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COOPERATIVE ACTION FOR IMPROVED STATUTORY INTERPRETATION

FRANK E. HORACK JR.*

During the past quarter century there has been a constant acceleration in legal periodical comment concerning statutory construction. Judges, practicing attorneys and law professors all have echoed basic dissatisfaction with the operation and application of the rules of statutory interpretation. Some would return to the "safe old ground" of literal interpretation; others would find relief in an expanded use of extrinsic aids; all find the process in a state of confusion and disintegration.

In one sense this is both surprising and puzzling. The interpretation of words alone is not a more vexatious process today than it has been in the past. The interpretation of deeds, mortgages, wills, contracts and other private instruments is centuries old. These instruments have not always been clear and unambiguous; the intent of the draftsman has not always been crystal clear and yet there has been no frontal attack on the interpretative process as applied to these instruments. Why then the growing dissatisfaction with statutory interpretation? Perhaps it is because statutory interpretation unlike other interpretation includes objectives other than the attainment of legislative meaning. For example, it is hard to believe that sovereign immunity as a 20th century concept is applicable to a legislative enactment without express declaration.¹ It is difficult to understand that because a phrase becomes formalized a court is entitled to disregard it as evidence of legislative intention.² It is doubtful that legislative silence can mean one thing in one statute and something very different in the next.³ And, as a matter of constitutional construction, it is hard to accept the proposition that Congress is not supreme in making rules for its own governance.⁴ In situations of this character the judicial act of applying or refusing to apply a statute may as frequently be a determination of what the law (*i.e.*, the statute) should or should not proscribe as it is a determination of what it has or has not proscribed.

If this is so then it is fruitless to consider statutory construction as a

* Professor of Law, Indiana University; author, SUTHERLAND, STATUTORY CONSTRUCTION (3d ed. 1943), CASES ON LEGISLATION (1940).

1. United States v. United Mine Workers, 330 U.S. 258, 67 Sup. Ct. 677, 91 L. Ed. 884 (1947).

2. Berco, Inc., v. Whitworth, 81 F.2d 721 (4th Cir. 1936).

3. Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 Sup. Ct. 982, 84 L. Ed. 1311, 128 A.L.R. 1044 (1940); Helvering v. Griffiths, 318 U.S. 371, 63 Sup. Ct. 636, 87 L. Ed. 843 (1943) (constitutional decision); but see Girouard v. United States, 328 U.S. 61, 66 Sup. Ct. 826, 90 L. Ed. 1084 (1946); Cleveland v. United States, 329 U.S. 14, 67 Sup. Ct. 13, 91 L. Ed. 12 (1946).

4. Christoffel v. United States, 338 U.S. 84, 69 Sup. Ct. 1447 (1949).

judicial act directed exclusively toward the determination of statutory meaning. Although in the ordinary case the legislative standards are reasonably determinable and the process of interpretation poses no difficulty and provides no distortion of the legislative enactment, in cases where the statutory standard is uncertain, interpretation cannot determine legislative intent for it may be and often is nonexistent. Here the court cannot escape the obligation of exercising in small or great degree the legislative function, that is, the determination of what the law *is going to be* for the case before the court and for all society in the future.

The determination of the applicability of the statute becomes at this point something more than a determination of the "meaning" of the statute or the "intent" of the legislature, for by hypothesis the word-symbols of the statute are insufficient to disclose either meaning or intent as applied to the particular case. There is nothing new about this problem. It has always been the major concern of the interpretative process.⁵ The only change in the situation is that in the past forty years and particularly in the last twenty, there has been a substantial shift in the locus of lawmaking. Prior to that time, at least in the Anglo-American system, the "law" primarily affecting individual relationships was the common law—the monopoly of the courts. Statutory enactment did not challenge on wide scale the time honored common law principles.⁶ Legislatures spent more time on the "housekeeping details" of government than upon the basic relations of "jurisprudence."

