A New Approach to Statutory Interpretation in Washington

*Philip A. Talmadge**

When the legislature enacts a statute, it intends to accomplish a particular purpose. Such a purpose may be shrouded in imprecise drafting, legislative jargon, or political compromise.[1] Nevertheless, it is the constitutional role of the courts in a particular case to implement the legislative purpose expressed in statute. It is in this practical application that the problems with the enactment arise.

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* B.A. Yale University, J.D. University of Washington. The author was a member of the Washington State Senate from 1979 to 1995 and a Justice of the Washington State Supreme Court from 1995 to 2001. He gratefully acknowledges the assistance of Natalee Fillinger, Kimberley Gore-Galbraith, and Bernard H. Friedman in the research and preparation of this article.

1. Used in this context, I mean political compromise over the purpose or sections of the enactment. Some commentators, none of whom have been legislators, imply that legislative bodies intentionally make statutory language vague to achieve a political compromise. *See, e.g.*, Kenneth Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 240-41 (1992); *see also* Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1142 (1983). The view was cited with approval by the Washington State Supreme Court with regard to the Growth Management Act in *Association of Rural Residents v. Kitsap County*, 141 Wash. 2d 185, 188–89, 4 P.3d 115, 117 (2000):

> The GMA was a legislative compromise, and how it is carried out and enforced is a reflection of this compromise. As one commentator has stated: "unlike [the State Environmental Policy Act of 1971 (SEPA), WASH. REV. CODE § 43.21C (2000),] and [the Shoreline Management Act of 1971, WASH. REV. CODE § 90.58 (2000)], GMA was spawned by controversy, not consensus. The relative spheres of state mandate and local autonomy were the product of extremely difficult legislative compromise." Richard L. Settle, *Washington's Growth Management Revolution Goes to Court*, 23 SEATTLE U. L. REV. 5, 34 (1999). Moreover, [b]ecause the recommendations of the Growth Strategies Commission were variously embraced, rejected, and ignored by the wrangling legislature, the GMA was not the finely-honed product of a law revision commission. Both installments of the Act were riddled with politically necessary omissions, internal inconsistencies, and vague language, sometimes consciously designed to defer the final reckoning to another day and, perhaps, another forum.

Ass'n of Rural Residents, 141 Wash. 2d at 188–89, 4 P.3d at 117.

In my sixteen years in the Washington Legislature, I can recall no instance where we intentionally made the language of a statute ambiguous. This would be politically counterintuitive as both sides to such an agreement would legitimately fear the likely court decision interpreting the statute.

In a case or controversy, the courts use a variety of principles of statutory interpretation to assess precisely what the legislature meant in enacting a statute. Unfortunately, the canons of statutory construction developed by courts across the United States, including those in Washington, are often result-driven. There are literally so many canons of statutory construction, often diametrically opposed to one another, that the courts may pick and choose those canons most favorable to the ultimate disposition the court wishes to achieve. This leaves considerable power in the hands of the judiciary to make policy as the judges deem fit without regard to the legislature's actual intent in enacting a statute.

In this article, I will first explore Washington's existing law, both statutory and judicial, on statutory interpretation. I will then evaluate the mechanisms for construing statutes derived from common law and legislative sources. Finally, I will recommend a new paradigm for statutory construction so that legislative intent may be more accurately conveyed to the courts, abandoning many of the time-encrusted canons in favor of principles of interpretation adhering more specifically to the legislature's actual statutory language.

I. WASHINGTON LAW ON STATUTORY CONSTRUCTION

Washington law on statutory construction is found in statute, court rule, and case law. However, the common law rules of construction have been the predominant analytical force for interpreting statutes. Each aspect of interpretation is treated here in turn.

A. Statutes

A little known aspect of Washington law on statutory construction is that the legislature itself has established certain rules of construction in statute. As early as 1891, the legislature determined that the Washington Revised Code was to both be "liberally construed" and "not be limited by any rule of strict construction."[2] The courts have not specifically employed this statutory provision, instead choosing generally to utilize common law rules of statutory construction, applying statutes liberally or strictly.

Where statutes are amended, the legislature has adopted a general policy against implied repealers; statutory provisions substantially the same as those of a statute existing when the provisions were enacted are deemed a continuation of that statute.[3]

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2. WASH. REV. CODE § 1.12.010 (2000).

3. WASH. REV. CODE § 1.12.020 (2000); State *ex rel.* Duvall v. City Council, 71 Wash. 2d 462, 429 P.2d 235 (1967) (amendatory statute deemed to continue former statutory proceedings

If the legislature has amended the same code section more than once in the same legislative session without internal reference, the various amendments may be given effect if they do not conflict; if they conflict, the last enacted amendment controls.[4] The legislature delegated authority to the code reviser to publish the Washington Revised Code section with all of the amendments incorporated into that section, as well as to decodify repealed code sections which were repealed without reference to an amendment to the section.[5]

References to time,[6] certified mail use,[7] and numbers and gender[8] are also addressed by legislative rule.

In recognition of separation of powers concerns,[9] the legislature adopted a statute indicating court rules in conflict with statutory provisions render the statutory enactments of "no further force or effect."[10] This statute has been found constitutional,[11] but the courts have limited its application to procedural statutes.[12] Wherever possible, however, the courts endeavor to harmonize conflicts between rules and statutes to give effect to both within their appropriate spheres.[13]

The legislative enactments on statutory construction, though not extensive in scope, are significant because they confirm a critical prin-

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where changes in amendatory act were procedural in nature); State v. Carroll, 81 Wash. 2d 95, 500 P.2d 115 (1972).

4. WASH. REV. CODE § 1.12.025(1) (2000); *In re* Henderson, 97 Wash. 2d 356, 644 P.2d 1178 (1982).

5. WASH. REV. CODE § 1.12.025(2) (2000).

6. WASH. REV. CODE § 1.12.040 (2000).

7. WASH. REV. CODE § 1.12.060 (2000) (registered mail and certified mail are interchangeable).

8. WASH. REV. CODE § 1.12.050 (2000).

9. Marine Power & Equip. Co., Inc. v. Indus. Indemnity Co., 102 Wash. 2d 457, 687 P.2d 202 (1984) (under separation of powers, court has authority to set court rules even if inconsistent with rules set by the legislature); State v. Fields, 85 Wash. 2d 126, 530 P.2d 284 (1975); State v. Smith, 84 Wash. 2d 498, 527 P.2d 674 (1974) (courts have inherent power to adopt rules of procedure).

10. WASH. REV. CODE § 2.04.200 (2000).

11. State *ex rel.* Foster-Wyman Lumber Co. v. Superior Court, 148 Wash. 1, 267 P. 770 (1928) (legislature could delegate power to supreme court to promulgate rules and could invalidate inconsistent statutes); *In re* Messmer, 52 Wash. 2d 510, 326 P.2d 1004 (1958).

12. The Washington State Supreme Court differentiated procedural from substantive concerns as follows:

> Although a clear line of demarcation cannot always be delineated between what is substantive and what is procedural, the following general guidelines provide a useful framework for analysis. Substantive law prescribes norms for societal conduct and punishments for violations thereof. It thus creates, defines, and regulates primary rights. In contrast, practice and procedure pertain to the essentially mechanical operations of the courts by which substantive law, rights, and remedies are effectuated.

Smith, 84 Wash. 2d at 501, 527 P.2d at 676–77; *see also* State v. Ryan, 103 Wash. 2d 165, 691 P.2d 197 (1984); Petrarca v. Halligan, 83 Wash. 2d 773, 522 P.2d 827 (1974).

13. Emright v. King County, 96 Wash. 2d 538, 637 P.2d 656 (1981).

ciple: the legislature may take an active role in directing how the courts are to interpret legislative enactments. By statute, the legislature may direct particularized expansive or restrictive interpretations of its work, or generally mandate that certain information regarding the enactment is authoritative. This is vital to the later discussion in this article of a new approach to statutory interpretation.

B. Court Rules

A second significant source of rules on statutory construction is found in court rules. In adopting procedural rules for Washington's courts, the Washington State Supreme Court has established policies for construction of statutes in a narrow band of circumstances.

By court rule, procedural statutes are superseded by the civil and criminal rules for superior court.[14] In certain specific instances, the judiciary has preserved a statutory enactment on what is ostensibly a procedural matter.[15] Whether the courts have the power to invalidate legislative enactments by judicial fiat is an open question in Washington constitutional law.[16]

C. Case Law

The final and most significant source of rules in Washington on statutory construction is case law. The Washington judiciary claims the exclusive power to authoritatively interpret the acts of the legislature.[17] This claim rings a bit hollow in light of the legislature's power to amend a statute after the judicial interpretation of the legislature's act.[18] Regardless of the exclusivity of the authority, the consequences

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14. CR 81; CrR 1.1.

15. *E.g.*, CR 13(c)(1) (statutes on capacity of infants to sue and be sued); CR 60(e)(4) (WASH. REV. CODE §§ 4.72.010–.090 preserved).

16. *See generally* Hugh Spitzer, *Court Rulemaking in Washington*, 6 U. PUGET SOUND L. REV. 31 (1982) (advocating shared judicial-legislative role in making court procedural rules in light of history of both branches in court rules).

17. *See, e.g.*, State v. Wilson, 125 Wash. 2d 212, 216, 883 P.2d 320, 322 (1994) (court is "ultimate authority" on meaning and purpose of statute); *see also* Bellevue Fire Fighters Local 1604 v. City of Bellevue, 100 Wash. 2d 748, 751 n.1, 675 P.2d 592, 594 (1984), *cert. denied*, 471 U.S. 1015 (1985) (citing Davis v. County of King, 77 Wash. 2d 930, 933-34, 468 P.2d 679, 681 (1970)) (courts are final authority on statutory construction); Multicare Med. Ctr. v. Dep't of Soc. & Health Servs., 114 Wash. 2d 572, 582 n.15, 790 P.2d 124, 130 (1990)""; Short v. Clallam County, 22 Wash. App. 825, 832, 593 P.2d 821, 825 (1979) (court is "final arbiter" of legislative intent).

18. This power of the Legislature to amend a statute to alter the judicial interpretation is discussed *infra* at III-A. A fascinating example of the interplay between the branches in this regard is found in cases involving the standard of care for medical malpractice. In *Helling v. Carey*, 83 Wash. 2d 514, 519 P.2d 981 (1974), the Washington State Supreme Court held ophthalmologists could be held to a standard of care with respect to glaucoma higher than that practiced in

of the judicial interpretation are very significant: the judiciary's interpretation of the statute becomes a part of the enactment as if it had been there since the legislature enacted the legislation.[19]

The Washington courts have developed a paradigm for analyzing a statute; the centerpiece of this paradigm is that the courts analyze a statute to carry out the intent of the legislature.[20] If the statute is plain and unambiguous, the courts enforce the statute as written.[21] If the statute is ambiguous, susceptible to two or more reasonable interpretations, the courts resort to an interpretive process to ascertain the legislature's meaning.[22] Each aspect of the paradigm is reviewed here in turn.

1. Legislative Intent

In numerous cases, Washington courts have indicated that their purpose in analyzing a statute is the implementation of legislative in-

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the relevant medical community. The legislature amended the law relating to malpractice to define the standard of care more restrictively. The Court reaffirmed *Helling* in *Gates v. Jensen*, 92 Wash. 2d 246, 595 P.2d 919 (1979), despite the Legislature's action and its specific reference in a bill report to its intent to overrule *Helling*.

19. *See, e.g.*, Ino Ino v. City of Bellevue, 132 Wash. 2d 103, 137, 937 P.2d 154, 173 (1997); State v. Regan, 97 Wash. 2d 47, 51–52, 640 P.2d 725, 727–28 (1982).

