THE PLAIN MEANING RULE AND EXTRINSIC AIDS IN THE INTERPRETATION OF FEDERAL STATUTES

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The orthodox jurisprudential theory that judicial thinking is rarely originative, but involves normally only the discovery and application of pre-existing law, is implemented by two concepts or formulae which, supposedly, enable judges to extract neat rules of decision for particular cases from the approved legal sources. In the decision of controversies according to the common law, the formula is that judges are bound to follow the "holdings" or *rationes decidendi* of the decisions of the past. In the judicial application of statute law, the basic conception is that doubts as to the meaning or legal effect of statutory provisions are to be resolved in accordance with "the intention of the legislature."

Pointing out that there is in our law no accepted measure by which the "holding" or *ratio decidendi* of a past case is to be determined,[1] modern legal realists have won general acceptance for their thesis that it is unrealistic to consider judges as wholly bound by the "holdings" of past cases, since they have the power, within vague and undefined limits, to determine what those "holdings" actually are. Similarly, it is argued vigorously that the notion of "legislative intention" is a concept of purely fictional status, and that the judicial application of the statute law should be governed rather by the personal conviction of the judge with respect to the worth of the competing interests involved in particular controversies.[2]

It is beyond the scope of the present article to consider in detail the essential reality of the concept of "legislative intention."[3] It is true, of course, that the decision of particular cases

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1. See, for example, Llewellyn, The Rule of Law in Our Case Law of Contract (1938) 47 Yale L. J. 1243, in which the author enumerates seven different measures which courts actually apply in determining the proposition of law or "holding" which a precedent may be taken to establish. And see Oliphant, A Return to Stare Decisis (1924) 14 A. B. A. J. 71.

2. For a trenchant statement of this point of view see Radin, Statutory Interpretation (1930) 43 Harv. L. Rev. 863.

3. On the general subject, see Landis, A Note on Statutory Interpretation (1930) 43 Harv. L. Rev. 886; Horack, In the Name of Legislative

by reference to the general commands of the statute law involves problems as difficult as those inherent in common law judicial decision. A legislative direction must be expressed in words, and words are notoriously inexact and imperfect symbols for the communication of ideas.[4] To determine from the language of an enactment the "legislative intention," in the sense of a pre-existing understanding as to its meaning or legal effect, may involve semantic problems of almost insurmountable difficulty. If, in Lieber's definition,[5] "Interpretation is the art of finding out the true sense of any form of words, that is the sense which their author intended to convey," it is evident that any serious effort on the part of judges to discover the thought or reference behind the language of a statute must be based upon a painstaking endeavor to reconstruct the setting or context in which the statutory words were employed.[6]

Even more difficult are the cases in which the governing interpretative issue is one which was not, and perhaps could not have been, foreseen even in the most general outline by the legislators responsible for the enactment. In such cases more is required of the judge than the discovery of a pre-existing and ascertainable meaning; the "interpreting" judge must perform the originative function of assigning to the statute a meaning or legal effect which it did not possess before his action.[7] Dean Landis

Intention (1932) 38 W. Va. L. Q. 119; Corry, Administrative Law and the Interpretation of Statutes (1936) 1 U. of Toronto L. J. 286. An analysis of the concept of "legislative intention," by the present writer, will appear in a forthcoming number of the Columbia Law Review.

4. Ogden & Richards, *The Meaning of Meaning* (1923); Chase, *The Tyranny of Words* (1938).

5. Lieber, *Legal and Political Hermeneutics* (3d ed. 1880, by W. G. Hammond) 11.

6. " * * * any ascertainment of the meaning of language requires consideration of the atmosphere in which the conveyance originated, and ascertainment of the associations or connections understood by the conveyor to exist between the terms of the conveyance and the various possible objects in the external world. By this process, selected symbols which imperfectly symbolize the conveyor's idea are made more understandable, and the danger, that a selected symbol will call up in the mind of the construer a different idea from that which the conveyor intended to symbolize, is lessened. Language is capable of clear meaning only when read in the light of the circumstances of its employment." Restatement, *Property*, Explanatory Notes (Tent. Draft No. 7, 1937) sec. 241, quoted in R. Powell, Construction of Written Instruments (1939) 14 Ind. L. J. 199, 231.

7. "Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had none the less a real and ascertainable pre-existence in the legislator's mind. The process is, indeed, that at times, but it is often something more." Cardozo, *The Nature of the Judicial Process* (1921) 14. Compare Gray, *The Nature and Sources of the Law* (1909) 165.

has remarked that the term, "legislative intention," may be taken to signify either the more immediate concept of *meaning* or the teleological concept of *purpose*.[8] The principle that courts are bound to follow "the intention of the legislature" requires, in this latter signification of "intention" that interpretative issues, unforeseen specifically by the legislators, should be resolved in such a way as to advance rather than to retard the attainment of the objectives which the legislators sought to achieve by the enactment of the legislation.

It is evident that a judge cannot, from a bare reading of the text of a statute, form any accurate idea either of the construction placed upon it by its framers, or of the purposes which the members of the legislature sought to accomplish by its passage.[9] Judicial reference to the actual circumstances of the passage of the legislation, that is, to its legislative history and to the clarifying statements made in committee reports and during discussion on the floor by responsible legislators, is the prerequisite to intelligent comprehension of "legislative intention" in either sense. If a legislative understanding with respect to the interpretative issue of a given case actually existed, it can be discovered only when the statutory language is put in its full context. If such a specific understanding is non-existent or undiscoverable, "legislative intention," in the sense of the moving purposes underlying the legislation, must be found in sources of the same, or of even more comprehensive, character.

Examination of the relevant cases decided by the Supreme Court and by the lower federal courts, particularly since the decision of *Church of the Holy Trinity v. United States*,[10] in 1892, reveals that the judges have come to rely, increasingly, upon such extrinsic aids as committee reports and records of legislative history, in the interpretation of Congressional enactments.[11] Extrinsic aids, however, are not treated as significant

8. Landis, A Note on Statutory Interpretation (1930) 43 Harv. L. Rev. 886.

9. "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and context according to the circumstances and the time in which it was used." Holmes, J., in Towne v. Eisner (1918) 245 U. S. 418, 425.

10. 143 U. S. 457.