Today the situation is almost reversed. First, through workmen's compensation legislation, and then through the social security programs the relations of the individual and the state have been materially altered. The regulation of business and agriculture has received continued legislative attention, as has labor legislation reflecting concepts unknown at least in 19th century American law.⁷ Taxation has been used as a machine not only for the direct support of the government but also for the furtherance of specific social and economic objectives. In lawmaking the legislature has achieved a supremacy in forming the direction of our society which it had scarcely achieved before.

Initially, legislative supremacy was vigorously challenged by the courts. State legislation particularly fell before the unrelenting application of due process concepts by state and federal courts. The gulf between courts and legislatures continued to widen until the court felt the impact of public opinion

5. "[W]hen 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 as to what its intention was." GRAY, NATURE AND SOURCES OF THE LAW 172 (2d ed. 1927).

6. Federal statutes such as the Sherman Act, the Interstate Commerce Act, and the State Utilities Acts were fitted into common law concepts. See *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007 (1897).

7. Foreign as many of the statutory regulations affecting labor may appear to our common law, most of them were the subject of extensive judicial experimentation in England a decade earlier.

as legislatures had felt it earlier. There was no reorganization of the court; indeed, none was needed, for judicial supremacy through constitutional interpretation gave ground to permit a wider expression to the legislative function of determining state and national policy. Whether this has been a wise judgment only a longer experience will disclose, but it was none the less a judgment democratically made by a majority of the people.

This competition between courts and legislatures for supremacy in determining primary national and state policy frequently obscures the fact that on secondary questions courts have frequently permitted or even encouraged the settlement of controversy having constitutional implications in arenas other than the courts. From this experience is it possible to avoid growing conflicts between the legislative and judicial branches over the exercise of the legislative function at a sub-constitutional level?

CONSTITUTIONAL INTERPRETATION

The inevitable exercise of legislative power by the Supreme Court of the United States and, to a lesser degree, by the supreme courts of the several states, as an incident of their judicial functions cannot be ignored. The Constitution is a legislative document. It sets forth the basic policies by which society determines how it shall be governed. Its preparation and adoption is reflective of our belief in popular participation in the formation of the rules that establish the government and determine the relations between it and the individuals in our society. Thus, the ultimate power to change the Constitution is in its nature legislative.

This legislative power is distributed among the people, and the several branches of the government. The people through their state legislatures or through specially called constituent assemblies may initiate constitutional change. Congress likewise, may initiate amendments for ratification by the state legislatures or conventions. And in the states, constitutional amendments are commonly submitted to a vote of the people. These are direct and obvious exercises of legislative power; the paucity of their use on the federal level suggests that they have not been the significant modes of constitutional amendment.

Indirectly, the executive, the legislatures, and the courts are, through the exercise of their respective functions, interpreting and, to the extent that their interpretations achieve results which previously had not obtained, amending the constitution. Inasmuch as judicial interpretation supported by the doctrine of judicial supremacy is controlling, it has without question had the most profound effect upon constitutional meaning and content. A survey of constitutional decisions in successive decades of our history leaves unquestioned the fact that constitutional provisions mean very different things at

different times and that the difference is exclusively the result of judicial opinion. And this is as it should be. Literal and historical interpretation early were found inadequate to the needs of an expanding society. The judgment that the constitution must be an ever growing instrument has been fully justified by history.

This judicial supremacy in matters constitutional does not mean that the court has been unwilling to share, within limits, the responsibility for constitutional interpretation. The judiciary has readily admitted that the other branches of government are of coordinate authority and dignity and that it cannot be presumed that their personnel hold their constitutional oaths more lightly than does the court. In matters of separation and delegation of powers the court has for a quarter of a century recognized that some comingling of governmental power is both necessary and desirable. Certainly, the obligation to interpret the constitution and the laws is one of the functions which of necessity every branch of the government must exercise and the courts have long recognized it. Indeed, in some areas the court has permitted nonjudicial interpretation to have final and conclusive effect.

The doctrine of "political questions" bears dramatic testimony to the court's recognition of both the limitations on its own ability to enforce its decrees and of the wisdom of non-interference in areas where judgments are primarily of unsettled policy rather than ones where the policy is at least potentially settled by existing law. Unfortunately, to the state courts this policy has had a lesser appeal.