20. A fairly typical recitation of this paradigm is found in *Whatcom County v. City of Bellingham*, 128 Wash. 2d 537, 546, 909 P.2d 1303, 1308 (1996):

> In interpreting a statute, we do not construe a statute that is unambiguous. Food Servs. of Am. v. Royal Heights, Inc., 123 Wash. 2d 779, 784–85, 871 P.2d 590 (1994). If the statute is ambiguous, the courts must construe the statute so as to effectuate the legislative intent. In so doing, we avoid a literal reading if it would result in unlikely, absurd or strained consequences. State v. Elgin, 118 Wash. 2d 551, 555, 825 P.2d 314 (1992). The purpose of an enactment should prevail over express but inept wording. *Id.*; State *ex rel.* Royal v. Bd. of Yakima County Comm'rs, 123 Wash. 2d 451, 462, 869 P.2d 56 (1994). The court must give effect to legislative intent determined "within the context of the entire statute." *Elgin*, 118 Wash. 2d at 556; *Royal*, 123 Wash. 2d at 459. Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. Stone v. Chelan County Sheriff's Dep't, 110 Wash. 2d 806, 810, 756 P.2d 735 (1988); Tommy P. v. Bd. of County Comm'rs, 97 Wash. 2d 385, 391, 645 P.2d 697 (1982). The meaning of a particular word in a statute "is not gleaned from that word alone[] because our purpose is to ascertain legislative intent of the statute as a whole." State v. Krall, 125 Wash. 2d 146, 148, 881 P.2d 1040 (1994).

See also In re Detention of A.S., 138 Wash. 2d 898, 911, 982 P.2d 1156, 1163 (1999) (the "primary objective in interpreting a statute is to ascertain and give effect to the intent of the Legislature" (citing State v. Keller, 98 Wash. 2d 725, 728, 657 P.2d 1384, 1386 (1983)) (quoting *In re* Detention of LaBelle, 107 Wash. 2d 196, 728 P.2d 138 (1986)).'

21. Food Servs. of Am. v. Royal Heights, Inc., 123 Wash. 2d 779, 871 P.2d 590 (1994).

22. *See* Vashon Island Cmty. for Self-Gov't v. State Boundary Review Bd., 127 Wash. 2d 759, 903 P.2d 953 (1995).

tent.[23] This purpose has been described variously as the court's "primary goal"[24] or "paramount duty."[25]

But in practical application, Washington courts have taken two distinct approaches to the intent of the legislature. On the one hand, the courts have adopted a literalist approach: take the words as the legislature stated them.[26] The second approach evaluates the "spirit" or "purpose" of the enactment and interprets the statute so as to avoid an absurd result compelled by the actual legislative language.[27] Neither

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23. Knipe v. Austin, 13 Wash. 189, 193, 44 P. 25, 26 (1895) ("The legislative mind may or may not have reasoned correctly on this proposition, but when we concede to it the right to enter upon an investigation of this kind, the results of the investigation expressed in an enactment cannot be called in question by the court."). *See also* C.L. Featherstone v. Dessert, 173 Wash. 264, 268, 22 P.2d 1050, 1052 (1933) ("In the interpretation of a statute, the intent of the legislature is the vital thing, and the primary object is to ascertain and give effect to that intent.").

24. Nat'l Elec. Contractors Ass'n v. Riveland, 138 Wash. 2d 9, 19, 978 P.2d 481, 485 (1999).

25. State v. Johnson, 119 Wash. 2d 167, 172, 829 P.2d 1082, 1084 (1992).

26. Shelton Hotel Co. v. Bates, 4 Wash. 2d 498, 508, 104 P.2d 478, 482 (1940) (quoting BLACK ON INTERPRETATION OF LAWS 48, 49, 53 (2d ed. 1911):

> Even if the court is fully persuaded that the legislature really meant and intended something entirely different from what is actually enacted, and that the failure to convey the real meaning was due to inadvertence or mistake in the use of language, yet, if the words chosen by the legislature are not obscure or ambiguous, but convey a precise and sensible meaning (excluding the case of obvious clerical errors or elliptical forms of expression), then the court must taken the law as it finds it, and give it its literal interpretation, without being influenced by the probable legislative meaning lying back of the words.

A "court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or inadvertent omission." Auto. Drivers & Demonstrators Union Local 882 v. Dep't of Ret. Sys., 92 Wash. 2d 415, 421, 598 P.2d 379, 382–83 (1979) (citations omitted). *See also* Vita Food Prods., Inc. v. State, 91 Wash. 2d 132, 587 P.2d 535 (1978) (court may not add words to statute even if it believes the legislature intended something else but failed to express it); Duke v. Boyd, 133 Wash. 2d 80, 942 P.2d 351 (1997).

27. *See* State v. Elgin, 118 Wash. 2d 551, 555, 825 P.2d 314, 316 (1992); *see also* State *ex rel.* Royal v. Bd. of Yakima County Comm'rs, 123 Wash. 2d 451, 462, 869 P.2d 56, 62 (1994); Janovich v. Herron, 91 Wash. 2d 767, 592 P.2d 1096 (1979); State v. Daniel J. Evans Campaign Comm'n, 86 Wash. 2d 503, 546 P.2d 75 (1976) (holding that the spirit, purpose of a statute overcomes an inept effort by Legislature to state such a purpose in the statute).

A similar analysis has been advanced in federal cases:

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." Nevertheless, in rare cases, the literal application of a statute will produce a result demonstratively at odds with the intentions of its drafters, and those intentions must be controlling. We have reserved some "scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning . . . would thwart the obvious purpose of the statute."

Griffin v. Oceanic Contractors, Inc., 485 U.S. 564, 571 (1982) (quoting first United States v. Am. Trucking Ass'ns, Inc., 310 U.S. 534, 543 (1940); quoting second Comm'r v. Brown, 380 U.S. 563, 571 (1965). *See also* United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its

approach is exclusive, as Washington courts have used both. If, on the one hand, the courts say they lack the power to insert words into a statute that the legislature did not enact, it is difficult to then reconcile case law indicating the courts will supply language to avoid absurd results and to carry out the legislature's spirit instead of the strict letter of the law. If Washington courts have been troubled by these divergent models of statutory interpretation, they have not articulated such concern in a written opinion.

The difficulty inherent in the seemingly simple exercise of ascertaining the legislative body's "intent" is striking. Of course, it is very difficult to discern precisely what 147 legislators and the governor or 535 members of Congress and the President had in mind, if anything, with regard to a piece of legislation. Not all legislators are actively involved in the enactment of a bill; not all legislators necessarily know the contents of a bill on which they voted.[28]

By its nature, the legislative process expects legislators will develop expertise in certain types of legislation. Legislators serve on committees organized by subject matter and bills are directed to those committees for the critical initial work, including public hearings.[29] Particular legislators, by virtue of their key leadership positions as committee chairs, will have a greater say in the creation of legislation, as well as its content.[30] While the language of a statute expresses the collective judgment of the legislature, it is also true that this collective judgment may be the actual product of a single legislator or small group of legislators.

Many commentators contend that it is possible to discern legislative intent from a statute.[31] They argue that groups are capable of forming intent; in fact, collective intent is common. Examples of where collective intent commonly occurs are within the military, an orchestra, a sports team, and a large corporation.

Philosopher Gilbert Ryle addressed this question decades ago. Ryle used the example of a person who, on visiting Oxford University and being shown the various "colleges, libraries, playing fields, muse-

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drafters.' In such cases, the intention of the drafters, rather than the strict language, controls.") (quoting *Griffin*, 458 U.S. at 571).

28. In the 2000 legislative meeting, a "short" session, for example, 866 bills were introduced in the House of Representatives and 763 in the Senate. In the regular and special sessions, 262 became law. *See* SENATE JOURNAL, 56th Legis. Sess. 1314–58 (Wash. 2000); HOUSE JOURNAL, 56th Legis. Sess. 2199–2270 (Wash. 2000).

29. *See* EDWARD D. SEEBERGER, SINE DIE: A GUIDE TO THE WASHINGTON STATE LEGISLATIVE PROCESS 45–54 (1989).

30. *Id.* at 41, 47–54.

31. *See supra* note 30, *infra* note 32.

ums, scientific departments and administrative offices, . . . then asks, 'But where is the University.'"[32] After discussing two other examples, Ryle writes:

> These illustrations of category-mistakes have a common feature, which must be noticed. The mistakes were made by people who do not know how to wield the concepts University, division, and team-spirit. Their puzzles arose from [an] inability to use certain items in the English vocabulary.
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> The theoretically interesting category-mistakes are those made by people who are perfectly competent to apply concepts, at least in the situations with which they are familiar, but are still liable in their abstract thinking to allocate those concepts to logical types to which they do not belong.[33]

This same concept has been applied to legislative intent:

> To refuse to ascribe a "purpose" to Congress in enacting statutory language simply because one cannot find three or four hundred legislators who have claimed it as a personal purpose[] is rather like (to use Professor Ryle's old example) refusing to believe in the existence of Oxford University because one can only find colleges.[34]

Legislatures can and do form an intent, which may be objectively discovered. To understand an individual's true intent, it would be necessary to inspect the inner workings of the person's decision-making process, because individual intent is both objective and subjective. Individual intent is formed by internal values and impulses as well as external dynamics. By contrast, a legislature's intent is objective and external. "A legislature is an intrinsically public body and wears its inner thoughts on its sleeve, so to speak."[35] Analyzing credible documentation of the legislature's process regarding a statute may enable a court to find legislative intent.

The fact that legislators have divergent degrees of input on legislation has lead commentators to conclude it is impossible to discern a single intent from a collective body.[36] In federal parlance, this analysis has been described as the "Busy Congress Model."[37] Legislators are

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32. GILBERT RYLE, THE CONCEPT OF MIND 16–17 (1949). *See also* MICHAEL SINCLAIR, GUIDE TO STATUTORY INTERPRETATION 91–93 (2000).

33. RYLE, *supra* note 32, at 16–17.

34. Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 866 (1992).

35. SINCLAIR, *supra* note 32, at 92.

36. *See* Shepsle, *supra* note 1.

37. *See, e.g.*, Bank One Chicago v. Midwest Bank & Trust Co., 516 U.S. 264, 276–77 (Stevens, J., concurring) ("Legislators, like other busy people, often depend on the judgment of

busy people who lack personal knowledge about most of the bills on which they vote. Just as a corporate board member must rely on colleagues for information and advice about the issues that he or she votes on, so a legislator must rely on trusted colleagues when casting a vote. It is a common and acceptable practice to vote based on the advice of others rather than personal knowledge about the contents of bills. No large institution could function if its decision makers could not rely on the advice of others. Voting based on advice rather than personal knowledge is a common and perfectly appropriate way of managing massive decision making responsibilities. That some legislators lack personal knowledge related to the contents of bills in no way diminishes the potency of the statute's legislative intent.

In response to the views that intent may be discerned from a collective body, or that legislative intent is appropriately gleaned from the working of a busy legislative institution, some commentators not only contend that it is impossible to discover a single intent from a group as diverse as a legislative body,[38] but also argue that to rely on the institutional processes associated with a legislative body may be demeaning to the democratic process. For example, Justice Antonin Scalia of the United States Supreme Court criticizes the "Busy Congress Model" as degrading the legislative process because it acknowledges that staff and lobbyists create laws with their accompanying legislative history; this diminishes the role of the people elected to make those judgments. According to Scalia, "[t]he legislative power . . . is nondelegable. Congress can no more authorize one committee to 'fill in the details' of a particular law in a binding fashion than it can authorize a committee to enact minor laws."[39] Scalia and others would go farther and dis-

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trusted colleagues when discharging their official responsibilities. . . . [S]ince most Members are content to endorse the views of the responsible committees, the intent of those involved in the drafting process is properly regarded as the intent of the entire Congress.").

From my own legislative experience, it is common practice for legislators to rely on the expertise of their colleagues serving on committees that prepared legislation. This is a significant, but not conclusive, factor. Legislators will often amend or vote against bills emerging from committees on which they did not serve.

