in interpreting the Oregon statute; however, the judicial interpretations of the state from which the statute was borrowed, if made prior to enactment of the statute by Oregon, generally receive greater weight than such interpretations made by the

---

4 Two Oregon territorial cases approving the doctrine of *in pari materia* are McLaughlin v. Hoover, 1 Or. 31 (1853), and Winter v. Norton, 1 Or. 43 (1853). In speaking of statutes *in pari materia*, the Supreme Court of Oregon has quoted from and approved the following statement: "Statutes which are not inconsistent with one another, and which relate to the same subject-matter, are *in pari materia*, and should be construed together; and effect should be given to them all, although they contain no reference to one another, and were passed at different times. Acts *in pari materia* should be construed together and so as to harmonize and give effect to their various provisions. This is especially the case when the acts are passed at the same session." Daley v. Horsey Irrigation Dist., 143 Or. 441, 445, 21 P. 2d 787 (1933). Elsewhere the court has said: "... the two statutes should be read together as though they constitute one law. Repeals by implication are not favored, and before such repeal is established there must be between two acts 'plain, unavoidable, and irreconcilable repugnancy, and even then the old law is repealed by implication only *pro tanto*, to the extent of the repugnancy.' The Courts, moreover, will adopt any reasonable construction which will sustain both statutes." (Citations omitted.) Noble v. Noble, 164 Or. 538, 549, 103 P. 2d 292, 298 (1940).

But, in the following cases, despite the doctrine of *in pari materia*, the court declared statutes to be repealed by implication because of inconsistency and the latest expression of the Legislature was held to prevail: State ex rel. Washington-Oregon Investment Co. v. Dobson, 169 Or. 546, 130 P. 2d 939 (1942); Watson v. Jantzer, 151 Or. 17, 47 P. 2d 239, 241 (1935); Miller v. School Dist. No. 1, 106 Or. 108, 211 Pac. 174 (1922).

5 E.g., Peters v. Central Labor Council, 179 Or. 1, 169 P. 2d 870 (1946); Auld v. Starbard, 89 Or. 284, 173 Pac. 664 (1918).
courts of the other state after adoption of the statute by Oregon.\(^6\) Other well-accepted extrinsic aids to statutory construction are the authorities establishing the common law: judicial opinions, early English statutes, and outstanding text writers.

There are important additional extrinsic aids to statutory construction that have not been as widely accepted or as generally used as the foregoing, but which are of increasing significance. A group of extrinsic materials that belongs in this class are those pertaining to the history of statutes prior to enactment, including such legislative materials as journals, committee reports, transcripts of committee hearings, transcripts of floor debates, bills and amendments introduced but not passed in the form in which introduced, draftsmen's notes on bills introduced, legislative briefs of counsel for lobbyists and government agencies, opinions of the attorney general on pending legislation, messages by the governor to the legislature, and reports of commissions appointed to revise statutes. The use of pre-enactment legislative history as a source of statutory meaning is more common in the Federal courts than in state courts because the Federal Congress keeps a more complete and permanent record of its activities than do state legislatures.\(^7\) Contrary to the usual practice in state legislatures, all Congressional floor debate is published,\(^8\) detailed Congressional committee reports are usually published, and the proceedings of many Congressional committees are transcribed and published. On any of the recent Federal statutes of importance, a considerable body of pre-enactment historical material in published form is readily available to counsel and to the courts for interpretive purposes. The relatively greater significance of Federal legislation, the greater amount of time given to consideration of Federal bills compared to that given to bills submitted to state legislatures, and the greater amount of money allocated to the legislative process at the Federal level compared to what each state legislature spends, are the explanations for the greater wealth of materials on legislative history found in the Federal system.

However, the states, including Oregon, do have some written materials on legislative history which can and are used as aids to statutory construction. In Oregon, the house and senate journals of each legislative session are published; they include a brief record of the progress

---

\(^6\) Wehoffer v. Wehoffer, 176 Or. 345, 156 P. 2d 830 (1945) ; Elliott v. Clement, 175 Or. 44, 151 P. 2d 739 (1944).

\(^7\) For a discussion of the much more limited approval of extrinsic aids to statutory construction by the English courts compared to that by the American courts, see Davies, *Interpretation of Statutes in the Light of Their Policy by the English Courts*, 35 CoL. L. Rev. 519 (1935). However, in civil-law countries, extrinsic aids are widely used. Gutteridge, *A Comparative View of the Interpretation of Statute Law*, 8 Tulane L. Rev. 1 (1933).

