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A BETTER THEORY OF LEGAL INTERPRETATION *

CHARLES P. CURTIS †

We have, almost all of us, I think, been brought up in the belief that the interpretation of legal documents consists essentially in a search for the intention of the author. I take it the classic, and I am sure the most elegant, exposition of this doctrine is the paper which Vaughan Hawkins, almost ninety years ago, in 1860, read before the Juridical Society.¹ Thayer printed it as an appendix in his *Preliminary Treatise on Evidence* and said of it, "the nature of the inquiry is described with penetration and accuracy."²

Hawkins states our creed in a few sentences.

"[I]n the interpretation of written language in the most general form . . . , the object is a single one—to ascertain the meaning or intention of the writer—to discover what were the ideas existing in his mind, which he desired and endeavored to convey to us. . . . In the interpretation of a legal document, however, we have not indeed a different, but an additional object of inquiry. We desire not only to obtain information as to the intention or meaning of the writer or writers, but also to see that that intention or meaning has been expressed in such a way as to give it legal effect and validity; we desire, in short, to know what the writer meant by the language he has used, and also to see that the language used sufficiently expresses that meaning. The legal act, so to speak, is made up of two elements,—an internal and external one; it originates in intention, and is perfected by expression. Intention is the fundamental and necessary basis of the legal effect of the writing; expression is the outward formality annexed by the law."³

This is what we were brought up on, and what most of us still believe, or at any rate take for granted. For it is still the orthodox theory of legal interpretation.

The recent *Restatement of Property* says:

"The dominant objective of construing a conveyance is to determine the disposition which the conveyor wanted to make. This depends upon an ascertainment of what may be termed his subjective intent, in so far as he had one. But there are difficulties in ascertaining subjective intent."⁴

* This article appeared first in 4 THE RECORD 321-58 (Ass'n of Bar of City of New York, Dec. 1949), in a slightly different form and is reprinted with permission. Mr. Curtis has revised it for this symposium to place more emphasis on the subject of interpretation of statutes.

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1. Hawkins, *On the Principles of Legal Interpretation, with Reference Especially to the Interpretation of Wills*, 2 JURID. SOC. PAP. 298 (1860), reprinted in THAYER, *PRELIMINARY TREATISE ON EVIDENCE* 577-605 (App. C) (1898).

2. THAYER, *PRELIMINARY TREATISE ON EVIDENCE* 405 (1898).

3. *Id.* at 580-81.

4. 3 RESTATEMENT, PROPERTY § 241, comment *c* (1940).

The *Restatement* lists these difficulties, such as inadequate evidence, rules of policy, etc., and continues,

"Hence the judicial ascertainment of the intent of the conveyor is a process which combines an orderly, but somewhat restricted, search for his subjective intent, with supplementing inferences of an intent which the conveyor probably would have had, if he had addressed his mind to those problems which, in fact, have arisen out of his conveyance."⁵

Take trusts, and *Scott on Trusts* carries as much authority as a *Restatement*.

"The terms of the trust are determined by the intention of the settlor at the time of the creation of the trust, and not by his subsequent intention. . . . The settlor's words or conduct subsequent to the creation of the trust, however, may be admissible in order to show what his intention was at the time of the creation of the trust."⁶

This is enough, more than enough, to show that the familiar doctrine is current as well as orthodox. And yet it is quite wrong. It is the purpose of this paper not just to show how wrong it is. I want to propose a better theory.

Orthodox as it is, we must not forget that this search for the intention of the author is not very old, as things grow old in the law. Wigmore dates its origin around the turn of the 18th century into the 1800's.⁷ I suppose it must be regarded as one of the reforms of the Enlightenment of the eighteenth century. So Hawkins, in 1860, was still speaking in a spirit of renovation and reform. He was attacking the earlier doctrine, which was medieval. It took and was still maintaining the position that every word—in the eyes of the law—had one single and immutable meaning. Legal interpretation was taxonomic, like the Latin names for flowers.

Plowden reported Brook, C. J., as saying:

"For the party ought to direct his meaning according to law, and not the law according to his meaning, for if a man should bend the law to the intent of the party, rather than the intent of the party to the law, this would be the way to introduce barbarousness and ignorance and to destroy all learning and diligence. For if a man was assured that whatever words he made use of his meaning only should be considered, he would be very careless about the choice of his words, and it would be the source of infinite confusion and uncertainty to explain what was his meaning."⁸

This was in 1554. Only forty years later Shakespeare started words flowing, including legal words at that, more happily and freely than any man, before or since, has ever succeeded in doing. But medieval doctrines die hard.

5. *Ibid.*

6. 2 SCOTT, TRUSTS § 164.1 (1939).

7. 9 WIGMORE, EVIDENCE § 2461 (3d ed. 1940).

8. Thockmerton v. Tracy, 1 Plow. 145, 162, 75 Eng. Rep. 222, 251 (K.B. 1554), quoted in 9 WIGMORE, EVIDENCE § 2461 (3d ed. 1940).

As late as 1814, another English judge, LeBlanc, J., called the inquiry after intention "a very dangerous rule to go by, because it would be to say that the same words should vary in their construction."⁹ The same thought led Baron Parke, in 1833, to say, "In expounding a will, the Court is to ascertain, not what the testator actually intended, as contradistinguished from what his words express, but what is the meaning of the words he used."¹⁰

We see how persistent the medieval attitude was, how atavistic the legal mind is. Even in the minds of the best of judges, well into the 19th century, it still persisted, and a remnant of it still persists, in the doctrine that a "plain meaning" cannot be disturbed.¹¹ Plain, that is, to lawyers. Even now, the flood of the inquiry into intent could not reach this medieval ledge. If you make what you say too plain to lawyers, too easy for them to understand, they will not trouble to listen to anything else.

The case of *Mahoney v. Grainger*,¹² is not a bad example. A lady left the residue of her estate to "my heirs at law living at the time of my decease." We all know what those words mean. They have a very definite legal meaning.

What had happened was this: The lawyer who drew her will asked her, "Whom do you want to leave the rest of your money to? Who are your nearest relatives?" She said, "I've got about twenty-five first cousins. Let them share it equally." And he wrote, "my heirs at law."

The trouble was, she had an aunt still living, who survived her. Only the aunt, of course, fell within the lawyer's words, and of course only the aunt took the money. Do you know any lawyer who would say that "my heirs at law" meant "my nearest relatives"?

It is taking the law an unconscionable time to rid itself of this medieval illusion that each word has, and can have, only one taxonomic legal meaning. But the law was stepping out of one illusion only to step into another and a worse. This is the one we are now concerned with, that words in themselves have no meaning at all, and that we must look through them and behind them and peer into what the author intended.

It is a hallucination, this search for intent. The room is always dark. The hat we are looking for is often black. If it is there at all, it is on our own head. I think we all recognize this. Hawkins recognized it, without dismay. A few pages farther on from where I have quoted, Hawkins said,

"It is to be observed, that there may be cases where intention can and must be inferred, although, in fact, there may have been none. The interpreter cannot certainly

9. Doe *ex dem.* Hick v. Dring, 2 M. & S. 448, 455, 105 Eng. Rep. 447, 450 (K.B. 1814), quoted in 9 WIGMORE, EVIDENCE § 2461 (3d ed. 1940).

10. Doe *dem.* Gwillim v. Gwillim, 5 B. & Ad. 122, 129, 110 Eng. Rep. 737, 740 (K.B. 1833), quoted in 9 WIGMORE, EVIDENCE § 2459 (3d ed. 1940).

11. See 9 WIGMORE, EVIDENCE § 2461 (3d ed. 1940).

12. 283 Mass. 189, 186 N.E. 86 (1933).

know whether the intent existed; it is the *indicia* of intent, the marks or signs which afford reasonable presumption of its existence, which he can alone regard, and these he is bound to regard, although, in spite of such indications, there may have been no actual intention."¹³

It is difficult to have to infer an intention where there may be none. Scott handles the difficulty with more circumspection. He falls back, as you will have noticed the *Restatement of Property* did too, on John C. Gray's shrewd observation in his *Nature and Sources of the Law*. Citing Gray's book,¹⁴ Scott says, "In many cases the court is ascertaining not what the settlor actually intended if he had thought about the matter."¹⁵

Gray was talking about the interpretation of statutes. There, of course, the orthodox theory becomes quite obviously absurd, as so many have pointed out.

Take an egregious example of the operation of the orthodox theory on the interpretation of a statute. Long before the adoption of the Nineteenth Amendment, which was in 1920, a Massachusetts statute provided that "a person qualified to vote for representatives to the General Court shall be liable to serve as a juror."¹⁶ Then in 1920 by the Nineteenth Amendment women became just that, "qualified to vote." The Amendment said, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex." Did that bring women into the category of persons liable to serve as a juror?

True, the court said, "the word 'person' when used in an unrestricted sense includes a woman." Indeed, the court added, it may include a national bank or a corporation. Yes, but not a woman.

"It is clear beyond peradventure," said the Supreme Judicial Court (Rugg, C. J.),

"that the words of G.L. Ch. 234, § 1, when originally enacted, could not by any possibility have included or been intended by the general court to include women among those liable to jury duty. . . . Manifestly, therefore, the intent of the Legislature must have been, in using the word 'person' in statutes concerning jurors and jury lists, to confine its meaning to men."¹⁷

But the Nineteenth Amendment?