Likewise, courts have been reluctant to disagree with or even review questions where constitutional discretion was conceivably vested in other branches of the government. Thus, review of the rules of legislative procedure has been avoided; and even with those questions on which the constitutions of the states are usually specific—such as length of legislative sessions,⁸ place of origin of bills,⁹ the advertisement of special bills,¹⁰ three readings,¹¹ the printing of bills,¹² the keeping of journals,¹³ and the recording of aye and nay votes on final passage¹⁴—the courts have left final judgment to the legislatures. Indeed, even in those areas where the constitutions are either silent or inconclusive, such as on the effect of enrollment, or the power of

8. *State ex rel. Cline v. Schrickler*, 88 N.E.2d 746 (Ind. 1949), *rehearing denied*, 89 N.E.2d 547 (1950).

9. *Flint v. Stone Tracy Co.*, 220 U.S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312 (1911); *Mikell v. School District of Philadelphia*, 359 Pa. 113, 58 A.2d 339 (1949).

10. 2 SUTHERLAND, STATUTORY CONSTRUCTION § 2101 (3d ed., Horack, 1943).

11. *Skipper v. Street Improvement District*, 144 Ark. 38, 221 S.W. 866 (1920); *People ex rel. Sccarce v. Glenn Co.*, 100 Cal. 419, 35 Pac. 302 (1893).

12. *Ex parte Seward*, 299 Mo. 385, 253 S.W. 356 (1923), *writ of error dismissed*, 264 U.S. 599 (1924).

13. See *In re Taylor*, 60 Kan. 87, 55 Pac. 340 (1898).

14. 1 SUTHERLAND, STATUTORY CONSTRUCTION §§ 1302-03 (3d ed., Horack, 1943).

investigation, legislative interpretation of the constitution is usually followed by the courts.¹⁵

Only *Christoffel v. United States*¹⁶ casts doubt on the unbroken line of federal decisions sustaining legislative determination of constitutional compliance on matters of legislative procedure; and while there is greater divergence in the states, the almost inevitable consequence of the abandonment of a hands-off policy has been a return to it at the earliest possible moment.¹⁷

Even outside the field of legislative procedure, the courts have been cautious in overthrowing the legislative judgment. Thus, for example, special legislation,¹⁸ private bills,¹⁹ curative acts,²⁰ claims²¹ and grants of public funds²² have been generally held valid by the courts whenever the constitution intimated that the question might have been one of policy for the legislature. Even in the face of specific constitutional limitations, courts often refuse to overthrow the legislative act, because of the "presumption of constitutionality."

In short, the Supreme Court, and the state courts as well, have looked with favor on the proposition that all of the decisions of government need not necessarily be made or reviewed by lawyers and judges. Thus, although compliance with the constitution, either federal or state, is within the doctrine of judicial supremacy, the courts have wisely left final decisions in many areas to the legislature because the character of the decision is more nearly a matter of legislative policy than one of judicial determination.

STATUTORY INTERPRETATION: EXTRINSIC AIDS

If courts within the admitted area of their supremacy give legislative decisions substantial finality on many constitutional questions, there is little reason to doubt that courts will be equally cooperative on questions of statutory

15. "The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject-matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject-matter was not indispensable." *McGrain v. Daugherty*, 273 U.S. 135, 178, 47 Sup. Ct. 319, 71 L. Ed. 580 (1927).

16. 338 U.S. 84, 69 Sup. Ct. 1447 (1949). As the dissent so appropriately pointed out, "the Court is denying to the records of the Congress and its committees the credit and effect to which they are entitled, quite contrary to all recognized parliamentary rules, our previous decisions, and the Constitution itself." 338 U.S. at 90.

17. See *Smith v. Thompson*, 219 Iowa 888, 258 N.W. 190 (1934), which overruled *Davidson Building Co. v. Mulock*, 212 Iowa 730, 235 N.W. 45 (1931), and was in turn overruled by *Carlton v. Grimes*, 337 Iowa 912, 23 N.W.2d 883 (1946).