38. Justice Scalia articulates this view in the following fashion:

> [T]o tell the truth, the quest for "genuine" legislative intent is probably a wild-goose chase anyway. In the vast majority of cases[,] I expect that Congress neither (1) intended a single result, nor (2) meant to confer discretion upon the agency, but rather (3) didn't think about the matter at all. If I am correct in that, then any rule adopted [by an administrative agency] represents merely a fictional, presumed intent. . . .

Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989). *See also* Frank Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983) ("Each member may or may not have a design. The body as a whole, however, has only outcomes.")

39. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW: AN ESSAY 35 (1997). *See also* Blanchard v. Bergerson, 489 U.S. 87, 98–99 (1989) (Scalia,

pense with the concept of legislative intent entirely, contending that the statutory text is the only real manifestation of legislative intent. This approach has been termed "textualism" and has powerful historical antecedents.[40]

The importance of textualism rests in its simplicity. Such an approach rests on the language of the legislation rather than arcane judicial rules of construction or unreliable legislative history materials. The meaning is more accessible and comprehensible to officials and citizens affected by the legislation. The textual approach also tends to constrain judicial tendencies to engage in policymaking by construction.[41]

The debate on legislative intent has raged in federal circles, but Washington cases reveal little attention to the issue. While numerous Washington cases speak of legislative intent, they are devoid of serious discussion of the definition of the concept; by the very absence of definition to legislative intent, intent is what the courts say it is. This is hardly a satisfying articulation of a key concept in statutory inter-

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J., concurring). Scalia responds to the majority's reliance on district court cases, which were inserted into the Congressional Report:

> [The majority's use of the cited cases] displays the level of unreality that our unrestrained use of legislative history has attained. . . . As anyone familiar with modern-day drafting of congressional committee reports is well aware, the references to the cases were inserted, at best by a committee staff member on his own initiative, and at worst by a committee staff member at the suggestion of a lawyer-lobbyist; and the purpose of those references was not primarily to inform the Members of Congress what the bill meant . . . but rather to influence judicial construction. What a heady feeling it must be for a young staffer[] to know that his or her citation of obscure district court cases can transform them into the law of the land, thereafter dutifully to be observed by the Supreme Court itself.

40. This concept of greater reliance on the legislative text has been oft-repeated. "[I]t seems axiomatic that the *words* of a statute—and *not* the legislators' intent as such—must be the crucial elements both in the statute's legal force and in its proper interpretation." LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 30 (1985). Justice Oliver Wendell Holmes was particularly skeptical about excessive reliance on the process of the legislative institution. "We do not inquire what the legislature meant; we ask only what the statute means." Oliver Wendell Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 419 (1899). Putting the same thought in more colloquial terms: "[I]f my fellow citizens want to go to Hell[,] I will help them. It's my job." OLIVER WENDELL HOLMES, HOLMES-LASKI LETTERS; THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 249 (Mark DeWolfe Howe ed., Cambridge Univ. Press 1953).

> [N]ew textualism maintains that 'legislative intent' is a dysfunctional fiction that should be jettisoned. A corollary is that the use of legislative history in statutory interpretation is a waste of time at best and, at worst, an activity so manipulable that it is much more like looking over a crowd and picking out your friends than it is an objective historical recreation of what legislators collectively were contemplating.

Philip Frickey, *John Minor Wisdom Lecture: Wisdom on Weber*, 74 TUL. L. REV. 1169, 1185 (2000).

41. *See* Eric S. Lasky, *Perplexing Problems with Plain Meaning*, 27 HOFSTRA L. REV. 891, 895 (1999).

pretation. Apparently, Washington courts have not been troubled in the least about a definition of legislative intent while the debate about the concept rages elsewhere.

However, an operating definition of legislative intent is possible. For the judiciary to speak in terms of legislative intent as a monolithic concept may be erroneous, but not fatal to the effort to discern the "intent" of the legislature. The intent of the legislature is the aim or purpose of the enactment as objectively indicated in the language of the statute; the intent may be revealed in the process of a bill's enactment by the legislature. Although the subjective statements of individual legislators may contribute to understanding the legislature's objective intent as expressed in the statute's language, the touchstone for the judiciary's interpretive role must still be, first and foremost, the language of the statute.[42]

This concept of legislative intent derived from the language of the statute may be flexible. If the legislature is seeking to remedy a very specific problem, its intention may be easy to discover. By contrast, if the problem is of greater magnitude, the legislature may envision a variety of potential ways of achieving the larger legislative goal and may afford the judiciary or the administrative agencies wider discretion in achieving the necessary goal.[43]

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42. In effect, the courts must presume that the language of the statute controls. This concept has its analog in a judicial doctrine that eschews an examination by the courts into the procedures of the legislature in passing a bill. Under the enrolled bill doctrine, for example, the Washington State Supreme Court has expressed great reluctance on constitutional separation of powers grounds to go behind the face of a statute's enactment to examine the process by which the legislature enacted the measure. *See, e.g.*, Citizens Council Against Crime v. Bjork, 84 Wash. 2d 891, 897–98 n.1, 529 P.2d 1072, 1076 n.1 (1975); *see also* State *ex rel.* Reed v. Jones, 6 Wash. 452, 34 P. 201 (1893) (enrolled bill presented to Secretary of State is conclusive as to regularity of all proceedings constitutional enactment if bill is fair on its face); State *ex rel.* Dunbar v. State Bd. of Equalization, 140 Wash. 433, 249 P. 996 (1926) (proper repassage of bill after veto); Morrow v. Henneford, 182 Wash. 625, 47 P.2d 1016 (1935) (legislation passed after 60 days of regular legislative session); State *ex rel.* Bugge v. Martin, 38 Wash. 2d 834, 232 P.2d 833 (1951) (scope and object of amendment); Roehl v. PUD No. 1, 43 Wash. 2d 214, 261 P.2d 92 (1953) (same); State *ex rel.* Washington Toll Bridge Auth. v. Yelle, 61 Wash. 2d 28, 377 P.2d 466 (1962) (inquiry of senators as to whether they were deceived by bill).

Similarly, Washington courts intrude only reluctantly upon the legislative decision to declare that a statute's enactment constitutes an emergency and must take effect immediately without the possibility of a referendum. *See* CLEAN v. State, 130 Wash. 2d 782, 807–813, 928 P.2d 1054, 1066–69 (1996); State *ex rel.* Humiston v. Meyers, 61 Wash. 2d 772, 776, 380 P.2d 735, 738 (1963).

The enrolled bill doctrine is a recognition that the legislature may control its own procedures for the enactment of legislation. It should be no different for statutory interpretation.

43. *See* William Eskridge, Jr., *The Circumstances of Politics and the Application of Statutes*, 100 COLUM. L. REV. 558, 564–65 (2000). *See also* SINCLAIR, *supra* note 32, at 119–33 (Sinclair describes these varying levels of judiciary discretion as "tight" or "loose coupling." If the language and history of a statute indicates a "tight coupling," it is a signal to the judiciary to exercise virtually no discretion in its application of the statute. For example, a law setting the speed limit

In any event, it is still appropriate to speak of the judiciary's obligation, based on separation of powers analysis, to effectuate the Legislature's intent in interpreting an enactment as the touchstone of statutory construction.[44]

2. Ambiguous/Unambiguous Enactments

a. Plain Meaning Rule

Washington courts have long indicated that they will not construe a plain and unambiguous statute, that is, they will not resort to canons of construction or legislative history to analyze the meaning of a statute. This is often described as the plain meaning rule.[45]

The concept of judicial reluctance to construe unambiguous legislative enactments runs deep in the Anglo-American legal tradition. Some commentators contend the plain meaning rule may be traced to nineteenth century England.[46]

Early English cases indicated the courts would attempt to understand the "mischief" Parliament was seeking to suppress and then would construe the statute in the fashion most advantageous to the suppression of the mischief.[47] Later English cases employed both a literal rule[48] and a so-called golden rule[49] in interpreting statutes. In

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in school zones at twenty miles per hour would leave virtually no discretion in the statute's application. By contrast, a statute that calls for a speed limit that is "reasonable and prudent for the conditions" would signal to the judiciary that it may more freely use its own discretion in the statute's application.).

44. This is important if the courts are truly to give meaning to the oft-expressed principle that courts do not consider the wisdom of an enactment in their interpretation of it. *See, e.g.*, Young v. Estate of Snell, 134 Wash. 2d 267, 279–80, 287, 948 P.2d 1291, 1296–97 (1997) (courts may not question the wisdom and necessity of a statute).

45. A "court will interpret words in the statute according to their usual or plain meaning as understood by the general public." BLACK'S LAW DICTIONARY 796 (abr. 6th ed. 1991). The rule may trace back to biblical times: "[T]he concept calling for strict construction of statutes has roots in the Old Testament: 'You shall not add to the word which I command you, nor take from it. (Deut. 4:2)' *In re* Kolinsky, 100 B.R. 695, 704 (Bankr. S.D.N.Y. 1989). Even the framers of American government longed for a version of a plain meaning rule: "Laws are made for men of ordinary understanding and should, therefore, be construed by the ordinary rules of common sense. Their meaning is not to be sought for in metaphysical subtleties which may make anything mean everything or nothing at pleasure." Letter of June 12, 1823, S. PADOVER, THE COMPLETE JEFFERSON 323 (1943).

46. *See generally* Lasky, *supra* note 41, at 894–896; Bradley C. Karkkainen, *"Plain Meaning": Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J.L. & PUB. POL'Y 401, 433 n.124 (1994).

47. Heydon's Case, 76 Eng. Rep. 637, 638 (1584). *See* Samuel Thorne, *Equity of a Statute and* Heydon's Case, 31 U. ILL. L. REV. 202, 211 (1936).

48. "[I]f the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity." Queen v. Judge of the City of London Court, 1 Q.B. 273, 290 (1892).

the United States, the plain meaning rule was effectively adopted by the United States Supreme Court as early as 1889,[50] but was not adopted by name until 1929.[51]

The plain meaning rule has been applied by Washington courts since territorial days, but the courts did not articulate the origin of the rule.[52] In *Board of Trade v. Hayden*,[53] Justice Dunbar, who was present at the constitutional convention, implied the plain meaning rule was an essential public policy.[54] He contended the courts must give statutes their full effect, even if the result is unjust, arbitrary, or inconvenient.[55]

In recent years, Washington courts routinely apply the plain meaning rule to avoid interpretation of clear and unambiguous statutes.[56]

b. Elements of Ambiguity

The flaw in the plain meaning rule is that the Washington decisional law offers little guidance as to what a plain meaning is. A careful reading of Washington State Supreme Court authority indicating a statute is plain or unambiguous reveals precious little guidance as to how the court arrived at such a belief. Even in the face of dissenting views as to the plain and unambiguous meaning of the statute, the court has held to its paradigm.[57] In truth, in the absence of any clear

49. "We must . . . give to the words used by the legislature their plain and natural meaning, unless it is manifest from the general scope and intention of the statute that injustice and absurdity would result." Mattison v. Hart, 139 Eng. Rep. 147, 159 (1854).

50. *See* Lake County v. Rollins, 130 U.S. 662, 670 (1889) (If the words of the statute convey a definite meaning that involves no absurdity, nor any contradiction of other parts of the statute, then the statute's facial meaning must be accepted).

51. United States v. Missouri Pac. R.R. Co., 278 U.S. 269, 278 (1929) ("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.") *See also* Caminetti v. United States, 242 U.S. 470, 485 (1917) (where the statutory language is plain, and only one meaning is discernible, no interpretation is required and construction canons need not be employed).

52. *See, e.g.*, Wheeler v. Port Blakely Mill Co., 2 Wash. Terr. 71, 74, 3 P. 635, 636 (1881). *See also* Bd. of Trade v. Hayden, 4 Wash. 263, 280, 30 P. 87, 91 (1892); Howlett v. Cheatum, 17 Wash. 626, 629–30, 50 P. 522, 523 (1897); State v. Rathbun, 22 Wash. 651, 653, 62 P. 85, 86 (1900).

53. 4 Wash. 263, 30 P. 87 (1892).

54. *Id.*, 4 Wash. at 281, 30 P. at 91.