"The Nineteenth Amendment to the federal Constitution conferred the suffrage upon an entirely new class of human beings. . . . No member of the class thus added to the body of voters had ever theretofore in this commonwealth had the right to vote for candidates for offices created by the Constitution."¹⁸

13. THAYER, PRELIMINARY TREATISE ON EVIDENCE 590 (1898).

14. GRAY, THE NATURE AND SOURCES OF THE LAW 175-76 (1921).

15. 2 SCOTT, TRUSTS § 164.1 (1939).

16. MASS. GEN. LAWS, c. 234, § 1 (1921).

17. *Commonwealth v. Wolosky*, 276 Mass. 398, 177 N.E. 656, 659, 660 (1931).

18. 177 N.E. at 661.

The Chief Justice was no feminist.

"The change in the legal status of women wrought by the Nineteenth Amendment was radical, drastic and unprecedented. While it is to be given full effect in its field, it is not to be extended by implication. It is unthinkable that those who first framed and selected the words for the statute now embodied in G.L. Ch. 234, § 1, had any design that it should ever include women within its scope. It is equally inconceivable that those who from time to time have re-enacted that statute had any such design. When they used the word 'person' in connection with those qualified to vote for members of the more numerous branch of the general court, to describe those liable to jury service, no one contemplated the possibility of women becoming so qualified."¹⁹

Certainly not.

"The conclusion is irresistible that, according to sound principles of statutory construction, it can not rightly be held that the scope of R.L. c. 176, § 1, the statute in force on August 26, 1920, now G.L. c. 234, § 1, was extended by the ratification of the Nineteenth Amendment so as to render women liable to jury duty. To reach that result would be directly contrary to every purpose and intent of the general court in enacting that law."²⁰

I cannot help wondering what the court would have done with a stiff property qualification for voters after it had been likewise later repealed. But it is the orthodox doctrine. Orthodox, but not universal. Of course it has been criticized. Frankfurter, in the course of his Cardozo Lecture before the Association of the Bar of the City of New York in June, 1947, said, "You may have observed that I have not yet used the word 'intention.' All these years I have avoided speaking of the 'legislative intent' and I shall continue to be on my guard against using it."²¹

The courts used to be fastidious as to where they looked for the legislative intention. They used to confine the inquiry to the reports by committees and statements by the member in charge of the bill. But now the pressure of the orthodox doctrine has sent them fumbling about in the ashcans of the legislative process for the shoddiest unenacted expressions of intention. I don't know a better example than you will find in *Shapiro v. United States*,²² where the Court was construing the Emergency Price Control Act. Frankfurter made some necessary comments in his dissent.²³

The doctrine has had a natural, but surely an unintended, consequence on legislation. It gives anyone who drafts an act, committee members and its counsel, the administrative agency involved, even lobbyists, a right, anyhow the opportunity, to plant expressions of intention for the very purpose of having the courts nose them out and use them. Archibald Cox says,

19. *Ibid.*

20. *Ibid.*

21. Frankfurter, *Some Reflections on the Reading of Statutes*, 2 THE RECORD 213, 227-28 (Ass'n of Bar of City of New York, 1947), also in 47 COL. L. REV. 527, 538 (1947).

22. 335 U.S. 1, 68 Sup. Ct. 1375, 92 L. Ed. 1787 (1948).

23. 335 U.S. at 44-49.

"[I]t is becoming increasingly common to manufacture 'legislative history' during the course of legislation. The accusations of outside participation made in Congress, and the elaborate interpretations in some passages in the committee reports, suggest the danger that this occurred during consideration of the Taft-Hartley amendments."²⁴

I will leave the last word on this bad practice to one who was himself an addict. Jackson not long ago spoke about it to the American Law Institute. He suggested that the Institute draft a statement of the basic principles of statutory construction. About the practice of resorting to legislative history he said,

"I, like other opinion writers, have resorted not infrequently to legislative history as a guide to the meaning of statutes. I am coming to think it is a badly overdone practice, of dubious help to true interpretation and one which poses serious practical problems for a large part of the legal profession. . . .

"The Constitution evidently intended Congress itself to reduce the conflicting and tentative views of its members to an agreed formula. It was expected to speak its will with considerable formality, after deliberation assured by three readings in each House. Its exact language requires executive approval, or enough support to override a veto. How far, then, should this formal text and context be qualified or amplified by expressions of one or several Congressmen in reports or debates which did not find place in the enactment itself?

"There is a tendency to decrease the measure of the ambiguity which originally justified resort to legislative history. But even if the ambiguity is genuine and substantial, do we find more solid ground by going back of it? It is a poor cause that cannot find some plausible support in legislative history, which often includes tentative rather than final views of legislators or leaves misinterpretation unanswered lest more definite statements imperil the chance of passage.

"The custom of remaking statutes to fit their histories has gone so far that a formal Act, read three times and voted on by Congress and approved by the President, is no longer a safe basis on which a lawyer may advise his client, or a lower court decide a case. This has very practical consequences to the profession. The lawyer must consult all of the committee reports on the bill, and on all its antecedents, and all that its supporters and opponents said in debate, and then predict what part of the conflicting views will likely appeal to a majority of the Court. Only the lawyers of the capital or the most prosperous offices in the large cities can have all the necessary legislative material available. The average law office cannot afford to collect, house and index all this material. Its use by the Court puts knowledge of the law practically out of reach of all except the Government and a few law offices."²⁵

Other judges repudiate the doctrine, but entertain a substitute which, I must say, is no better. They are too sophisticated to search for what they know is not there or planted just for them to find. Instead they undertake to imagine what Congress, or the legislature, would have done or said, if the point had been raised and considered.

Cardozo asked, when he was tormented by alternative meanings, "which choice is it the more likely that Congress would have made?" and answered,

24. Cox, *Some Aspects of Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 44 (1947).

25. Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A.J. 535, 537-38 (1948), also in 8 F.R.D. 121, 124-25 (1948).

"a choice between uncertainties. We must be content to choose the lesser."²⁶ Even our very best judge, Learned Hand, as recently as 1944, said,

"We can best reach the meaning here, as always, by recourse to the underlying purpose, and with that as a guide, by trying to project upon the specific occasion how we think persons, actuated by such a purpose, would have dealt with it, if it had been presented to them at the time. To say that is a hazardous process is indeed a truism, but we cannot escape it, once we abandon literal interpretation—a method far more unreliable."²⁷

I do not know what Hand means by "literal interpretation." Perhaps he is thinking of the case of the immigration officer and the newborn child, which always amused Lawrence Lowell and which he told in his *Conflicts of Principle*.

"An example both of the defects of statutes and of the embarrassment courts may have in interpreting them was furnished a few years ago when a Chinese woman who had a permit to come to this country landed at San Francisco with a child born on the voyage. The immigration officer asked the authorities in Washington whether the child, having no permit to land, must be sent back to China. In view of the statute refusing immigration without a permit the legal question might have presented difficulties, and the answer was appropriate: 'Don't be a damned fool.' Now suppose the question had come before a court. Obviously Congress had no such case in mind, and yet the statute was in terms explicit. If the court, relying on the language of the act, had decided that the child must be sent back, who would have been the 'damned fool'?"²⁸

However, I am sure there is something better than going back and trying to reconstruct how Congress or any other person would have dealt with the situation. It was Hand's to deal with, then and there, as he had characteristically dealt with so many other difficulties in the law. It is uncharacteristic of him to escape into the past. I am sure he would laugh at the idea he ought to go back and search for what Congress intended. Yet here he is, going back and trying to pick up what Congress would have done. It is perhaps less speculative, because Congress certainly intended nothing and it could be that Congress would have done something.

And so too one of our wisest and shrewdest jurists, Gray. It seems to me, however, that he is talking cynically.

"A fundamental misconception prevails, and pervades all the books as to the dealing of the courts with statutes. Interpretation is generally spoken of as if its chief function was to discover what the meaning of the Legislature really was. But when a Legislature has had a real intention, one way or another, on a point, it is not once in a hundred times that any doubt arises as to what its intention was. If that were all a judge had to do with a statute, interpretation of statutes, instead of being one of the most difficult of a judge's duties, would be extremely easy. The fact is that the difficulties of

26. *Burnet v. Guggenheim*, 288 U.S. 280, 285, 288, 53 Sup. Ct. 369, 77 L. Ed. 748 (1933).

27. *Borella v. Borden Co.*, 145 F.2d 63, 64-65 (2d Cir. 1945), *aff'd*, 325 U.S. 679, 65 Sup. Ct. 1223, 89 L. Ed. 1865 (1945).

28. LOWELL, *CONFLICTS OF PRINCIPLE* 82 (1932).

so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; then what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.”²⁹

It is somewhat surprising to find the Supreme Court canonizing this analysis by Gray of “what the judges have to do” when there is no legislative intention, turning what Gray said the judges could not help doing into a judicial duty to do it. The smile with which Gray so often wrote as well as talked would have burst into a laugh if he had seen his “have to” turned into an “ought to,” his statement of fact transmuted into legal doctrine. Yet this is just what the Court did in the case of *Vermilya-Brown Co. v. Connell*.³⁰ It was a matter of applying the Fair Labor Standards Act to Bermuda.