18. *Guthrie Nat. Bank v. Guthrie*, 173 U.S. 528, 19 Sup. Ct. 513, 43 L. Ed. 796 (1899); *Gentile v. State*, 29 Ind. 409 (1868); *Lefman v. Schuler*, 317 Mo. 671, 296 S.W. 808 (1927); *Woodall v. Darst*, 71 W. Va. 350, 77 S.E. 264, 80 S.E. 367 (1912-13). But some state constitutions have made the question judicial. See 2 SUTHERLAND, STATUTORY CONSTRUCTION § 2103 n.5 (3d ed., Horack, 1943).

19. For an excellent collection of cases, see *Fairfield v. Huntington*, 23 Ariz. 528, 205 Pac. 814 (1922).

20. See 2 SUTHERLAND, STATUTORY CONSTRUCTION §§ 2213-16 (3d ed., Horack, 1943).

21. See note 19 *supra*.

22. *United States v. Denver R.G.R.R.*, 150 U.S. 1, 14 Sup. Ct. 11, 37 L. Ed. 975 (1893); *Irvien v. United States*, 251 U.S. 41, 40 Sup. Ct. 75, 64 L. Ed. 128 (1919); *Massachusetts v. Mellon*, 262 U.S. 447, 43 Sup. Ct. 597, 67 L. Ed. 1078 (1923).

interpretation. A court welcomes all reliable evidence that assists in the resolution of the question before it. In the case of a statute the determination of its applicability may be so easy as to be almost automatic, or after the most exhaustive study the issue may remain in doubt. In these cases, save for a few where the court has found the statute "clear and unambiguous" and therefore will not consider extrinsic aids "which cast doubt upon the clear legislative expression," the use of legislative histories, committee reports and other glosses is as common and unquestioned as the use of judicial precedents. Further law review argument in favor of their use seems hardly needed; the practice is now firmly settled judicially.

The real problem today is in the production, not the use, of extrinsic materials. Except for Congress and four or five state legislatures, legislative bodies have failed to provide administrators or courts with materials other than the statutes themselves.²³

In the federal system, with slight dissent, extrinsic aids are used wherever and whenever they are available. And their use has had these notable consequences: (1) a marked reduction in legal opinion founded on the formal rules of interpretation, and (2) the recognition of the statutory law as a reliable source for judicial opinion. The federal system discloses without question the advantages of properly prepared legislative material.

In the great majority of the states the situation is completely reversed. The legislatures provide administrators and courts nothing but the statutes themselves. Without legislative assistance in interpretation, courts have resorted to all the artificialities which make the rules of statutory construction an impenetrable tangle of waste words. State court opinions are replete with archaic and meaningless maxims which achieve results but which guarantee neither achievement of legislative policy nor professional respect. For this the courts are not exclusively to blame. Legislatures must accept the responsibility of providing something more than journals recording motions made and lost, amendments offered, and final roll call votes and committee reports that consist of solemn recommendations that "the bill do (or do not) pass." Bill drafters are untrained in this special skill and their resulting products are often undistinguishable from poorly drafted complaints. This is the raw material with which the legislature and later the courts are forced to work. Legislators are reluctant to change that which is already incomprehensible to them and the courts can hardly be charged with perverting a legislative intent which is at best imperfectly expressed in an inarticulate statute unsupported by any materials which indicate the sweep or direction of legislative policy.

All these are matters of legislative responsibility and the defects of ad-

23. See Finley, Book Review, 24 *IND. L.J.* 328 (1949).

ministrative and judicial decision should be assessed to the legislatures and to their draftsman.²⁴ Until state legislatures take the time and are prepared to spend the money necessary for effective legislative records they must be prepared to abdicate to the courts the settlement of policy in all doubtful cases.

