

June 1969

## Statutory Construction--The Role of the Court

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### Recommended Citation

Linda L. Hupp, *Statutory Construction--The Role of the Court*, 71 W. Va. L. Rev. (1969).  
Available at: <https://researchrepository.wvu.edu/wvlr/vol71/iss3/17>

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who has custody of the dead body not as the owner but merely as a trustee who holds it in trust for the benefit of those who may have an interest in the corpse.<sup>31</sup>

*Thomas McKendree Chattin, Jr.*

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### Statutory Construction—The Role of the Court

*"If there is no meaning in it,  
that saves a world of trouble,  
you know, as we needn't try to  
find any."*

Alice in Wonderland

The 1964 Civil Rights Act includes within its purview the words "place of . . . entertainment" which "customarily presents . . . entertainment which move(s) in commerce." When a mother and her two children were turned away from defendant's amusement park because of their race, the question arose whether the defendant corporation fell within the coverage of the Act. The lower court and the dissenting opinion given in the circuit court, employing the rule of *ejusdem generis*, construed "entertainment" as used in the Act to mean only exhibitive entertainment, not participative, and held that the defendant, offering only participative amusements, was not within the Act. Moreover, they emphasized the requirement that the "entertainment . . . moves in commerce," holding that permanently placed mechanical rides do not so "move."

The majority, however, held that the defendant corporation came within both the letter and the spirit of the 1964 Civil Rights Act. In reaching this conclusion, they found among other things: that "entertainment" as used in the Act included both exhibitive and participative activities; that because the park was located on a major highway and no geographical restrictions were placed on its radio and television advertisements, its patrons move in commerce to the extent required by the Act; and finally, after looking at the purpose behind the statute, that this decision complied with the spirit of the law.<sup>2</sup>

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<sup>31</sup> *Teasley v. Thompson*, 204 Ark. 959, 165 S.E.2d 940 (1942). See *Sherrard v. Henry*, 88 W. Va. 315, 106 S.E. 705 (1921), which held that survivors had a right to the possession of the body and also have a right to make final disposition; however, it stated that they are under an obligation to make the disposition "properly."

<sup>1</sup> Civil Rights Act of 1964, § 201 (b)(3) and (c)(3), 42 U.S.C. § 2000 a (b)(3) and (c)(3).

<sup>2</sup> *Miller v. Amusement Enterprises, Inc.*, 394 F.2d 342 (5th Cir. 1968).

These two conflicting views on statutory construction illustrate an as yet unsolved problem in American jurisprudence—the lack of agreement on what role the courts should play in interpreting statutes.

Legislation is of necessity abstract and general. Obviously, then, cases requiring statutory construction arise in which the particular factual situation is not expressly covered by the statute. This may occur because the terms used in the statute are so broad, their applicability to any given situation is shrouded in vagueness or because the factual situation is one never conceived of by the legislature. The contending parties will present two very plausible, yet contradictory interpretations. What should the court's function be in these situations? Is the gap between the statute and the particular factual situation to be filled by the legislature or by the court acting in place of the legislature as it thinks the legislature would act? Should the court act according to its own judgment without regard to how it thinks the legislature would act? How a judge answers this question reflects his philosophy of the judicial function. As there have been different viewpoints of the court's role in this situation, the approaches to the problem have varied.

According to Pound, statutes in general may be accepted by the courts in one of four ways.<sup>3</sup> Regardless of the category adopted, the interpretation of a statute involves, as a preliminary process, a search for the meaning of the word or words in question. This can be explored on three levels. First, the ordinary meaning of the word is sought—the usual source being the dictionary. Secondly, the context in which the word is found is probed—the relation of the word to other words in the statute. From this second consideration have come three rules of construction:

A. "*noscitur a sociis*"—a general word takes color from the preceding specific words with which it is attached.

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<sup>3</sup> Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383, 385-86 (1908). The four possibilities are:

(1) Receive it completely into the law, accord it greater value than earlier case-law on the subject, and reason by analogy from it.

(2) Receive it completely into the law, analogize from it, yet hold it equal to case-law.

(3) Do not receive it completely into the law, do not analogize from it, but construe its provisions liberally.

(4) Do not receive it completely into the law, do not analogize from it, and construe its provisions very narrowly.

B. "*ejusdem generis*"—a general phrase takes color from preceding specific words or phrases.

C. "*expressio unius, exclusio alterius*"—a general phrase takes color from the specific words or phrases following it as well as those preceding it.<sup>4</sup>

The third method of establishing the meaning of words within the statute is in relation to the subject matter—that is, finding the meaning of a word in relation to the background of that part of human conduct with which the act deals.<sup>5</sup>

These considerations, however, deal only with the textual material of the statute; they do not per se establish how the statute is to be construed. Thus, new considerations must be examined, and the court may choose which to invoke on the basis of whether it adopts a strict or liberal view of statutory interpretation.