\(^8\) Floor debate of Congress is published in the *Congressional Record*. 
of each bill filed in either house during a session, the reports of stand­
ing, special, and conference committees, and the governor's messages to
the Legislature, including his veto messages. All bills introduced in the
Oregon Legislature are printed, as are most amendments; the original
copies of bills and amendments are kept on file in the office of the secre­
tary of state⁹ and are available for public inspection. In Oregon, as in
most states, legislative-committee reports seldom contain more than
brief recommendations that bills assigned to committees pass or do not
pass, and very often recommendations for the passage of bills are ac­
 companied by recommended committee amendments. An exception to
such brief committee reports is common in the case of reports by interim
committees appointed to make studies and investigations of designated
problems between legislative sessions. These interim committees usu­
ally report prior to the next session of the Legislature and commonly
make lengthy written reports incorporating the results of their investi­
gations and setting forth suggested plans for legislative action on the
problems in question. In many instances these written reports are the
basis for highly significant legislation, since the problems assigned to
 interim committees are likely to be of unusual importance.¹⁰ No official
transcript is made of committee proceedings or debate on the floor of
the Oregon Legislative Assembly, newspaper reports being about the
only written record of the argument and debate before committees or the
assembly. Nor are the files of Oregon's legislative committees custom­
arily maintained as public records after the close of a legislative session;
the result is that no public record is kept of documentary or other writ­
ten evidence submitted to committees by proponents of measures. The
attorney general is often asked to give opinions on the validity or prob­
able effect of proposed legislation pending before the Legislative As­
sembly, and his opinions given in response to the requests of legislators
are published¹¹ and constitute valuable materials for interpreting stat­
utes by resort to legislative history.

Although there are many Federal cases in which pre-enactment legis­
 lative history has been used by the courts in statutory interpretation,¹²

⁹ O. C. L. A. sec. 90-208 (1940).
¹⁰ The 44th Oregon Legislative Assembly, which met in 1947, provided for
interim committees that subsequently made various written reports, including re­
ports on the following problems: juvenile delinquency, salaries of county officials,
aeronautics, restoration of Oregon wild life and resources, veterans' affairs, edu­
cation and care of the blind, and highways (two reports). Copies of the above
reports are available in the Oregon State Library, as are many earlier interim­
committee reports.
¹¹ These opinions are published biennially by the attorney general, together with
his report, and include opinions rendered by him on existing legislation as well
as proposed legislation.
¹² Appendix A to the dissenting opinion of Frankfurter, J., in Commissioner v. 
Estate of Church, 335 U. S. 632, 687 (1949), lists 134 U. S. Supreme Court cases
under the heading: "Decisions During the Past Decade in Which Legislative
there are comparatively few cases of this type in the reports of the Oregon Supreme Court. In *State ex rel. Van Winkle v. Siegmund*, Fink v. Shepard Steamship Co., and *Hust v. Moore-McCormack Lines*, the Oregon Supreme Court referred to reports of Congressional committees in interpreting Federal statutes; and in *Byers v. We-Wa-Ne*, also involving construction of a Federal statute, the court discussed the progress through Congress of the statute in question and referred to Congressional debate, bills on the same subject introduced but not passed, and legislative recommendations by the commissioner on Indian affairs and the Secretary of the Interior. However, in *Portland v. Duntley*, after dictum in the opinion to the effect that a court can resort to legislative history, the court refused to be influenced, in its construction of the Oregon state racing act, by provisions in the original state racing bill which was abandoned upon referral to committee and replaced by a new bill. In *Eugene School District No. 4 v. Fisk*, in *Allen v. Multnomah County*, and in *Sprague v. Fisher*, the court, in interpreting Oregon statutes, made use of arguments appearing in the *Official Voters' Pamphlet* in support of the statutes when they were being submitted to the people as initiative or referendum measures. The *Official Voters' Pamphlet* material relied on by the court in *Allen v. Multnomah County* included a report submitted by a legislative tax committee consisting of certain designated members of each house of the Oregon Legislature.

*History Was Decisive of Construction of a Particular Statutory Provision.*" Note the highly critical attitude of another member of the U. S. Supreme Court toward the use of legislative history in statutory construction. Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A. B. A. J. 535 (1948), reprinted in 8 F. R. D. 121 (1949). Jackson is of the opinion that resort to legislative history is "a badly overdone practice," and has led to confusion in statutory meaning. Furthermore, he feels that the average lawyer's problems in advising on the meaning of Federal statutes are greatly increased because few lawyers can afford to collect and index all of the legislative materials necessary for interpretation by resort to legislative history. Note how Jackson treated arguments based on legislative history in *Western Union Telegraph Co. v. Lenroot*, 323 U. S. 490 (1945).


14. 125 Or. 197, 220, 266 Pac. 1075, 1083 (1928).
15. 176 Or. 662, 158 P. 2d 275 (1945), rev'd on other grounds, 328 U. S. 707 (1946).
16. 183 Or. 373, 192 P. 2d 258, 269 (1948), cert. granted, 335 U. S. 870 (1948).
17. 179 Or. 245, 79 P. 2d 262 (1938).
18. 177 P. 2d 662, 672 (Or. 1948).
19. 203 P. 2d 640, 647 (Or. 1949).
20. 120 Or. 432, 248, 562, 173 P. 2d 475, 481 (1946), noted in 26 Or. L. Rev. 210 (1947).
In the light of these cases and the substantial body of supporting judicial authority in the reports of the Federal courts and other state courts, it is probable that the Oregon courts, in statutory-construction cases, would give consideration to most types of pre-enactment extrinsic aids. This conclusion is further substantiated by the case of Jory v. Martin in which the Oregon Supreme Court, when interpreting the Oregon constitution, gave weight, not only to the proceedings of the constitutional convention, but also to opinions as to the meaning of the constitution submitted to the Legislature at its request by prominent lawyer members of the convention twenty years after the convention. This would indicate that the Oregon Supreme Court would also be liberal in admitting evidence of legislative proceedings submitted in statutory-construction cases, since there is a marked similarity between constitutional-construction problems and statutory-construction problems.