STATUTORY INTERPRETATION: WHERE EXTRINSIC AIDS ARE
INSUFFICIENT OR NONEXISTENT

Practically all state legislation and most of the older Congressional legislation fall within this category. It would be a fair guess to say that 99% of the state statutes and 50% of federal statutory law reach a court without the benefit of any adequate legislative history officially recorded in hearings, reports or journals. Considering the fact that many interpretative questions will arise which even the best legislative histories will not settle with finality, it is clear that for many years to come courts will deal with statutes which do not have the benefit of extrinsic aids, even if all legislatures immediately provide official reports and records for all future legislation.

Obviously, it is insufficient to say that in these cases the statute should be literally construed,²⁵ for this is no more than to say that the court is satisfied with the result which it reaches by such a process. It is equally clear that it is insufficient to say that the court should look for the legislative intent²⁶ if by that is meant any objectively discoverable evidence of the applicability of the statute to the question in issue, for by hypothesis if that were available the question would be settled. Certainly if there are committee hearings and reports, amendments proposed and accepted or rejected, statutes *in pari materia* that provide keys to meaning, if there is prior administrative or judicial construction, a court will hesitate to ignore them or to depart from consistent enforcement patterns which they may have established.

However, with a case before the court, the court must decide; and even a determination that the "intention" of the legislature cannot be determined amounts to a decision—a decision that the statute does not apply to the situation at issue. Thus, at this point courts should not continue the fiction that they are interpreting the statute, but frankly recognize that their decision amounts to a partial exercise of the legislative function.

An application, however, of the modern view of separation of powers which the courts have applied to the other branches of the government fully justifies them in exercising a limited legislative function. Admonishing that

24. See Note, *The Inadequacy of Legislative Reporting in Iowa*, 35 IOWA L. REV. 88 (1949).

25. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COL. L. REV. 527 (1947).

26. "Society cannot act effectively on subjectivity of intent; and, therefore, 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, 341 (1949).

the "whole power" of one branch of the government cannot be usurped and exercised by another, the Supreme Court has nevertheless affirmed the proposition that the exercise of some powers other than the primary power is permissible when it accords with "common sense and the inherent necessities of governmental coordination."²⁷ The necessary legislative effect of many interpretative decisions is so clear that it hardly can be imagined how the court might discharge its judicial functions without interstitially exercising a limited legislative function. And this judges have on occasion admitted.²⁸ Thus, a court in deciding an issue which arises under a statute the applicability of which cannot be determined by available legislative or quasi-legislative²⁹ sources, must decide not only whether the statute should apply, but also whether the court should make this legislative decision.

The court in determining whether it will exercise a limited legislative function must recognize that in our form of government we have consciously placed the primary lawmaking function in that branch of the government most responsive to the wishes of a majority of the people.³⁰ Thus a court should hesitate to make a legislative determination which will result in a change in basic and broadly applicable legislative policies; but conversely it should not hesitate to decide where the amendatory effect of its decision is minor and obviously consistent with well accepted legislative policies in related fields.

To what extent should a court consider the inadequacies of judicial procedure for raising questions basically legislative in nature? All but the most immediately affected persons may be unaware of the case. Even the *amicus* brief may not provide a means for the presentation of argument of indirectly affected persons, not able to present their position. The "factual brief" may be a comparable tool for the presentation of material normally heard in legislative hearings; but legitimate lobbying and interest-group representation are foreign to and totally out of place in judicial proceedings, yet such activity might have determinative effect with the legislature. Balanced against these serious obstacles is the fact that the court must make a decision, but the decision is not final. If the court has improperly determined the legislative policy, the legislature, like the court in constitutional issues, may overrule the court—here, by statutory amendment.

Should the court exercise the legislative function in order to avoid the necessity of declaring at some future time a statute unconstitutional? This

27. *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 48 Sup. Ct. 348, 72 L. Ed. 624 (1928).

28. "[W]ithin the range over which choice moves, the final principle of all selection for judges, as for legislators, is one of fitness to an end." CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 103 (1928).