55. *Id.*

56. *See, e.g.*, Davis v. Dep't of Licensing, 137 Wash. 2d 957, 964, 977 P.2d 554, 556 (1999). *See also* State v. Enstone, 137 Wash. 2d 675, 680, 974 P.2d 828, 830 (1999); State v. Chapman, 140 Wash. 2d 436, 998 P.2d 282 (2000); Hendrickson v. State, 140 Wash. 2d 686, 2 P.3d 473 (2000).

57. *See, e.g.*, *Davis*, 137 Wash. 2d at 977–79, 977 P.2d at 563-64 (Alexander, J., dissenting).

articulation of what distinguishes a plain and unambiguous enactment from a murky, ambiguous statute,[58] it is clear that the court has imposed a value judgment in choosing a particular interpretation of a statute. Indeed, perhaps the legislative history or interpretative canons would reveal the statute is neither plain nor ambiguous.[59]

Perhaps it is best to acknowledge this rule for what it is: a device by which the judiciary can impose its normative choice on the Legislature's act. Favored statutes contain plain and unambiguous language and contrary legislative history materials can be ignored; unfavored ambiguous statutes require in-depth judicial construction of the legislature's true intent.[60]

II. TOOLS FOR STATUTORY CONSTRUCTION

Once a Washington court determines a statute is ambiguous, it may resort to canons of statutory construction, principles developed in the common law, to give meaning to the legislative action. In fact, the courts assume the legislature is aware of its rules of construction.[61]

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58. The United States Supreme Court in *United States v. Turkette*, 452 U.S. 576, 580 (1981), conceded the absence of any guiding standard on this issue: "[T]here is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language."

59. *See* Lasky, *supra* note 41, at 910.

60. An example of how the judiciary imposes its normative values on legislative decision-making is found in the Washington State Supreme Court interpretation of the 1981 Product Liability and Tort Reform Act. Although the legislature expressly stated that the standard for failure to warn and defective design products cases was "negligence," WASH. REV. CODE § 7.72.030(1) (2000), the Washington State Supreme Court ignored the statutory language, determining that the standard was strict liability. *See* Falk v. Keene Corp., 113 Wash. 2d 645, 782 P.2d 974 (1989); *see also* Soproni v. Polygon Apartment Partners, 137 Wash. 2d 319, 333–34, 971 P.2d 500, 507–08 (1999) (Talmadge, J., dissenting). How the court could reinterpret "negligence" in WASH. REV. CODE § 7.70.010(1) to be "strict liability" was a trick of interpretive legerdemain.

Similarly, the legislature's mandate in the Growth Management Act, WASH. REV. CODE § 36.70A, that interim urban growth boundaries be established by counties to prevent urban level growth outside the core urban areas of Washington was not respected by the Washington State Supreme Court in *Association of Rural Residents v. Kitsap County*, 141 Wash. 2d 185, 4 P.3d 115 (2000), and *Wenatchee Sportsmen's Ass'n v. Chelan County*, 141 Wash. 2d 169, 4 P.3d 123 (2000). A boundary was not a boundary, in the Court's view.

Plainly, the Washington State Supreme Court imposed its policy judgment in these cases on the "plain" legislative language.

61. *See, e.g.*, State v. Blilie, 132 Wash. 2d 484, 492, 939 P.2d 691, 694 (1997) (citing State *ex rel.* Gebhardt v. Superior Court, 15 Wash. 2d 673, 690, 131 P.2d 943, 951 (1942)). But Judge Richard Posner expressed his difficulty with assuming that a legislative body enacts law in light of judicial methodologies of interpretation:

> There is no evidence that members of Congress, or their assistants who do the actual drafting, know the code [of statutory interpretation] or that if they know, they pay attention to it. Nor, in truth, is there any evidence that they do not; it is remarkable how little research has been done on the question that one might have thought lawyers would regard as fundamental to their enterprise. Probably, though, legislators do not pay attention to it, if only because, as Llewellyn showed, the code is internally incon-

The court may also resort to legislative history materials, materials generated inside and outside of the legislative process with respect to legislation, to attempt to discern what the legislature meant in enacting a law. Both the canons and legislative history materials have been used in Washington cases. Each is examined in turn.

A. Canons of Statutory Construction

Like other courts, the Washington judiciary makes reference to canons of judicial construction as if there were a tidy little volume in a judicial bookshelf some place that neatly sets forth all the applicable canons with their precise meaning. Unfortunately, no such exhaustive authoritative compilation of interpretive rules exists. Washington courts are free to invent or subtract canons at whim. The best that one can say about Washington law in this area is that certain canons have been used repeatedly by Washington courts. I attempt to highlight only a few of these many rules here.

Generally, courts seem to have a love-hate relationship with the statutory interpretive canons.[62] Canons are intended to function as a basis for decision making, theoretically elevating decisions above mere result-oriented analysis because the rulings appear grounded in a historically tested maxim. Most members of the legal community appreciate the notorious and fundamental defects intrinsic to the canons such as their inconsistency and vagueness.[63]

Despite these deeply rooted defects, courts seem unable to resist relying on them. Washington courts are no exception, and the canons are frequently invoked in Washington cases. While frequently invoked, the precise place of the canons in statutory interpretation is unclear. For example, the cases are not consistent on whether the canons may be invoked at any point in the statutory analysis or only if the statute is ambiguous and requires construction.[64]

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sistent. We should demand evidence that statutory draftsmen follow the code before we erect a method of interpreting statute on the improbable assumption that they do.

Richard Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 806 (1983).

62. Canons, or "maxims," of construction were originally conceived of as wise saws, rules of interpretation that capture some of the wisdom of ages. *See* SINCLAIR, *supra* note 32, at 140.

63. The most well-know articulation of the canons' defects came from Karl Llewellyn. *See* Karl Llewellyn, *Remarks On the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Constructed*, 3 VAND. L. REV. 395 (1950).

64. Even in his adherence to textualism, Justice Scalia makes room for the canons of construction:

I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and

One may divide Washington's canons of statutory construction into two broad canons: textual and extrinsic source.

1. Textual Canons

Textual canons are used to divine the meaning of a statute within the statute itself by looking to the words of the statutory text as well as linguistics, grammar, syntax, and the structure of the text for their strength.

Washington courts have used a variety of linguistic canons including *espressio unius*, which says that the expression of one thing suggests the exclusion of others;[65] *noscitur a sociis*, which says "the meaning of words may be indicated or controlled by those with which they are associated";[66] *ejusdem generis*, which provides a specific statute will generally supercede a more general one or a general term must be interpreted to reflect the class of objects reflected in more specific terms accompanying it;[67] the ordinary usage rule which indicates that "an undefined term should be given its plain and ordinary meaning unless a contrary legislative intent is indicated";[68] the dictionary definition rule, which says a court should follow a recognized dictionary's definition of terms unless the legislature has provided a specific defini-

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second, using establishes canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies.

Chisom v. Roemer, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting).

65. *See* Washington State Republican Party v. Washington State Pub. Disclosure Comm'n, 141 Wash. 2d 245, 280, 4 P.3d 808, 827 (2000); Nat'l Elec. Contractors Ass'n v. Riveland, 138 Wash. 2d at 17–18 (citing Weyerhauser Co. v. Tri, 117 Wash. 2d 128, 133–134, 814 P.2d 629, 631 (1991)).

66. State v. Jackson, 137 Wash. 2d 712, 729, 976 P.2d 1229, 1237 (1999) (citing Ball v. Stokley Foods, Inc., 37 Wash. 2d 79, 87-88, 221 P.2d 832 (1950)). *See also* City of Mercer Island v. Kaltenbach, 60 Wash. 2d 105, 109, 371 P.2d 1009, 1012 (1962); Ball v. Stokely Foods, Inc., 37 Wash. 2d 79, 87–88, 221 P.2d 832, 837-38 (1950).

67. Simpson Inv. Co. v. State, 141 Wash. 2d 139, 156–57, 3 P.3d 741, 750 (2000) ("In other words, the precise terms modify, influence or restrict the interpretation or application of the general terms where both are used in sequence or collocation in legislative enactments."). *See also Nat'l Elec. Contractors Ass'n*, 138 Wash. 2d at 24, 978 P.2d at 488 (citing Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n, 123 Wash. 2d 621, 630, 869 P.2d 1034, 1039 (1994); Davis v. Dep't of Licensing, 137 Wash. 2d 957, 970, 977 P.2d 554, 559 (1999)). This canon, however, is only supposed to be employed when "the statute contains an enumeration by specific words which [sic] suggests a class is not 'exhausted by the enumeration.'" City of Seattle v. State, 136 Wash. 2d 693, 699, 965 P.2d 619, 622 (1998) (quoting NORMAN J. SINGER SUTHERLAND, STATUTORY CONSTRUCTION § 47.18 (15th ed. 1992)); Dean v. McFarland, 81 Wash. 2d 215, 221, 500 P.2d 1244, 1248 (1972).

68. Ravenscroft v. Washington Water Power Co., 136 Wash. 2d 911, 920, 969 P.2d 75, 80 (1998) (citing Cowishe Canyon Conservancy v. Bosley, 118 Wash. 2d 801, 813, 828 P.2d 549, 556 (1992)).

tion;[69] and the "shall" rule, which indicates that the term "may" is permissive, and does not create a statutory duty,[70] but the term "shall" usually creates an imperative obligation[71] unless unconstitutional[72] or contrary to legislative intent.[73]

The Washington State Supreme Court has also applied the grammar and syntax canons on several occasions, even to the point of examining the legislature's use of commas and hyphens.[74]

Finally, the Washington State Supreme Court routinely relies upon certain canons pertaining to the structure of the statutory text when it is doing its textual analysis. These structural maxims provide that each statutory provision should be read by reference to the whole act;[75] a court must avoid interpreting a provision in a way that would render other provisions of the act superfluous or unnecessary;[76] a court should interpret the same or similar terms in a statute the same way;[77]

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69. Western Telepage, Inc. v. City of Tacoma, 140 Wash. 2d 599, 609–10, 998 P.2d 884, 890 (2000) (citing C.J.C. v. Corp. of Catholic Bishop, 138 Wash. 2d 699, 709, 985 P.2d 262, 267 (1999)); *Ravenscroft*, 136 Wash. 2d at 920, 969 P.2d at 80 (1998). In *Ravenscroft*, where a statute made private landowners liable for "artificial latent conditions," the court looked to the dictionary to define "artificial" and the common law to define "latent" without acknowledging that the statute had any ambiguity. The court employed these methods while denying an ambiguity and determining the statute had a "plain meaning." *Id.* at 922, 924–5, 969 P.2d at 81–82. It is also interesting to note that in one case, seven different dictionaries were used to arrive at the plain meaning of words. *See* Kitsap Co. v. Allstate Ins. Co., 136 Wash. 2d 567, 964 P.2d 1173 (1998).

70. *Nat'l Elec. Contractors Ass'n*, 138 Wash. 2d at 28, 978 P.2d at 490 (citing Yakima County (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima, 122 Wash. 2d 371, 381, 858 P.2d 245, 251 (1993)).

71. *See, e.g.*, State v. Martin, 137 Wash. 2d 149, 154–55, 975 P.2d 450, 452–53 (1999); *see also* State v. Mollichi, 132 Wash. 2d 80, 86, 936 P.2d 408, 411 (1997); State v. Krall, 125 Wash. 2d 146, 148, 881 P.2d 1040, 1041 (1994); Erector Co. v. Dep't of Labor & Indus., 121 Wash. 2d 513, 518, 852 P.2d 288, 291 (1993).

72. *See In re* Elliott, 74 Wash. 2d 600, 607–610, 446 P.2d 347, 352–54 (1968).

73. *See* N.W. Natural Gas Co. v. Clark County, 98 Wash. 2d 739, 743, 658 P.2d 669, 671 (1983); Niichel v. Lancaster, 97 Wash. 2d 620, 625, 647 P.2d 1021, 1023 (1982).