Somewhat similar to pre-enactment legislative aids to interpretation, and given much the same force and effect by the courts, are preambles and titles to acts. Although both bear the direct approval of the legislature, in Oregon a preamble is not considered to be part of an act, but, because the Oregon constitution requires that each act have a title and because it is part of the enrolled bill, the title is considered part of the act. However, it would appear that in Oregon, as in most states, neither the preamble nor the title can supply a provision not appearing in the body of the act, and neither will be considered in ascertaining the meaning a statute unless the body of the act is ambiguous, in which instance the preamble and title may both be considered in construing the act.

---

21 On the use of legislative-history materials in statutory construction, see Note, 70 A. L. R. 5 (1929); ten Broek, Admissibility of Congressional Debates in Statutory Construction by the United States Supreme Court, 25 Calif. L. Rev. 326 (1937); and Shearer, Statutory Construction, Use of Extrinsic Aids in Wisconsin, Wis. L. Rev. 453 (1940). Those legislative-history materials that courts have generally shown the most reluctance to accept as aids to statutory construction are legislative debates and opinions of legislators not given at hearings or debates. But cf. Byers v. We-Wa-Ne, 86 Or. 617, 169 Pac. 121 (1917), and Jory v. Martin, 153 Or. 278, 56 P. 2d 1193 (1936).

22 153 Or. 278, 56 P. 2d 1193 (1936).


26 Preambles: Sunshine Dairy v. Peterson, 183 Or. 305, 193 P. 2d 543, 549 (1948); Briedwell v. Henderson, 99 Or. 506, 514, 195 Pac. 575, 578 (1921); 2 Sutherland, op. cit. supra note 2, sec. 4804.

Titles: Eugene School Dist. No. 4 v. Fisk, 159 Or. 245, 256, 79 P. 2d 262, 267 (1938); Earle v. Holman, 154 Or. 578, 593, 61 P. 2d 1242, 1245 (1936); Lockwood v. Guerin, 142 Or. 138, 18 P. 2d 246 (1933); 2 Sutherland, op. cit. supra note 2, sec. 4802.
A well-established but not frequently used rule of statutory construction is that the history of the times during which an act was passed, showing the conditions and problems with which the legislature was faced when the statute was enacted, may be considered in seeking the meaning of a statute. The Oregon Supreme Court has taken advantage of this rule, and, in construing statutes, has discussed the nature of salmon fishing on the Columbia River,\(^{27}\) the stocking of fish in waters of the state,\(^{28}\) and the purpose behind a tax measure,\(^{29}\) but, except for its occasional references to pre-enactment legislative proceedings, has not referred to specific source materials in its comments on historical background. In similar discussions of the history of the times during which statutes were passed, as an aid to statutory meaning, the United States Supreme Court has cited books, magazines, newspapers, and government publications which were the sources of its historical knowledge.\(^{30}\)

In presenting arguments as to the meaning of Oregon statutes based on historical conditions at the time of enactment, attorneys would certainly be justified in presenting to the court fact briefs similar to those that have occasionally been prepared by counsel in constitutional cases before the Federal courts beginning with the famous Brandeis brief in *Muller v. Oregon*.\(^{31}\) Such briefs could fully set forth the historical facts comprising the contemporary setting in which the legislation was passed.

As government has grown bigger and more complex and administrative agencies with regulatory and enforcement powers have assumed an imposing place in government, the courts have made increased use of another type of extrinsic aid: interpretations of statutes by the executive branch of the government. Most of these interpretations have been those of administrative agencies, and, administrative government being more fully developed at the Federal level than in any of the states, the Federal courts have been called upon more frequently than the state courts to use administrative-agency interpretation of statutes,\(^{32}\) but there is a