This Act, which was passed in 1938, covered “any Territory or possession of the United States” as well as the United States themselves. Two years later, and quite unexpectedly to Congress, we leased Bermuda from Great Britain as a military base. Did the Act apply to employees of contractors working on the base? Yes, said the Court, five of them, over the vehement dissent of Jackson, Chief Justice Vinson, Frankfurter, and Burton; and this is what the Court said about the point of statutory construction:

“The point of statutory construction for our determination is as to whether the word ‘possession,’ used by Congress to bound the geographical coverage of the Fair Labor Standards Act, fixes the limits of the Act’s scope so as to include the Bermuda base. The word ‘possession’ is not a word of art, descriptive of a recognized geographical or governmental entity. What was said of ‘territories’ in the *Shell Co. Case*, 302 U.S. 253, at 258, 58 Sup. Ct. at page 169, is applicable:

“Words generally have different shades of meaning, and are to be construed if reasonably possible to effectuate the intent of the lawmakers; and this meaning in particular instances is to be arrived at not only by a consideration of the words themselves, but by considering, as well, the context, the purposes of the law, and the circumstances under which the words were employed.”

“The word ‘possessions’ has been employed in a number of statutes both before and since the Fair Labor Standards Act to describe the areas to which various congressional statutes apply. We do not find that these examples sufficiently outline the meaning of the word to furnish a definition that would include or exclude this base. While the general purpose of the Congress in the enactment of the Fair Labor Standards Act is clear, no such definite indication of the purpose to include or exclude leased areas, such as the Bermuda base, in the word ‘possession’ appears. We cannot even say, ‘We see what you are driving at, but you have not said it, and therefore we shall go on as before.’ Under such circumstances, our duty as a Court is to construe the word ‘possession’ as our judgment instructs us the lawmakers, within constitutional limits, would have done had they acted at the time of the legislation with the present situation in mind.”³¹

If our courts are going to decide our cases on what they think our legislatures would have done, would they not be better occupied with what the

29. GRAY, *THE NATURE AND SOURCES OF THE LAW* 172-73 (2d ed. 1921).

30. *Vermilya-Brown Co. v. Connell*, 335 U.S. 377, 69 Sup. Ct. 140 (1948).

31. 335 U.S. at 386-88.

present legislature or the next legislature will do than turn themselves into a historical society reading papers on what some past legislature might then have done?

This doctrine of guessing at what the legislature would have done is no better than asking what the legislature intended. It too puts the court back to the time when the statute was passed, shoving the whole process of interpretation as far back into the past as possible. It has the same archaic, regressive ring as the orthodox doctrine.

As soon as a statute is enacted, it joins the rest of the law, and together with all the rest it speaks to the judge at the moment he decides a case. When it was enacted, to be sure, it was a command, uttered at a certain time in certain circumstances, but it became more than that. It became a part of the law which is now telling the judge, with the case before him and a decision confronting him, what he should now do. And isn't this just what the legislature wanted? The legislature had fashioned the statute, not for any immediate occasion, but for an indefinite number of occasions to arise in an indefinite future, until it was repealed or amended. It was to be used and applied to any such occasion, not only to the variety which might arise out of the particular situation out of which the statute itself had arisen and which had stimulated the legislature to pass it. If that were all the legislature had wanted, or if you please, intended, to do, it could have and should have used more specific terms.

The legislature which passed the statute has adjourned and its members gone home to their constituents or to a long rest from all lawmaking. So why bother about what they intended or what they would have done? Better be prophetic than archaeological, better deal with the future than with the past, better pay a decent respect for a future legislature than stand in awe of one that has folded up its papers and joined its friends at the country club or in the cemetery. Better that the courts should set their decisions up against the possibility of correction than make them under the shadow of a fiction which amounts to a denial of any responsibility for the result.

There are lawyers who will call this a crude alternative, my suggestion that the courts would do better to try to anticipate the wishes of their present and future masters than divine their past intentions. It seems crude, partly because lawyers prefer the past to the future, partly because it is candid, and candor is more formidable than any let's pretend. What the courts do, or at any rate say now they do, is not crude. It's rococo. Let the courts deliberate on what the present or a future legislature would do after it had read the court's opinion, after the situation has been explained, after the court has exhibited the whole fabric of the law into which this particular bit of legislation had had to be adjusted. The legislature would then be acting,

if it did act, in the light of the tradition of the whole of law, which is what the courts expound and still stand for.

Some of the judges have been taking precisely this attitude toward the Supreme Court. For a higher court can and does tell off the lower courts with as much force, with much the same effect, and, as I think, in much the same way, as Congress can tell off the Supreme Court. Listen to Learned Hand. It is always hard, and here it is impossible, not to quote him.

"It is always embarrassing," Hand wrote, in a dissent, mind you; which shows he was the more compelled,

"for a lower court to say whether the time has come to disregard decisions of a higher court, not yet explicitly overruled, because they parallel others in which the higher court has expressed a contrary view. I agree that one should not wait for formal retraction in the face of changes plainly foreshadowed; the higher court may not entertain an appeal in the case before the lower court, or the parties may not choose to appeal. In either event the actual decision will be one which the judges do not believe to be that which the higher court would make. . . . Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant; on the contrary I conceive that the measure of its duty is to divine, as best it can, what would be the event of an appeal in the case before it."³²

Peter Woodbury acted along the same line when he too dissented in one of those cases where citizenship had been denied to a man who was not willing to bear arms in war. Three times the Supreme Court had denied citizenship, always over heavy dissent.³³ The Circuit Court followed the three decisions, but Woodbury, dissenting, said,

"I would probably feel compelled to follow them were it not for my view that now the Supreme Court itself would not do so. . . . I believe that the prediction can be ventured that the above cases are no longer expressive of the law. And I believe that this prediction can be ventured even resisting the temptation to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant. . . . Therefore, I feel that we are not constrained to follow the Supreme Court cases cited last above."³⁴

And Woodbury was proved right, for the Supreme Court did indeed itself refuse to follow them and granted the man citizenship.³⁵

Judge Parker's decision in the *Barnette* case³⁶ gives us a third example. He was clearly bound by the Supreme Court's recent decision in the *Gobitis* case,³⁷ but he counted heads, and preferred to anticipate what the next decision would be.

32. *Spector Motor Co. v. Walsh*, 139 F.2d 809, 823 (2d Cir. 1943).

33. *United States v. Bland*, 283 U.S. 636, 51 Sup. Ct. 569, 75 L. Ed. 1319 (1931); *United States v. Macintosh*, 283 U.S. 605, 51 Sup. Ct. 570, 75 L. Ed. 1302 (1931); *United States v. Schwimmer*, 279 U.S. 644, 49 Sup. Ct. 448, 73 L. Ed. 889 (1929).

34. *United States v. Girouard*, 149 F.2d 760, 767 (1st Cir. 1945).

35. *Girouard v. United States*, 328 U.S. 61, 66 Sup. Ct. 826, 90 L. Ed. 1084 (1946).

36. *Barnette v. West Virginia State Board of Education*, 47 F. Supp. 251 (S.D.W.Va. 1942).

37. *Minersville School District v. Gobitis*, 310 U.S. 586, 60 Sup. Ct. 1010, 84 L. Ed. 1375, 127 A.L.R. 1493 (1940).

"Ordinarily we would feel constrained to follow an unreversed decision of the Supreme Court of the United States, whether we agreed with it or not. It is true that decisions are but evidences of the law and not the law itself; but the decisions of the Supreme Court must be accepted by the lower courts as binding upon them if any orderly administration of justice is to be attained. The developments with respect to the Gobitis case, however, are such that we do not feel that it is incumbent upon us to accept it as binding authority. Of the seven justices now members of the Supreme Court who participated in that decision, four have given public expression to the view that it is unsound, the present Chief Justice in his dissenting opinion rendered therein and three other justices in a special dissenting opinion in *Jones v. City of Opelika*, 316 U.S. 584, 62 S.Ct. 1231, 1251, 86 L.Ed. 1691. The majority of the court in *Jones v. City of Opelika*, moreover, thought it worth while to distinguish the decision in the Gobitis case, instead of relying upon it as supporting authority. Under such circumstances and believing, as we do, that the flag salute here required is violative of religious liberty when required of persons holding the religious views of plaintiffs, we feel that we would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court itself has thus impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties."³⁸

Come now to contracts. Here the hunt for the Snark runs into a further difficulty. There is not only the serious possibility that what we are looking for may not be there, but each party may quite justifiably have a different intention, so justifiably that there is no contract. The *Restatement of Contracts* prudently enough refuses to lay down any rule. Instead, it lists half a dozen standards of interpretation: general usage, which shades off, of course, into one of any number of special usages, local or occupational or other; the mutual standard of what both parties actually intended; the individual standard of what each actually intended; a standard of reasonable expectation, *i.e.*, the meaning which a party should reasonably have apprehended that his words would convey to the other; and a standard of reasonable understanding, *i.e.*, the meaning which the person to whom the words are addressed might reasonably give them.³⁹ We are thrown into the same state of mild confusion as we are when the waiter hands us the menu.

Williston undertakes to explain all this, and to help us to choose. I will go only very briefly into his explanation, only far enough to give Williston's own choice.

"It is useless to talk of the 'meaning' of a contract or agreement unless it is known whose meaning is sought; and this inquiry cannot be disposed of by the answer—the meaning of the parties. The inadequacy of such an answer is obvious. The parties may not have had the same intention. Furthermore, the courts, after asserting that what they are seeking is the intention of the parties, generally add that this intention can be proved only by what they say and do. In other words, it is not the intention of the parties that is material, but the meaning that the court gives to their manifestations."

38. 47 F. Supp. at 252-53. His decision, as we all know, was sustained by the Supreme Court. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 Sup. Ct. 1178, 87 L. Ed. 1628, 147 A.L.R. 674 (1943).

39. 1 RESTATEMENT, CONTRACTS §§ 226-36 (1932).

