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SOME REFLECTIONS ON THE READING OF STATUTES*

FELIX FRANKFURTER¹

A single volume of 320 octavo pages contains all the laws passed by Congress during its first five years, when measures were devised for getting the new government under way; 26 acts were passed in the 1789 session, 66 in 1790, 94 in 1791, 38 in 1792, 63 in 1793. For the single session of the 70th Congress, to take a pre-depression period, there are 993 enactments in a monstrous volume of 1014 pages—quarto not octavo—with a comparable range of subject matter. Do you wonder that one for whom the Statutes at Large constitute his staple reading should have sympathy, at least in his moments of baying at the moon, with the touching Congressman who not so long ago proposed a “Commission on Centralization” to report whether “the Government has departed from the concept of the founding fathers” and what steps should be taken “to restore the Government to its original purposes and sphere of activity”? Inevitably the work of the Supreme Court reflects the great shift in the center of gravity of law-making. Broadly speaking, the number of cases disposed of by opinions has not changed from term to term. But even as late as 1875 more than 40% of the controversies before the Court were common-law litigation, fifty years later only 5%, while today cases not resting on statutes are reduced almost to zero. It is therefore accurate to say that courts have ceased to be the primary makers of law in the sense in which they “legislated” the common law. It is certainly true of the Supreme Court that almost every case has a statute at its heart or close to it.

This does not mean that every case before the Court involves questions of statutory construction. If only literary perversity or jaundiced partisanship can sponsor a particular rendering of a statute there is no problem. When we talk of statutory construction we have in mind cases in which there is a fair contest between two readings, neither of which comes without respectable title

* Sixth Annual Benjamin N. Cardozo Lecture delivered before the Association of the Bar of the City of New York, March 18, 1947. This address is reprinted with permission from 2 THE RECORD OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK No. 6 (1947).

1. It gives me pleasure to make acknowledgment to my learned friends, Philip Elman, Louis Henkin and Philip Kurland, Esqs. They have no responsibility for what I have said; they are merely subjected to my gratitude.

deeds. A problem in statutory construction can seriously bother courts only when there is a contest between probabilities of meaning.

DIFFICULTIES OF CONSTRUCTION

Though it has its own preoccupations and its own mysteries, and above all its own jargon, judicial construction ought not to be torn from its wider, non-legal context. Anything that is written may present a problem of meaning, and that is the essence of the business of judges in construing legislation. The problem derives from the very nature of words. They are symbols of meaning. But unlike mathematical symbols, the phrasing of a document, especially a complicated enactment, seldom attains more than approximate precision. If individual words are inexact symbols, with shifting variables, their configuration can hardly achieve invariant meaning or assured definiteness. Apart from the ambiguity inherent in its symbols, a statute suffers from dubieties. It is not an equation or a formula representing a clearly marked process, nor is it an expression of individual thought to which is imparted the definiteness a single authorship can give. A statute is an instrument of government partaking of its practical purposes but also of its infirmities and limitations, of its awkward and groping efforts. With one of his flashes of insight, Mr. Justice Johnson called the science of government "the science of experiment."² The phrase, uttered a hundred and twenty-five years ago, has a very modern ring, for time has only served to emphasize its accuracy. To be sure, laws can measurably be improved with improvement in the mechanics of legislation, and the need for interpretation is usually in inverse ratio to the care and imagination of draftsmen. The area for judicial construction may be contracted. A large area is bound to remain.

The difficulties are inherent not only in the nature of words, of composition, and of legislation generally. They are often intensified by the subject matter of an enactment. The imagination which can draw an income tax statute to cover the myriad transactions of a society like ours, capable of producing the necessary revenue without producing a flood of litigation, has not yet revealed itself.³ Moreover, government sometimes solves problems by shelving them temporarily. The legislative process reflects that attitude. Statutes as well as constitutional provisions at times embody purposeful ambiguity or are expressed with a generality for future unfolding. "The prohibition contained in the Fifth Amendment refers to infamous crimes—a term obviously inviting interpretation in harmony with conditions and opinions prevailing from time to time."⁴ And Mr. Justice Cardozo once re-

2. *Anderson v. Dunn*, 6 Wheat. 204, 226 (U. S. 1821).

3. 1 REPORT OF INCOME TAX CODIFICATION COMMITTEE, CMD. 5131, pp. 16-19 (England 1936).

4. See Mr. Justice Brandeis in *United States v. Moreland*, 258 U. S. 433, 451 (1922).

marked, "a great principle of constitutional law is not susceptible of comprehensive statement in an adjective."⁵

The intrinsic difficulties of language and the emergence after enactment of situations not anticipated by the most gifted legislative imagination, reveal doubts and ambiguities in statutes that compel judicial construction. The process of construction, therefore, is not an exercise in logic or dialectic: The aids of formal reasoning are not irrelevant; they may simply be inadequate. The purpose of construction being the ascertainment of meaning, every consideration brought to bear for the solution of that problem must be devoted to that end alone. To speak of it as a practical problem is not to indulge a fashion in words. It must be that, not something else. Not, for instance, an opportunity for a judge to use words as "empty vessels into which he can pour anything he will"—his caprices, fixed notions, even statesmanlike beliefs in a particular policy. Nor, on the other hand, is the process a ritual to be observed by unimaginative adherence to well-worn professional phrases. To be sure, it is inescapably a problem in the keeping of the legal profession and subject to all the limitations of our adversary system of adjudication. When the judge, selected by society to give meaning to what the legislature has done, examines the statute, he does so not in a laboratory or in a classroom. Damage has been done or exactions made, interests are divided, passions have been aroused, sides have been taken. But the judge, if he is worth his salt, must be above the battle. We must assume in him not only personal impartiality but intellectual disinterestedness. In matters of statutory construction also it makes a great deal of difference whether you start with an answer or with a problem.