\(^{27}\) Union Fishermen's Co. v. Shoemaker, 98 Or. 659, 671, 193 Pac. 476, 480 (1921).
\(^{28}\) State v. Gates, 104 Or. 112, 206 Pac. 863 (1922).
\(^{29}\) State ex rel. Van Winkle v. Siegmund, 125 Or. 197, 214, 266 Pac. 1075, 1081 (1928).
\(^{31}\) 208 U. S. 412 (1907). Note also the extensive reference to statistical and literary materials made by Mr. Justice Frankfurter in his concurring opinion in the recent case of A. F. of L. v. American Sash and Door Co., 335 U. S. 538 (1949).
\(^{32}\) The Federal cases are discussed in ten Broek, *Interpretive Administrative Action and the Lawmaker's Will*, 20 Or. L. Rev. 206 (1941).
sizable body of state-court precedent in which executive interpretation of statutes has been given weight by the courts in the construction of statutes. The Oregon Supreme Court has considered executive interpretations of statutes in a number of cases and has clearly accepted the rule that these interpretations are entitled to weight but are not controlling on the court. Statutory interpretations by the following agencies and persons charged with the administration of legislative enactments have been given weight by the Oregon Supreme Court in construing statutes: the State Tax Commission, the Hydroelectric Commission of Oregon, the State Highway Commission, the Oregon Racing Commission, the State Industrial Accident Commission, the attorney general, the codifier of the state code, election officials, departments and officers of the state generally, and persons charged with the enforcement of a statute. In several cases, the court has refused to consider executive interpretations on the theory that the language of the statute was plain and that hence there was no need to resort to such interpretations.

The courts will accord greater weight to executive interpretations of statutes given by hearing officers and others acting in a quasi-judicial capacity during adversary proceedings than to those given by enforcement authorities acting as advocates, because the former are likely to be

---

33 E.g., In re Parker's Adoption, 31 Cal. 2d 608, 191 P. 2d 420 (1948); In re Cowan's Estate, 98 Utah 393, 99 P. 2d 605 (1949); State v. Superior Court for King County, 2 Wash. 2d 575, 98 P. 2d 985 (1940).
34 Allen v. Multnomah County, 179 Or. 548, 564, 173 P. 2d 475, 482 (1946); Kelly v. Galloway, 156 Or. 301, 320, 66 P. 2d 272, 279 (1937); Biggs v. McBride, 17 Or. 640, 651 (1889).
35 Sprague v. Fisher, 197 P. 2d 662 (Or. 1948), in which the court based its decision largely on interpretations of the State Tax Commission which the commission subsequently reversed and opposed in the litigation in question; Eugene School Dist. No. 4 v. Fisk, 159 Or. 245, 258, 79 P. 2d 262, 267 (1938); Kelly v. Galloway, 156 Or. 301, 320, 66 P. 2d 272, 279 (1937); see State ex rel. Galloway v. Watson, 167 Or. 403, 418, 118 P. 2d 107, 113 (1941).
37 Kelsey v. Norblad, 136 Or. 76, 298 Pac. 199 (1930).
39 Lamm v. Silver Falls Timber Co., 133 Or. 468, 512, 286 Pac. 527, 537 (1930).
40 Allen v. Multnomah County, 179 Or. 548, 564, 173 P. 2d 475, 482 (1946).
43 Allen v. Multnomah County, 179 Or. 548, 564, 173 P. 2d 475, 482 (1946); Kappa Gamma Rho v. Marion County, 130 Or. 165, 177, 297 Pac. 555, 558 (1929); Portland v. Welch, 126 Or. 253, 269 Pac. 808 (1928); Kelly v. Multnomah County, 18 Or. 356 (1890); Biggs v. McBride, 17 Or. 640, 650 (1889).
44 Spencer v. Portland, 114 Or. 381, 390, 235 Pac. 279, 282 (1925); and see dissent of Kelly, J., in Fehl v. Martin, 153 Or. 455, 487, 64 P. 2d 631, 643 (1937).
45 Gouge v. David, 202 P. 2d 489 (Or. 1949); State ex rel. Galloway v. Watson, 167 Or. 403, 418, 118 P. 2d 107, 113 (1941); Larison-Frees Chevrolet Co. v. Payne, 163 Or. 276, 302, 96 P. 2d 1067, 1077 (1939); Twohy Bros. Co. v. Ochoco Irrigation Dist., 108 Or. 1, 18, 210 Pac. 873, 878 (1922).
more impartial.\textsuperscript{46} Similarly, greater weight will be given to executive interpretations of long standing,\textsuperscript{47} particularly if there has been a legislative re-enactment, without change, of the section so interpreted.\textsuperscript{48}

The most common sources of executive interpretations of statutes are the published regulations, rulings, and opinions of executive officers and administrative agencies. Most all of the regulations and orders promulgated by the executive branch of the Federal government, including the departments and independent agencies, are published in the \textit{Federal Register},\textsuperscript{49} and filing of regulations and orders with the Federal Register Division of the National Archives constitutes constructive notice of the regulations and orders so filed.\textsuperscript{50} Although there is no publication in Oregon similar to the \textit{Federal Register}, it is required by statute that a copy of every "executive order or general order, regulation or rule issued, prescribed or promulgated by" the administrative branch of the state government\textsuperscript{51} shall be filed with the secretary of state and by him made available for public inspection in his office.\textsuperscript{52} No order, regulation, or rule required to be so filed with the secretary of state shall be valid against any person not having actual knowledge thereof until a filing has been made pursuant to the act.\textsuperscript{53} In addition to filing with the secretary of state, some Oregon executive agencies print copies of their regulations for distribution to their employees and interested members of the public.\textsuperscript{54}

Most of the Oregon administrative bodies that hold adversary hearings of a quasi-judicial nature involving such matters as license revocations, issue their rulings in the form of written orders or opinions. Although the Oregon administrative officials will occasionally disclose executive interpretations of statutes, these orders and opinions are not

\textsuperscript{46} Fishgold v. Sullivan Drydock & Repair Corp., 328 U. S. 275 (1946); Suwanee Fruit and Steamship Co. v. Fleming, 160 F. 2d 897, 903 (Emergency Ct. of App. 1947); and see Gouge v. David, 202 P. 2d 489, 496 (Or. 1949), citing the Fishgold Case with approval.