11. Chamberlain, The Courts and Committee Reports (1933) 1 U. of Chi. L. Rev. 81; Miller, The Value of Legislative History of Federal Statutes (1925) 73 U. of Pa. L. Rev. 158; Frankham, Use of Legislative Debates and Committee Reports in Statutory Interpretation (1933) 2 Brooklyn L.

in every case involving the interpretation of a federal statute. Even the federal courts continue to assert, although not always to apply, the "plain meaning rule," that

> * * * where the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended.[12]

The present discussion is intended as an analysis of judicial theory and practice, with respect to the plain meaning rule, with particular reference to a number of highly relevant decisions of the Supreme Court of the United States.

The plain meaning rule seems to have been intended, originally, to rule out the traditional judicial doctrine of "the equity of the statute," a doctrine which justified alterations in the literal meaning of statutory language to avoid results which, in the opinion of an interpreting judge, were unfair or inequitable. The main effect of the rule in modern statutory interpretation, however, is that it bars resort to otherwise admissible extrinsic aids, evidencing the meaning or purpose of the enacting legislators, in cases which, in the judgment of the deciding court, fall within the scope of its operation. Whenever one encounters a statement of the rule in a modern judicial opinion, there is a strong probability that further examination of the record in the case will disclose that counsel for one party or the other had attempted to introduce a committee report or other legislative record in support of his interpretation of the statute.

Thus, in representative opinions, the Supreme Court has employed the plain meaning doctrine as a rule of exclusion, barring the presentation, as aids to interpretation, of committee reports,[13] records of the legislative history of an act,[14] administrative con-

Rev. 173; McManes, Effect of Legislative History on Judicial Decision (1937) 5 Geo. Wash. L. Rev. 235; tenBroek, Admissibility of Congressional Debates in Statutory Construction by the United States Supreme Court (1937) 25 Calif. L. Rev. 326; Wagner, Use and Abuse of Legislative History in the Construction of a Statute (1938) 5 I. C. C. Prac. Jour. 485.

12. United States v. Missouri Pac. Ry. (1929) 278 U. S. 269, 278.

13. Pennsylvania R. R. v. International Coal Mining Co. (1913) 230 U. S. 184; Railroad Comm. of Wis. v. Chicago, B., & Q. R. R. (1922) 257 U. S. 563; Helvering v. City Bank (1935) 296 U. S. 85.

14. United States v. Trans-Missouri Freight Ass'n (1897) 177 U. S. 290; Wilbur v. United States ex rel. Vindicator Consolidated Gold Mining Co. (1931) 284 U. S. 231. Cf. Matson Nav. Co. v. United States (1932) 284 U. S. 352, 356, in which Stone, J., said: "As the words of the statute are plain, we are not at liberty to add to or alter them to effect a purpose which does not appear on its face or from its legislative history."

struction,[15] and other sources extrinsic to the text of an enactment.[16] This effect of the plain meaning doctrine as a rule of exclusion is indicated by the language of Mr. Justice Sutherland in *United States v. Shreveport Grain & Elevator Co.*,[17] in which the Supreme Court refused to consider committee reports offered as evidence of Congressional intention:

> In proper cases, such reports are given consideration in determining the meaning of a statute, but only where that meaning is doubtful. They cannot be resorted to for the purpose of construing a statute contrary to its plain terms. * * * Like other extrinsic aids to construction, their use is "to *solve* but not to *create* an ambiguity."

Judges have been reluctant to concede that the rule that they are bound by the "plain meaning" of statutory language is inconsistent with the general principle that the end of statutory interpretation is the discovery and application of "the intention of the legislature," and several familiar circumlocutions have been employed in attempted reconciliation. In certain cases, the effort has been made to square the plain meaning rule with the general theory of interpretation by the statement that the statutory language, if "plain and unambiguous" is "the sole evidence of the ultimate legislative intention."[18] In other opinions, the explanation has been that the legislature is "conclusively presumed" to have intended the meaning which "plain words" necessarily bear.[19]

Realistic analysis of the plain meaning doctrine, however, must be based upon full recognition that interpretation according to the literal approach does not involve any effort to discover "the intention of the legislature," in the sense of a meaning or purpose which the draftsmen of a statute ever actually entertained. Whenever, in the judgment of the interpreting court, the language of a statute "standing alone, is fairly susceptible of but

15. Koshland v. Helvering (1936) 298 U. S. 441; Banco Mexicano v. Deutsche Bank (1924) 263 U. S. 591.

16. Hamilton v. Rathbone (1899) 175 U. S. 414 (past acts); Cornell v. Coyne (1904) 192 U. S. 418, 430 (title of statute). And see Johnson v. United States (C. C. A. 7, 1914) 215 Fed. 679 (statements of author).

17. (1932) 287 U. S. 77, 83.

18. Caminetti v. United States (1917) 242 U. S. 470, 490.

19. Frequently, also, the statement found is that the "legislative intention" controls, but that the court must limit its consideration to the "intention" as expressed in the statute. United States v. Goldenberg (1897) 168 U. S. 95, 103.

one construction,"[20] the plain meaning rule, at least theoretically, bars any further inquiry into the actual thought or idea which the members of the legislature sought to communicate through the statutory language.

That the plain meaning rule, within the scope of its application, justifies the preference of a supposed literal meaning borne by the words of a statute, over the sense in which the legislature intended them to be understood, may be illustrated by a number of federal decisions.[21] Probably the clearest case in this connection is *Caminetti v. United States*,[22] decided in 1917, in which the Supreme Court was called upon to decide whether the lately adopted Mann Act, which made it a federal offense to aid in the transportation of a woman across a state line "for the purpose of prostitution or debauchery or for any other immoral purpose," applied to a case in which a young college man, accompanied by an agreeable co-ed, had driven across a state boundary on the way to a tavern at which the two were to spend the night. The defendant had had intercourse with the girl, but no commercial element had entered into the transaction.

It seems perfectly clear that the author of the Mann Act, and the Congressional committees which considered it, had not intended to make such conduct as that outlined above, punishable by the Federal Government. The title of the enactment, *The White Slave Traffic Act*, suggests that Congress was striking solely at the interstate ramifications of commercialized vice. In fact, Representative Mann, speaking as the author of the bill and as chairman of the committee in charge, had assured members of the House, who had raised this very issue, that the Act was aimed only at "vice as a business."

Nevertheless, the majority of the Supreme Court held that the meaning of the statutory language was "plain and unambiguous" and that conduct of the type in question was clearly within the denotation of "other immoral purpose." Extrinsic evidence of the actual intention of Congress was excluded, and the majority opinion, written by Mr. Justice Day, stated:[23]

20. Hamilton v. Rathbone (1899) 175 U. S. 414, 419.

21. For example, Banco Mexicano v. Deutsche Bank (1924) 263 U. S. 591; Hildick Apple Juice Co. v. Williams (D. C. S. D. N. Y. 1920) 269 Fed. 184. And see Lake County v. Rollins (1899) 130 U. S. 662.