29. Such as administrative rules and administrative and judicial decisions relating to the statute.

30. And this should be true even in jurisdictions where judges are popularly elected, for popular election of the judicial ticket implies a very different exercise of franchise than does the election of legislators.

seems to depart from the reluctance of courts to consider hypothetical cases, give advisory opinions, to reach decisions without the benefit of a properly developed factual background. If there is fear of misunderstanding of the court's decision, an admonitory dictum should provide sufficient warning, for if we presume that legislators enact statutes in light of the decisions, an equal presumption should be extended to administrators.³¹

The policy questions which a court faces are, indeed, limitless. Will the decision reverse judicial decisions long relied upon as properly interpreting the statutory enactment?³² Has legislative silence after prior court construction confirmed the propriety of the original construction?³³ Should the court consider in its determination the possibility that the legislature has not given effect to the "real opinion" of the electorate?³⁴

Should the court withhold review, if possible, when it perceives that proper interpretation depends upon administrative experience and the act has not had sufficient operation for that experience to accumulate? Should the court consider that its interpretation of the statute may impose new administrative duties, change well established administrative practices, or stimulate litigation to determine the effect of its new rule on other possibly similar situations?³⁵

Granted that one of the risks of living in society is the risk of having rights and duties improperly determined, to what extent should a court consider, particularly in a criminal case, that its decision may place the entire burden of improper construction on a single individual? If legislatures should customarily provide compensation for persons improperly fined or imprisoned should the court treat actions of this character differently?

To what extent should the court exercise its limited legislative function as a means of encouraging or "forcing" the legislature to take action? Some, for example, have advanced this hypothesis in defense of the decision in *Christoffel v. United States*.³⁶

If a court has passed these and other hurdles and concludes that it should exercise its legislative power, the question remains, what standards other than those implicit in the answers to the above questions should the court follow? If extrinsic aids are nonexistent or insufficient, then legislative intent is of no aid. Under these circumstances it would seem most consistent with constitu-

31. 2 SUTHERLAND, STATUTORY CONSTRUCTION §§ 5101-10 (3d ed., Horack, 1943).

32. See *People v. Olah*, 89 N.E.2d 329 (N.Y. 1949).

33. Horack, *Congressional Silence: A Tool of Judicial Supremacy*, 25 TEXAS L. REV. 247 (1947).

34. This would appear to be real usurpation of legislative function. Cf. Rutledge, J., in *Cleveland v. United States*, 329 U.S. 14, 23, 67 Sup. Ct. 13, 91 L. Ed. 12 (1946): "At times political considerations may work to forbid taking corrective action. And in such cases, as well as others, there may be a strong and proper tendency to trust to the courts to correct their own errors . . . as they ought to do when experience has confirmed or demonstrated the errors' existence."

35. E.g., *Dobson v. Comm'r*, 320 U.S. 489, 64 Sup. Ct. 239, 88 L. Ed. 248 (1943).

36. 338 U.S. 84, 69 Sup. Ct. 1447, 93 L. Ed. 1349 (1949).

tional theory, and the subordinate position of the court in matters legislative, if the court sought a result similar to that which a legislature would reach.

But what legislature? The legislature that passed the act; the legislature that last had an opportunity to amend the act; or even the legislature convened next after the court's decision? When formal rules of interpretation are announced in opinions courts usually assert that their interpretation must be limited to the statute as enacted.³⁷ Nevertheless, the results obtained in many cases cast doubt upon the actuality of the rule. For although courts have frequently asserted that this is the principal difference between constitutional and statutory interpretation, the distinction seems of doubtful merit so long as the court is not attempting to make basic changes in legislative policy in non-constitutional cases.

Historically this position is understandable. Originally there was no distinction between statutory and constitutional interpretation—both were limited to a literal application of the instrument. However, as was pointed out earlier, courts soon discovered that as the time of constitutional adoption receded, a literal or historical interpretation became impractical. This reason, of course, did not apply to statutes, because legislatures were, at least, in biennial session.