\textsuperscript{47} National Lead Co. v. United States, 252 U. S. 140, 145 (1920); Puget Sound Bridge and Dredging Co. v. Department of Labor and Industries, 26 Wash. 2d 550, 556, 174 P. 2d 957, 960 (1946).

\textsuperscript{48} Great Northern Ry. v. United States, 315 U. S. 262, 275 (1942); National Lead Company v. United States, 252 U. S. 140, 146 (1920), and see Gouge v. David, 202 P. 2d 489, 499 (Or. 1949).


\textsuperscript{51} O. C. L. A. sec. 89-501 (1940).

\textsuperscript{52} Or. Laws 1941, c. 125, sec. 1.

\textsuperscript{53} Or. Laws 1941, c. 125, sec. 4.

\textsuperscript{54} Agencies of the state of Oregon that print copies of some or all of their regulations include the State Tax Commission, the State Industrial Accident Commission, the State Public Welfare Commission, the Department of Agriculture, the State Board of Education, the State Board of Forestry, the Hydroelectric Commission of Oregon, the State Board of Health, and the office of the public utilities commissioner.
made available, as a matter of right, to others than the parties to the proceedings.

THE PLAIN-MEANING RULE IN THE OREGON CASES

As has been seen, the Oregon Supreme Court has made use of some types of extrinsic aids in interpreting statutes, and the court probably would rely on other types if they were relevant to cases before it. The question then arises: May available extrinsic aids be used in any case in which the meaning of a statute is raised, or will they be completely excluded from consideration in some types of cases? This question is a difficult one and has generated much controversy and conflict.

Much of this controversy and conflict has centered around the so-called plain-meaning rule which declares that, if the literal meaning of a statute is plain and unambiguous, no extrinsic materials will be considered in interpreting the statute. There are many Oregon opinions in which the court has declared itself as following the plain-meaning rule. Thus, the court, in construing a statute giving certain rights to utility districts, has declared:

"The authority of a utility district to operate 'within or without' its boundaries is conferred upon it in plain, simple, unambiguous language. There is no need of construction when the language is reasonably susceptible of only one meaning."

In construing a motor-licensing statute, the court, in the words of Mr. Justice Rossman, has stated:

"It seems to us that the portion of the act before us conveys its meaning in such a clear and unmistakable manner that there is presented no occasion for resorting to the rules of statutory construction. The plaintiff has called to our attention the history of this act, it has cited its antecedents, and argues that when these matters are borne in mind, as well as the purpose of and reason for this act we must conclude that the word 'passenger' includes the operator of the conveyance. However, subsection 1 of section 15 is not ambiguous and the words it employs are not uncertain of meaning. When the language of a statute is plain and unambiguous, its meaning clear and unmistakable, and when a

---

55 Although the plain-meaning rule is usually applied to the use of statutes in pari materia, 2 SUTHERLAND, op. cit. supra note 2, sec. 5201, n. 1, it is not, of course, applicable to the use of previous judicial opinions construing the same statute.

56 Gouge v. David, 202 P. 2d 489 (Or. 1949); Fullerton v. Lamm, 177 Or. 655, 163 P. 2d 941 (1945); Central Lincoln P. U. D. v. Smith, 170 Or. 356, 133 P. 2d 702 (1943); State ex rel. Galloway v. Watson, 167 Or. 403, 418, 118 P. 2d 107, 113 (1941); Public Service Commission v. Pacific Stages, 130 Or. 572, 281 Pac. 125 (1929); Deetz v. Cobbs and Mitchell Co., 120 Or. 600, 606, 253 Pac. 542, 544 (1927).

literal interpretation of the words leads to no unjust or absurd consequence, a court is not permitted to search for its meaning beyond the statute itself . . .”\(^{58}\)

In recent years, the plain-meaning rule has come in for heavy criticism by legal writers.\(^{59}\) The avowed objective of the rule is to follow the intent of the legislature,\(^{60}\) but critics of the rule argue that this objective is defeated if the plain-meaning rule is applied when extrinsic aids disclose a meaning contrary to the literal meaning of the statute.\(^{61}\)

It is also argued that words are merely symbols of meaning, that these symbols have varying meanings and shades of meaning, and that therefore statutes, being composed of words, are always of uncertain meaning.\(^{62}\) If this argument is adopted, the plain-meaning rule can never have any application because no statute can be absolutely clear and unambiguous, and the courts should be willing at all times to consider all available extrinsic evidences of statutory meaning.