74. *See In re* Personal Restraint of Smith, 139 Wash. 2d 199, 204, 986 P.2d 131, 133–34 (1999) (discussing the "last antecedent" rule of statutory construction); *see also In re* Sehome Park Care Ctr., Inc., 127 Wash. 2d 774, 781–82, 903 P.2d 443, 447 (1995) ("the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one"). *Compare to* Simplot v. Knight, 139 Wash. 2d 534, 543–545, 988 P.2d 955, 959-60 (1999) (the use of a hyphen between the payees' names rendered draft patently ambiguous as to the payor's intent).

75. Washington State Republican Party v. Washington State Pub. Disclosure Comm'n, 141 Wash. 2d 245, 280–81, 4 P.3d 808, 827–28 (2000); Davis v. Dep't of Licensing, 137 Wash. 2d 957, 970–71, 977 P.2d 554, 559-60 (1999); City of Seattle v. State, 136 Wash. 2d 693, 698, 965 P.2d 619, 621 (1998); State v. Talley, 122 Wash. 2d 192, 213, 858 P.2d 217, 228-29 (1993).

76. City of Bellevue v. East Bellevue Cmty. Council, 138 Wash. 2d 937, 946–47, 983 P.2d 602, 607 (1999). *See also Davis*, 137 Wash. 2d at 969, 977 P.2d at 558–59; City of Seattle v. Dep't of Labor & Indus., 136 Wash. 2d 693, 701, 965 P.2d 619, 623 (1998).

77. Washington State Legislature v. Lowry, 131 Wash. 2d 309, 327, 931 P.2d 885, 894–95 (1997). *See also* Pfeifer v. City of Bellingham, 112 Wash. 2d 562, 569–570, 772 P.2d 1018, 1022

a court should read provisos and statutory exceptions narrowly;[78] a court must not create exceptions in addition to those specified by the Legislature;[79] and a court may treat silence as acquiescence by the Legislature in judicial interpretations of a statute.[80]

The textual canons are assumptions about legislative meaning derived from the use of language, grammar, and sentence structure of the statute itself. They are generally useful maxims that hue most closely to the statutory text. It is only when these textual canons rely upon extrinsic sources such as dictionary definitions that their reliability becomes questionable.

2. Extrinsic Source Canons

In contrast to the textual canons, the extrinsic source canons look to evidence outside the words of the statute to determine the meaning of a statute, rendering these canons somewhat less reliable than the textually based canons previously discussed. These canons look to information derived from the executive branch agencies, the attorney general, other statutes, the common law, and the constitution to interpret a statute.

Washington courts have frequently relied on administrative agency rules implementing statutory policy and opinions of the attorney general in construing statutes. Administrative agency rulemaking pursuant to the Administrative Procedure Act,[81] and quasi-judicial administrative decisions[82] are common sources of interpretation of statutes. Separate quasi-judicial administrative bodies also exist.[83] Courts often defer to the agency interpretation of a statute unless that interpretation is contrary to the plain meaning of a statute or is unreasonable in the eyes of the court.[84]

(1989); Garvey v. St. Elizabeth Hosp., 103 Wash. 2d 756, 759, 697 P.2d 248, 249 (1985); State v. Turpin, 94 Wash. 2d 820, 825, 620 P.2d 990, 993 (1980); State v. Wright, 84 Wash. 2d 645, 652, 529 P.2d 453, 458 (1974).

78. *See, e.g.*, Welch v. Southland Corp., 134 Wash. 2d 629, 636, 952 P.2d 162, 166 (1998).

79. *Washington State Republican Party*, 141 Wash. 2d at 280–81, 4 P.2d at 827-28.

80. *See* note 148, *infra*.

81. WASH. REV. CODE §§ 34.05.310–.395 (2000).

82. WASH. REV. CODE §§ 34.05.410–.494 (2000) (a separate Office of Administrative Hearings addresses such administrative appeals); WASH. REV. CODE §§ 34.12.010–.160 (2000).

83. *E.g.*, WASH. REV. CODE §§ 51.52.010–.200 (2000) (Board of Industrial Appeals); WASH. REV. CODE §§ 43.21B.010–.330 (2000) (Pollution Control Hearings Board); WASH. REV. CODE §§ 36.70A.260–.902 (2000) (Growth Management Hearings Board); WASH. REV. CODE §§ 41.56.010–.490 (2000) (Public Employment Relations Commission).

84. *See, e.g.*, Waggoner v. Ace Hardware Co., 134 Wash. 2d 784, 754–55, 953 P.2d 88, 91 (1998); Dep't of Fisheries v. Chelan County PUD No. 1., 91 Wash. 2d 378, 383, 588 P.2d 1146, 1149 (1976); State v. Roth, 78 Wash. 2d 711, 715, 479 P.2d 55, 57-58 (1971). Unlike federal courts, Washington courts have rarely given administrative rulings a presumption of correctness

The Washington State Attorney General has the authority to give formal opinions upon the law by request of elected officials.[85] Just as the courts have deferred to agency interpretation of a statute, Washington courts have given some deference to formal attorney general opinions on the interpretation of a statute.[86]:

A second group of extrinsic canons focuses on the relationship of an enactment to the larger body of Washington statutory law and interprets the enactment in a fashion designed to render that statutory law a consistent whole.[87] These canons include the following: the borrowed statute rule, which indicates that where the legislature borrows a statute, it impliedly adopts the statute's judicial interpretations;[87] the reenactment rule, which says that when the legislature reenacts a statute, it incorporates settled interpretations of the reenacted statute;[88] *in pari materia*, which says similar statutes should be interpreted similarly;[89] the presumption against repeals by implication;[90] the rule re-

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unless the ruling is issued from a specialized agency or such a presumption is legislated. *See* U.S.W. Communications Inc. v. Washington Utils. & Transp. Comm'n, 134 Wash. 2d 74, 118, 949 P.2d 1337, 1360 (1997); *see also* ARCO Prods. Co. v. Washington Utils. & Transp. Comm'n, 125 Wash. 2d 805, 811–12, 888 P.2d 728, 732 (1995); Marguerite M. Sullivan, Brown & Williamson v. FDA: *Finding Congressional Intent Through Creative Statutory Interpretation—A Departure from Chevron*, 94 NW. U. L. REV. 273, 285–291 (1999).

85. WASH. REV. CODE §§ 43.10.030(7), .110 (2000).

86. *See, e.g.*, Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council, 129 Wash. 2d 787, 803, 920 P.2d 581, 588 (1996) (Attorney General opinions (AGO) are entitled to great weight); *see also* Washington Educ. Ass'n v. Smith, 96 Wash. 2d 601, 606, 638 P.2d 77, 80 (1981). *But see* Washington Fed'n of State Employees v. Office of Fin. Mgmt., 121 Wash. 2d 152, 164, 849 P.2d 1201, 1207 (1993) (an AGO is entitled to less weight when it is interpreting a statute). Notably, the Washington State Supreme Court has "held that an AGO 'constitutes notice to the Legislature of the Department's interpretation of the law,' finding acquiescence where the Legislature had not subsequently acted to 'overturn the Department's interpretation.'" City of Seattle v. State, 136 Wash. 2d 693, 703, 965 P.2d 619, 624 (1998) (citing Bowles v. Dep't of Ret. Sys., 121 Wash. 2d 52, 63–64, 847 P.2d 440, 446 (1993)).

87. *See* Town of Republic v. Brown, 97 Wash. 2d 915, 917–18, 652 P.2d 955, 957 (1982); Jenkins v. Bellingham Mun. Court, 95 Wash. 2d 574, 627 P.2d 1316 (1981); Pac. First Fed. Sav. & Loan Ass'n v. Pierce County, 27 Wash. 2d 347, 355, 178 P.2d 351, 355 (1967). *Compare with In re* Taylor, 105 Wash. 2d 67, 69–70, 711 P.2d 345, 347 (1985) ("Absent a clearer indication of legislative intent, we cannot accept petitioner's theory of incorporation.").

88. *See* Longview Fibre Co. v. Cowlitz Co., 114 Wash. 2d 691, 698, 790 P.2d 149, 153 (1990) (a mere Attorney General Opinion prior to reenactment was "settled" enough for the Court); *see also Washington Educ. Ass'n*, 96 Wash. 2d at 606, 638 P.2d at 80; Ellis v. Dep't of Labor & Indus., 88 Wash. 2d 844, 567 P.2d 224 (1977); McKinney v. Estate of MacDonald, 71 Wash. 2d 262, 427 P.2d 974 (1967); Yakima Valley Bank & Trust Co. v. Yakima City, 149 Wash. 552, 271 P. 820 (1928).

89. State v. Tili, 139 Wash. 2d 107, 985 P.2d 365 (1999). *See also* Enter. Leasing v. City of Tacoma, 139 Wash. 2d 546, 554–6, 988 P.2d 961, 966 (1999); Harmon v. DSHS, 134 Wash. 2d 523, 542, 951 P.2d 770, 779 (1998).

90. Gilbert v. Sacred Heart Hosp., 127 Wash. 2d 370, 375, 900 P.2d 552, 554 (1995). *See also* Jenkins v. State, 85 Wash. 2d 883, 540 P.2d 1363 (1975) (implied repeals are disfavored); Herrett Trucking Co. v. State Pub. Serv. Comm'n, 58 Wash. 2d 542, 364 P.2d 505 (1961). *But*

quiring interpretation of provisions consistently with subsequent statutory amendments;[91] the rule of continuity, which assumes that the legislature did not create discontinuities in legal rights and obligations without some clear statement;[92] and courts presume when the legislature acts, it intends to change existing law.[93]

A third group of extrinsic source canons addresses the relationship of a statute to the common law and include: a presumption in favor of following common law usage where the legislature has employed words or concepts with well-settled common law traditions;[94] a presumption that the legislature is aware of prior law including judicial or administrative interpretations of statutes;[95] and a presumption in favor of prospective application of a statute and its corollary canon, which rejects retroactive application of statutes.[96]

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see Walton v. Absher Const. Co., Inc., 101 Wash. 2d 238, 242, 676 P.2d 1002, 1004 (1984) ("However, an implied repeal will be found where: (1) the later act covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede prior legislation on the subject; or (2) the two acts are so clearly inconsistent with, and repugnant to, each other that they cannot be reconciled and both given effect by a fair and reasonable construction.") (citing *In re* Chi-Dooh Li, 79 Wash. 2d 561, 563, 488 P.2d 259, 261 (1971)).

91. *See* State v. Blilie, 132 Wash. 2d 484, 939 P.2d 691 (1997); *see also Brown*, 97 Wash. 2d at 917–18, 625 P.2d at 957; State v. Horton, 59 Wash. App. 412, 416, 798 P.2d 813, 815-16 (1990).

92. *See, e.g.*, State Dep't of Ecology v. Theodoratus, 135 Wash. 2d 582, 589, 957 P.2d 1241, 1244 (1998); *see also* City of Pasco v. Pub. Employment Relations Comm'n, 119 Wash. 2d 504, 507, 833 P.2d 381, 382 (1992); Pasco Police Officers' Ass'n v. City of Pasco, 132 Wash. 2d 450, 458, 938 P.2d 827, 832; Cowiche Canyon Conservancy v. Bosley, 118 Wash. 2d 801, 828 P.2d 549 (1992).

93. Spokane County Health Dist. v. Brockett, 120 Wash. 2d 140, 154, 839 P.2d 324, 331 (1992). *See also* Johnson v. Morris, 87 Wash. 2d 922, 926, 557 P.2d 1299, 1303 (1976); Fisher Flouring Mills Co. v. State, 35 Wash. 2d 482, 490, 213 P.2d 938, 942 (1950). "It is not to be presumed that a legislative body would enact a statute without other purpose than to declare what is already indisputably and confessedly the law." United States v. Douglas-Willan Sartoris Co., 22 P. 92, 94 (Wyo. 1889). But a legislative body may clarify an earlier enactment where an ambiguity arose about the statute. State v. Riles, 135 Wash. 2d 326, 343, 957 P.2d 655, 663 (1998).