He comes to the conclusion,

"The standard most applicable to a bilateral transaction would seem to be that of reasonable expectation, No. 5, that is, the sense in which the party using the words should reasonably have apprehended that they would be understood by the other party."⁴⁰

Though Williston regards this as in theory the right standard for all contracts, he goes on to say that the law imposes a different standard where the contract is in writing and the law requires that its meaning be discovered exclusively in that writing, as under the Statute of Frauds or the parol evidence rule. There, Williston says, the standard must be "the ordinary meaning of the writing to parties of the kind who contracted at the time and place where the contract was made, and with such circumstances as surrounded its making."⁴¹ This is, of course, the special usage of the locality, occupation, etc., No. 2 of the *Restatement*, as Williston says in a footnote.⁴²

It is clear that Williston takes no interest in the hunt. The meaning of a contract is to be sought in your reasonable expectations of what meaning the other party will give to your words; or, when the policy of the law requires you to put them down in writing, they must be intelligible enough to be understood by such people as share your circumstances. Both are objective standards; and, as Williston says, only in two cases do they reach different results. One, of course, is where there is such a justifiable difference in meaning that the parties do not meet in any contract at all. In the other, considerations of policy interfere and hold the parties down to ordinary usage. Here the law does not leave the parties free to attach their own private meaning to words which in public ordinarily bear another. You will detect a slight odor of the medieval about legal policy here. At least I do. But scarcely enough to be musty.

Holmes was another who took no interest in the hunt for intention. Holmes did not agree with Hawkins and Thayer, and he said so in a short article which you can find in the *Harvard Law Review* or in his *Collected Legal Papers*. Holmes referred to Hawkins, disagreed with him, and went on to say,

"It is not true that in practice (and I know no reason why theory should disagree with the facts) a given word or even a given collection of words has one meaning and no other. A word generally has several meanings, even in the dictionary. You have to consider the sentence in which it stands to decide which of those meanings it bears in the particular case, and very likely will see that it then has a shade of significance more refined than any given in the word-book. . . .

"How is it when you admit evidence of circumstances and read the document in the light of them? Is this trying to discover the particular intent of the individual, to get into his mind and to bend what he said to what he wanted? No one would contend that such

40. 3 WILLISTON, *CONTRACTS* § 603 (2d ed. 1936).

41. *Id.* § 607.

42. *Id.* § 607 n. 1.

a process should be carried very far, but, as it seems to me, we do not take a step in that direction. It is not a question of tact in drawing a line. We are after a different thing. What happens is this. Even the whole document is found to have a certain play in the joints when its words are translated into things by parol evidence, as they have to be. It does not disclose one meaning conclusively according to the laws of language. Thereupon we ask, not what this man meant, but what those words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used, and it is to the end of answering this last question that we let in evidence as to what the circumstances were. But the normal speaker of English is merely a special variety, a literary form, so to speak, of our old friend the prudent man. He is external to the particular writer, and a reference to him as the criterion is simply another instance of the externality of the law."⁴³

Holmes, then, would apply to all contracts the standard or rule which Williston says the law imposes on those which it requires to be in writing. They are both offering us a laicized version of the medieval theory. Instead of a fixed and immutable meaning which the law assigns to each word, they are offering us the sense which a reasonable layman in the given circumstances would assign to it. A layman in the circumstances when the words were uttered takes the place of the lawyer in court or in consultation. This is all to the good, and better by a long shot than what the medieval law prescribed for us, but there is no reason why we should forget that it is essentially no more than a new model of the old theory.

This is what Holmes and Williston would substitute for the now orthodox illusion that we can turn interpretation into an inquiry after a subjective intention. I think we can do better, and I can now state my thesis very easily. Holmes' insistence on the external standard of the normal speaker and Williston's belief that the other party has something to do with meaning point the way I am taking. This is not to say that I agree with either Holmes or with Williston, but that will become clear as I go on.

Of course words can and do have many meanings. Even a whole document has a certain play in the joints, as Holmes said, when its words are translated into things. I want to go farther and assert that all words which are applicable to things, even in the particular context of the circumstances in which they are uttered, with the exception only of proper names and singular terms which purport to name one and only one object—an exception which I will discuss later when I come to wills—always have many meanings. Their author, I say, expects them to, wants them to, indeed uses, and even comes to admire, this above all their other virtues. So, I say, we are not talking about one meaning, as both Holmes and Williston were, neither the meaning which their author intended, nor the meaning which a reasonable person would ascribe to them, nor the meaning which either party expected of the other. We are all of us, the author, the person to whom they are ad-

43. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 417-18 (1899), also in HOLMES, COLLECTED LEGAL PAPERS 203-04 (1920).

dressed, the court and therefore you and I too, we are all dealing with sets or groups of meanings.

These words—I include, of course, phrases and sentences and complete documents—have size as well as color and quality and, having size, they contain within themselves groups of meanings. It is this comparatively drab and uninteresting quality with which we are concerned in legal interpretation. These words include a number of particular applications, some more, some less. A word can be adjusted, by the addition of adjectives and qualifying phrases, to cover less, or a word can be selected for its size. Words and phrases can be either adjusted to or selected for, the required size. This, essentially, is the craft of the draftsman.

This is the virtue in words which the good draftsman learns to use, and in the end, admire. It is a quality which has been too much and too long neglected, perhaps because people who like words have been more interested in literature than in law, and this quality is too drab to excite them. They have given their attention to the abstract and the concrete. Lawyers are concerned with the general and the particular.

The distinction is as significant as it is subtle. I think I was at first misled into ignoring it by not being able to see any difference between the concrete and the particular. But the other ends of the two sticks are far apart. Let me transpose what Quine has said in his *Short Course in Logic*⁴⁴ into what lawyers have to deal with. We talk about negligence or about fraud. These are abstract terms. They name a property which is shared by those acts which we call negligent or fraudulent. These are general terms, not abstract. They are synonymous, you say. No, the act is not the same thing as one of its properties, as lawyers should know better than others. For lawyers, in their practice, deal with the acts themselves. A lawyer does not have a case of fraud or a case of negligence. He is presented with and he is engaged to deal with certain particular acts and events—so particular in many ways they are unique—which someone has called negligent or fraudulent in one aspect.

You ask, reasonably enough, what the difference is, what odds it makes which he calls them. Quine says that as soon as we elevate general terms to the status of singular abstract terms, as we do when we think in terms of "negligence" instead of "negligent acts," we run into the question whether there are any such abstract entities. Quine wants to keep logic and logicians clear of this metaphysical question. The consequences for lawyers are more serious. Lawyers' careers are devoted to particular events. When they start thinking that they are dealing only with the properties of those events, they lose touch, they take their eyes off the ball, they start making gestures. They could not do worse.

44. QUINE, *SHORT COURSE IN LOGIC* 104-08 (1946).

Literary people—it is their affair, not ours—deal happily and expertly with the abstract and the concrete. Lawyers deal, arduously and expertly, with the general and the particular. Their interest in words is confined to the verbal virtue which resides in general terms.

This virtue has not been wholly neglected. Vaughan Hawkins quotes the great German scholar Savigny as saying that “the excellence of a Roman law lay in its being neither too plain nor too obscure, but expressed in a sort of middling obscurity, ‘*Auf einem schmalen Raume mittelmässigen Dunkelheit.*’” Hawkins does not agree at all. He hastily adds that this “sounds ironical, and is manifestly appropriate only to writings which, like Roman laws, and perhaps the saying of some philosophers, are made avowedly with a view to being interpreted, and not to legal writings in general, which, it will be admitted on all hands ought to be so plain as not to require interpretation.”⁴⁵ No, what they ought to be is as plain and precise or as ambiguous and imprecise as a good draftsman sees fit to make them.

The virtue which resides in the size of words has been a commonplace of the logicians for a long time. They call it the extensive meaning of words, as distinguished from the intensive. Take one of the best of logicians. C. I. Lewis in his *Analysis of Knowledge and Valuation*, which was published by The Open Court in 1946, says that of “the two modes of . . . meaning” which are “traditional and familiar (though not always specified in the same way) . . . the *denotation* or extension of a term is . . . the class of all actual or existent things which the term correctly applies to or names.”⁴⁶

The intensive meaning of a term, on the other hand, is the quality which the things in the class all share, which has been abstracted from them. It is an undue interest in the intensive meaning, and an emphasis upon it alone, which have led lawyers into the paper chase for abstractions which they call intentions. For abstractions have the appearance of being precise, and lawyers cherish a prejudice in favor of precision, however illusory, just as Hawkins did. Impreciseness and vagueness have been regarded as defects and not as another natural characteristic of words. Max Radin, for one, is an exception. In his article on statutory interpretation in the *Harvard Law Review*⁴⁷ he uses the terms, a determinable and a determinate, for which he refers to W. E. Johnson’s *Logic*. A statute is a determinable, and a determinate its application, as I understand it.

The extensive meaning of a word, Lewis says, is “the class of all actual or existent things which the term *correctly* applies to.” But the area of a word is seldom or never staked out with enough precision to enable the class to be “correctly” enumerated or defined. Its boundaries are vague and penumbral.

45. Hawkins, *supra* note 1, in THAYER, PRELIMINARY TREATISE ON EVIDENCE 577, 579 (1898).

46. LEWIS, AN ANALYSIS OF KNOWLEDGE AND VALUATION 39 (1946).

47. Radin, *Statutory Interpretation*, 43 HARV. L. REV. 803 (1931).

Or, to put the same thing another way, "correctly" calls for a decision by someone. Take almost any word, legal or not, and you will readily think of a number of particular applications to which it may or may not apply. The law books are full of them. Indeed I doubt if you can find any case in the books which does not raise just such a question.