The Federal courts have shown an increased tendency to depart from the plain-meaning rule. Mr. Justice Reed, in the majority opinion in *United States v. American Trucking Associations*, in which construction of the Federal Motor Carrier Act of 1935 was involved, expressed a common modern viewpoint of the courts on the plain-meaning rule:

“There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.' . . . Obviously there is danger that the court's conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not

\(^{58}\) Public Service Commission v. Pacific Stages, 130 Or. 572, 576, 281 Pac. 125 (1929).
\(^{60}\) State v. Tollefson, 142 Or. 192, 198, 16 P. 2d 625, 627 (1933); Cary v. Metropolitan Life Ins. Co., 141 Or. 388, 17 P. 2d 1111 (1933); Caminetti v. United States, 242 U. S. 470, 490 (1917).
\(^{62}\) 2 SUTHERLAND, *op. cit. supra* note 2, sec. 4502.
considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion."68

However, the position of the United States Supreme Court has not been consistent, even in recent years; at times it strictly applies the plain-meaning rule,64 and at other times it follows the viewpoint expressed above by Mr. Justice Reed.65 The Federal courts have been so inconsistent in their application of the plain-meaning rule that it is difficult to predict in advance whether extrinsic aids will receive any consideration or will be controlling in statutory-interpretation cases before the Federal courts.

The position of the Oregon Supreme Court on the plain-meaning rule has been much more consistent than that of the United States Supreme Court. The Oregon cases show a fairly uniform adherence to the plain-meaning rule although they are not completely uniform. In the recent case of Allen v. Multnomah County, Mr. Justice Hay, who wrote the court's opinion, used several extrinsic aids in construing a tax-exemption statute, and in his opinion stated:

"When the legislative intent has been ascertained, it should be given effect, even although, in doing so, the literal meaning of the words used is not followed. In arriving at the legislative intention, it is proper for the court to take into consideration the policy and purposes of the act, and to consider, in that connection, whether or not such policy and purposes will be attained by a literal interpretation of the language used. . . . The general language of the statute should be limited to the persons and subjects to which it is reasonable to suppose it was intended to apply, especially when a literal interpretation would lead to harmful and absurd consequences." (Citations omitted.)66

In Oregon, California and Eastern Ry. v. Blackmer,67 the court refused to follow the literal meaning of the word "main line" in construing a railway-safety act and it quoted extensively from Church of the Holy Trinity v. United States,68 with approval, on the question of literal interpretation.

63 310 U. S. 534, 543-544 (1940).
68 143 U. S. 457 (1892), cited note 65 supra.
construction. The *Holy Trinity Case* is a leading United States Supreme Court case in opposition to the plain-meaning rule.

The Oregon court has also adopted a well-established exception to the plain-meaning rule which, if broadly applied, can greatly reduce the effect of the rule, if not destroy it. This exception provides that, if the literal and unambiguous meaning of a statute will lead to an absurd, unjust, or unreasonable result, the courts are not bound by the rule. In *Nanny v. Oregon Liquor Control Commission*, the plaintiff brought a replevin action against the defendant commission to recover liquor stolen from him and brought by the thieves to Oregon where it was seized by the commission as contraband. The commission defended on the ground that the literal language of the Oregon code prohibited and made criminal the possession of alcoholic liquor by any person in Oregon unless procured from the commission and that to grant the plaintiff his remedy would make him a criminal, and hence defeat his right to a recovery, apparently on the theory that the courts should not assist a person to violate the law. In the *Nanny Case*, judgment was given to the plaintiff on the ground that to construe the Oregon code in such a way as to make the plaintiff a criminal by his recovery in this action would lead to an absurd and unjust result and the court was not bound by the literal meaning of the statute. In other cases, the court has also approved of this absurd-result qualification to the plain-meaning rule.

The exception to the plain-meaning rule followed in the *Nanny Case* can be so used as to give courts the widest discretion in deciding cases on the basis of the courts' own views of right and wrong despite comparatively unambiguous statutory language indicating contrary views. Courts often differ with legislatures on the wisdom of particular legislative enactments and it is a simple process for a court to decide that the results of a literal application of a statute are absurd, unjust, or unreasonable. However, the Oregon court has not extensively applied this exception to the plain-meaning rule; nor has it abused its discretion when the exception has been applied.

Another point at which the effect of the plain-meaning rule has been reduced is in judicial rulings on the question whether or not statutes are clear and unambiguous and subject to the plain-meaning rule. The test usually applied in determining ambiguity is whether or not, taken literally, the language of a statute is "reasonably" susceptible of more than one meaning. If it is, then the plain-meaning rule cannot be applied; if it is not, then the plain-meaning rule may be applied.