Today, many of our statutes have the same antiquity as our constitution. And while it is true that the legislature is in a position to revise them and keep them up-to-date it is equally obvious that on minor points where ambiguity may arise from the very lapse of time, the minuteness of the problem almost insures that it will not be called to legislative attention. Thus, there is real merit in the argument that if the court is exercising a legislative function secondarily, and auxiliary to its judicial function it should in forming its decision weigh the shift in social, economic and governmental philosophy, accept the facts of invention and improvement in the things upon which law operates, and should avoid a decision which will necessitate immediate legislative amendment of existing statutes.

The analogy between interpreting a constitution as a living and ever growing document and similarly interpreting a statute is subject to one serious objection. Generally speaking, a constitution restricts the powers of government and confers protections upon individuals, whereas statutes tend to restrict the powers of individuals and confer powers on the government or on classes of individuals. Arguably, if this is the character of legislation, the act of legislating should be reserved to the popularly elected representatives. The argument is, however, not conclusive. It goes rather to the propriety of the exercise of the power in particular cases rather than to its existence.

From the foregoing discussion it is clear that at least for new legislation

37. "The office of the court is to interpret the language used by the legislature where it requires interpretation, but not to annex new provisions." *People v. Boreman*, 401 Ill. 566, 82 N.E.2d 459 (1948); *People v. Olah*, 89 N.E.2d 329 (N.Y. 1949).

the most effective contributions to the interpretation problem can be made by the legislatures themselves. Some steps are so obvious they scarcely require comment: improvement in the mechanics of determining legislative policy, better legislative records and improved drafting. Certainly the *Caminetti*,³⁸ *Holy Trinity Church*,³⁹ *McBoyle*⁴⁰ and *Alpers*⁴¹ cases (to mention but a few) would not have reached the Supreme Court if the apparent legislative policy had been more accurately stated and had been paralleled by statutory language sufficient for the task.

In *Alpers v. United States*,⁴² for example, the apparent policy of Congress to bar from interstate shipment "matter of an indecent character" would have been reasonably clear, even with an inconclusive committee report, if the draftsman had not particularized items all visual in character—*i.e.*, "books, pamphlets, pictures, motion picture film, papers, letters, writing, print."

Alpers was prosecuted for the interstate shipment of admittedly obscene and indecent phonograph records. The dissent found that the enumeration implied a limitation to "matter" visual in character;⁴³ the majority found no such limitation implied and cited the fact that the section also included a prohibition on the shipment of "any drug, medicine, article, or thing designed . . . for preventing conception or producing abortion."⁴⁴ But the actual limits of the statutory policy are not determinable from the words of the statute alone.

In situations of this character the courts must recognize not only that legislators attack problems from particulars and then generalize, but also that administrators and law enforcement officers in case of doubt rely on particulars to guide their conduct.⁴⁵ Thus, statutes drafted in general terms may fail of enforcement even if they escape the threat of being held void for vagueness.⁴⁶ Conversely, legislatures must recognize that frequently courts are unwilling to enforce statutes beyond particulars, and if they expect the particulars to be merely illustrative of a more general policy they are under a duty to say so expressly.

Many legislatures have undertaken to give guidance on questions of this character. The first chapter of most state codes and of the United States

38. *Caminetti v. United States*, 242 U.S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442 (1917).

39. *Holy Trinity Church v. United States*, 142 U.S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226 (1892).

40. *McBoyle v. United States*, 283 U.S. 25, 51 Sup. Ct. 340, 75 L. Ed. 816 (1931).

41. *Alpers v. United States*, 70 Sup. Ct. 352 (1950).

42. See note 41 *supra*.

43. *Alpers v. United States*, 70 Sup. Ct. 352 (1950), and even visual must apparently relate to matter in the nature of "writing." Quare as to books in Braille and books reproduced by sound recording. See REV. STAT. § 84 (1875), 2 U.S.C.A. § 135a (Supp. 1949).

44. *Alpers v. United States*, 70 Sup. Ct. 352, 354 n.2 (1950).

45. See Horack, *supra* note 26, at 338-39.

46. *Winters v. New York*, 333 U.S. 507, 68 Sup. Ct. 665, 92 L. Ed. 840 (1948).