94. "Presumption in favor of following common law usage where Legislature has employed words or concepts with well-settled. . ." as they looked to common law settled definition of "latent." Ravenscroft v. Washington Water Power Co., 136 Wash. 2d 911, 924, 969 P.2d 75, 82 (1998). *See also In re* Recall of Pearsall-Stipek, 141 Wash. 2d 756, 10 P.3d 1034 (2000); *In re* Tyler's Estate, 140 Wash. 679, 689, 250 P. 456, 460 (1926).

95. Dep't of Transp. v. State Employee Ins. Bd., 97 Wash. 2d 454, 462, 645 P.2d 1076, 1080 (1982).

96. State v. T.K., 139 Wash. 2d 320, 329, 987 P.2d 63, 67–68 (1974). *See also In re* Shepard, 127 Wash. 2d 185, 898 P.2d 828 (1995); Yellam v. Woerner, 77 Wash. 2d 604, 464 P.2d 947 (1970); State v. Belgarde, 119 Wash. 2d 711, 722, 837 P.2d 599, 604-05 (1992) ("A statute operates prospectively when the precipitating event for [its] application . . . occurs after the effective date of the statute, even though the precipitating event had its origin in a situation existing prior to the enactment of the statute.") (quoting Aetna Life Ins. Co. v. Washington Life & Disability Ins. Guar. Ass'n, 83 Wash. 2d 523, 535, 520 P.2d 162, 170 (1974)). *But see* McGee

A final group of extrinsic canons addresses the relationship of statutory enactments to overarching constitutional principles. Courts generally interpret a statute so as to avoid constitutional problems.[97] Courts also interpret statutes to favor judicial review, especially for constitutional questions.[98] In the criminal context, principles of lenity[99] may have their roots in constitutional concerns.[100]

3. A Detailed Example of a Canon in Operation

To place these canons of statutory interpretation in appropriate perspective, it is useful to view a canon in application in an actual case. The doctrine of *in pari materia* is a useful example of such a canon in operation.

In pari materia is an old canon, which has been used in Washington for at least eighty-seven years.[101] In fact, it is held in such high regard, the Washington State Supreme Court has called it "a cardinal rule,"[102] describing it as follows:

> In ascertaining legislative purpose, statutes which stand *in pari materia* are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes. Also, the entire sequence of statutes relating to a given subject matter should

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Guest Home, Inc. v. Dep't of Soc. and Health Servs., 142 Wash. 2d 316, 12 P.3d 144 (2000) (curative or remedial amendment may be retroactive).

97. Washington State Republican Party v. Washington State Pub. Disclosure Comm'n, 141 Wash. 2d 245, 280, 4 P.3d 808, 827 (2000). *See also* Duskin v. Carlson, 136 Wash. 2d 550, 557, 965 P.2d 611, 614 (1998); City of Seattle v. Montana, 129 Wash. 2d 583, 590, 919 P.2d 1218, 1222 (1996).

98. This presumption in favor of judicial review is furthered by the rule that constitutional questions are reviewed de novo. *See* Washam v. Sonntag, 74 Wash. App. 504, 507, 874 P.2d 188, 191 (1994).

99. Washington Courts accept the rule of lenity. *See, e.g.*, State v. Tili, 139 Wash. 2d 107, 113, 985 P.2d 365, 369 (1999); *see also In re* Personal Restraint of Hopkins, 137 Wash. 2d 897, 901, 976 P.2d 616, 617 (1999). The rule of lenity comes into play only when there are two reasonable interpretations of a criminal statute. *In re* Post-Sentencing Review of Charles, 135 Wash. 2d 239, 250, 955 P.2d 798, 803 (1998).

100. For example, statutes involving a deprivation of liberty are strictly construed. *In re* Cross, 99 Wash. 2d 373, 379, 662 P.2d 828, 832 (1983). *See also In re* Carson, 84 Wash. 2d 969, 973, 530 P.2d 331, 333 (1975).

101. *See* State v. Savidge, 75 Wash. 116, 120, 134 P. 680, 682 (1913) (where statutes are part of a general system relating to the same class of subjects and rest upon the same reasons, they should be so construed, if possible, as to be uniform in their application and in the results which they accomplish); *see also* White v. City of N. Yakima, 87 Wash. 191, 195, 151 P. 645, 647 (1915) ("Laws that are *in pari materia* will be read together for the purpose of ascertaining the legislative intent.").

102. State v. Fairbanks, 25 Wash. 2d 686, 690, 171 P.2d 845, 848 (1946) ("It is a cardinal rule that two statutes dealing with the same subject will, if possible, be so construed as to preserve the integrity of both.").

> be considered, since legislative policy changes as economic and sociological conditions change.[103]

The Court has relied on the canon in numerous instances, even where the provisions were passed in different bills in the same session:

> Statutes *in pari materia* should be harmonized as to give force and effect to each[,] and this rule applies with peculiar force to statutes passed at the same session of the Legislature. . . . Although the two provisions had been acted on under separate bills, this court found that its obligation to harmonize statutes *in pari materia* was even greater when the two statutes had been enacted in the same legislative session."[104]

As with so many canons, *in pari materia* may be manipulated to achieve a particular result.[105] The rule was applied in different cases involving the same set of facts, for example a sting operation was conducted and the two defendants were arrested for manufacturing 40,000 M-80's and 200 tennis balls filled with flash powder, or tennis ball bombs. The sting operation was undertaken after an eight-year-old both blew his hand off and had sheetrock and ceiling pieces imbedded into his fingers and bones after he found a tennis ball bomb in his brother's closet and lit it in the family's fireplace.[106]

An issue on review was whether the device was regulated under the Explosives Act or the Fireworks Act. The Explosives Act specifically does not regulate fireworks,[107] hence the fireworks that the defendants were manufacturing might have been exempt from the fireworks law.[108] Thus, the defendants sought to avoid punishment under either act.

The defendants initially pled guilty to violations of the Explo-

2d 453, 457 (1974) (citing Connick v.
Wash. 2d 32, 36–37, 720 P.2d 435, 435
99 Wash. 2d 302, 307, 661 P.2d 976
2d 581, 989 P.2d 512 (1999).
59 P.2d 694, 695 (1998).
n pertinent part: "For the purposes of
nition primers, smokeless powder not
ive pounds shall not be defined as ex-
27) states that "[t]he term 'pyrotechnic'
ive compositions or manufactured arti-
g audible or visible effects which are
–18. *See generally* WASH. REV. CODE
103. State v. Wright, 84 Wash. 2d 645, 650, 529
Chehalis, 52 Wash. 2d 288, 333 P.2d 647 (1958)).
104. Harmon v. Pierce County Bldg. Dep't, 106
(quoting Int'l Commercial Collectors, Inc. v. Carver,
(1983)).
105. *See In re* Personal Restraint of Yim, 139 Was
106. State v. Yokley, 91 Wash. App. 773, 774–75,
107. WASH. REV. CODE § 70.74.010(3) provides
this chapter small arms ammunition, small arms amm
exceeding five pounds, and black powder not exceedin
plosives . . . ." Further, WASH. REV. CODE § 70.74.01
shall be held to mean and include any combustible explo
cles designed and prepared for the purpose of produc
commonly referred to as fireworks."
108. *Yim*, 139 Wash. 2d at 592–94, 989 P.2d at 5
§§ 70.77.126, .236 (2000).
109. WASH. REV. CODE § 70.74 (2000).

they had actually manufactured were legal fireworks under section 70.77 of the Washington Revised Code.[110] The majority found the Explosives Act and the Fireworks Act should be read *in pari materia* because they each "govern the manufacture, purchase, sale, possession, transportation, et cetera, of potentially dangerous explosive devices, [and so] stand *in pari materia* due to the fact that they relate to the same person or thing, or the same class of persons or things."[111] In so holding, the majority in effect agreed with the lower court's decision to ignore the plain meaning rule, reasoning that it would be "absurd" for the explosives that the defendants manufactured to be unregulated by both the Explosives Act and the Fireworks Act.[112]

The dissent disagreed with the treating of the Explosives Act and the fireworks law *in pari materia*, arguing that it could not read the statutes *in pari materia* because one statute (the Explosives Act) predated the other (the Fireworks Act).[113] The dissent asserted that the fireworks and explosives statutes could not be within the same statutory scheme because of the time difference in their enactment. Since the men were charged under the explosives statute, the dissent found the Explosive Act unambiguous, and the search for legislative intent by employing the canon of *in pari materia* was improper, warning that "[t]o broaden the use of in pari materia beyond these narrow boundaries—i.e., using it as a vessel to navigate beyond distinct statutory enactments—is to usurp the sought-after legislative intent by judicial construction out of whole cloth."[114]

There is no direct link between the Explosives Act and the Fireworks Act. Consequently, different philosophies of statutory interpretation were used by the majority and dissent. Ultimately, the result in the case may be dictated by the tragedy that befell the child, rather than a clear articulation of the canon.

By plucking out useful canons and utilizing their rhetorical skill, different judges steer the same facts in different directions. This ability to achieve different results by using different canons is both the genius and curse of the canons.

To the uninitiated, or perhaps the cynical, Karl Llewellyn's acute observation that for each canon of statutory interpretation, there is an equal and opposite canon of judicial interpretation bears repetition.[115]

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110. *Yim*, 139 Wash. 2d 581, 989 P.2d 512.

111. *Id.* at 591–92, 989 P.2d at 517–18.

112. *Yokely*, 91 Wash. App. 773, 779–80, 959 P.2d at 698.

113. *Yim*, 139 Wash. 2d at 559–60, 989 P.2d 521-22 (Sanders, J., dissenting).

114. *Id.* at 601, 989 P.2d at 522.

115. Karl Llewelyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

Llewellyn was thus prompted to observe that the canons held little meaning:

> When it comes to presenting a proposed construction in court, there is an accepted conventional vocabulary. As in argument over points of case-law, the accepted convention still[] unhappily requires discussion as if only one single correct meaning could exist. Hence[,] there are two opposing canons on almost every point. An arranged selection is appended. Every lawyer must be familiar with them all: they are still needed tools of argument. At least as early as Fortescue[,] the general picture was clear, on this, to any eye which would see.
> Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon: the good sense of the situation and a *simple* construction of the available language to achieve that sense, *by tenable means, out of the statutory language.*[116]

Llewellyn's observation was echoed by Justice Finley in *Schneider v. Forcier.*[117] Llewelyn's criticism may be apt.

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116. *Id.* at 401.

117. 67 Wash. 2d 161, 167–68, 406 P.2d 935, 939 (1965) (Finley, J., dissenting) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 544 (1947)):

> The essence of the matter is the fact that the rules or maxims of statutory interpretation should be recognized and treated as nothing more than aids or tools which [sic] may or may not be pertinent or useful in determining the meaning of statutory language. There is nothing mandatory about the applicability of a rule of statutory interpretation, i.e., nothing compelling in an ultimate sense in determining the meaning of statutory language. See for instance *In re Horse Heaven Irrigation Dist.* . . . wherein this realistic approach to the rules of construction was adopted as the law of this state. Actually, today it should be clear without citation of authority and without prolonged explanation, that every statutory maxim or rule of interpretation has its countervailing or opposite maxim or rule. As Mr. Justice Frankfurter said: "Nor can canons of construction save us from the anguish of judgment. Such canons give an air of abstract intellectual compulsion to what is in fact a delicate judgment concluding a complicated process of balancing subtle and elusive elements. Insofar as canons of construction are generalizations of experience, they all have worth. In the abstract, they rarely arouse controversy. Difficulties emerge when canons compete in soliciting judgment, because they conflict rather than converge. For the demands of judgment underlying the art of interpretation, there is no vademecum."