THE JUDGE'S TASK

Everyone has his own way of phrasing the task confronting judges when the meaning of a statute is in controversy. Judge Learned Hand speaks of the art of interpretation as "the proliferation of purpose." Who am I not to be satisfied with Learned Hand's felicities? And yet that phrase might mislead judges intellectually less disciplined than Judge Hand. It might justify interpretations by judicial libertines, not merely judicial libertarians. My own rephrasing of what we are driving at is probably no more helpful, and is much longer than Judge Hand's epigram. I should say that the troublesome phase of construction is the determination of the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were part of it, written in ink discernible to the judicial eye.

5. *Carter v. Carter Coal Co.*, 298 U. S. 238, 327 (1936).

Chief Justice White was happily endowed with the gift of finding the answer to problems by merely stating them. Often have I envied him this faculty but never more than in recent years. No matter how one states the problem of statutory construction, for me at least it does not carry its own answer. Though my business throughout most of my professional life has been with statutes, I come to you empty-handed. I bring no answers. I suspect the answers to the problems of an art are in its exercise. Not that one does not inherit, if one is capable of receiving it, the wisdom of the wise. But I confess unashamedly that I do not get much nourishment from books on statutory construction, and I say this after freshly reexamining them all, scores of them.

When one wants to understand or at least get the feeling of great painting, one does not go to books on the art of painting. One goes to the great masters. And so I have gone to great masters to get a sense of their practise of the art of interpretation. However, the art of painting and the art of interpretation are very different arts. Law, Holmes told us, becomes civilized to the extent that it is self-conscious of what it is doing. And so the avowals of great judges regarding their process of interpretation and the considerations that enter into it are of vital importance, though that ultimate something called the judgment upon the avowed factors escapes formulation and often, I suspect, even awareness. Nevertheless, an examination of some 2,000 cases, the bulk of which directly or indirectly involves matters of construction, ought to shed light on the encounter between the judicial and the legislative processes, whether that light be conveyed by hints, by explicit elucidation, or, to mix the metaphor, through the ancient test, by their fruits.

And so I have examined the opinions of Holmes, Brandeis and Cardozo and sought to derive from their treatment of legislation what conclusions I could fairly draw, freed as much as I could be from impressions I had formed in the course of the years.

Holmes came to the Supreme Court before the great flood of recent legislation, while the other two, especially Cardozo, appeared at its full tide. The shift in the nature of the Court's business led to changes in its jurisdiction, resulting in a concentration of cases involving the legislative process. Proportionately to their length of service and the number of opinions, Brandeis and Cardozo had many more statutes to construe. And the statutes presented for their interpretation became increasingly complex, bringing in their train a quantitatively new role for administrative regulations. Nevertheless, the earliest opinions of Holmes on statutory construction, insofar as he reveals himself, cannot be distinguished from Cardozo's last opinion, though the latter's process is more explicit.

A judge of marked individuality stamps his individuality on what he writes, no matter what the subject. What is however striking about the opinions of the three Justices in this field is the essential similarity of their attitude and of their appraisal of the relevant. Their opinions do not disclose a private attitude for or against extension of governmental authority by legislation, or towards the policy of particular legislation, which consciously or imperceptibly affected their judicial function in construing laws. It would thus be a shallow judgment that found in Mr. Justice Holmes' dissent in the *Northern Securities* case⁶ an expression of his disapproval of the policy behind the Sherman Law. His habit of mind—to be as accurate as one can—had a natural tendency to confine what seemed to him familiar language in a statute to its familiar scope. But the proof of the pudding is that his private feelings did not lead him to invoke the rule of indefiniteness to invalidate legislation of which he strongly disapproved,⁷ or to confine language in a constitution within the restrictions which he gave to the same language in a statute.⁸

The reservations I have just made indicate that such differences as emerge in the opinions of the three Justices on statutory construction, are differences that characterize all of their opinions, whether they are concerned with interpretation or constitutionality, with admiralty or patent law. They are differences of style. In the case of each, the style is the man.

If it be suggested that Mr. Justice Holmes is often swift, if not cavalier, in his treatment of statutes, there are those who level the same criticism against his opinions generally. It is merited in the sense that he wrote, as he said, for those learned in the art. I need hardly add that for him "learned" was not a formal term comprehending the whole legal fraternity. When dealing with problems of statutory construction also he illumined whole areas of doubt and darkness with insights enduringly expressed, however briefly. To say "We agree to all the generalities about not supplying criminal laws with what they omit, but there is no canon against using common sense in construing laws as saying what they obviously mean,"⁹ is worth more than most of the dreary writing on how to construe penal legislation. Again when he said that "the meaning of a sentence is to be felt rather than to be proved,"¹⁰ he expressed the wholesome truth that the final rendering of the meaning of a statute is an act of judgment. He would shudder at the

6. *Northern Securities Co. v. United States*, 193 U. S. 197, 400 (1904).