---

69 179 Or. 274, 171 P. 2d 360 (1946).
70 Fish v. Bishop, 176 Or. 210, 156 P. 2d 204 (1945); Fox v. Galloway, 174 Or. 339, 347, 148 P. 2d 922, 925 (1944); and see State v. Gates, 104 Or. 112, 123, 206 Pac. 863, 866 (1922).
At times the Oregon court, giving a strict and narrow interpretation of the meaning of a statute, has held that meanings suggested by counsel were unacceptable because the statute was literally unambiguous, and that the plain-meaning rule applied. At other times the court, accepting a broader view of the literal limitations of the meaning of statutory language, has held that the language did, on its face, have more than one meaning, and that therefore the plain-meaning rule did not apply.

Courts have considerable latitude at this initial point in the application of the plain-meaning rule, the point at which a determination must be made as to the degree of ambiguity in a statute. This latitude is broad enough to permit courts, at their discretion, to defeat the plain-meaning rule whenever they desire to do so in cases before them involving the rule.

Thus it can be seen that, by one means or another, there is considerable authority in Oregon for avoiding the effects of the plain-meaning rule, and this increases the number of statutory-construction situations in which the court will consider extrinsic aids. Perhaps the express renunciations of the plain-meaning rule rather commonly found in the recent Federal cases, may indicate a trend that will become increasingly apparent in the state courts, including Oregon, because, as is true in constitutional law, administrative law, and certain phases of taxation, the Federal courts in the field of statutory construction are likely to point the way which the state courts will follow.

Extrinsic Aids as Disclosing the Intent of the Legislature

When extrinsic aids are used in deciding the meaning to be given statutory language, the courts, as their reason for using them, state that such aids show the intent of the legislature and that the intent of the legislature should control the meaning given to statutes by the courts. The pre-enactment history of a statute shows the intent of the legisla-


14 The following state-court cases are examples of opinions in which the courts departed from the plain-meaning rule: Steele v. Smalley, 141 Me. 355, 44 A. 2d 213 (1945); Kenney v. Building Commissioner of Melrose, 315 Mass. 291, 52 N. E. 2d 683 (1943); Western Pennsylvania Hospital v. Lichliter, 340 Pa. 382, 17 A. 2d 206 (1941); Wisconsin Employment Relations Board v. Evangelical Deaconess Society, 242 Wis. 78, 7 N. W. 2d 590 (1943).
acquiescence by the legislature in executive interpretations of statutes, showing approval of such interpretations, is an expression of legislative intent; the legislature, in enacting a statute, acted with the intent of making the new statute part of a consistent whole with previous unrepealed statutes on the same matter; in passing a statute borrowed from another state, the legislature intended to adopt the judicial interpretations placed on that statute by the courts of the other state. In Oregon, the Legislature, by statute, has even instructed the courts to follow the intention of the Legislature in the construction of statutes.

But can a legislature have an intent and, if so, should the courts give any weight to this intent? Professor Max Radin is of the opinion that the intention of the legislature is undiscoverable, that legislatures consist of groups of men who do not have uniform ideas about the laws they enact, and that hence no consistent collective intent of the legislature exists. Furthermore, Radin argues, if a uniform intent did exist, there is no means of determining what it is because few legislators express themselves on the meaning of statutes except by voting for or against them, and there is no proof that the expressions of the few are held by the others. Radin is of the opinion that the function of a legislature is to pass statutes and that the courts should ignore all expressions of legislative activity except the words of the statute; ambiguities in statutes should be resolved by courts applying their own sound sense. Radin's conclusions have been attacked by others who claim that there is a legislative intent which is discoverable and should be controlling; it is said that, in voting for a statute, a legislator thereby approves of the views regarding its meaning expressed by its proponents, or that legislative intent in the form of broad policy purposes of the legislature in enacting a particular piece of legislation can be determined by extrinsic evidence.

---

75 Byers v. We-Wa-Ne, 86 Or. 617, 630, 169 Pac. 121, 125 (1917); United States v. Congress of Industrial Organizations, 335 U. S. 106, 112 (1948); Reconstruction Finance Corporation v. Denver and R. G. W. R. R., 328 U. S. 495, 511 (1946); United States v. American Trucking Associations, 310 U. S. 534 (1940).
78 Columbia Rock and Sand Co. v. Hibernia Savings Bank, 86 Or. 536, 169 Pac. 88 (1917); Caroleen Products Co. v. United States, 323 U. S. 18, 26 (1944).
79 O. C. L. A. sec. 2-217 (1940).
81 Landis, A Note on Statutory Interpretation, 43 Harv. L. Rev. 886 (1930).
sic means. But whatever one's views on the nature of legislative intent, the fact remains that the courts have considered and will consider extrinsic aids in many cases when construing statutes and, in justifying their position, will usually argue that they are applying the "intent of the legislature." But to the degree that the courts admit that they are not restricted or bound by legislative intent, to that degree are they free to decide problems of statutory meaning by the judges' own standards of justice. Then a vast new field of extrinsic aids in statutory cases opens up; factual evidence with respect to the desirability of legislation then becomes relevant whether or not such evidence is related to legislative intent, whether or not the legislature collectively or any of its members individually considered or was aware of the evidence in question. Some support exists in the authorities advocating a theory of limited judicial independence in applying statutes to factual situations before the courts. An acceptance of this theory should carry with it the opportunity of presenting arguments to the court on what is good or bad in any possible constructions of the statute being considered before the court and of submitting all relevant extrinsic factual aids in support of such arguments.