22. 242 U. S. 470.

23. Id. at 490.

> * * * when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports, accompanying their introduction or from any extraneous source. * * * the language being plain, and not leading to absurd or wholly impracticable consequences; it is the sole evidence of the ultimate legislative intent.

Mr. Justice McKenna, dissenting, filed a vigorous opinion, studded with citations drawn from the legislative records, and taxed the majority of the Court with open disregard of the undisputed legislative intention.

Under the plain meaning rule, as applied in such decisions as that of the *Caminetti* case, extrinsic aids offered by counsel as evidence of "the intention of the legislature," are rejected if the words of the statute involved are "plain and unambiguous." It may be difficult to grasp the significance of the terms "plain" and "unambiguous" as used in this connection, unless it is kept in mind that in our legal system statutes are not given a general judicial exposition in abstraction from particular litigated fact-situations. The point here raised would be unecessary if it were not for the fact that analytically-minded writers on statutory interpretation have developed a subtle jurisprudential distinction between the "meaning" of a statute and its "application" to the facts of a given case.

In a still influential article,[24] published in 1913, Dean Pound divided the judicial process in dealing with statutes into three stages: (1) finding the statute; (2) interpreting it, that is, arriving at its meaning; and (3) applying it to the facts of a given case. This analysis gives the impression that the discovery of the meaning of a statute and the determination of its applicability to a particular fact-situation are separate operations, successive in point of time. Professor de Sloovere, who has accepted the analysis as a working principle, has carried the distinction between "meaning" and "application" to its logical conclusion:[25]

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24. Courts and Legislation (1913) 77 Cent. L. J. 219, 222. The analysis is also found in Pound, *An Introduction to the Philosophy of Law* (1922) c. 3.

25. de Sloovere, Textual Interpretation of Statutes (1934) 11 N. Y. U. L. Q. Rev. 538, 553, 554. And see de Sloovere, Steps in the Process of Interpreting Statutes (1932) 10 N. Y. U. L. Q. Rev. 1. For further implications drawn from the distinction, see de Sloovere, The Functions of Judge and Jury in the Interpretation of Statutes (1933) 46 Harv. L. Rev. 1086.

> After the single meaning has been found, the remaining difficulties are those of applying the statute to the case at hand. For example, whether radio broadcasting is a "public performance for profit" does not, without more, involve any question of interpretation at all, since the words themselves are clear and explicit. In other words, apart from or in relation to any case, the language is not susceptible of more than one meaning.

What Dean Pound and Professor de Sloovere seem to be suggesting is that in determining the effect of a statute in particular situations of fact, the court must first determine the *connotation*[26] of the general terms of the statute, and then determine their *denotation*, that is, their applicability to the concrete facts of an actual case. Whatever merits this distinction may have, and the present writer doubts even its general validity,[27] it may lead to misunderstanding in an attempt to analyze the significance of "plain" and "unambiguous" as those terms are employed in judicial decisions on the plain meaning rule. A distinction between the "meaning" of a statute and its "application" would appear to suggest that a statute may have a "plain meaning" which would bar resort to extrinsic aids, although the effect of the statute upon the particular case in question is subject to serious doubts. The courts, however, employ the phrase "plain meaning" without regard to the jurisprudential distinction drawn between "meaning" and "application."

"Plain meaning," as that term is used in judicial opinions, refers not to the abstract coherence or intelligibility of a statute, but rather to the direction which the statute affords to the judge as to the decision of a particular controversy. The "plain meaning" which bars resort to extrinsic aids is not a meaning "apart from any case" but a meaning with particular reference to the

26. "A term may be viewed in two ways, either as a class of objects (which may have only one member) or as a set of attributes or characteristics which determine the objects. The first phase or aspect is called the *denotation* or extension of the term, while the second is called the *connotation* or intension." Cohen & Nagel, *An Introduction to Logic and Scientific Method* (1934) 31. (Italics are the present writer's.)

27. When a judge refers to a statute it is for guidance as to the decision of a case, the particular facts of which are already known to him. His thinking is affected throughout by his awareness of the facts of the controversy which it is his duty to decide. Is it not an unrealistic description of actual judicial thinking to suggest that the judge arrives at a determination of the abstract meaning of a statute *before* he considers its applicability to the particular case?

case presented for decision. The same statutory provision may be held to have a "plain meaning" with respect to certain controversies, but to be "ambiguous" with respect to others.[28] A statute is "ambiguous," and so open to explanation by extrinsic aids, not only when its abstract meaning (that is, the connotation of its terms) is uncertain, but also when it is uncertain in its application to, or effect upon, the fact-situation of the case at bar. The statement of the plain meaning rule in an actual case implies that the judgment of the court is that the decision which it has reached in the particular case is the only decision which could possibly have been made without attributing to the words of the statutory direction a meaning, that is, a connotation or denotation, wholly unjustified by the accepted usages of speech.

The effect of the plain meaning rule, at least in theory, is to restrict the office of extrinsic aids to the resolution of doubts as to the effect of the statute concerned upon the particular case, created by such causes as internal conflict in the statutory language,[29] the vagueness of the connotation or denotation of the statutory terms in accepted usage,[30] or the existence in the statute of terms which possess different popular and "trade" meanings.[31] The Supreme Court has frequently quoted from the opinion of Mr. Justice Brown in *Hamilton v. Rathbone*,[32] to the effect that "the province of construction lies wholly within the domain of ambiguity," and that extrinsic aids may be "resorted to to *solve* but not to *create* an ambiguity." Not even committee reports, generally regarded as the most reliable of the extrinsic aids, are admissible as evidence that the decision directed by the supposed "plain meaning" of the text of a statute is not the result which the members of the legislature actually intended.

Theoretically, the plain meaning rule raises a preliminary issue

28. Compare Osaka Shosen Kaisha Line v. United States (1937) 300 U. S. 98, with Taylor v. United States (1907) 207 U. S. 120.

29. Interpretative problems of this character are illustrated by American Net & Twine Co. v. Worthington (1891) 141 U. S. 468, and Arthur v. Morrison (1877) 96 U. S. 108.