Llewelyn's comments on the interpretive canons have not always been accepted. Another commentator, William Eskridge, Jr., observed that Llewelyn's comment on opposite canons meant, "The canons have no independent value in statutory interpretation and are just window dressing for results reached for other reasons." William Eskridge, Jr., *Norms, Empiricism, and Canons in Statutory Interpretation*, 66 U. CHI. L. REV. 671, 679 (1999). But Eskridge believes it would be difficult to test if the canons constrain judges or make interpretation more predictable: "The democratic value potentially served by the canons needs to be tempered by the observation that our polity might not want statutory interpretation always to mimic the results reached or would have been reached by the legislature." *Id.* at 681. Eskridge candidly espouses a role for the courts permitting them to disregard legislative intent.

If there are often conflicting interpretive canons for virtually every eventuality, the canons offer little practical guidance to the courts in their interpretive role. No single interpretive canon appears to have greater moment than another. This leaves the judiciary extremely wide latitude to substitute its own normative values for those of the legislature, the ostensible authors of the legislation. As noted earlier, the canons are not analytically precise in number, scope, or usage. The Washington State Supreme Court should decide with greater precision when the canons should be used in statutory construction, what canons should be employed, and the relative authoritative value of the canons in the judiciary's function of statutory analysis.

B. Legislative History

The ultimate extrinsic canon of statutory interpretation is found in the materials of the legislative process itself. When the language of the statute is ambiguous or the standard rules of interpretation are not helpful, Washington case law has recognized a variety of possible sources to discover the intent of the legislature in enacting a statute.[118] However, the courts have not been entirely consistent in their treatment of these sources.

Of greatest utility are legislative findings in a preamble section of a bill as the findings represent an affirmative statement of legislative intent enacted by the legislature.[119] Similarly, official section-by-section comments adopted by the legislature as part of the journal of one or both houses also retain a sense of official imprimatur to a particular interpretation of an enactment.[120] Plainly, these contemporaneous, collective expressions of legislative purpose are more significant than the individual, non-contemporaneous thoughts of legislators and others. After all, when divining legislative intent, the courts are looking to the collective decision of 147 legislators in a particular legislative session. The thoughts of a legislator or lobbyist expressed long after that session may have been affected by bias or the sheer passage of time.

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118. *See generally* Arthur Wang, *Legislative History in Washington*, 7 U. PUGET SOUND L. REV. 571 (1984).

119. *See* Spokane County Health Dist. v. Brockett, 120 Wash. 2d 140, 839 P.2d 324 (1992); *see also* Oliver v. Harborview Med. Ctr., 94 Wash. 2d 559, 618 P.2d 76 (1980); Hartman v. Washington State Game Comm'n, 85 Wash. 2d 176, 179, 532 P.2d 614, 616 (1975); Whatcom County v. Langlie, 40 Wash. 2d 855, 246 P.2d 836 (1952); State *ex rel.* Berry v. Superior Court, 92 Wash. 16, 159 P. 92 (1916).

120. Equipto Div. Aurora Equip. Co. v. Yarmouth, 134 Wash. 2d 356, 366, 950 P.2d 451, 456 (1998).

Courts have also looked to official documents of the legislature such as bill reports, which are the product of the legislative staff, as authoritative sources of legislative intent.[121] Similarly, an official document used by the legislature in its deliberations such as a fiscal note, detailing the financial implications of a bill may be used to determine legislative intent,[122] but some caution here may be in order as fiscal notes are ordinarily prepared by the executive or judicial branch agency charged with administration of the proposed law,[123] and the note may reflect agency bias with regard to the bill.[124]

Transactional materials, those materials generated in the course of the enactment of the legislation, may also serve as a basis for understanding the legislature's work. Various drafts of a proposed bill can be very revealing as to the legislature's intent with regard to the final statutory language.[125] The court may look to model or uniform acts as sources where the legislature enacts such legislation.[126] Committee work, including statements of legislators during committee sessions; both oral and written testimony of witnesses before the relevant legislative committees; contemporaneous letters of legislators; and staff memoranda on the legislation can be of assistance in learning legisla-

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121. *See* Young v. Estate of Snell, 134 Wash. 2d 267, 280, 948 P.2d 1291, 1297 (1997); *see also* Noble Manor v. Pierce County, 133 Wash. 2d 269, 277–78, 943 P.2d 1378, 1383 (1997); State v. Reding, 119 Wash. 2d 685, 690, 835 P.2d 1019, 1021–22 (1992); Biggs v. Vail, 119 Wash. 2d 129, 134–36, 830 P.2d 350, 353–54 (1992); Johnson v. Cont'l W., Inc., 99 Wash. 2d 555, 663 P.2d 482 (1983). *But see* State v. Shore, 113 Wash. 2d 83, 90, 776 P.2d 132, 136 (1989) (criticizing bill report accuracy).

122. *See* Davis v. Dep't of Licensing, 137 Wash. 2d 957, 977 P.2d 554 (1999); *see also* City of Ellensburg v. State, 118 Wash. 2d 709, 717, 826 P.2d 1081, 1085 (1992).

123. *See* WASH. REV. CODE § 43.88A.010 (2000); *see also* WASH. REV. CODE § 43.88A.020 (2000) (office of financial management to coordinate development of fiscal notes with appropriate state agencies).

124. *See* SEEBERGER, *supra* note 29, at 54, 56.

125. Sequential drafts of a bill may be indicative of legislative intent. Howlett v. Cheetham, 17 Wash. 626, 632, 50 P. 522, 524 (1897). *See also* Spokane County Health Dist. v. Brockett, 120 Wash. 2d 140, 153, 839 P.2d 324, 331 (1992); Bellevue Firefighters Local 1604 v. City of Bellevue, 100 Wash. 2d 748, 750–51, 675 P.2d 592, 594 (1984); State v. Frampton, 95 Wash. 2d 469, 475–78, 627 P.2d 922, 925–26 (1981). *But see* Hama Hama Co. v. Shorelines Hearing Bd., 85 Wash. 2d 441, 450, 536 P.2d 157, 162–63 (1975) (criticizing the reliance on sequential drafts). The rejection of a particular amendment by the legislature may not be used by the judiciary to ascertain legislative intent. Spokane County Health Dist., 120 Wash. 2d at 153, 839 P.2d at 331. *See also* Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wash. 2d 46, 63–64, 821 P.2d 18, 26 (1991). *But see* State v. Clark, 129 Wash. 2d 805, 812–13, 920 P.2d 187, 190 (1996) (rejected amendment indicative of legislature's intent); Buchanan v. Simplot Feeders Ltd. P'ship, 134 Wash. 2d 673, 688, 952 P.2d 610, 617 (1998) (legislative history of unenacted bill relevant).

126. McCarver v. Manson Park & Recreation Dist., 92 Wash. 2d 370, 374, 597 P.2d 1362, 1364 (1974). *See also In Re* Marriage of Little, 96 Wash. 2d 183, 191 n.3, 634 P.2d 498, 503 n.3 (1981).

tive intent.[127] Materials pertaining to activities on the floor of each house of the legislature are also significant interpretive tools. Washington courts have used legislative debates in construing statutes,[128] but have been more reluctant to use the colloquy of legislators reported in legislative journals[129] as these colloquies are often staged for the benefit of the courts.[130]

It is difficult to reconcile the disparate judicial treatment of floor colloquies in the case law. In *Johnson*,[131] the Washington State Supreme Court found value in the exchange between the former chair of the Senate Select Committee on Product Liability and Tort Reform and the vice-chair of the Senate Judiciary Committee on an issue involving the 1981 Product Liability and Tort Reform Act.[132] However, in *North Coast Air Services*,[133] the court declined to give pay significant heed to the exchange of two key members of that same select committee on the interpretation of that same 1981 legislation even though the exchange related to the precise issue before the court and indicated a clear legislative intent to overrule the court's decision in *Ohler*.[134]

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127. *See, e.g., In re* Marriage of Kovacs, 121 Wash. 2d 795, 854 P.2d 629 (1993) (letter, remarks of committee chair, and prime sponsor of bill to other house); *see also* Biggs v. Vail, 119 Wash. 2d 129, 135, 830 P.2d 350, 353 (1992) (Bar Association statement); State v. Turner, 98 Wash. 2d 731, 658 P.2d 658 (1983) (committee action, staff analyses, hearing testimony); State v. Anderson, 94 Wash. 2d 176, 616 P.2d 612 (1980) (committee memoranda, transcript); State v. Herrmann, 89 Wash. 2d 349, 572 P.2d 713 (1977) (letter).

In *Nelson v. McClatchy Newspapers, Inc.*, 131 Wash. 2d 523, 936 P.2d 1123 (1997), the court cited a staff memorandum as authority for an interpretation of a statute. *Id.* at 531, 936 P.2d at 1127. But subsequently in the opinion, the court indicated a staff memorandum on a bill introduced after the initiation of the litigation was not authoritative in describing legislative intent. *Id.* at 532 n.5, 936 P.2d at 1127 n.5.

128. *See* CLEAN v. State, 130 Wash. 2d 782, 810, 928 P.2d 1054, 1067 (1996); *see also* Sofie v. Fibreboard Corp., 112 Wash. 2d 636, 771 P.2d 711 (1989) (legislative floor remarks), *amended by* 55 Wash. App. 685, 780 P.2d 260 (1989). *But see In re* F.D. Processing, Inc., 119 Wash. 2d 452, 832 P.2d 1303 (1992) (one legislator's floor remarks not enough to establish legislative intent).

129. *See* Snow's Mobile Homes, Inc. v. Morgan, 80 Wash. 2d 283, 494 P.2d 216 (1972) (colloquy recognized); *see also* Johnson v. Cont'l W., Inc., 99 Wash. 2d 555, 663 P.2d 482 (1983) (colloquy recognized). *But see* N. Coast Air Servs. Ltd. v. Grumman Corp., 111 Wash. 2d 315, 759 P.2d 405 (1988) (colloquy not recognized).

130. SEEBERGER, *supra* note 29, at 72; *see also* Wang, *supra* note 118, at 591.

131. 99 Wash. 2d 555, 663 P.2d 482 (1983).

132. *Id.*, 99 Wash. 2d at 561, 663 P.2d at 485.

133. 111 Wash. 2d 315, 759 P.2d 405 (1988).

134. The court stated:

> We are not persuaded that this floor exchange supports defendant's position. First, the answer of a single legislator should not create an intent different from that in the official committee report if the answer is inconsistent with the report. Second, the question and answer are ambiguous. Senator Bottiger said the bill would overrule *Ohler*, but to overrule *Ohler* would eliminate the discovery rule in product cases. That is not the effect of this statute; indeed it statutorily recognizes a different form of what had been a judicially created discovery rule. The statute, despite the floor colloquy,

An additional source of legislative intent is found in the action of the governor. A gubernatorial veto is deemed part of the legislative process.[135] Thus, veto messages of the governor are significant sources of legislative intent.[136]

The least significant legislative construction tools are those materials created after the enactment of the legislation. Generally, the courts have not valued declarations of legislative intent offered by legislators[137] or lobbyists;[138] however, law review articles prepared by legislators commenting on legislation have been used to construe statutes.[139]

In this discussion of interpretive sources for legislative intent, the author has intentionally grouped the materials in descending order of persuasive force. For example, legislative materials expressing an official, contemporaneous, and collective intention, such as the preamble to a bill, have greater persuasive force than a lobbyist's declaration submitted years after the bill's enactment. But it is important to note that no statute or case law gives official sanction to such an ordering of the persuasive power of legislative source materials.

In his excellent article on legislative history in Washington, former Representative Art Wang argued for greater legislative attention to its materials designed to describe the legislature's intention in enacting a bill. Specifically, Wang suggested the creation of a joint select legislative committee to study the issue of legislative history. This committee would examine such diverse suggestions as publication of bill reports and fiscal notes in the legislative journal, create conference committee reports, and provide for a legislatively controlled repository

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did not overrule *Ohler*, it modified the conditions necessary to trigger running of the statute of limitations.

N. Coast Air Servs., 111 Wash. 2d at 326, 759 P.2d at 410.

135. Allied Daily Newspapers v. Eikenberry, 121 Wash. 2d 205, 213, 848 P.2d 1258, 1262 (1993). *See also* State *ex rel.* Stiner v. Yelle, 174 Wash. 402, 408, 25 P.2d 91, 93 (1933).