7. *Cf. Nash v. United States*, 229 U. S. 373 (1913) and *International Harvester Co. v. Kentucky*, 234 U. S. 216 (1914).

8. *Cf. Towne v. Eisner*, 245 U. S. 418 (1918) and *Eisner v. Macomber*, 252 U. S. 189 (1920).

9. *Roschen v. Ward*, 279 U. S. 337, 339 (1929).

10. *United States v. Johnson*, 221 U. S. 488, 496 (1911).

thought that by such a statement he was giving comfort to the school of visceral jurisprudence. Judgment is not drawn out of the void but is based on the correlation of imponderables all of which need not, because they cannot, be made explicit. He was expressing the humility of the intellectual that he was, whose standards of exactitude distrusted pretensions of certainty, believing that legal controversies that are not frivolous almost always involve matters of degree, and often degree of the nicest sort. Statutory construction implied the exercise of choice, but precluded the notion of capricious choice as much as choice based on private notions of policy. One gets the impression that in interpreting statutes Mr. Justice Holmes reached meaning easily, as was true of most of his results, with emphasis on the language in the totality of the enactment and the felt reasonableness of the chosen construction. He had a lively awareness that a statute was expressive of purpose and policy, but in his reading of it he tended to hug the shores of the statute itself, without much re-enforcement from without.

Mr. Justice Brandeis, on the other hand, in dealing with these problems as with others, would elucidate the judgment he was exercising by proof or detailed argument. In such instances, especially when in dissent, his opinions would draw on the whole arsenal of aids to construction. More often than either Holmes or Cardozo, Brandeis would invoke the additional weight of some "rule" of construction. But he never lost sight of the limited scope and function of such "rules." Occasionally, however, perhaps because of the nature of a particular statute, the minor importance of its incidence, the pressure of judicial business or even the temperament of his law clerk, whom he always treated as a co-worker, Brandeis disposed of a statute even more dogmatically, with less explicit elucidation, than did Holmes.

For Cardozo, statutory construction was an acquired taste. He preferred common law subtleties, having great skill in bending them to modern uses. But he came to realize that problems of statutory construction had their own exciting subtleties and gave ample employment to philosophic and literary talents. Cardozo's elucidation of how meaning is drawn out of a statute gives proof of the wisdom and balance which, combined with his learning, made him a great judge. While the austere style of Brandeis seldom mitigated the dry aspect of so many problems of statutory construction, Cardozo managed to endow even these with the glow and softness of his writing. The differences in the tone and color of their style as well as in the moral intensity of Brandeis and Cardozo made itself felt when they wrote full-dress opinions on problems of statutory construction. Brandeis almost compels by demonstration; Cardozo woos by persuasion.

SCOPE OF THE JUDICIAL FUNCTION

From the hundreds of cases in which our three Justices construed statutes one thing clearly emerges. The area of free judicial movement is considerable. These three remembered that laws are not abstract propositions. They are expressions of policy arising out of specific situations and addressed to the attainment of particular ends. The difficulty is that the legislative ideas which laws embody are both explicit and immanent. And so the bottom problem is: What is below the surface of the words and yet fairly a part of them? Words in statutes are not unlike words in a foreign language in that they too have "associations, echoes, and overtones."¹¹ Judges must retain the associations, hear the echoes, and capture the overtones. In one of his very last opinions, dealing with legislation taxing the husband on the basis of the combined income of husband and wife, Holmes wrote: "The statutes are the outcome of a thousand years of history. . . . They form a system with echoes of different moments, none of which is entitled to prevail over the other."¹²

What exactions such a duty of construction places upon judges, and with what freedom it entrusts them! John Chipman Gray was fond of quoting from a sermon by Bishop Hoadley that "Whoever hath an *absolute authority* to *interpret* any written or spoken laws, it is he who is truly the law-giver to all intents and purposes, and not the person who first wrote or spoke them."¹³ By admitting that there is some substance to the good Bishop's statement, one does not subscribe to the notion that they are law-givers in any but a very qualified sense.

Even within their area of choice the courts are not at large. They are confined by the nature and scope of the judicial function in its particular exercise in the field of interpretation. They are under the constraints imposed by the judicial function in our democratic society. As a matter of verbal recognition certainly, no one will gainsay that the function in construing a statute is to ascertain the meaning of words used by the legislature. To go beyond it is to usurp a power which our democracy has lodged in its elected legislature. The great judges have constantly admonished their brethren of the need for discipline in observing the limitations. A judge must not rewrite a statute, neither to enlarge nor to contract it. Whatever temptations the statesmanship of policy-making might wisely suggest, construction must eschew interpolation and evisceration. He must not read in by way of creation. He must not read out except to avoid patent nonsense or internal contradiction. "If there is no meaning in it," said Alice's King, "that saves a world of trouble, you know, as

11. BARKER, *THE POLITICS OF ARISTOTLE* lxiii (1946).

12. *Hoeper v. Tax Comm'n*, 284 U. S. 206, 219 (1931).

13. GRAY, *NATURE AND SOURCES OF THE LAW* 102, 125, 172 (2d ed. 1921).

we needn't try to find any." Legislative words presumably have meaning and so we must try to find it.