30. See, for example, the interpretative issues in U. S. Cartridge Co. v. United States (1932) 284 U. S. 511; United States v. Louisville & N. R. R. (1915) 236 U. S. 318; United States v. Rehwald (D. C. S. D. Cal. 1930) 44 F. (2d) 663.

31. See, for example, the interpretative issues in Bailey v. Clark (U. S. 1874) 21 Wall. 284 ("capital"); Nix v. Hedden (1893) 149 U. S. 304 ("fruit" and "vegetables").

32. (1899) 175 U. S. 414, 421. (Italics are those of Brown, J.)

of admissibility in every case, and the acceptance or rejection of offered extrinsic aids should depend upon the disposition which the court makes of that preliminary issue. The evidence afforded by extrinsic aids, logically speaking, should be irrelevant unless the interpreting court has *first* come to the conclusion either that the statute is "ambiguous" with respect to the fact-situation of the particular controversy, or that the application of the statute, according to its literal meaning, would lead to "absurd or wholly impracticable consequences." The frequently quoted formula that extrinsic aids may be resorted to "to solve but not to create an ambiguity" can only mean that the evidence provided by such aids should be considered solely for the light which it throws upon the proper resolution of a doubt or "ambiguity" apparent to the court *before* it examines the extrinsic sources. In other words, the theory of the plain meaning doctrine is that the "ambiguity" or "absurdity" which will take a case outside the scope of its application must be discoverable upon a bare or literal reading of the text, wholly apart from the background or context which the committee reports and other extrinsic sources provide.[33]

With a few notable exceptions,[34] writers on the subject of statutory interpretation have accepted the plain meaning doctrine at its face value, that is, as a rule applied with fair consistency by the courts in cases in which no "ambiguity" is discoverable upon a literal reading of a statutory text.[35] Close consideration of a number of federal cases, in many of which the opinion makes no mention of the plain meaning rule, has brought the present writer to the conclusion that the doctrine is not followed invariably by the courts, and that the incidence of its application has been uncertain and unpredictable. In many cases which, apparently, should have fallen within the scope of the plain meaning rule, it has been disregarded and the literal meaning of the language of the relevant statute subjected to

33. Hopkins, The Literal Canon and the Golden Rule (1937) 15 Can. Bar Rev. 689.

34. R. Powell, Construction of Written Instruments (1939) 14 Ind. L. J. 199, 309, 397; Note, Legislative Materials to Aid Statutory Interpretation (1937) 50 Harv. L. Rev. 822.

35. For example, Miller, The Value of Legislative History of Federal Statutes (1925) 73 U. of Pa. L. Rev. 158; McManes, Effect of Legislative History on Judicial Decision (1937) 5 Geo. Wash. L. Rev. 235.

material alteration.[36] A few instances should be sufficient to indicate the dimensions of the gulf between asserted judicial theory and actual judicial practice in the interpretation of Congressional enactments.

Of the many cases in which the Supreme Court has assigned to a statute an interpretation in conflict with the literal meaning of its text, perhaps the most generally known are those in which the "rule of reason" was read into the Sherman Anti-Trust Act. By the express words of the enactment, it was provided that

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce * * * is declared to be illegal.

It would be difficult to conceive of more inclusive words in which the prohibition might have been drafted, unless, as suggested by an irreverent former student of the writer, the statute had continued, "and by *every* combination we mean every doggone one."

In the first cases in which counsel for indicted combinations made the effort to restrict the prohibition of the act to combinations in "unreasonable" restraint of trade, the Supreme Court rejected the "rule of reason," as in conflict both with the plain meaning and with the purpose of the statute.[37] Fifteen years later, after several unsuccessful efforts had been made to secure a restrictive amendment of the Anti-Trust Law,[38] the Supreme Court reopened the question in *Standard Oil Co. v. United States*,[39] and by an eight-to-one majority read the "rule of reason" into the Sherman Act. The majority interpretation seems to have been based, in part, upon the theory that it was the actual "intention" of Congress to adopt the common law standard with respect to restraint of trade, and some reference was made to extrinsic sources, notably to the debates, as evidence of that

36. United States v. Alabama Great Southern R. R. (1892) 142 U. S. 615; Coosaw Mining Co. v. South Carolina (1892) 144 U. S. 550; Luckenbach S. S. Co. v. United States (1930) 280 U. S. 173; and cases cited elsewhere in the text and footnotes of this article.

37. United States v. Trans-Missouri Freight Ass'n (1897) 166 U. S. 290. The dissent of White, Ch. J., later became the position of the Court.

38. "At every session of Congress since the 1896 decision, Congress refused to change the policy it had declared or to so amend the Act of 1890 as to except from its operation contracts, combinations, and trusts that *reasonably* restrain competition." Harlan, J., dissenting, in part, in Standard Oil Co. v. United States (1911) 221 U. S. 1, 91.

39. (1911) 221 U. S. 1. Accord: United States v. American Tobacco Co. (1911) 221 U. S. 106.

intention. Mr. Justice Harlan, disagreeing with the majority conclusion, stated his objection in vigorous terms:[40]

> * * * if I do not misapprehend its opinion, the court has now read into the act of Congress words which are not to be found there, and has thereby done that which it adjudged in 1896 and 1898 could not be done without violating the Constitution, namely, by interpretation of a statute, changed a public policy declared by the legislative department.

It may be noted, parenthetically, that the majority opinion of Chief Justice White in the case in question is rather unconvincing with respect to the actual legislative intention. The immediate point, however, is that the case offers a strong instance of judicial disregard of the plain meaning rule.

Another instance of judicial failure to apply the literal meaning of a statute is the 1921 decision in *Duplex Printing Press Co. v. Deering*,[41] in which the majority of the Supreme Court upheld an injunction granted under the Clayton Act, restraining labor union officials from continuing to carry on a secondary boycott, in the effort to compel the complainant manufacturer to give recognition to the union and to grant a closed shop. The sections of the Clayton Act exempting labor unions from its general provisions are too detailed for full citation here, but it should be noted that section 20 of the Act read, in part:

> No such restraining order or injunction shall prohibit any person or persons, whether singly or in concert * * * from ceasing to patronize any party to such [labor] dispute, or from recommending, advising, or persuading others by peaceful and lawful means to do so.