All this is obvious enough, once we have got over our prejudice for the precise, and are willing to recognize the equally admirable properties of selective and adjustable inexactitude. Then we shall be free to substitute for what the orthodox theory of interpretation calls the intention of the legislature, of the party to the contract, of the grantor, of the testator, the particular thing to which the word is applied by the person, whoever it may be, to whom the words were addressed and to whom the power of applying them was delegated. The vaguer they are, the more imprecise they are, the greater the delegation. Inside, well on the inside, of the area of their meaning there will be little or no doubt or obscurity or even disagreement. But along the margin, up and down and around the boundary, in the penumbra, "here in the skirts of the forest, like fringe upon a petticoat,"⁴⁸ there will be doubt of the correctness of the application. Here lie controversy and litigation, in which the question must be decided. But the question is not whether the doubted, denied, controverted, and now litigated application is or is not to be taken as what the word means. It is whether the person to whom the word was addressed acted reasonably in choosing and acting on the one of many meanings which he did choose and did act on. It is not simply what would a reasonable man have taken the words to mean, or what the speaker would reasonably have expected him to understand. This embodies the fallacy of the single right meaning. There is a world of difference between what a reasonable man would have done and whether a particular man acted reasonably, and not beyond the length of the tether. And so the problem of interpreting legal documents becomes one with the old problem with which the law is so familiar, reasonable conduct, and a man's interpretation of documents is to be handled like another of his acts, objectively, just as Holmes wished it to be.

It is fair to ask what criteria I should expect the courts to apply when they come to answer this question, whether the addressee has acted reasonably, whether he has abused his discretion, whether he has exceeded his authority, or however you want to put the question which would be presented to the courts. An equally fair answer would call for a book, perhaps nothing short of a great book on jurisprudence, or a greater book on what is Justice. All I need say here is that the criteria are more than the author's intention, however well discovered and demonstrated. For recourse to his intention is not simply an oversimplification of the problem and therefore a restriction of the

48. AS YOU LIKE IT, Act III, scene 2.

criteria to the simplest and most obvious of the factors in the great equation of Justice. It is an escape from the problems of the present into the happy hunting country of the past. The court is rolling with the punch of the problem. Personally I believe that the most important criterion is simply consistency with all the rest of the law. This contract or that will is a very small piece of our total law, just as truly as this or that statute is a larger piece; and, though Justice has higher aims, the virtue on which the Law stakes its hopes of salvation is consistency. But, as I say, this answer falls back on general jurisprudence, all the rest of the law.

The grave fault of the orthodox theory is that it assumes that the author retains control over his words after he has uttered them. How can he? He knows that his words are to be applied by others and in the future, by others over whom he may have no control except by litigation, and in a future in which he may have no part. The orthodox is no more than a futile gesture of maintaining his control over his words by expecting everyone to surmise what he may have meant by them.

What the author of a legal document is trying to control is the future itself. Your client and you are not just trying to express yourselves. This, to be sure, is a part of the picture, but only a very small part. The orthodox theory has been nearsighted, and by peering exclusively at this very small and unimportant part of the picture it has stultified itself, instead of standing back and admiring the whole picture of what you and your client were trying to do. "[H]ow futile it is," Alan Gardiner says, in his *Speech and Language*, "to describe the purpose of speech as the expression of thought." Speech, he says, is used "in order to influence the conduct of others."⁴⁹

You and your client are trying to influence the conduct of the people to whom the document you are drafting is addressed. You are trying to lay hands on the future, to control this person's conduct in the future. Your client, with your aid, wants to assure himself, so far as he wisely can, that six months hence, two years hence, or if it's a will you are drawing, at some undetermined time hence, this or that will be brought to pass, that someone, your client's partner if it's articles of partnership, or the purchaser of your client's property, if it's a deed, or all of us, if it's a statute, will behave in a certain prescribed way. You are trying to stabilize a part of the future, set it on a course, make it more foreseeable and more reliable. Legal draftsmen must stop thinking of themselves as creative writers—to use a pretentious phrase—or even ghost writers. They may be artists in other peoples' troubles, but when it comes to writing, they are only artisans. And our courts are critics, not historical societies reading papers at us, or the judges, when they dissent, at each other.

49. GARDINER, *THE THEORY OF SPEECH AND LANGUAGE* 20, 19 (1932).

There are other ways in which words can be used to control the future behavior of people than by legal documents. Eloquence, persuasion, indeed fraud and deceit, offer their own methods, but they are best served by argument, forensic or domestic, by appeals to our emotion, by abuse of our confidence. We are not talking about them. We are talking about the interpretation of legal documents, from promissory notes to statutes and constitutions; but no more. Their way of affecting or controlling the future is the legal way, and it is based upon the liabilities, penalties, and sanctions which the law imposes, though it may call in a posse of private shames and social stigmas. But all of these are contingent upon whether the future conduct is or is not described in these legal documents. It is fundamentally, therefore, only a question whether certain future behavior, certain future acts and events, fall within or without the scope of the words which you are selecting for your client. The problem before you, his problem, is the matching of words with future events. But what happens in the future is necessarily uncertain, inchoate, contingent, only partly foreseeable, and you must, therefore, find some similar and corresponding quality in the words you are using. Briefly, your words should be as flexible, as elastic, indeed as vague, as the future is uncertain and unpredictable. I say *vague*, because both *flexible* and *elastic* imply sharp edges and definite contours.

So the meaning of words is to be sought, not in their author, but in the person addressed, in the other party to the contract; not in the grantor but in the grantee; not in the testator but in the executor or the legatee; in the defendant who is charged with violating the statute, in the conduct of any person who is acting under the authority and either within or without the authority of the words to be interpreted. Words are but delegations of the right to interpret them, in the first instance by the person addressed, in the second and ultimate instance by the courts who determine whether the person addressed has interpreted them within their authority.

This, then, whether the addressee has applied or proposes to apply the words within the authority they have given him, is what the courts have to decide. I do not see how they can very well succeed until they recognize that this is what they are doing. Surely what is sought has something to do with the search. Holmes says, at the end of his article on the "Theory of Legal Interpretation," from which I have already quoted, "But although practical men generally prefer to leave their major premises inarticulate, yet even for practical purposes theory generally turns out the most important thing in the end."⁵⁰

I have shown that the theory I offer you is based on a natural virtue in words themselves. Let me state this theory of interpretation dogmatically.

50. 12 HARV. L. REV. 417, 420 (1898), COLLECTED LEGAL PAPERS 209 (1920).

Words in legal documents—I am not now talking about anything else—are simply delegations to others of authority to give them meaning by applying them to particular things or occasions. The only meaning of the word meaning, as I am using it, is an application to the particular. And the more imprecise the words are, the greater is the delegation, simply because then they can be applied or not to more particulars. This is the only important feature of words in legal draftsmanship or interpretation.

Words mean not what their author intended them to mean, or even what meaning he intended, or expected, reasonably or not, others to give them. They mean, in the first instance, what the person to whom they are addressed makes them mean. Their meaning in the first instance is whatever occasion or thing he may apply them to or what in some cases he may only propose to apply them to. The meaning of words in legal documents is to be sought, not in their author or authors, the parties to a contract, the testator, or the legislature, but in the acts or the behavior with which the person addressed undertakes to match them. This is the beginning of their meaning.

In the second instance, but only secondarily, a legal document is also addressed to the courts. This is a further delegation, and a delegation of a different authority, to decide, not what the word means, but whether the immediate addressee had authority to make them mean what he did make them mean, or what he proposes to make them mean. In other words, the question before the court is not whether he gave the words the right meaning, but whether or not the words authorized the meaning he gave them.

In appropriate cases, to be sure, the law allows the person to whom the words were addressed, their immediate addressee, to ask the court a different question—not the extent of his authority, but simply what he ought to do. This is a little unusual, for usually a court is required only to pass judgment upon a man's conduct, whether he has done right or acted reasonably, or less often, whether he is going to. Usually a court looks at a man's predicament from the outside. It is, therefore, somewhat exceptional to require a court to put itself in the man's place, substitute itself for him. But here, in these cases, a man is given the right to ask the court's advice, so to speak. He is acting under the authority of a document upon which he must rely, but which he is not sure how he should interpret, not sure enough to ignore what others might take it to mean, who might then charge him with misinterpreting it. He is, let us say, an executor or a trustee, and he files a petition for instructions; or he is a stake-holder and he files a bill of interpleader. In these and other such cases, he is impartial and indifferent to the result. He does not care what meaning is selected and applied. As Holmes said, "I am much more disposed to regard trustees as a sort of domestic tribunal, *ex necessitate* between the parties

subject to the control of the courts in case of a want of good faith or reasonable judgment.”⁵¹

Nor, of course, does the court care. It wants only to settle the controversy. So the court tries to strike the center. It ignores what other meanings the words may carry, what other conduct they might justify, and seeks the one safest and most generally satisfactory and acceptable meaning, that is, the most obvious meaning. We must not be confused when the court tries to give it the appearance of being the words' only meaning. It is really only an adjudicated best meaning. The court does not mean that there never was but one.

In every other and the usual case the legal draftsman must have two things in mind when he selects a word. First he must consider the extent of authority or discretion he is giving to the person to whom in the first instance the word is addressed. At the same time he must keep in mind the question which will be presented to the court if it comes, as it may, to interpret the words. This is, except in those special cases I have just mentioned, whether the person to whom the word was addressed has exceeded its authority or abused his discretion.