This duty of restraint, this humility of function as merely the translator of another's command, is a constant theme of our Justices. It is on the lips of all judges, but seldom, I venture to believe, has the restraint which it expresses, or the duty which it enjoins, been observed with so consistent a realization that its observance depends on self-conscious discipline. Cardozo put it this way: "We do not pause to consider whether a statute differently conceived and framed would yield results more consonant with fairness and reason. We take this statute as we find it."¹⁴ It was expressed more fully by Mr. Justice Brandeis when the temptation to give what might be called a more liberal interpretation could not have been wanting. "The particularization and detail with which the scope of each provision, the amount of the tax thereby imposed, and the incidence of the tax, were specified, preclude an extension of any provision by implication to any other subject. . . . What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertance, may be included within its scope."¹⁵ An omission at the time of enactment, whether careless or calculated, cannot be judicially supplied however much later wisdom may recommend the inclusion.

The vital difference between initiating policy, often involving a decided break with the past, and merely carrying out a formulated policy, indicates the relatively narrow limits within which choice is fairly open to courts and the extent to which interpreting law is inescapably making law. To say that, because of this restricted field of interpretive declaration, courts make law just as do legislatures is to deny essential features in the history of our democracy. It denies that legislation and adjudication have had different lines of growth, serve vitally different purposes, function under different conditions, and bear different responsibilities. The judicial process of dealing with words is not at all Alice in Wonderland's way of dealing with them. Even in matters legal some words and phrases, though very few, approach mathematical symbols and mean substantially the same to all who have occasion to use them. Other law terms like "police power" are not symbols at all but labels for the results of the whole process of adjudication. In between lies a gamut of words with different denotations as well as connotations. There are varying shades of compulsion for judges behind different words, differences that are due to the words themselves, their setting in a text, their setting in history. In short, judges are not unfettered glossators. They are under a special duty not to over-emphasize the episodic aspects of life and not to undervalue its

14. *Anderson v. Wilson*, 289 U. S. 20, 27 (1933).

15. *Iselin v. United States*, 270 U. S. 245, 250, 251 (1926).

organic processes—its continuities and relationships. For judges at least it is important to remember that continuity with the past is not only a necessity but even a duty.

There are not wanting those who deem naive the notion that judges are expected to refrain from legislating in construing statutes. They may point to cases where even our three Justices apparently supplied an omission or engrafted a limitation. Such an accusation cannot be rebutted or judged in the abstract. In some ways, as Holmes once remarked, every statute is unique. Whether a judge does violence to language in its total context is not always free from doubt. Statutes come out of the past and aim at the future. They may carry implicit residues or mere hints of purpose. Perhaps the most delicate aspect of statutory construction is not to find more residues than are implicit nor purposes beyond the bound of hints. Even for a judge most sensitive to the traditional limitation of his function, this is a matter for judgment not always easy of answer. But a line does exist between omission and what Holmes called "misprision or abbreviation that does not conceal the purpose."¹⁶ Judges may differ as to the point at which the line should be drawn, but the only sure safeguard against crossing the line between adjudication and legislation is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so.

In those realms where judges directly formulate law because the chosen lawmakers have not acted, judges have the duty of adaptation and adjustment of old principles to new conditions. But where policy is expressed by the primary law-making agency in a democracy, that is by the legislature, judges must respect such expressions by adding to or subtracting from the explicit terms which the lawmakers use no more than is called for by the shorthand nature of language. Admonitions like that of Justice Brandeis in the *Iselin* case that courts should leave even desirable enlargement to Congress will not by itself furnish the meaning appropriate for the next statute under scrutiny. But as is true of other important principles, the intensity with which it is believed may be decisive of the outcome.

THE PROCESS OF CONSTRUCTION

Let me descend to some particulars.

The text.—Though we may not end with the words in construing a disputed statute, one certainly begins there. You have a right to think that a hoary platitude, but it is a platitude not acted upon in many arguments. In any event, it may not take you to the end of the road. The Court no doubt must listen to the voice of Congress. But often Congress cannot be heard clearly because its

16. *St. Louis-San Francisco Ry. v. Middlekamp*, 256 U. S. 226, 232 (1921).

speech is muffled. Even when it has spoken, it is as true of Congress as of others that what is said is what the listener hears. Like others, judges too listen with what psychologists used to call the apperception mass, which I take it means in plain English that one listens with what is already in one's head. One more caution is relevant when one is admonished to listen attentively to what a statute says. One must also listen attentively to what it does not say.

We must, no doubt, accord the words the sense in which Congress used them. That is only another way of stating the central problem of decoding the symbols. It will help to determine for whom they were meant. Statutes are not archaeological documents to be studied in a library. They are written to guide the actions of men. As Mr. Justice Holmes remarked upon some Indian legislation "The word was addressed to the Indian mind."¹⁷ If a statute is written for ordinary folk, it would be arbitrary not to assume that Congress intended its words to be read with the minds of ordinary men. If they are addressed to specialists, they must be read by judges with the minds of the specialists.

And so we assume that Congress uses common words in their popular meaning, as used in the common speech of men. The cases speak of the "meaning of common understanding," "the normal and spontaneous meaning of language," "the common and appropriate use," "the natural straightforward and literal sense," and similar variants. In *McBoyle v. United States*,¹⁸ Mr. Justice Holmes had to decide whether an aeroplane is a "motor vehicle" within the meaning of the Motor Vehicle Theft Act. He thus disposed of it: "No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air, and sometimes legislation extends the use in that direction. . . . But in everyday speech 'vehicles' calls up a picture of a thing moving on land."