In spite of the apparent "plain meaning" of the text of the Clayton Act, the Court majority held that the facts of the case were not within the scope of the statutory immunity from injunctive process. The majority opinion of Mr. Justice Pitney made exhaustive reference to extrinsic aids and called particular attention to the fact that the chairman of the House Committee, in reporting the bill, had denied explicitly that the statute was intended to legalize the secondary boycott. In the dissenting opinion of Mr. Justice Brandeis,[42] concurred in by Justices Holmes

40. (1911) 221 U. S. 1, 104.
41. 254 U. S. 443.
42. Mr. Justice Brandeis has been a consistent advocate of the rule of literalness in statutory and constitutional interpretation. See, for example, his dissents in Duplex Printing Press Co. v. Deering (1921) 254 U. S. 443;

and Clark, one of the points most strongly urged was that the case fell within the plain meaning rule.

In *Boston Sand & Gravel Co. v. United States,*[43] decided in 1928, the Supreme Court had before it for interpretation a statute which subjected the United States to certain suits in admiralty, and provided that the District Courts

> Shall have jurisdiction * * * to enter a judgment or decree for the amount of the legal damages * * * if any shall be found to be due either for or against the United States, upon the same principle and measure of liability as in like cases in admiralty between private parties.[43a]

The immediate interpretative issue in the case was whether the statute directed the allowance of interest against the United States, interest being included in the "legal damages" which would have been awarded as between private parties in comparable cases. The majority of the Court held that, despite the apparent literal meaning of the text, it was not the intention of Congress "to put the United States on the footing of private parties in all respects." Four justices dissented, and the minority opinion of Mr. Justice Sutherland expressed the contention that "it follows indubitably from the words of the statute" that interest should be allowed against the United States. In conclusion, Mr. Justice Sutherland stated:[44]

> To refuse interest in this case, in my opinion, is completely to change the clear meaning of the words employed by Congress by invoking the aid of extrinsic circumstances to import into the statute an ambiguity which otherwise does not exist and thereby to set at naught the prior decisions of this Court and long established canons of statutory construction.

By way of contrast, the majority opinion of Mr. Justice Holmes made reference to statutes *in pari materia* and to the legislative history of the act, and concluded with the unusually frank statement:[45]

> It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. This

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and in Evans v. Gore (1920) 253 U. S. 245; and his opinion for the Court in State Board of Equalization of Cal. v. Young's Market Co. (1936) 299 U. S. 59, 63.

43. 278 U. S. 41.

43a. (1922) 42 Stat. 1590, c. 192.

44. Boston Sand & Gravel Co. v. United States (1926) 278 U. S. 41, 55.

45. Id. at 48. Compare: Holmes, The Theory of Legal Interpretation (1899) 12 Harv. L. Rev. 417, *Collected Legal Papers* (1921) 203.

> is rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.

Instances could be multiplied in which the Supreme Court and the lower federal courts have, virtually without explanation, disregarded the plain meaning rule so rigidly applied in the *Caminetti* decision. Detailed consideration here will be restricted to two additional cases of comparatively recent occurrence. The factual background of *Texas & Pacific Railway v. United States,*[46] decided by the Supreme Court in 1933, was that certain railroads had offered substantially the same rates on import and export traffic between New Orleans and inland points as were charged between those points and certain Texas ports, although the rail haul to New Orleans was, in each instance, much the longer. The Interstate Commerce Commission, after a finding of undue preference to New Orleans and undue prejudice to the Texas ports, prescribed minimum rate differentials in favor of the Texas ports where the New Orleans haul was more than twenty-five per cent longer. Statutory authority for the Commission order was supposedly found in section 3(1) of the Act to Regulate Commerce, which provides:[46a]

> It shall be unlawful for any common carrier * * * to make or give any undue or unreasonable preference or advantage to any particular person * * * or *locality,* * * * in any respect whatsoever, or to subject any particular person * * * or *locality,* * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

The Supreme Court, by a five to four decision, held the Commission order invalid, as beyond the scope of its statutory authority. Mr. Justice Roberts, writing the opinion for the majority, made extensive reference to committee reports and to the legislative history of the statute in support of his conclusion that it was not the intention of Congress to remove discriminations against seaports, "in respect of traffic to which they are in no sense points of origin or destination." One of the points made by Mr. Justice Stone[47] in his dissenting opinion was that

> On its face the prohibition of any undue and unreasonable prejudice to "any particular locality," "in any respect what-

46. 289 U. S. 627.

46a. (1887) 24 Stat. 380, c. 104, sec. 3, 49 U. S. C. A. sec. 3(1). (Italics supplied).

47. Texas & Pacific Ry. v. United States (1933) 289 U. S. 627, 658.

ever," would seem so plainly to include a port as to leave no room for construction.

Perhaps the most revealing single case of disregard of the plain meaning rule is *Helvering v. New York Trust Co.*,[48] decided by the Supreme Court in 1934, involving the interpretation of a provision of the Revenue Act of 1921 which subjected net gain from the sale of "capital assets" to a tax rate much lower than that on ordinary income. In the statute, the term "capital assets" was defined as "property acquired and held *by the taxpayer* for profit or investment for more than two years." The circumstances of the particular controversy were that a gain had been realized from the sale of securities which had been transferred to the trustee of an irrevocable trust, the sale having been made within less than two years after the creation of the trust, although more than two years after the settlor had acquired the securities.

The decision of the Court majority was that the gain so realized was "a gain from the sale of capital assets" and taxable at the lower rate, although the securities had not been "held by the taxpayer" for more than two years, as required in the statutory definition. Mr. Justice Butler justified his departure from the literal or plain meaning of the statutory language on the ground that the purpose of the statute, as disclosed in the extrinsic sources, was to promote the free exchange of frozen securities, and that the decision reached would advance that underlying purpose. Mr. Justice Butler said further:[49]

> The rule that where the statute contains no ambiguity, it must be taken literally and given effect according to its language is a sound one not to be put aside to avoid hardships that may sometimes result from giving effect to the legislative purpose. * * * But the expounding of a statutory provision according to the letter without regard to the other parts of the Act and legislative history would often defeat the object intended to be accomplished.

Mr. Justice Roberts, dissenting, pointed out that the interpretation of the majority not only violated the plain meaning rule but also conflicted with administrative rulings which, for twelve years after the first adoption of the statutory provision, had

48. 292 U. S. 455.
49. Id. at 464.

denied the benefit of the "capital gains" provision to one who had not, himself, held the property for two years or more.