Perhaps the most famous quote dealing with the subject of judicial construction of statutes is one attributed to a sermon by Bishop Hoadley:

Nay, whosoever hath an *absolute authority* to interpret any written or spoke laws, it is *he* who is truly the *Law-giver* to all intents and purposes and not the person who first wrote or spoke them<sup>6</sup>

In possible deference to such an admonition, courts using the strictest of constructions will invoke the "plain-meaning" rule. If the words in question are plain and unambiguous, the courts will give them their ordinary meaning even if this results in absurdity or injustice in the particular case.<sup>7</sup> A step up from this guideline is one called the "golden rule." Here again, words are given their ordinary meaning, but there is one exception—if the result would be an absurdity, the words may be modified, but only for that particular situation.<sup>8</sup>

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<sup>4</sup> Although these three rules are obvious propositions, they are still used by courts today to justify decisions as is evidenced by the lower court's reliance on *ejusdem generis* in the *Miller* case. *Miller v. Amusement Enterprises, Inc.*, 394 F.2d 342, 348 (5th Cir. 1958).

<sup>5</sup> Willis, *Statute Interpretation in a Nutshell*, 16 CAN. BAR REV. 1 (1938).

<sup>6</sup> Quoted in J. GRAY, *NATURE AND SOURCES OF THE LAW*, 102, 125, 172 (2nd ed. 1921).

<sup>7</sup> Willis, *supra* note 5, at 10.

<sup>8</sup> *Id.* at 12. Neither of these approaches is particularly helpful—where words in a statute are that unambiguous, their construction will not ordinarily be called for. Moreover, what actually is plain-meaning and what is an absurdity within the laws? Such nebulous terms are of little aid in attempting to set out clear-cut standards of statutory construction.

Statutory construction is commonly thought to be necessary when "there is a fair contest between two readings, neither of which comes without respectable title deeds."<sup>9</sup> In such a situation, more than a reading of the text is required. Justice Frankfurter described the most troublesome area of statutory construction as "the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were part of it, written in ink discernible to the judicial eye."<sup>10</sup> Thus the question becomes: what other evidence will the court consider in addition to the words of the statute itself? Frankfurter maintained that the purpose of statutory construction is to ascertain meaning; thus, any extrinsic evidence that is considered is to be devoted solely to that end. Furthermore, the meaning sought is of the "words used by the legislature. To go beyond [that] is to usurp a power which our democracy has lodged in its elected legislature."<sup>11</sup> He contended that to permit the courts to employ a loose standard of statutory construction would take pressure off the legislature to responsibly discharge its duty.<sup>12</sup>

Justice Holmes stressed finding the general purpose of a statute as "a more important aid to meaning than any rule which grammar or formal logic may lay down."<sup>13</sup> Thus the search is for the general purpose or legislative intent behind the statute. Such a construction is referred to as the "mischief rule." In interpreting a statute, four things are to be considered:

1. What was the common law rule before the statute was passed?
2. What mischief or defect was not provided for by the common law?
3. What remedy has the legislation offered to cure that defect?
4. What reason lies behind such a remedy?<sup>14</sup>

Under this rule, a statute may not be interpreted until the court knows what social policy it encompasses. Only after discovering why the act was passed can the court interpret the words of the statute so as to give effect to the underlying social policy established by the legislature.<sup>15</sup>

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<sup>9</sup> Frankfurter, *Some Reflections On The Reading Of Statutes*, 47 COLUM. L. REV. 527, 527-28 (1947).

<sup>10</sup> *Id.* at 529.

<sup>11</sup> *Id.* at 533.

<sup>12</sup> *Id.* at 545.

<sup>13</sup> *United States v. Whitridge*, 197 U.S. 135, 143 (1905).

<sup>14</sup> *Heydon's Case*, 3 Co. 7b (1584).

<sup>15</sup> *Willis*, *supra* note 5, at 14.

Unless, as is rarely the case, the legislature spells out its purpose within the act itself, the search for intent will focus on the legislative history of the statute.

The "search for the legislative intent" approach has been strongly criticized. One writer has maintained that legislative intent is nearly impossible to find and, even if discovered, would not be binding.<sup>16</sup> The issue being litigated cannot exist until the statute has been passed. "To say that the intent of the legislature decides the interpretation is to say that the legislature interprets in advance by undertaking the impossibility of examining a determinable to see whether it can cover a situation which does not exist"<sup>17</sup> On the other hand, it was argued fairly recently that statements by those who helped in drafting a statute, whether or not they are legislators, should be considered as indicative of the aim of the statute.<sup>18</sup> However, there is some danger here that too much significance could be attached to a casual or tentative statement that was not meant to be an explanation of policy; moreover, legislators do not always reveal the intent behind a statute for fear it will imperil passage.<sup>19</sup> It has been further argued that in cases involving factual situations never conceived of by the legislature when it passed the statute, the court does not really decide the issue of legislative intent. Rather, the judge steps into the shoes of the legislative and attempts to predict what that body would have done had this particular question come before it.<sup>20</sup>

The need to reply on legislative intent as a justification for court interpretation of statutes, particularly in cases where no clear legislative policy is discernible, seems to result from a judicial fear

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<sup>16</sup> Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

<sup>17</sup> *Id.* at 871-72. In reply to this criticism, another writer maintained that through records of legislative assemblies, and studies of legislative history, including the political and economic forces at work at the time of passage, legislative intent could be discovered. Moreover, the author decried strong judges who override legislative intent to make the law conform to their personal views and judges, who, to keep from admitting that they are legislating, speak of legislative intent in a statute where none is discoverable. Landis, *A Note On "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930).