Sometimes Congress supplies its own dictionary. It did so in 1871 in a statute defining a limited number of words for use as to all future enactments. It may do so, as in recent legislation, by a section within the statute containing detailed definitions. Or there may be indications from the statute that words in it are the considered language of legislation. "If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute. But, as we have said, the usage of Congress simply shows that it has spoken with careful precision, that its words mark the exact spot at which it stops."¹⁹ Or words may ac-

17. *Fleming v. McCurtain*, 215 U. S. 56, 60 (1909).

18. 283 U. S. 25, 26 (1931).

19. *Boston Sand & Gravel Co. v. United States*, 278 U. S. 41, 48 (1928).

quire scope and function from the history of events which they summarize or from the purpose which they serve.

"However colloquial and uncertain the words had been in the beginning, they had won for themselves finally an acceptance and a definiteness that made them fit to play a part in the legislative process. They came into the statute . . . freighted with the meaning imparted to them by the mischief to be remedied and by contemporaneous discussion. . . . In such conditions history is a teacher that is not to be ignored."²⁰

Words of art bring their art with them. They bear the meaning of their habitat whether it be a phrase of technical significance in the scientific or business world, or whether it be loaded with the recondite connotations of feudalism. Holmes made short shrift of a contention by remarking that statutes used "familiar legal expressions in their familiar legal sense."²¹ The peculiar idiom of business or of administrative practise often modifies the meaning that ordinary speech assigns to language. And if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.

The context.—Legislation is a form of literary composition. But construction is not an abstract process equally valid for every composition, not even for every composition whose meaning must be judicially ascertained. The nature of the composition demands awareness of certain presuppositions. For instance, the words in a constitution may carry different meanings from the same words in a statute precisely because "it is a constitution we are expounding." The reach of this consideration was indicated by Mr. Justice Holmes in language that remains fresh no matter how often repeated :

"[W]hen we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago."²²

And so, the significance of an enactment, its antecedents as well as its later history, its relation to other enactments, all may be relevant to the construction of words for one purpose and in one setting but not for another. Some words are confined to their history; some are starting points for history. Words are intellectual and moral currency. They come from the legislative

20. Mr. Justice Cardozo in *Duparquet Co. v. Evans*, 297 U. S. 216, 220, 221 (1936).

21. *Henry v. United States*, 251 U. S. 393, 395 (1920).

22. *Missouri v. Holland*, 252 U. S. 416, 433 (1920).

mint with some intrinsic meaning. Sometimes it remains unchanged. Like currency, words sometimes appreciate or depreciate in value.

Frequently the sense of a word cannot be got except by fashioning a mosaic of significance out of the innuendoes of disjointed bits of statute. Cardozo phrased this familiar phenomenon by stating that "the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view."²³ And to quote Cardozo once more on this phase of our problem: "There is need to keep in view also the structure of the statute, and the relation, physical and logical, between its several parts."²⁴

The generating consideration is that legislation is more than composition. It is an active instrument of government which, for purposes of interpretation, means that laws have ends to be achieved. It is in this connection that Holmes said "words are flexible."²⁵ Again it was Holmes, the last judge to give quarter to loose thinking or vague yearning, who said that "the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down."²⁶ And it was Holmes who rebided courts for being "apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them."²⁷ Note, however, that he found the policy in "those words"!

PROLIFERATION OF PURPOSE

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. The objection to "intention" was indicated in a letter by Mr. Justice Holmes which the recipient kindly put at my disposal:

"Only a day or two ago—when counsel talked of the intention of a legislature, I was indiscreet enough to say I don't care what their intention was. I only want to know what the words mean. Of course the phrase often is used to express a conviction not exactly thought out—that you construe a particular clause or expression by considering the whole instrument and any dominant purposes that it may express. In fact intention is a residuary clause intended to gather up whatever other aids there may be to interpretation beside the particular words and the dictionary."

If that is what the term means, it is better to use a less beclouding characterization. Legislation has an aim; it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of govern-

23. *Panama Refining Co. v. Ryan*, 293 U. S. 388, 433, 439 (1935) (dissenting).

24. *Duparquet Co. v. Evans*, 297 U. S. 216, 218 (1936).

25. *International Stevedoring Co. v. Haverly*, 272 U. S. 50, 52 (1926).

26. *United States v. Whitridge*, 197 U. S. 135, 143 (1905).

27. *Olmstead v. United States*, 277 U. S. 438, 469 (1928) (dissenting).

ment. That aim, that policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute, as read in the light of other external manifestations of purpose. That is what the judge must seek and effectuate, and he ought not to be led off the trail by tests that have overtones of subjective design. We are not concerned with anything subjective. We do not delve into the mind of legislators or their draftsmen, or committee members. Against what he believed to be such an attempt Cardozo once protested:

"The judgment of the court, if I interpret the reasoning aright, does not rest upon a ruling that Congress would have gone beyond its power if the purpose that it professed was the purpose truly cherished. The judgment of the court rests upon the ruling that another purpose, not professed, may be read beneath the surface, and by the purpose so imputed the statute is destroyed. Thus the process of psycho-analysis has spread to unaccustomed fields. There is a wise and ancient doctrine that a court will not inquire into the motives of a legislative body. . . ."²⁸

The difficulty in many instances where a problem of meaning arises is that the enactment was not directed towards the troubling question. The problem might then be stated, as once it was by Mr. Justice Cardozo, "which choice is it the more likely that Congress would have made?"²⁹ While in its context the significance and limitations of this question are clear, thus to frame the question too often tempts inquiry into the subjective and might seem to warrant the court in giving answers based on an unmanifested legislative state of mind. But the purpose which a court must effectuate is not that which Congress should have enacted, or would have. It is that which it did enact, however inaptly, because it may fairly be said to be imbedded in the statute, even if a specific manifestation was not thought of, as is often the very reason for casting a statute in very general terms.