The cases discussed in comparative detail in the preceding pages are not in any sense unique or unrepresentative. It seems a safe generalization to say that the plain meaning rule is disregarded in actual judicial practice at least as often as it is applied as a controlling principle in cases involving the interpretation of Congressional enactments.[50] The Supreme Court, however, has not openly discarded the rule of literalness, and there are recent decisions of the federal courts in which it appears with unimpaired vitality.[51] Perhaps the most remarkable example of the lengths to which courts sometimes go into their application of this literal canon of construction is *United States v. Shreveport Grain & Elevator Co.*,[52] in which Mr. Justice Sutherland, writing the opinion for the Court majority, first repunctuated an originally doubtful statute in such a way as to alter its essential tenor, and then announced that the statute, as repunctuated, possessed a single plain meaning which barred the consideration of committee reports offered as evidence of the actual intention of Congress.[53]

In short, the plain meaning rule is applied or ignored, apparently at the discretion of the interpreting judges, and it is impossible to frame any generalization concerning the conditions of its applicability which will fit all of the cases. It may be observed that the same uncertainty has characterized the application of the plain meaning principle in cases of constitutional interpretation.[54] The existence of so fundamental a conflict in the judi-

50. Note, Legislative Materials to Aid Statutory Interpretation (1937) 50 Harv. L. Rev. 822; R. Powell, Construction of Written Instruments (1939) 14 Ind. L. J. 309. And see cases cited in text and footnotes of this article.

51. Osaka Shosen Kaisha Line v. United States (1937) 300 U. S. 98, 101; Koshland v. Helvering (1936) 298 U. S. 441, 447; Helvering v. City Bank Farmers Trust Co. (1935) 296 U. S. 85, 89. And see State Board of Equalization of Cal. v. Young's Market (1936) 299 U. S. 59, 63.

52. (1932) 287 U. S. 77.

53. See the comment on the instant case in Chamberlain, The Courts and Committee Reports (1933) 1 U. of Chi. L. Rev. 81, pointing out that reference to available committee reports would have made possible a decision of the case without the judicial legerdemain actually resorted to. The case suggests that the plain meaning rule may not only lead to the frustration of legislative purposes, but may also make the process of decision even more laborious than would reference to extrinsic aids.

54. The rule of literalness was made applicable to constitutional interpretation in Sturges v. Crowninshield (U. S. 1819) 4 Wheat. 122. But see

cial approach to the interpretation of statutes makes impossible any certain prediction with respect to the consideration which will be given to extrinsic aids in a particular case in which the bare text of a statute appears to suggest only a single possible meaning. The rule of literalness, as actually employed, seems a useful judicial argument in favor of exclusion, when the evidence presented in the form of extrinsic aids suggests a decision which is contrary to that which the interpreting judges deem just and expedient. When judges discover, in the extrinsic aids, support for what they consider a desirable addition to or subtraction from the literal meaning of the statutory language, they usually manage to make full use of it.

Specifically, it must be pointed out that the cases in which the plain meaning rule has been, respectively, applied or ignored, cannot be reconciled upon any theory that the literal meaning of the statutory language, in the latter case, would have led to "absurd or wholly impracticable consequences," within the theoretical requirements of that recognized exception to the plain meaning doctrine. The restricted scope of the "absurdity" exception, in the theory of the Supreme Court, is suggested by the often-quoted language of Chief Justice Marshall in *Sturges v. Crowninshield,*[55] that a case for which the words of a statute expressly provide may be excepted from its operation only where

> * * * the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application.

A recent formulation of the conditions of applicability of the "absurdity" exception is found in the opinion of Mr. Justice Sutherland in *Crooks v. Harrelson,*[56] in which the requirement

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the disregard of the literal meaning of constitutional provisions in Evans v. Gore (1920) 253 U. S. 245; Popovici v. Alger (1930) 280 U. S. 379; Smiley v. Holm (1932) 285 U. S. 355; and Williams v. United States (1933) 289 U. S. 553. Compare: Martin v. Hunter's Lessee (U. S. 1816) 1 Wheat. 304, 350; Hans v. Louisiana (1890) 134 U. S. 1; Missouri v. Illinois (1901) 180 U. S. 208. On the general subject, see tenBroek, Admissibility and Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction (1938) 26 Calif. L. Rev. 287, 437, and 664.

55. (U. S. 1819) 4 Wheat. 122, 202.

56. (1930) 282 U. S. 55. "Application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. * * * It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation." Sutherland, J., at p. 60.

stated was that "the absurdity must be so gross as to shock the general moral or common sense." There are certain cases which may perhaps be said to have fallen properly within the narrow limits of the "absurdity" exception,[57] but it is evident that none of the cases mentioned in the preceding discussion as instances of judicial disregard of the plain meaning rule involved any absurdity "so gross as to shock the general moral or common sense."

It should be understood, moreover, that the many instances of judicial variation of the literal meaning of statutory language cannot be reconciled with accepted theory upon any such ground as that a result directed by the literal meaning of a statute is an "absurd result," within that recognized exception to the rule of literalness, if it is inconsistent with the general purposes which the legislators had in mind at the time of the enactment of the statute. What Mr. Justice Butler seems to have done in *Helvering v. New York Trust Co.*[58] is to have referred to extrinsic aids to discover the underlying purpose of the statute involved in that case, and then to have held that the literal meaning might be disregarded, because the application of the statute according to its bare text would be inconsistent with the legislative purpose so discovered.

It is clear, however, that inconsistency between the underlying purposes of a statute, as disclosed by sources extrinsic to its text, and the result reached by the literal application of the statutory language, does not constitute an "absurd result" or "monstrous absurdity" within the theory of the plain meaning rule. The "doubt" or "ambiguity" which will justify judicial departure from the literal meaning of a statutory provision must, in theory, have been apparent to the court *before* it examined the extrinsic aids, that is, must have been discoverable upon a bare or literal reading of the text. Reference to extrinsic aids to determine whether the literal meaning of the statutory text is consistent with the actual "intention," or purpose, of the legis-

57. United States v. Kirby (U. S. 1868) 7 Wall. 482; Church of the Holy Trinity v. United States (U. S. 1892) 143 U. S. 457. See construction placed upon the Holy Trinity decision by Sutherland, J., in Crooks v. Harrelson (1930) 282 U. S. 55, 69. But cf. Comm'r of Immigration v. Gottlieb (1924) 265 U. S. 310. And see: United States v. Goldenberg (1897) 168 U. S. 95, 103; Gulf States Steel Co. v. United States (1932) 287 U. S. 32, 45.