CONCLUSION

Extrinsic aids are materials of sufficient value to courts in the construction of statutes that there is no good reason for excluding them in any case. Courts very often will not be controlled by relevant extrinsic aids, but that is no reason for not permitting courts to weigh the value of these aids in any matter before them in which the meaning of a statute is in issue. In other words, the plain-meaning rule and any other rule excluding relevant extrinsic aids from consideration by the courts are undesirable ones that reduce the influence of the legislative and executive branches of the government to an unnecessary degree. The judiciary has sufficient integrity and ability to be trusted with all relevant aids in weighing the meaning of statutory language, and there is no reason

83 Radin, Statutory Interpretation, 43 HARV. L. REV. 863, 881 (1930); Radin, A Short Way with Statutes, 56 HARV. L. REV. 388 (1942); Horack, In the Name of Legislative Intention, 38 W. VA. L. Q. 119 (1932); 2 SUTHERLAND, op. cit. supra note 2, sec. 4508.

The Oregon court has indicated that judges' ideas of justice and equity should have a part in judicial interpretation of statutes. This implies an approval of at least some independent judicial discretion in statutory interpretation. Nanny v. Oregon Liquor Control Commission, 179 Or. 274, 171 P. 2d 360 (1946); Fish v. Bishop, 176 Or. 210, 156 P. 2d 204 (1945); State v. Gates, 104 Or. 112, 206 Pac. 863 (1922). See Corbett Investment Co. v. State Tax Commission, 181 Or. 244, 250, 181 P. 2d 130, 132 (1947); Ulrich v. Lincoln Realty Co., 180 Or. 380, 394, 168 P. 2d 582, 587 (1946); Banfield v. Schuderman, 137 Or. 167, 178, 298 Pac. 905, 907 (1930); accord, In re Tyler's Estate, 140 Wash. 679, 250 Pac. 456 (1926).
to require that they ever be restricted to a consideration of the four corners of a legislative act in applying that act to cases before them.

Assuming that it is proper for a court to consider extrinsic aids, how should they be presented by counsel? Since most extrinsic materials pertain to matters that the court can take judicial notice of, counsel can present these materials to the court in oral argument or in a written brief, or he may take his chances on the court considering the materials on its own initiative without reminder or argument by counsel. This latter course is likely to be a disappointment to counsel if he is anxious to have the court consider extrinsic materials but takes no positive steps to facilitate such consideration. Although difficulties as to admissibility may arise, it has been recommended that the best procedure is to introduce extrinsic aids into evidence so as to make them a part of the record which an appellate court must consider on review. 84 Attorneys can benefit their clients and assist the courts if they will more effectively present extrinsic aids in statutory-construction cases. A need for more effective use of extrinsic materials, other than judicial opinions and statutes in pari materia, is quite noticeable in state-court proceedings.

Although extrinsic aids are a valuable adjunct to statutory construction, their use can be abused. Undue reliance can be placed by courts on an executive interpretation, committee report, legislative debate, or some other extrinsic material which is only remotely connected with the problem at hand or which is inconsistent with some other equally credible extrinsic material. Or the language of the statute may be exceedingly explicit and the extrinsic material somewhat vague and general, in which case any departure from the explicit language of the statute would be uncalled for. Also, under the guise of finding legislative intent through extrinsic aids, courts can rationalize decisions predicated in reality upon the judges' personal views of right and wrong. 85

If, from a consideration of the language of a statute and all available extrinsic aids, a court still feels in doubt as to how the statute should be applied to the case at hand, then is the time for the court consciously to apply its discretion in interpreting the statute and deciding the case. At this stage there are times when statutes are found to be so uncertain and ambiguous as to require their being held void for uncertainty, 86 or un-

84 Horack, op. cit. supra note 59, at 606. Methods of presenting extrinsic aids to the courts are also considered in Read and MacDonald, Cases and Other Materials on Legislation 1174-1176 (1948).

85 Pound calls this "spurious interpretation." Pound, Spurious Interpretation, 7 Col. L. Rev. 379 (1907).

constitutional because violative of due process or the separation of powers. Nevertheless, there is a rather broad field of statutory interpretation in which it is traditional and right for courts to use their discretion in reaching decisions on statutory meaning without hiding behind a facade of inadequately expressed legislative intent. Better decisions and better government will result from the courts being fully aware of their rights, their powers, and their responsibilities in the interpretation of statutes.


88 However, there are limits on the free exercise of judicial discretion. In this connection, Cardozo said: "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.' Wide enough in all conscience is the field of discretion that remains." CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921).