Often the purpose or policy that controls is not directly displayed in the particular enactment. Statutes cannot be read intelligently if the eye is closed to considerations evidenced in affiliated statutes, or in the known temper of legislative opinion. Thus, for example, it is not lightly to be presumed that Congress sought to infringe on "very sacred rights."³⁰ This improbability will be a factor in determining whether language, though it should be so read if standing alone, was used to effect such a drastic change.

More frequently still, in the interpretation of recent regulatory statutes, it becomes important to remember that the judicial task in marking out the extent to which Congress has exercised its constitutional power over commerce, is not that of devising an abstract formula. The task is one of accommodation as between assertions of new federal authority and historic

28. *United States v. Constantine*, 296 U. S. 287, 298, 299 (1936) (dissenting).

29. *Burnet v. Guggenheim*, 288 U. S. 280, 285 (1933).

30. *Milwaukee Social Democrat Publishing Co. v. Burleson*, 255 U. S. 407, 438 (1921) (dissenting).

functions of the individual states. Federal legislation of this character cannot therefore be construed without regard to the implications of our dual system of government. In such cases, for example, it is not to be assumed as a matter of course that when Congress adopts a new scheme for federal industrial regulation, it deals with all situations falling within the general mischief which gave rise to the legislation. The underlying assumptions of our dual form of government, and the consequent presuppositions of legislative draftsmanship which are expressive of our history and habits, cut across what might otherwise be the implied range of legislation. The history of congressional legislation regulating not only interstate commerce as such but also activities intertwined with it, justify the generalization that, when the Federal Government takes over such local radiations in the vast network of our national economic enterprise and thereby radically readjusts the balance of state and national authority, those charged with the duty of legislating are reasonably explicit and do not entrust its attainment to that retrospective expansion of meaning which properly deserves the stigma of judicial legislation.

SEARCH FOR PURPOSE

How then does the purpose which a statute expresses reveal itself, particularly when the path of purpose is not straight and narrow? The English courts say: look at the statute and look at nothing else. Lord Reading so advised the House of Lords when a bill was before it as to which the Attorney General had given an interpretative explanation during its passage in the House of Commons: "Neither the words of the Attorney General nor the words of an ex-Lord Chancellor, spoken in this House, as to the meaning intended to be given to language used in a Bill, have the slightest effect or relevance when the matter comes to be considered by a Court of Law. The one thing which stands out beyond all question is that in a Court of Law you are not allowed to introduce observations made either by the Government or by anybody else, but the Court will only give consideration to the Statute itself. That is elementary, but I think it is necessary to bring it home to your Lordships because I think too much importance can be attached to language which fell from the Attorney General."³¹ How narrowly the English courts confine their search for understanding an English enactment is vividly illustrated by the pronouncements of Lord Haldane, surely one of the most broadminded of all modern judges. "My Lords," he said in *Viscountess Rhondda's Claim*,³² "the only other point made on the construction of the Act was that this Committee might be entitled to look at what passed while the Bill was still a Bill and in the Committee stage in the House.

31. 94 H. L. DEB. 232 (5th ser. 1934).

32. [1922] 2 A. C. 339, 383.

It was said that there amendments were moved and discussions took place which indicated that the general words of s. 1 were not regarded by your Lordships' House as covering the title to a seat in it. But even assuming that to be certain, I do not think, sitting as we do with the obligation to administer the principles of the law, that we have the least right to look at what happened while the Bill was being discussed in Committee and before the Act was passed. Decisions of the highest authority show that the interpretation of an Act of Parliament must be collected from the words in which the Sovereign has made into law the words agreed upon by both Houses. The history of previous changes made or discussed cannot be taken to have been known or to have been in view when the Royal assent was given. The contrary was suggested at the Bar, though I do not think the point was pressed, and I hope that it will not be thought that in its decision this Committee has given any countenance to it. To have done so would, I venture to say, have been to introduce confusion into well-settled law. In *Millar v. Taylor* the principle of construction was laid down in words, which have never, so far as I know, been seriously challenged, by Willes J. as long ago as in 1769: "The sense and meaning of an Act of Parliament must be collected from what it says when passed into a law; and not from the history of changes it underwent in the house where it took its rise. That history is not known to the other house or to the sovereign."