58. (1934) 292 U. S. 455.

lators, is, in effect, a use of such sources to *create* a doubt or ambiguity, and not to resolve a doubt or ambiguity apparent upon the face of the statute. The analysis of federal decisions is made very difficult by the failure of the judges to recognize, or at least to concede, that departure from the plain or literal meaning of a statutory provision, in order to give effect to the actual purpose of Congress, is wholly inconsistent with the literalistic approach to interpretation embodied in the plain meaning rule.

Modern opinions of the Supreme Court and of the lower federal courts reflect a trend away from the literal approach and towards the utilization of extrinsic evidence of legislative intention in every case in which such evidence is persuasive or suggestive with respect to the interpretative issue in question. In a majority of the modern federal cases in which the plain meaning rule has been stated as a governing proposition, analysis discloses that the evidence of the extrinsic aids offered was, in fact, unpersuasive with respect to the Congressional intention and could have been disregarded as of insufficient probative value, without the statement of a flat exclusionary rule of theoretically universal application.[59] The retention of the rule of literalness in the doctrine of interpretation, however, raises the possibility in every case that its rigid application will lead to the exclusion of highly relevant and persuasive extrinsic evidence of actual Congressional intention.

The existing conflict in the decisions of the Supreme Court on the question whether extrinsic aids can be considered in the absence of a doubt as to statutory meaning apparent on the face of the statute, leads to the result that the Court, in many cases, can decide the ultimate interpretative issue either way, and can support either conclusion with respectable authority. The judicial process in statutory interpretation cannot become fully predictable until the Supreme Court has recognized the fundamental confusion in its present practice and has decided either to abandon the plain meaning doctrine as applied in such cases as

59. Note, Legislative Materials to Aid Statutory Construction (1937) 50 Harv. L. Rev. 822. Note the general unpersuasiveness of the extrinsic aids offered in Mackenzie v. Hare (1915) 239 U. S. 299; Van Camp & Sons Co. v. American Can Co. (1929) 278 U. S. 245; Wilbur v. United States ex rel. Vindicator Consolidated Gold Mining Co. (1931) 284 U. S. 231.

Caminetti v. United States,[60] or to follow it resolutely in all the cases which fall within the scope of its theoretical application. It is the conviction of the present writer that the Supreme Court should openly discard the rule of literalness, as it exists in theory, and so conform the doctrine of interpretation to prevailing judicial practice. Careful analysis of the assumptions upon which the rule is based, and of the arguments of judicial policy urged in its support, justifies the conclusion that the rule is an inappropriate one in the interpretation of modern Congressional enactments.

Different judges, and writers on statutory interpretation, have offered several justifications in support of the doctrine that the "plain meaning" of a statute should be applied, despite the possibility that the decisions so reached will be in opposition to the actual intention of the legislature.[61] The rule has the obvious convenience of enabling judges to decide certain cases without the undeniable labor involved in going over the history of a statute, the committee reports, and the other sources which might contain some clue as to what the meaning or purpose which the legislators had in mind may have been. That the plain meaning rule is not founded upon a policy of judicial convenience, however, is shown by the existence of the established rule that extrinsic aids may be resorted to *in confirmation* of the literal meaning of the statutory language.[62]

The chief argument advanced in favor of the rule of literalness is that it brings certainty, that is, uniformity and predictability of decision, into statutory interpretations. A statute, after all, is not only a command to the courts; it is also a rule to which individuals may refer for guidance in planning their conduct, and private citizens can hardly be expected to make reference to committee reports and other legislative records. The fear has been expressed by Mr. Justice Sutherland[63] that the interpretation of a statute, other than according to its literal meaning, might make of the enactment "a concealed trap for the unsuspecting." The force of this objection is, of course, undeniable.

60. (1917) 242 U. S. 470.

61. For a general discussion of the root assumptions of the plain meaning rule, see Hopkins, The Literal Canon and the Golden Rule (1937) 15 Can. Bar Rev. 689.

62. United States v. Missouri Pac. R. R. (1929) 278 U. S. 269, 278. And see Martin v. Hunter's Lessee (U. S. 1816) 1 Wheat. 304, 350.

63. Van Camp & Sons Co. v. American Can Co. (1929) 278 U. S. 245, 253.

It may be noted in the first place, however, that the predictability argument, even if completely valid otherwise, would be appropriate only in cases in which a party can show that he has acted to his disadvantage in reliance upon the "plain meaning" of a statute, and that it would not justify the universal application of the literalistic approach. No considerations drawn from the judicial desire to prevent disappointed expectation are applicable in such cases as *Caminetti v. United States*,[64] in which the plain meaning rule was, nevertheless, applied. The more basic point, however, is that the assumption upon which the predictability argument is based, that the words of a statute can be taken to possess a single necessary "plain meaning," apart from their full context, is open to serious question. When judges apply the plain meaning rule in the decision of an actual case, they are saying not only that a particular designated meaning of the statute is plain, but also that the statutory language is not reasonably capable of suggesting any other meaning. It may be pointed out that the confidence of judges in their ability to determine the necessary true meaning frequently seems not to be affected by the circumstance that the supposed necessary "plain meaning" was neither necessary nor plain to the persons who actually drew up the enactment, or to other judges who may have interpreted the statutory language.

Students of the symbolic aspects of language are generally agreed that it is unrealistic to consider words as possessed of any absolute meaning, apart from the psychological reference which they symbolize.[65] If a judge is not to attempt to discover the reference which was in the minds of those responsible for the enactment of a statute, he must substitute some other reference occasioned by the words. In the cases in which the plain meaning rule is actually given controlling effect, the deciding judge would deny indignantly that he might be substituting for the reference of the authors, the reference which the statutory language occasions to himself. The fact that the plain meaning rule is usually justified as required in the interests of legal predictability indicates that what the judges are attempting to do is to determine the thought or reference which the language of

64. (1917) 242 U. S. 470.
65. Ogden & Richards, *The Meaning of Meaning* (1923); Chase, *The Tyranny of Words* (1938).

the statute would occasion to a hypothetical average person, governed by the accepted usages of speech.[66]

In other words, the assumption of the rule of literalness is that a statutory meaning which seems necessary to an interpreting judge will also have seemed necessary to any other person who may have referred to the language of the statute for guidance in his action. The many instances in which judges have disagreed as to what the "plain meaning" of a particular statute actually was, however, indicate that the literalistic approach is not as completely objective as it may appear to be. It is quite possible, for example, that the meaning which the statutory language bore *to the legislators* is the meaning which it will suggest to those referring to it in advance of litigation. All interpretation involves a choice among possible meanings which language may be taken to suggest. The possibility that a statute may have possessed a meaning to its framers different from that which it suggests to an interpreting judge is certainly worthy of consideration by that judge, at least as a check against purely personal and subjective interpretation on his part.