Language, at any rate in legal documents, does not fix meaning. It circumscribes meaning. Legal interpretation is concerned, not with the meaning of words, but only with their boundaries.

So much for a theory of interpretation which I believe fits the nature of language better than any other, and most assuredly better than current doctrine. The obverse of the coin is draftsmanship. If I had any judicial authority for this theory, I should cite it and so approach the drafting of legal documents by way of the judicial doctrines which a draftsman must expect will be applied to his work. I have no authority. All I can do, then, is show that this theory fits exactly what the draftsman does in fact do, notwithstanding and in the teeth of the current and mistaken judicial doctrine.

One of the amiable myths of the law is that the bar follows the law. No, the converse more nearly fits the facts. The courts, somehow or other, say what they will, conform to the actual practice of the bar. The great and general virtue of the theory of interpretation which I am offering lies in the fact that it makes it easier for the courts to conform to the practice of the bar. I propose, therefore, now, to show by some examples that the bar is right in practice. Good draftsmen will learn little or nothing from what I am going to say. They know it already, though they may not all be fully aware of it.

Take first an unsecured loan agreement. In it you want to put a provision requiring the borrower to keep its working capital up to some fixed amount. You reject the phrase, "working capital," as a bit too loose. You are not sure that it has enough technical meaning. So instead you put "the excess of the

51. Dissenting in *New England Trust Co. v. Eaton*, 140 Mass. 532, 548, 4 N.E. 69, 80 (1886).

total current assets over current liabilities," which has a firmer technical usage. And you make it the firmer by qualifying it, "determined in strict accordance with sound accounting practice." But then you remember that you are requiring audit reports by an accountant who is subject to the bank's approval. So you add, "by the independent public accountants responsible for the preparation of the audit report."

Thus you adjust the scope and tether of the discretion you are delegating by adding qualifying words and phrases. For this is what they do. Every word you add modifies the future power of action of the person you address, here a prospective borrower. If you hadn't put in "independent," the borrower might have used its own accounting department. If you hadn't put in "public" you could not object that he hadn't been certified.

And yet you have respected the fact that times do change, and accounting practices with them. You are dealing with the future and you do not want to tie the borrower down too tight, nor the bank down with him, to present accounting practices. They are to be "sound," but currently, not presently sound. Moreover, within the scope of that word "sound," are left all the discretions which engage so much of the attention of accountants.

Is it not misleading to talk about the bank's intention, or even about what a reasonable man would take these words to mean, or even about what the bank might reasonably expect its client to take them to mean? Your client, the bank, does not live in an expressionist world, nor is it dealing with any hypothetical reasonable man, nor with its own reasonable expectations. It is dealing with certain particular individuals who are going to act in their own particular ways, and your client expects just that of them. Within limits as broad and wide as it dares, you and your client want them to do just that.

Here in this case the degree of delegation reflected your wisdom in dealing with the future, as well as the bank's desire to attract borrowers. So you gave them as much discretion as you dared, though no more. You could, but wisely you did not, reduce the delegated discretion to so fine a point that it begins to make sense to talk about the orthodox intention. But sometimes you have no choice. For you are imposing your will on someone as well as expressing your intention to anyone, and the sharper your will the greater must be your power. When there is opposition, it may be impossible. In that case you may be compelled to delegate a power of interpretation to the other party not only because you are wise enough to recognize that you cannot wholly control a partly unforeseeable future, but simply because the other party insists.

Take a separation agreement. You are acting for the husband and you have had to agree that the wife shall have the custody of the children. This is almost plenary discretion. All she will concede to the husband is "the right to visit the children at reasonable times and places." In effect she retains the discretion which reposes in that ample phrase, at least in the first instance, be-

cause the children will be with her. But your client, the husband, will not stand for that. He wants "the right to have the children live with him during the summer," and you demand this further concession. But the wife recognizes that "summer" is a vague word and, though she will be in a position to determine when it starts, how long after Labor Day may not your client choose to prolong the visit? For it is he who will then have the discretion. So you have to compromise. You agree to wipe out almost all discretion by adding, "which period shall, subject to unavoidable adjustment, begin June 15th and end September 15th of each year." It is a barter of discretions, with neither party willingly giving the other any more than he has to, and finally trading it out into as little as possible.

I turn to another situation, where your client has almost plenary power to make the discretion as narrow or as broad as he chooses. He is bound only by two considerations: He knows that he will not be present himself to supervise what he wants done; and at the same time he knows that he does not himself know precisely how it had better be done. At any rate he ought to know this. If he doesn't, you must tell him.

Suppose you are drafting a will and you have come to the powers of the executor or the trustee. You take up the provision which tells him how to credit receipts and charge payments in his probate accounts. One way would be to copy into your draft the definition of net income from the Internal Revenue Code, and add as many of the Regulations as you choose. I do not say it is the best way, or even advisable, although it would go far to reduce the annoying difference between your trustee's probate account and his income tax return. For it would give your life tenant all the breaks. I need not tell you that Congress has taken full advantage of the Sixteenth Amendment. But it would relieve your trustee of a good deal of responsibility, because it would very much narrow his discretion. He would have to give everything to the life tenant.

Parenthetically, let me say that a congressional committee drafting a new definition of net income stands in the same relation to the Treasury Department, with the same power of giving it much or little discretion, as a testator to the trustee under his will. There is no essential difference between public and private documents so far as the theory of their interpretation is concerned.

But then it occurs to you or your client that after all he is going to choose his own trustee and that he can have confidence in him. So he asks you to provide that stock dividends shall be added to principal except when paid in lieu of regular cash dividends, or that bond premiums shall be not amortized, or that depreciation must be handled this way or that. In all other respects he leaves his trustee free—within the bounds of the words principal and income, as free as the Sixteenth Amendment made Congress.

In the next will you draft, the testator has asked you to make his son

executor. There is not even a hesitation of confidence. Your client wants to give his son all the discretion he can. So you say, "My executors and trustees shall have power to credit receipts and charge payments to income or to principal or to both as may seem fair to him though not in accordance with the law."

You have given him as much discretion as you can. What is your client's intention, in the sense the orthodox doctrine gives to that word? His intention is to have no intention, in that sense anyhow. It is an abdication, not an assertion, of any intention. His son is to do as he chooses, within the farthest bounds of the words, income and principal, whatever the judges may have said in other cases, and whatever you might have thought.

I see no reason to treat wills as such, or legacies and devises as such, any differently from any other document. In a way, and I think it is the relevant way, wills are little statutes and testators little sovereigns of their small domain. Holmes called the testator a "despot, within limits."⁵² I see no reason why wills should be interpreted any differently from statutes, but I recognize that with wills the courts are under a peculiar temptation to administer only that kind of justice which consists in satisfying the immediate parties.

Perhaps then, in dealing with wills, the courts sometimes yield to the temptation of being guided by the author's intention. For a testator carries, or it seems he ought to carry, a prestige which the parties to contracts and what we may call more democratic arrangements do not and cannot aspire to. Courts are tempted to take the easy way out of interpretation by playing on that modicum of respect which executors and legatees, and even not too distant heirs, feel for a testator. When the parties to litigation feel this way about anything, the court is under a great temptation to satisfy them and call it a day.

I can make this quite clear by taking the case of the trust for charitable purposes by a living donor. Here the donor's prestige and the respect paid him by the donee are high. The donee becomes keenly aware of both whenever the donor, still living, or even heirs who may in a very practical sense stand in his place, come and express dissatisfaction with the way his money, their money almost, is being spent. Now any lawyer could tell either of them that it is none of his business. Only the attorney-general through his visitorial powers or the courts with their powers of cy-pres have anything to say about how that trust ought to be administered and how that money ought or ought not to be spent. But a living and dissatisfied donor is more than a nuisance. Practical considerations move a charitable as well as, and even more promptly than, a judicial institution. Dead donors, who leave no heirs, or anyway uninterested heirs, are blessed. Living donors who know when their function ceases go to the highest heaven. The intention of the author is always an intruder, and the respect which is paid to his intent is a peg on which the courts often hang a

⁵² Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 420 (1899), COLLECTED LEGAL PAPERS 208 (1921).

quick convenient form of justice. This, I think, is the only valid reason to treat the interpretation of wills in any way differently from other documents.

But specific legacies and devises are a case apart. They are examples of the one kind of case, rare, but always annoying enough to attract attention, to which this doctrine of interpretation in its very nature does not apply. It is the case of the devise of "my manor of Dale," when the testator had two, or the legacy of "my watch," when he had two. Four of the five examples which Hawkins gives are of this kind. Or that better case, where Mary J., an elderly spinster, left a fifth of the residue of her estate to "my nephew, Arthur Murphy." She had three. There was a nephew called Arthur Murphy who lived in Australia. There was another nephew, also called Arthur Murphy, but he was taking his father's share of Mary's estate. And she had an illegitimate nephew called Arthur Murphy, who had married Mary's niece and was managing Mary's affairs. The court gave the fifth to this illegitimate husband of a niece.⁵³

The theory will not work here, because it is based on the extensive meaning of given words. The annoyance here is due to the fact that we do not know, and yet we have to decide, what word or which word the testator or other author used. For we are dealing in these cases with two words, homonyms. They may sound alike. They may be spelled alike and so look alike. But they are only dressed alike. They may be twins, but they are two individuals. So I find it easier to think of them as two different words than as one word with two meanings. You may prefer to call them ambiguous; that is, in the strict sense of ambiguity, which must on no account be confused with generality. Ambiguity must be reserved for terms which have two or more quite separate meanings or applications.

