1993

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Recommended Citation
James L. Robertson, Myth and Reality--Or, is It "Perception and Taste"?--In the Reading of Donative Documents, 61 Fordham L. Rev. 1045 (1993).
Available at: http://ir.lawnet.fordham.edu/lr/vol61/iss5/3

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MYTH AND REALITY—OR, IS IT “PERCEPTION AND TASTE”?—IN THE READING OF DONATIVE DOCUMENTS

JAMES L. ROBERTSON*

In this Essay, Professor Robertson suggests revitalizing a once prominent but long dormant approach for interpreting donative documents. He advocates replacing the traditional search for donor’s subjective intent with a circumsanced external approach. According to Professor Robertson, this external approach is grounded in our legal history of donative transfers and is “better suited to the task at hand.” Under this approach, a court would ask what a hypothetical semi-sovereign donor (SSD) meant given the text of the donative document and its surrounding circumstances.

I. MY “CAN’T HELPS” ARE BORN: HEREIN OF THE EXTERNAL APPROACH AND THE MYTHS OF LEGAL CLASSIFICATION

O VER ten years ago, when I became an appellate judge, I had no well-honed approach to interpreting legal texts. Like so many of my generation, I had been instructed in the “process of reasoned elaboration,” and, from time to time, had resorted to the statutory interpretation dimension of that noble project and often with profit, or so I thought. Still, I was never quite sure what I was to do with a tough text other than think in a principled way, tempered with a touch of common sense. Nor had I given much thought to the interrelatedness of interpretive techniques from one type of text to the next. Contracts and statutes bore different labels, and, while I had begun to see contracts as laws, I had not yet appreciated the commonality that unites all forms of law.

In any event, in January of 1983 I began a term of almost ten years as an appellate judge and, for better or for worse, found legal interpretation my daily fare. Over those years, two general prejudices gradually emerged and firmly fixed themselves in my mind, so that I now “can’t help” believing them. The first is that intent is often a “will o’ the wisp”

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2. See 3 id. at ch. 7.
3. See 1 id. at ch. 2.
and, when found, a legal irrelevancy. Most lawyers and judges confronting legal texts think about meaning by thinking of the intent of the authors. They ground their arguments for meaning in that intent. Hundreds of reported cases, scholarly expositions, and briefs of counsel are saturated with exhortations of legislative intent, donor’s intent, the intent of contracting parties, and the like. Only rarely do these writers let on they know they are manipulating a metaphor.

From the beginning I have found such searches for intent highly problematic. In cases of texts of even modest complexity, lawyers and supposedly disinterested judges could often argue almost too easily for sharply conflicting, yet credible, notions of the author’s intent. My own quests for some solid ground in resolving such conflicts invariably found the access routes to the author’s thoughts incomplete and obstructed. With documents of any difficulty, I could seldom vanquish disquiet and doubt, no matter how hard I studied the case or thought of the matter. Often, I would listen to one of my colleagues refer to an opinion he had written several years earlier and declare his intention in writing it, whereupon reading the opinion, I would find it to say something quite different.\(^5\)

I came to see the search for intent pregnant with potential for many a slip ‘twixt the cup and the lip. I began to realize that judges, confidently proclaiming their understanding of an author’s intent, were, even in the easy cases, often projecting their personal prejudices into the author’s mind, and I have no doubt there is evidence upon which I myself might be convicted. Still, I had before me a legal text, and it was my job to make as much sense of it as I could. It was during these days that I started reading Holmes seriously.\(^6\) From these experiences and studies, I gradually came to see an external approach to legal interpretation as not only necessary and viable but positively desirable. Not only was I external to the text before me, but, like a child to its mother, the text was external to and independent from the mind that gave birth to it. I breathed a breath of fresh air.

Second, I came to see that the classifications we impose upon legal texts are quite artificial and not nearly so important as I once thought. As a judge, one day I would be reading a will, the next day a statute, the next a contract, the next a constitution, and on every day reported appel-

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\(^5\) Drawing from experience along another of my occasional career paths, what law professor has not from time to time crafted an examination question so as to test the students’ knowledge in a particular area, only to realize after grading a few answers that the question has taken on a life of its own, testing quite unintended points of law? Or of publishing a piece others take to mean something other than what you intended?

late opinions. Though many hold these divisions to be sources of significance, as regards interpretation, I have come to view this as unnecessary and mistaken and generative of much mischief. Perhaps out of self-defense, I began reading all legal texts in the same way and, in time, became aware of what I was doing. The way I went about my job of making as much sense of it as possible out of the text on my desk was about the same, whatever the type of text. There seemed no reason to do otherwise. I began to see the external approach to interpretation that I found so attractive held its promise without regard to genera—public law or privately made law—or species—constitution, statute, or regulation, on the one hand, and contract, trust agreement, corporate charter, or donative document, on the other. I came to think of, to hope for, and tentatively to articulate the commonality I sensed—a unified field theory of textual interpretation,\(^7\) if you will.