136. State Dep't of Ecology v. Theodoratus, 135 Wash. 2d 582, 594, 957 P.2d 1241, 1247 (1998). *See also* Spokane County Health Dist. v. Brockett, 120 Wash. 2d 140, 153–54, 839 P.2d 324, 331; State v. Anderson, 81 Wash. 2d 234, 240, 501 P.2d 184, 188 (1972).

137. *See, e.g.*, Woodson v. State, 95 Wash. 2d 257, 623 P.2d 683 (1980); *see also, e.g.*, City of Yakima v. Int'l Ass'n of Firefighters, AFL-CIO, Local 469, 117 Wash. 2d 655, 818 P.2d 1076 (1991); City of Spokane v. State, 198 Wash. 682, 687, 89 P.2d 826, 828–29 (1939).

138. *See, e.g.*, W. Telepage, Inc. v. City of Tacoma, 140 Wash. 2d 599, 611, 998 P.2d 884, 891 (2000) (noncontemporaneous understanding of lobbyist as to legislative intent not reflective of legislature's rationale for enacting law). "While lobbyists refer to themselves as the 'Third House,' this appellation has no grounding in our [c]onstitution." *Id.* at 611 n.6, 998 P.2d at 891 n.6.

139. *See, e.g.*, Johnson v. Cont'l W., Inc., 99 Wash. 2d 555, 560, 663 P.2d 482, 485 (1983); *see also, e.g.*, Scott v. Cascade Structures, 100 Wash. 2d 537, 673 P.2d 179 (1983). *But see Anderson*, 94 Wash. 2d at 188, 501 P.2d at 618 (nonlegislative authors of manual for Criminal Justice Training Commission).

for legislative history materials.[140] Wang did not describe how the courts should approach the interpretation of legislation. Although the joint select committee was never appointed, Wang's suggestions remain valuable recommendations of a thoughtful legislator.

While Washington courts have resorted to legislative history materials when in doubt about a statute's meaning, this approach has generally not been criticized. In contrast, interpretation of federal statutes by the United States Supreme Court has spawned a firestorm of controversy on the Court itself and by legal scholars.

Justice Antonin Scalia has been the foremost Court proponent of a new statutory interpretation style that eschews any reliance on legislative history. Justice Scalia's most succinct articulation of this view is found in *Green v. Bock Laundry Machine Co.*:

> The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which [sic] voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated—a compatibility which [sic], by a benign fiction, we assume Congress always has in mind. I would not permit any of the historical and legislative material discussed by the Court, or all of it combined, to lead me to a result different from the one that these factors suggest.[141]

Scalia's approach, often termed "formalism" or "new textualism,"[142] is allegedly more democratic, relying on the proper role of legislative bodies in a democratic system.

In contrast, many commentators argue in response to Scalia for a more normative-based statutory interpretive model with the judiciary enjoying the power to ignore legislative history materials in favor of selecting certain key interpretive canons to make the best policy decision.[143]

The apparent flaw in all of the interpretive approaches, however, is the omission of the legislative branch, the very body whose intent the judiciary is in theory executing. The legislative branch certainly

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140. Wang, *supra* note 118, at 604–05.

141. 490 U.S. 504, 528 (1989) (Scalia, J., concurring).

142. *See* Philip P. Frickey, *Revisiting the Revival of Theory in Statutory Interpretation: A Lecture in Honor of Irving Younger*, 84 MINN. L. REV. 199, 204–05 (1999).

143. *See* Eskridge, *supra* note 117, at 684.

has a stake in how its views are interpreted. This stake is nowhere discussed in most statutory interpretation theories.

The legislature has not taken steps to better ensure that the courts truly execute its purpose in adopting legislation. Recognizing statutory interpretation as a key feature of separation of powers, it is crucial that the legislature address both the legislative history materials it generates and the interpretation of its enactments by the courts. Similarly, it is important for the court to treat the interpretation of statutes in a more coherent and realistic fashion. Toward these goals, a new paradigm for statutory interpretation in Washington is appropriate and possible.

III. A NEW PARADIGM FOR STATUTORY INTERPRETATION IN WASHINGTON

The responsibility for developing a better system for interpreting statutes is jointly that of the legislature and the courts, each within their respective constitutional spheres. Although the courts may be the final authority on the interpretation of a statute,[144] the legislature can prescribe what its objectives were in passing a law, indicate how a particular statute is to be treated by the courts, and express what materials regarding the legislative history of an enactment are authoritative. In turn, the courts can adopt more coherent, and less result-driven, principles of statutory interpretation, adhering more directly to the textual language employed by the legislature.

A. Legislature

The legislature should address statutory interpretation in several significant ways: by modifying how it drafts legislation, by amending section 1.12 of the Washington Revised Code to establish specific principles for guiding courts in their interpretation of the legislature's intent, and by carefully analyzing court decisions interpreting statutes to ensure that the judicial interpretation comports with the legislature's aims.

With respect to the first issue, the legislature, including members, legislative staff, and code reviser staff, can do more to advise the courts as to the reasons for a bill's enactment and the legislature's intent with regard to the bill. While not necessary for routine legislation, for significant legislative acts, the legislature should employ a preamble with findings as to the problems that the legislature hopes to address and the solutions intended. The legislature should consider

144. *See* note 17, *supra*.

incorporation of an official section-by-section analysis of the bill in the final bill report on a bill.[145] Finally, the bill should contain a section with specific directions—such as liberal or strict construction—for specific sections of the legislation.

Apart from legislative direction as to specific legislation, the legislature should amend section 1.12 to provide general guidance to the courts in interpreting a statute. At a minimum, the legislature should indicate to the courts the hierarchy of interpretive tools beginning with the official bill reports. The legislature may even choose to direct the courts to disregard certain interpretive tools; for example, the non-contemporaneous testimony of legislators, lobbyists, and others may be rendered inadmissible on legislative intent. The decision about which of its own materials—bill reports, fiscal notes, committee materials and testimony, floor debates, or post-enactment declarations—reveals the actual collective intention of the legislature in enacting a bill is peculiarly within the purview of the legislature itself.[146]

Finally, the most significant power of the legislature to ensure that judicial interpretations of its enactments are consistent with the legislature's intent is its amendatory power. If the legislature disagrees with a judicial decision interpreting a statute, it should immediately amend the statute to make the interpretation consistent with its views.[147] Indeed, the failure of the legislature to amend a statute in the face of a judicial interpretation has been viewed by the courts as acquiescence in the judicial construction of the statute.[148]

B. The Judiciary

The decisional law of Washington's judiciary on statutory interpretation suffers from the lack of coherent and consistent principles. The standard treatment of statutes—evaluate the statute to determine if it is ambiguous and construe it using a variety of interpretive canons

145. *See, e.g.*, 1981 WASH. SENATE JOURNAL 629–637 (section-by-section analysis of 1981 Product Liability and Tort Reform Act).

146. Courts have made clear that they want the legislature to maintain historical materials for court use. Seattle Times v. Benton County, 99 Wash. 2d 251, 255 n.1, 661 P.2d 964, 966 n.1 (1983). *See generally*, WASH. REV. CODE § 40.14.100 (2000).

147. As a former legislator, I would argue that the pertinent standing legislative committees and their staffs have an affirmative obligation to monitor new judicial decisions on issues within their committee jurisdiction and to take steps to enact legislation at the next legislative session to correct judicial errors of interpretation.

148. *See, e.g.*, Soproni v. Polygon Apartment Partners, 137 Wash. 2d 319, 327 n.3, 971 P.2d 500, 505 n.3 (1999); *see also, e.g.*, McKinney v. State, 134 Wash. 2d 388, 403, 950 P.2d 461, 469 (1998); Manor v. Nestle Food Co., 131 Wash. 2d 439, 446 n.2, 932 P.2d 628, 631 n.2 (1997); State v. Coe, 109 Wash. 2d 832, 846, 750 P.2d 208, 215–16 (1988); Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wash. 2d 778, 789, 719 P.2d 531, 537 (1986).

if ambiguous—is highly artificial. No real rigorous principles guide the differentiation of plain from ambiguous statutes.

The better approach to judicial interpretation of statutes is to adhere to a standard previously expressed in Washington case law and elsewhere. The courts should simply deduce the legislature's collective intent from what the legislature said in the text of the statute, using any other official expressions of intent the legislature sets forth in the bill itself or in section 1.12 of the Washington Revised Code generally for all statutes.

To a degree, this approach to statutory interpretation means the courts should undertake to construe a statute, regardless of whether the courts believe the statute is plain or ambiguous. Instead, the courts should endeavor to ascertain the legislature's intent from the statutory language or any other official interpretive guides sanctioned by the legislature itself. The courts may employ the traditional judicial canons of statutory interpretation in such an analysis, but the courts should articulate which canons have primacy in the interpretation of statutes.

Finally, the judiciary may wish to consider a new doctrine of abstention in statutory construction. If a court's interpretation of a statute requires it to adopt one of two or more legitimate and competing policy viewpoints, the better course for the court may be to abstain from deciding the case and allow the legislature to resolve the controversy. For example, in *National Electronical Contractors Ass'n v. Riveland*,[149] various contractors and unions challenged the use of inmate labor on prison facilities when such inmate laborers were not licensed electricians and the Department of Corrections did not specifically comply with workplace safety laws. In response, the legislature not only enacted section 19.28 of the Washington Revised Code pertaining to licensure of electricians and section 42.17 relating to workplace safety, but also enacted section 72.10.110, encouraging use of inmate labor on correctional facilities, and section 72.09.100, which directed the Department of Corrections to operate a comprehensive inmate work program and to "remove statutory and other restrictions which have limited work programs in the past."[150] The majority of the Washington State Supreme Court held that the licensure and workplace safety laws applied. The dissent disagreed, asserting the case was not justiciable in light of the diametrically competing policies; the

149. 138 Wash. 2d 9, 978 P.2d 481 (1999).
150. WASH. REV. CODE § 72.09.100 (2000).

dissent contended that the legislature should properly resolve such issues.[151]

IV. CONCLUSION

Washington courts have uncritically employed an artificial paradigm for statutory construction. Despite ferment in the federal courts and scholarly journals on the proper role of the judiciary in interpreting statutes, Washington courts have not assessed whether its existing paradigm adequately implements legislative intent, the theoretical touchstone for the courts. Moreover, the courts' application of the paradigm is inconsistent and episodic. Hence, it is difficult to determine what rules actually apply at what time.

Moreover, the legislature, despite grumbling about courts' misconstruction of its enactments, has done little to give courts guidance with respect to the interpretation of particular enactments or statutes generally.

Both the legislative and judicial branches of government need to critically assess issues relating to statutory construction, each within its respective sphere. Each branch can do far more to improve its treatment of laws enacted by the first branch of our government.

151.

> [W]e have legitimate and diametrically conflicting legislative policies before us. The majority's determination to apply chapter 19.28 RCW and WISHA to inmates working on Department facilities potentially hobbles use of prison inmates' labor on correctional facilities projects, despite the strong legislative policy in favor of inmate labor's being used in the construction and repair of prison facilities. At the same time, to apply the provisions of RCW 72.09.100, which speaks only in broad terms of removing unspecified statutory and other restrictions on inmate labor, to negate the licensure requirements for employees, seems far too broad an invitation to the courts selectively to apply the statutory mandates otherwise designed to protect the public and workers. In the absence of a clear policy choice from the Legislature and the Governor, the parties have asked us to resolve this public policy conflict.
>
> Resolution of the matter is within the easy purview of the Governor and the Legislature. Those are the branches of government constitutionally empowered and best able to broker the various interests at play in this case. For the Court to allow itself to be drawn into what is in essence a sociopolitical dispute is to misperceive our role in our tripartite form of government.

Nat'l Elec. Contractors Ass'n, 138 Wash. 2d at 41–42, 978 P.2d at 497 (Talmadge, J., dissenting).