Whether we think of these words as different words or as the same word with different meanings, in this infrequent but vexing case we are dealing with singular terms, words and phrases which purport to apply to one and only one object. They are in effect proper names. Wills offer the usual examples, but not the only ones.

Holmes put the case of the ship *PEERLESS*, out of Bombay with a cargo of cotton, which the defendant had agreed to buy. There was another ship *PEERLESS*, also out of Calcutta, sailing a month later. The defendant meant the ship sailing earlier. The plaintiff sued for damages for the defendant's refusal to accept the cargo on the one sailing later, and lost his suit. "The true ground of the decision," Holmes said, "was not that each party meant a different thing from the other, . . . but that each said a different thing."⁵⁴ There was not one name, any more than there was only one ship. As Holmes said, "They

53. *In re Jackson*, [1933] Ch. 237.

54. HOLMES, *THE COMMON LAW* 309 (1881), speaking of *Raffles v. Wichelhaus*, 2 H. & C. 906, 159 Eng. Rep. 375 (Ex. 1864).

are different words.”⁵⁵ There were two ships and each had its own name, however much they sounded alike on the tongue of the broker, however much they looked alike to the scribe who made a fair copy of the contract, or would sound alike to the stenographer who in our day would type it out.

In these cases, a search for the intention of the author, testator or either party, is both necessary and harmless. The particular application of the word he used is not in question. It is a search for what word was used, not how it could be applied. The fact that in these cases this second inquiry has so obvious an answer leads us into confusing it with that preliminary question. If we confine inquiry about the author's intention to the case of the singular homonym or the strict ambiguity, we shall keep out of trouble, and leave theory intact.

Names and singular terms mark the extreme end of the exactitude and precision of which words are capable. With them stand those terms which refer to an ascertainable group of objects, two, three, four, or more, with as much exactitude as if there were but one. The phrase, “heirs at law,” is a good example. As soon as you state whose heirs you are referring to and the date when they are to be determined and what law is to determine them, you have a precisely ascertainable class. To be sure, you may not yet have fixed the amount of each share, or whether they shall be distributed per stirpes or per capita. So you will probably want to say, “the person or persons whom and in the shares and proportions in which my administrator would have been required to pay the same had I died intestate and possessed thereof immediately after the termination of such trust,” or some such elegant circumlocution.

These terms for groups, which are as precise as a name or a singular term, bring up the distinction between general terms and vague terms. The draftsman has both at his disposal. When he wants a compendious word of the required size, he usually has his choice between a term which quite definitely and precisely covers as much ground as he wants to cover, and a vague term, which is elastic or flexible enough to be stretched at least over the same ground, a term with indeterminate flounces of meaning round the ankles of his doubt. As always, it is a choice between making up his mind now or leaving it to someone else to make up his mind for him later, as the fashion in the length of skirts changes.

This distinction is perhaps best observed in constitutional law, and a recent case, fortunately for us, spreads it out before us. It is the meaning of the word “States” in the Third Article of the Constitution, and the case is *National Mutual Ins. Co. v. Tidewater Transfer Co.*, decided on June 20, 1949.

We all know pretty much all there is to know about “due process,” from

55. Holmes, *The Theory of Legal Interpretation*, 12 HARV. L. REV. 417, 418 (1899), COLLECTED LEGAL PAPERS 205 (1920).

56. 337 U.S. 582, 69 Sup. Ct. 1173 (1949).

the *Twining* case⁵⁷ down through *Adamson*⁵⁸ and *Wolf v. Colorado*⁵⁹ last June. It is "a concept of ordered liberty." It is "the compendious expression for all those rights which the courts must enforce because they are basic to our free society." Some of these rights "may not too rhetorically be called eternal verities." There is, therefore, no "tidy formula." Such rights as these cannot even be confined to our Bill of Rights, as Black would have them.⁶⁰

I am talking about the other end of the stick, which, as I said, fortunately protruded above the swirling waters in the *Tidewater Transfer* case a week before *Wolf v. Colorado*, from which I have been quoting.

This word, "States," stands in that part of the Constitution which defines the cases and controversies to which the judicial power of the United States may extend, among them suits "between Citizens of different States." In 1940 Congress extended the jurisdiction to include not only actions between citizens of different States, but also "citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory." The plaintiff, the National Mutual Insurance Company, was a citizen of the District of Columbia. The Court had long ago hurdled the need of making a corporation into a "citizen"—not by way of interpretation, but by one of the law's most famous fictions.⁶¹ Now the Court faced the question whether the District of Columbia was a state. No one dared resort to a fiction. So the question was treated by way of interpretation.⁶²

I will not take your time or distract your attention with what Marshall had said the word "States" meant here,⁶³ nor with what other clauses in the Constitution could be relied on to show that Congress had the power to give the courts jurisdiction over the controversies of the citizens of the District of Columbia, nor even with the result to which the Court came, by a bare majority for different and divergent reasons. I want only to compare what Frankfurter and Reed said with what Rutledge and Murphy said. Nor do I care, for my purposes here, which was right. It is the distinction which begs our attention, for it is the distinction between words which have a definite size and words which are vague and have fringes on their petticoats.

Frankfurter and Reed, so far as I need to quote them, said,

"The precision which characterizes these portions of Article 3 is in striking contrast to the imprecision of so many other provisions of the Constitution dealing with other very vital aspects of government. This was not due to chance or ineptitude on the part of the Framers. The differences in subject-matter account for the drastic differences in treat-

57. *Twining v. New Jersey*, 211 U.S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97 (1908).

58. *Adamson v. California*, 332 U.S. 46, 67 Sup. Ct. 1672, 91 L. Ed. 1903 (1947).

59. *Wolf v. Colorado*, 338 U.S. 25, 69 Sup. Ct. 1359 (1949).

60. Dissenting in the *Adamson* case, 332 U.S. at 68-123; see what Murphy and Rutledge said, *id.* at 123-25.

61. See BUNN, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES 43-46 (5th ed. 1949).

62. See *id.* at 47-49.

63. *Hepburn v. Ellzey*, 2 Cranch 445, 2 L. Ed. 332 (U.S. 1804).

ment. Great concepts like 'Commerce *** among the several States,' 'due process of law,' 'liberty,' 'property' were purposely left to gather meaning from experience. For they relate to the whole domain of social and economic fact, and the statesmen who founded this Nation knew too well that only a stagnant society remains unchanged. But when the Constitution in turn gives strict definition of power or specific limitations upon it we cannot extend the definition or remove the translation. Precisely because 'it is a *constitution* we are expounding,' . . . we ought not to take liberties with it. . . .

"The very subject matter of §§ 1 and 2 of Article III is technical in the esteemed sense of that term. These sections do not deal with generalities expanding with experience. Provisions for the organization of courts and their jurisdiction presuppose definiteness and precision of phrasing. These requirements were heeded and met by those who were concerned with framing the Judiciary Article; Wilson and Madison and Morris and Rutledge and Sherman, were lawyers of learning and astuteness. The scope of the judicial power with which the federal courts were to be entrusted was, as I have said, one of the most sharply debated and thoroughly canvassed subjects in Independence Hall. When the Framers finally decided to extend the judicial Power to controversies 'between Citizens of different States,' they meant to be restrictive in the use of that term. They were not unaware of the fact that outside the States there was the Northwest Territory, and that there was to be a Seat of Government. Considering their responsibility, their professional habits, and their alertness regarding the details of Article III, the precise enumeration of the heads of jurisdiction made by the Framers ought to preclude the notion that they shared the latitudinarian attitude of Alice in Wonderland toward language."⁶⁴

Rutledge and Murphy said,

"The sole reason Marshall assigned for the decision was 'a conviction that the members of the American confederacy only are the states contemplated in the constitution,' a conviction resulting as he said from an examination of the use of that word in the charter to determine 'whether Columbia is a state in the sense of that instrument.' . . .

"Marshall's sole premise of decision in the Hepburn case has failed, under the stress of time and later decision, as a test of constitutional construction. Key words like 'state,' 'citizen,' and 'person' do not always and invariably mean the same thing. His literal application disregarded any possible distinction between the purely political clauses and those affecting civil rights of citizens, a distinction later to receive recognition."⁶⁵

So here the question turned on whether this word "State" had the precision which is appropriate when you are organizing a judicial system and fixing the jurisdiction of courts, where, as Frankfurter said, technicality is an esteemed virtue, or, on the other hand, the imprecision which is necessary when your words must "gather meaning from experience." Rutledge said the Court had to decide whether it was dealing with a purely political clause or with one of those which affect our civil rights.

I should put it this way. Here are two words. One of them no more includes the District of Columbia or a Territory than the word heirs includes all my kindred or all my relatives. The other word need no more exclude the District of Columbia here in the first paragraph of the third article of the Con-

64. 337 U.S. at 646-47, 654.

65. *Id.* at 619, 623.

stitution than it does in the third paragraph, where the trial of all crimes must be by jury, or in the Sixth Amendment, where the trial must be speedy and public and the jury impartial, etc. An even neater example of a word making a quick change of personality is the word "person" in the Sherman Act. Within only twelve words, "person" does not include the United States,⁶⁶ but does include a State.⁶⁷ These "conclusions" the court said, "derived not from the literal meaning of the words 'person' and 'corporation' but from the purpose, the subject matter, the context and the legislative history of the statute."⁶⁸ From what else does anything or anyone derive its personality? These may be twins, but they are different persons.