Code⁴⁷ set forth definitions of terms generally used in statutes and rules of interpretation which the legislature directs the courts to apply if definitions or rules of interpretation have not been set forth in particular statutes. But state and federal courts generally have paid but scant attention to these chapters, and occasionally a case arises which discloses that the court and counsel are all unaware of the existence of such statutory material.

Often there is real doubt as to the applicability of these acts to the statutes in question. Frequently, the specific problem is not covered by the legislatively adopted rules of interpretation. In *Alpers*, for example, the Congressional act is silent on the interpretation of words *ejusdem generis*. Because of the frequency with which these provisions appear in state statutes governing interpretation could it be inferred that Congress acquiesces in the ancient doctrine of *Ex parte Hill*?⁴⁸

Unfortunately, when state legislatures have enacted general interpretative statutes or provided definitions and interpretative standards in specific acts they have done so without realization of the judicial problems involved. For example, the common provision that "all general provisions, terms, phrases and expressions shall be liberally construed in order that the true intent and meaning of the legislature may be fully carried out," is of little usefulness to a court in deciding specific cases. Legislatures can no more solve the problems of interpretation by the enactment of canons and maximums than can courts. Only care in the preparation and drafting of the statutes will contribute to the judicial use of legislative materials.

When the legislature fails in its task then the courts must assume responsibility. It is here that a court's conscious recognition that it is exercising a legislative function as well as a judicial one would be helpful.

If the court follows one approach in *McBoyle* and *Holy Trinity Church* and another in *Caminetti* and *Alpers*, the legislature has little on which to build its own drafting practice, and administrators will remain in doubt as to the limits of their enforcement obligation. To avoid these consequences courts must in deciding cases give some consideration to the effect their decisions will have upon the legislative process.⁴⁹

Custom and tradition have separated the legislative and judicial institutions so sharply⁵⁰ that it is too much to hope that realistic standards of statu-

47. See, e.g., REV. STAT. § 1 (1875), 1 U.S.C.A. § 1 (1948); N.Y. STAT. § 71 (1909); ILL. ANN. STAT., c. 131, § 1 (Supp. 1949); IOWA CODE ANN. § 4 (Supp. 1949); MASS. ANN. LAWS, c. 4 (Supp. 1948).

48. 3 Car. & P. 225, 172 Eng. Rep. 397 (N.P. 1827).

49. See Frankfurter, J., dissenting in *Winters v. New York*, 333 U.S. 507, 525, 526, 68 Sup. Ct. 665, 92 L. Ed. 840 (1948). "In these matters legislators are confronted with a dilemma. . . . Answers to these questions are not to be found in any legislative manual nor in the work of great legislative draftsmen. They are not to be found in the opinions of this Court. These are questions of judgment, peculiarly within the responsibility and the competence of legislatures."

50. Though happily modified by more recent cases in the federal system, the philosophy of *Kilbourn v. Thompson*, 103 U.S. 168, 26 L. Ed. 377 (1880), to the effect that the de-

tory application can be worked out cooperatively by the two branches; but it may be hoped that in some states where judicial and legislative councils are active, they may bridge the chasm. Likewise, it might not be impossible for courts, as they have done with rules of procedure, to define the basic standards of interpretation which they will apply. But that day will not be soon, and even if it should arrive it is not clear that such rules would not create as many questions as they would cure.⁵¹

For now, the most hopeful improvement in "statutory interpretation" seems to be in a frank judicial recognition that in cases of real doubt the problems are not ones of interpretation but call for a limited exercise of the legislative function by the court. Judicial opinions drafted in these terms would be helpful to litigants and legislators, alike.

partments of government shall be rigidly separated and that "each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and no other" (103 U.S. at 191), still is given great effect in the state decision. See 1 SUTHERLAND, STATUTORY CONSTRUCTION § 207 (3d ed., Horack, 1943).

51. Cf. *Dobson v. Comm'r*, 320 U.S. 489, 64 Sup. Ct. 239, 88 L. Ed. 248 (1943).