<sup>18</sup> *Statutory Construction—Legislative Intent—Use Of Extrinsic Aids In Wisconsin*, 1964 WIS. L. REV. 660.

<sup>19</sup> Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A.J. 535 (1948). On the wisdom of referring to legislative intent, Justice Jackson stated: "I am coming to think it is a badly overdone practice, of dubious help to true interpretation and one which poses serious practical problems for a large part of the legal profession." *Id.* at 537-38.

<sup>20</sup> J. GRAY, *THE NATURE AND SOURCES OF LAW* 170-71 (2nd ed. 1921),

of usurping legislative prerogatives. However, Holmes, Hughes, Brandeis, Stone, Cardozo, Frankfurter, Douglas and Jackson, among others, have maintained that in the absence of a statute, judicial legislation is an inherent part of the judicial function.<sup>21</sup> "There has, however, been greater reluctance to admit that, similarly, interpretation of statutes often requires such legislation. Yet it is difficult to justify such a differentiation."<sup>22</sup>

Justice Cardozo noted the similarities between legislators and judges, observing also the limits placed on judges engaged in "legislating" decisions:

The choice of methods, the appraisalment of values, must in the end be guided by like considerations for the one as for the other. Each indeed is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between the gaps. He fills the open spaces in the law. . . . Even within the gaps, restrictions not easy to define . . . hedge and circumscribe his action. . . . None the less, within the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its act as creative.<sup>23</sup>

One other consideration has received attention in the attempt to delineate the judicial role in statutory construction. It is that since statutes vary, the methods for interpreting them should also vary. This idea has been implemented in two ways: looking at each statute individually to determine what rules of construction should be applied to it<sup>24</sup> and creating presumptions of strict or liberal

<sup>21</sup> *Guiseppi v. Walling*, 144 F.2d 608, 621 n.38 (2nd Cir. 1944).

<sup>22</sup> Judge Frank adds that limitations inherent in legislation

"frequently compels the courts, as best they can, to fill in the gaps, an activity which, no matter how one may label it, is in part legislative. Sagacious legal scholars of high repute . . . have said that courts, in discharging their duty of carrying out the express will of the legislature as faithfully as they can, are frequently unable to escape the responsibility of engaging in supplemental legislation. *Id.* at 621.

<sup>23</sup> B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 113-15 (1921).

Justice Cardozo further differentiated the roles by pointing out that the legislator deals abstractly with a general situation with few limitations; the judge, on the other hand deals with particular cases and concrete problems. Thus the judge must maintain his objectivity, ridding himself of any personal influences with the case. *Id.* at 120.

<sup>24</sup> Frankfurter, *Some Reflections on The Reading of Statutes*, 47 COLUM. L. REV. 527, 537 (1947):

And so, the significance of an enactment, its antecedents as well as its later history, its relation to other enactments, all may be relevant to the construction of words for one purpose and in one setting but not

interpretation for certain classes of cases.<sup>25</sup>

Thus, courts have run the gamut between strict and liberal constructions of statutes—no set standard has emerged and the area has indeed been a muddled one. Perhaps the answer lies in establishing that courts have a greater discretion, than is often thought, to interpret statutes in light of the social policies sought to be effected by the legislation. As the law increases in size and complexity, it seems reasonable to allow the courts an active part, along with the legislature, in implementing policy—rather than to shackle courts to the narrow duty of interpreting literal meanings.

It is arguable that whenever the construction of a statute is in doubt, the judge becomes a law-maker, as opposed to a mere law-finder. When the applicability of a statute is questioned, what in effect is being said is that the statute does not answer the judge's final question—what should he do with this particular factual situation? The answers the statute does give, however, may be close enough to the one sought—if they involve the same social goals—so as to provide the method for ascertaining that answer also. The court, by looking at the purposes behind the answers given, can formulate from these purposes the answer to the particular problem. In doing this, the court would not be confined to other statutes but would employ constitutions, judicial decisions, customs, etc.

When they are considered it becomes clear that the judicial task in the interpretation of statutes entails the same freedom and the same limitations as do the problems of the Constitution and of the Common Law. Authoritative answers in all of these cases are rarely in point; the resort must be to reason and judgment.<sup>26</sup>

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for another. Some words are confined to their history; some are starting points for history. Words are intellectual and moral currency. They come from the legislative mint with some intrinsic meaning. Sometimes it remains unchanged. Like currency, words sometimes appreciate or depreciate in value.

<sup>25</sup> Some of these presumptions are not used today to the extent that they have been in the past; however, a few examples of the presumptions are:

1. the presumption against taking away a common law right;
2. presumption against taking away property without compensation;
3. presumption against barring a person from the courts;
4. presumption against interfering with the personal liberty of the individual;
5. penal statutes given a strict interpretation.

<sup>26</sup> Bishin, *The Law Finders: An Essay In Statutory Interpretation*, 38 S. CAL. L. REV. 1, 29 (1965).