In the opinion of the present writer, no adequate case can be made out to justify the employment of the plain meaning doctrine as a flat rule of exclusion, barring resort to extrinsic evidence of legislative meaning or purpose, in all cases in which a statute suggests a single necessary meaning to the judges who happen to be its interpreters. It is freely conceded that it would be unjust to attribute a distorted meaning to statutory language, and so to penalize individuals who have acted in good faith upon the apparent meaning of a statutory direction. But it would seem that a judge can have no assurance that the meaning which the statute suggests to him is the meaning which it suggested to individuals acting in reliance upon the statute, unless he has canvassed all of the possible interpretations of which the statutory language is subject.

It follows that extrinsic aids should be resorted to, at the outset, in every case, in order to reveal, if possible, what the statute meant to those responsible for its enactment.[67] If, after

66. " * * * it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." Holmes, J., in McBoyle v. United States (1931) 283 U. S. 25, 27.

67. Compare the conclusion reached by Prof. Powell in Construction of Written Instruments (1932) 14 Ind. L. J. 309, 336.

careful consideration of this intended meaning, the interpreting judge nevertheless comes to the conclusion that the actual legislative intention was so badly expressed as to mislead individuals acting in reliance upon the statute, it is doubtless proper that the judge should refuse to give effect to the legislative understanding of the act.[68] But this serious compromising of the underlying theory of statutory interpretation is at all justifiable only in cases in which the enforcement of a statute according to the legislative meaning or purpose would result in injustice to persons who have, in fact, acted in reliance upon the statute, and would suffer from its interpretation in a distorted version.

Words are not precise mathematical symbols, and an approach to statutory interpretation which treats them as if they were, must be wholly unrealistic. The meaning of a word is qualified by the sentence in which it is used, and the thought expressed by the sentence becomes more definite when the sentence is considered in the light of the entire document in which it is contained. It is generally established that in the interpretation of statutes and other written instruments, courts will read a document as an entirety, rather than *seriatim*, by clauses.[69] The resort to extrinsic aids may be considered, from this point of view, as a means by which statutory language can be placed in its full context, without thorough comprehension of which an interpreting judge cannot make an intelligent choice among the several alternative meanings which any form of words is normally capable of suggesting. A statutory meaning which appears to be unreasonable upon a bare reading of the text of a statute may well appear to be a permissible and proper one in the light of the circumstances of the passage of the enactment, and of the objectives which the members of the legislature sought to attain by its enactment.

The theoretical objectivity of the plain meaning rule tends to

68. Restriction of the plain meaning rule to cases of this character would, of course, greatly decrease the number of cases falling within the theoretical scope of its application. Nor would the doctrine operate as a flat rule of exclusion of extrinsic aids in any case. If the interest of predictability is really the basis of the plain meaning rule, it seems wholly reasonable to confine the application of the doctrine to situations in which the predictability argument is really appropriate. But *quaere* whether greater predictability should be required of the statute law than is possessed by the common law.

69. R. Powell, Construction of Written Instruments (1939) 14 Ind. L. J. 199, 210.

conceal the danger that the doctrine will result merely in the adoption of the thought which the terms of the statute occasion to the judge, in preference to the thought which the members of the legislature may have intended to convey. Unless the interpreting judge is fully aware of the legislative background of an enactment, it is quite possible that the conclusions to which he may come will result in the obstruction of the deliberately adopted legislative policy.[70] The plain meaning rule, if rigorously applied, would have the effect, within the scope of its application, of withdrawing from the consideration of judges the facts which constitute the necessary basis of effective statutory interpretation. It may be that the interest of predictability is of sufficient weight to justify occasional interpretations which derogate from the intention of the law-making body. Such judicial action is hardly defensible, however, unless the judge is fully convinced that the meaning which the words of a statute bear to him, rather than some other meaning which they may have borne to the legislators, is the one which was suggested to the individuals who have, in fact, acted upon the statute. That assurance is impossible unless the statute has been read in its full legislative context, with adequate resort to all persuasive extrinsic aids.

The most significant evidence of the barrenness of a literalistic approach to statutory interpretation is, of course, that the federal courts have come to make use of extrinsic aids in virtually every case, despite the theoretical restriction of the plain meaning rule. The principle that extrinsic aids may be considered *to confirm* the literal or "plain" meaning of statutory language,[71] that is to show that the literal meaning is also the meaning which the legislators intended, has provided a loophole permitting the introduction of extrinsic aids in many cases, and it is by no means clear that such evidence has been considered

70. Jennings, Courts and Administrative Law—The Experience of English Housing Legislation (1936) 49 Harv. L. Rev. 426; Amos, The Interpretation of Statutes (1934) 5 Camb. L. J. 163.

71. United States v. Missouri Pac. R. R. (1929) 278 U. S. 269, 278. For examples of such confirmatory reference to extrinsic aids see: Dunlap v. United States (1899) 173 U. S. 65; Margolin v. United States (1925) 269 U. S. 93; Tagg Bros. & Moorehead v. United States (1930) 280 U. S. 420; Federal Trade Comm. v. Raladam Co. (1931) 283 U. S. 643; Fox v. Standard Oil Co. (1935) 294 U. S. 87. And see: Jeu Jo Wan v. Nagle (C. C. A. 9, 1925) 9 F. (2d) 309; Cully v. Mitchell (C. C. A. 10, 1930) 37 F. (2d) 493; United States v. Hess (C. C. A. 8, 1934) 71 F. (2d) 78.

only *after* the court had come to a final conclusion as to the literal meaning of the statutory text. The flat exclusionary rule has been whittled away, or openly ignored, because the federal courts, particularly the Supreme Court, have come to recognize the value of extrinsic aids, not merely to resolve doubts suggested upon a prior and literal meaning of the bare statutory text, but to make possible an intelligent comprehension of the meaning and purpose of the statute at every stage of interpretation.[72] It is regrettable that the doctrine of the Supreme Court has not, in this instance, kept pace with practice, and that the acceptance of extrinsic aids is still subject to the hazard of possible exclusion of relevant and persuasive evidence, through rigid application of the plain meaning rule.

72. R. Powell, Construction of Written Instruments (1939) 14 Ind. L. J. 199, 309.