However, whether you choose to regard these as two words, or as one word with two different meanings is as much your choice as it is mine. The point is that we are dealing with vastly different characteristics. One is precise. It has sharp edges. The other is imprecise, and has muzzy edges. If you use the one, you are keeping all discretion to yourself. If you use the other, you are delegating a great deal of it elsewhere.

This distinction between words with sharp edges and words which have no edges but fade away into the context, allows us to shake the dust off the rule that a plain meaning must not be disturbed. Restrict this rule to names, singular terms, and words which contain only a definite number of objects, and the medieval theory which it keeps alive becomes intelligible. These words have meanings as immutable as their objects. They are compendious enumerations. They are taxonomical tags. They are dead words. I should scarcely call them words at all.

Along with most delegated discretions, usually goes either an interest in taking appropriate action or an obligation to do so. The other party to a contract wants to do what will be to his advantage. An executor or a trustee is charged with responsibility. But an agent may be not only indifferent, but timid. So the draftsman of a power of attorney will sometimes want to impart confidence as well as give room for action. He will, accordingly, want to give his phrases the necessary size as well as a suitable vagueness of contour; and in order to be sure that they are large enough, he must make them fairly definite, as well as vague. Otherwise, his client, the principal, cannot rest assured that a timid, or even a prudent, agent will act, however obviously action may be called for by a situation. Discretion, unaccompanied by duty or by desire, must be given complete confidence in its power.

One way to impart confidence is to preface, or conclude, the power of attorney with an expansive clause something like this: "And to do any and all other acts which may be necessary or proper in the premises, and generally

66. *United States v. Cooper Corp.*, 312 U.S. 600, 61 Sup. Ct. 742, 85 L. Ed. 1071 (1941).

67. *Georgia v. Evans*, 316 U.S. 159, 62 Sup. Ct. 972, 86 L. Ed. 1346 (1942).

68. *Parker v. Brown*, 317 U.S. 341, 351, 63 Sup. Ct. 307, 87 L. Ed. 315 (1943).

to act in relation to my rights, obligations, property, and affairs as fully and effectually as I myself might do if personally present." The clause which the Constitution of the United States added to the powers it gave to Congress is less magnificent.

Another way is to multiply descriptions, even synonyms, so that everyone with whom the agent will deal may have a choice of words on which to rely for the agent's authority. Almost any form for a power of attorney contains examples. Instead of saying, ". . . to receive any of my property," you find ". . . to receive and take possession of any or all moneys, stocks, bonds, securities, goods, chattels, land, buildings, and other property, belonging to me."

Or split up the execution of negotiable instruments into varieties, ". . . to make, draw, accept, endorse, deliver, any negotiable notes, checks, drafts, bills of exchange, and orders."

Or separate the execution of a deed into its component parts, ". . . to execute, sign, seal, acknowledge, authenticate, and deliver any and all deeds." The first word, "execute," would be enough.

Here we are dealing with documents which are addressed on their face to the agent, but really they are addressed to everyone with whom he is going to transact business, who also will have to accept some responsibility, and liability, and none of them will have the least obligation or interest to act. The draftsman, therefore, must be thinking of people who are not only indifferent but meticulous. Do not precipitately blame the draftsman whose duty it is to indulge their doubts and anticipate their hesitations. Good round words are what they want. A foresighted draftsman will give them as many as they want, unless he can find a better way to encourage them.

Holmes warned us that even for practical purposes theory generally turned out to be the most important thing in the end. This is obviously true in your theory of interpreting the Constitution. It is perhaps less obvious, but equally true, with statutes. There are certain types of contracts where it is also true. Long term price agreements offer an example, and articles of partnership another, but collective bargaining agreements a better.

I will give you what Harry Shulman has recently said about them.

"The collective labor agreement merely states some of the conditions under which the parties will daily work together in the operation of the common enterprise from which they will both derive their shares, satisfactions and fears. The objective in which both parties are interested is the continuous operation of that enterprise. The collective agreement aids the achievement of that objective; it does not assure or command it. Achievement depends wholly on continuous daily cooperation, and cannot result merely from strict enforcement of the agreement.

"Moreover, the collective labor agreement is not and cannot be so comprehensive and clear as to provide for all the sources of friction which might interfere with the attainment of the parties' objectives. It cannot be so comprehensive, first, because of the sheer inability to anticipate all contingencies in a dynamic, competitive economy with an advancing technology. And it cannot be so comprehensive, secondly, because of the

utter impracticability of securing agreement in a relatively short time on all hypothetical situations that can be imagined and that involve human reactions.

"Even with respect to anticipated situations, the collective labor agreement cannot be altogether clear. This is not due only to hasty drafting under pressure; or to the literary inadequacies of lay draftsmen; or to the normal vagaries of language which confound the intent of even the lawyer draftsman. In labor agreements there are other reasons for imprecision. The agreements are frequently made by representatives on both sides whose prestige is in the balance. Face-saving is an important interest which can be ignored at the risk of cessation of operations, or served by statement less than bitingly clear. Again, abundant detail, even if agreed to by the negotiators, may be avoided because of the abundant opportunity it provides for aggregating minor objections by different individuals into a deceptive total dissatisfaction which may result in rejection by the principals. Or, desiring agreement, the parties may adopt inconclusive language precisely because they are in disagreement as to detailed application and wish to leave to the future the working out of particular differences, with the agreement serving only as one guide.

"The collective agreement, then, like others, is, indeed, intended to commit the parties and should faithfully be respected by them. But it is also like a general structure of government designed to aid the parties' future operation. It looks to daily accommodation to problems in the spirit in which the agreement was made."⁶⁹

Picture the effect of announcing the orthodox theory of interpretation at a conference where such an agreement is being drafted. Suppose you tell the parties that every word they use will mean only what someone later thinks they then intended. They will say, Why, the very point we are trying to make, the very thing we are all trying to do, is express the fact that we don't yet know what we mean or what we intend. They don't want even the standard that Holmes and Williston proposed, that the normal speaker of English or people of the same kind shall decide. These parties want no one, not even a fictitious person, to tell them what they meant. And why? Because they don't yet know.

At the very outset of his work, the draftsman is met by the fact that what the parties are striving for is the existence of an agreement, not the possibility of its judicial enforcement. To be sure, collective bargaining agreements are agreements. The parties commit themselves to something. But they are not so much making contracts to do thus and so, as they are trying to agree on how the parties can best agree, how best cooperate. The good draftsman can only give them as good an opportunity as he knows how.

Any theory which looks to the intention of these parties defeats their very purpose. What they want, what the success of their agreement depends on, is elbow room. In order to bring them together, they must be kept a little apart.

Let us look at the situation from a little distance and in a larger way. The orthodox doctrine then becomes even pettier. Shulman said a collective agreement was like a general structure of government. It is a little constitution, and it must be built around large concepts, a fair wage and the like, which

69. Shulman, *The Settlement of Labor Disputes*, 4 THE RECORD 12, 17-19 (Ass'n of Bar of City of New York, 1949).

must be expected to gather experience from their own domain of social and economic fact, just as the greater concepts of liberty and property in the Constitution were left to gather meaning from the whole domain.⁷⁰ Only in the procedure devised for the gathering, only in what Rutledge called "the purely political clauses," can the draftsman of a collective agreement dare make its phrases definite. The parties can agree upon how they shall go about agreeing further. The substance of this further agreement must be left to its own growth.

It will grow. Though the life of a collective agreement is shorter than the expectancy of a constitution, its field is smaller and it is crammed with immediate and pressing problems. The experience of trying to solve them can be relied upon to fill its smaller phrases, if they are equally vague and elastic.

There is no other way. What Lloyd Garrison had to say about labor and industrial peace a few years ago will remain true so long as we remain ourselves.

"Through centuries of trial and error we have developed a system of justice which works well in disputes between individuals. It works well because (1) we have been able to define the rules of the game with sufficient precision for judges to apply them; and (2) it is easy under such circumstances to persuade or force individuals to go along with the results.

"In the great group conflicts of our age these two conditions are lacking. There is no common agreement upon the rules of the game. You can define murder, rape, larceny, libel; but it is hard to define a just wage—or a fair peace. And the job of persuading or forcing group organisms, with their touchy egos, to go along with given decisions is a far different matter from persuading or forcing individuals. Yet we must find the way.

"We cannot wait for centuries of common law to develop. We must act swiftly to save our civilization. We can make progress only by agreement. That is the one fundamental necessity, at home and abroad.

"In the labor field this means that the leaders of industry and labor, with such aid and support as the government can give, must together work out the rules of the game and the new structures of settlement which we so imperatively need. Only by a combined and sustained effort of this sort can we hope to make lasting progress. There are no easier solutions. There never are in a democracy."⁷¹

Industry and labor have few points of immediate agreement. What they must have, and what we must hope they will find, is areas of agreement, within which they can together work out their own little common law, their rules of the game, as Garrison says, for themselves. They have a right to expect that their collective agreements will be interpreted under the auspices of the same theory in which they are written.

70. *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 69 Sup. Ct. 1173 (1949), quoted *supra*, notes 60-61.

71. Garrison, *Can Legislation Bring About Labor Industrial Peace?* 29 *SAT. REV. OF LIT.* [No. 46] 11, 38 (Nov. 16, 1946) [review of GREGORY, *LABOR AND THE LAW* (1946)].