These current English rules of construction are simple. They are too simple. If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded. The rigidity of English courts in interpreting language merely by reading it disregards the fact that enactments are, as it were, organisms which exist in their environment. One wonders whether English judges are confined psychologically as they purport to be legally. The judges deem themselves limited to reading the words of a statute. But can they really escape placing the words in the context of their minds, which after all are not automata applying legal logic but repositories of all sorts of assumptions and impressions? Such a modest if not mechanical view of the task of construction disregards legal history. In earlier centuries the judges recognized that the exercise of their judicial function to understand and apply legislative policy is not to be hindered by artificial canons and limitations. The well known resolutions in *Heydon's Case*,³³ have the flavor of Elizabethan English but they express the substance of a current volume of U. S. Reports as to the considerations relevant to statutory interpretation. To be sure, early English legislation helped ascertainment of

33. 3 Co. 7a, 76 Eng. Rep. 637 (1584).

purpose by explicit recitals; at least to the extent of defining the mischief against which the enactment was directed. To take a random instance, an act in the reign of Edward VI reads: " 'Forasmuch as intolerable Hurts and Troubles to the Commonwealth of this Realm doth daily grow and increase through such Abuses and Disorders as are had and used in common Alehouses and other Houses called Tipling houses': (2) it is therefore enacted by the King our Sovereign Lord, etc."³⁴ Judicial construction certainly became more artificial after the practice of elucidating recitals ceased. It is to be noted that Macaulay, a great legislative draftsman, did not think much of preambles. He believed that too often they are jejune because legislators may agree on what ought to be done, while disagreeing about the reasons for doing it. At the same time he deemed it most important that in some manner governments should give reasons for their legislative course.³⁵ When not so long ago the Parliamentary mechanism was under scrutiny of the Lord Chancellor's Committee, dissatisfaction was expressed with the prevailing practise of English courts not to go outside the statutes. It was urged that the old practise of preambles be restored or that a memorandum of explanation go with proposed legislation.³⁶

At the beginning, the Supreme Court reflected the early English attitude. With characteristic hardheadedness Chief Justice Marshall struck at the core of the matter with the observation "Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived."³⁷ This commonsensical way of dealing with statutes fell into disuse, and more or less catchpenny canons of construction did service instead. To no small degree a more wooden treatment of legislation was due, I suspect, to the fact that the need for keeping vividly in mind the occasions for drawing on all aids in the process of distilling meaning from legislation was comparatively limited. As the area of regulation steadily widened, the impact of the legislative process upon the judicial brought into being, and compelled consideration of, all that convincingly illumines an enactment, instead of merely that which is called, with delusive simplicity, "the end result." Legislatures themselves provided illumination by general definitions, special definitions, explicit recitals of policy, and even directions of attitudes appropriate for judicial construction. Legislative reports were increasingly drawn upon, statements by those in charge of legislation, reports of investigating committees, recommendations of agencies entrusted with the enforcement of laws, etc. When Mr. Justice Holmes came to the Court, the U. S. Re-

34. 6 Edw. VI, c. 25 (1552).

35. LORD MACAULAY'S LEGISLATIVE MINUTES 145 *et seq.* (Dharker ed. 1946).

36. Laski, Note to the REPORT OF THE COMMITTEE ON MINISTER'S POWERS, CMD 4060, Annex V, 135 (1932).

37. *United States v. Fisher*, 2 Cranch 358, 386 (U. S. 1805).

ports were practically barren of references to legislative materials. These swarm in current volumes. And let me say in passing that the importance that such materials play in Supreme Court litigation carry far-reaching implications for bench and bar.

The change I have summarized was gradual. Undue limitations were applied even after courts broke out of the mere language of a law. We find Mr. Justice Holmes saying, "It is a delicate business to base speculations about the purposes or construction of a statute upon the vicissitudes of its passage."³⁸ And as late as 1925 he referred to earlier bills relating to a statute under review, with the reservation "If it be legitimate to look at them."³⁹

Such hesitations and restraints are in limbo. Courts examine the forms rejected in favor of the words chosen. They look at later statutes "considered to throw a cross light" upon an earlier enactment.⁴⁰ The consistent construction by an administrative agency charged with effectuating the policy of an enactment carries very considerable weight. While assertion of authority does not demonstrate its existence, long-continued, uncontested assertion is at least evidence that the legislature conveyed the authority. Similarly, while authority conferred does not atrophy by disuse, failure over an extended period to exercise it is some proof that it was not given. And since "a page of history is worth a volume of logic,"⁴¹ courts have looked into the background of statutes, the mischief to be checked and the good that was designed, looking sometimes far afield and taking notice also as judges of what is generally known by men.

Unhappily, there is no table of logarithms for statutory construction. No item of evidence has a fixed or even average weight. One or another may be decisive in one set of circumstances, while of little value elsewhere. A painstaking, detailed report by a Senate Committee bearing directly on the immediate question may settle the matter. A loose statement even by a chairman of a committee, made impromptu in the heat of debate, less informing in cold type than when heard on the floor, will hardly be accorded the weight of an encyclical.

Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute. While courts are no longer confined to the language, they are still confined by it. Violence must not be done to the words chosen by the legislature. Unless indeed no doubt can be left that the legislature has in

38. *Pine Hill Coal Co. v. United States*, 259 U. S. 191, 196 (1922).

39. *Davis v. Pringle*, 268 U. S. 315, 318 (1925).

40. *United States v. Aluminum Co. of Amer.*, 148 F.2d 416, 429 (C. C. A. 2d 1945).

41. *New York Trust Co. v. Eisner*, 256 U. S. 345, 349 (1921).

fact used a private code, so that what appears to be violence to language is merely respect to special usage. In the end, language and external aids, each accorded the authority deserved in the circumstances, must be weighed in the balance of judicial judgment. Only if its premises are emptied of their human variables, can the process of statutory construction have the precision of a syllogism. We cannot avoid what Mr. Justice Cardozo deemed inherent in the problem of construction, making "a choice between uncertainties. We must be content to choose the lesser."⁴² But to the careful and disinterested eye, the scales will hardly escape appearing to tip slightly on the side of a more probable meaning.

CANONS OF CONSTRUCTION

Nor can canons of construction save us from the anguish of judgment. Such canons give an air of abstract intellectual compulsion to what is in fact a delicate judgment, concluding a complicated process of balancing subtle and elusive elements. All our three Justices have at one time or another leaned on the crutch of a canon. But they have done so only rarely, and with a recognition that these rules of construction are not in any true sense rules of law. So far as valid, they are what Mr. Justice Holmes called them, axioms of experience.⁴³ In many instances, these canons originated as observations in specific cases from which they were abstracted, taken out of the context of actuality, and, as it were, codified in treatises. We owe the first known systematic discussion of statutory interpretation in England to the scholarship of Professor Samuel E. Thorne, Yale's Law Librarian. According to Professor Thorne, it was written probably prior to 1567. The latest American treatise on the subject was published in 1943. It is not unfair to say that in the four intervening centuries not much new wisdom has been garnered. But there has been an enormous quantitative difference in expounding the wisdom. "A Discourse upon the Exposition & Understanding of Statutes" is a charming essay of not more than thirty pages. Not even the freest use of words would describe as charming the latest edition of Sutherland's *Statutory Construction*, with its three volumes of more than 1500 pages.

Insofar as canons of construction are generalizations of experience, they all have worth. In the abstract, they rarely arouse controversy. Difficulties emerge when canons compete in soliciting judgment, because they conflict rather than converge. For the demands of judgment underlying the art of interpretation, there is no *vade-mecum*.

But even generalized restatements from time to time may not be wholly

42. *Burnet v. Guggenheim*, 288 U. S. 280, 288 (1933).

43. *Boston Sand & Gravel Co. v. United States*, 278 U. S. 41, 48 (1928).

wasteful. Out of them may come a sharper rephrasing of the conscious factors of interpretation; new instances may make them more vivid but also disclose more clearly their limitations. Thereby we may avoid rigidities which, while they afford more precise formulas, do so at the price of cramping the life of law. To strip the task of judicial reading of statutes of rules that partake of the mysteries of a craft serves to reveal the true elements of our problem. It defines more accurately the nature of the intellectual responsibility of a judge and thereby subjects him to more relevant criteria of criticism. Rigorous analysis also sharpens the respective duties of legislature and courts in relation to the making of laws and to their enforcement.

FAIR CONSTRUCTION AND FIT LEGISLATION

The quality of legislative organization and procedure is inevitably reflected in the quality of legislative draftsmanship. Representative Monroney told the House last July that "ninety-five percent of all the legislation that becomes law passes the Congress in the shape that it came from our committees. Therefore if our committee work is sloppy, if it is bad, if it is inadequate, our legislation in ninety-five percent of the cases will be bad and inadequate as well."⁴⁴ And Representative Lane added that ". . . in the second session of the 78th Congress 953 bills and resolutions were passed, of which only 86 were subject to any real discussion."⁴⁵ But what courts do with legislation may in turn deeply affect what Congress will do in the future. Emerson says somewhere that mankind is as lazy as it dares to be. Loose judicial reading makes for loose legislative writing. It encourages the practise illustrated in a recent cartoon in which a senator tells his colleagues "I admit this new bill is too complicated to understand. We'll just have to pass it to find out what it means." A modern Pascal might be tempted at times to say of legislation what Pascal said of students of theology when he charged them with "a looseness of thought and language that would pass nowhere else in making what are professedly very fine distinctions." And it is conceivable that he might go on and speak, as did Pascal, of the "insincerity with which terms are carefully chosen to cover opposite meanings."⁴⁶

But there are more fundamental objections to loose judicial reading. In a democracy the legislative impulse and its expression should come from those popularly chosen to legislate, and equipped to devise policy, as courts are not. The pressure on legislatures to discharge their responsibility with care, understanding and imagination should be stiffened, not relaxed. Above all,

44. 92 CONG. REC. 10040 (1946).

45. 92 CONG. REC. 10054 (1946).

46. Pater, *Essay on Pascal* in MISCELLANEOUS STUDIES 48, 51 (1895).

they must not be encouraged in irresponsible or undisciplined use of language. In the keeping of legislatures perhaps more than any other group is the well-being of their fellow-men. Their responsibility is discharged ultimately by words. They are under a special duty therefore to observe that "Exactness in the use of words is the basis of all serious thinking. You will get nowhere without it. Words are clumsy tools, and it is very easy to cut one's fingers with them, and they need the closest attention in handling; but they are the only tools we have, and imagination itself cannot work without them. You must master the use of them, or you will wander forever guessing at the mercy of mere impulse and unrecognized assumptions and arbitrary associations, carried away with every wind of doctrine."⁴⁷

Perfection of draftsmanship is as unattainable as demonstrable correctness of judicial reading of legislation. Fit legislation and fair adjudication are attainable. The ultimate reliance of society for the proper fulfilment of both these august functions is to entrust them only to those who are equal to their demands.

47. Allen, *Essay on Jeremy Bentham* in *THE SOCIAL AND POLITICAL IDEAS OF THE REVOLUTIONARY ERA* 181, 199 (Hearnshaw ed. 1931).