To be sure, the classifications do have some significance and, on other points, can even be outcome determinative, as when we seek the locus of the authority to make changes or when we resort to hierarchical orderings to resolve conflicts. These problems aside, I found the notion that each classification generates its own distinct approach to interpretation to be inarticulable, fast fading, and in no way necessary to any end we ought wish. John Marshall’s thundering exhortation, “We must never forget that it is a constitution we are expounding”\(^8\) is, forgive me, so much rhetoric.

Debates regarding textual interpretation have become fashionable of late.\(^9\) If there is a spectrum of legal texts, surely constitutions are at one extremity. They are invariably foundational, supreme, and relatively enduring. They have an impressive pedigree and a quite potent power. And, to sensible people, they are the most unsusceptible to an author’s intent-based interpretive stratagem. People say a lot about constitutional interpretation.\(^10\) The subject is seen as one of the sexiest in today’s legal


\(^8\) *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819); *see also* Whitten & Robertson, *supra* note 7, at 266-67 n.80 (explaining that, regarding interpretation, Marshall’s dictum misses the point).


\(^10\) Justice Scalia’s opinions have been particularly provocative. *See*, e.g., *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991) (arguing that courts may discern the intent of the framers of the Eighth Amendment by examining common law precedent, historical practices, commentators, analogous state constitutional provisions and congressional...
scene. Statutory interpretation is almost as hot. All of which leads me to the point of the polemic to follow.

The texts at the other end of the spectrum are often ignored in this debate, though intelligent interpretation is equally imperative. Too often, these texts are not even seen as within the same playing field. I speak of the private laws made by sovereign citizens each day, the written instruments drafted by lawyers at the behest of clients and given legal effect through compliance with the criteria for their legal validity; and I speak of such documents as form contracts, insurance policies, security agreements, deeds, notes, even wills—far removed from their beginnings in the law office. These writings are laws in every relevant sense. They govern the rights and responsibilities, the duties and powers, the hopes and incentives and fears of the people of America, and they do so far more extensively than the product of all of this nation's legislative halls combined.

Most neglected are wills and other donative documents. There is generally but a lone author, and this is no doubt one reason "author's intent" has become such an entrenched and intractable theory of interpretation. Yet, experience leads me to demur. Increasing activity and interest in the field have fueled my itch to utter, and, though I direct my thoughts almost exclusively to the interpretation of donative docu-

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13. The term "donative document," according to one tentative definition, means a document containing a provision making a donative transfer, appointment, or nomination. The term includes a will, trust, deed making a donative conveyance, insurance or annuity policy, account with the POD designation, security registered in beneficiary form (TOD), pension, profit-sharing, retirement, or similar benefit plan, or a document creating or exercising a power of appointment or a power of attorney.

Restatement (Third) of Property (Donative Transfers) § 1.1 (9), at 3 (Preliminary Draft No. 1, Oct. 30, 1991). This definition will be used throughout this Essay.

ments, I insist this is not a discrete field of legal interpretation. The circumstanced external approach I describe may be brought to bear on all legal texts.\textsuperscript{15}

I believe that theory matters in law, though not in the sense that we should search for any metaphysical truth underpinning all of our laws. Useful legal theories should tailor means to ends. The law of donative transfers is essentially a creative and empowering facility the state makes available to its citizens. The state does not require that any given autonomous soul should use the facility, and is essentially indifferent to whether anyone uses it at all. Understanding, however, that many will take advantage of the facility, the law assures that those who do so enjoy its benefits insofar as may be, consistent with reasonable formalities. For those who make donative plans and transfers, the law should serve to assure them that the product of their efforts will receive the best and most coherent and most sensible and effective interpretation that may be found to flow from a circumstanced external reading of the text and the purposes implied therein. Viable legal theory should as well be grounded in social and experiential reality. And so I see it imperative that we seek to sharpen our perceptions of what is happening in the minds and lives of people and in the courts and processes they administer, as well as the abilities they possess and the phenomena they act upon and seek to regulate. But legal theory must also answer to the dimension of utility, lest we proceed less well than we might.

In the law of donative transfers as we have known it, it strikes me there is incongruity between phenomena, practice, and theory, and advantage would attend a reformulation. With all of our focus upon donor's intent, and proceeding as though we had before us a discrete field of endeavor, I doubt whether our law acts by reference to the realities of the phenomena at hand. When we seek the meaning of a donative document, we are not searching just for an ordinary fact, some object that is or some event that has occurred. We are seeking the meaning of law, albeit privately made law. That search should proceed—conceptually and practically—as the search for the meaning of any other species of law, private and public, contract or constitution. It is this, above all, that I hope here to say and explain and justify and defend.

\textsuperscript{15} The species of legal texts I have heretofore discussed have been duty-imposing and right-conferring texts where the focus is on prohibitions against certain affected persons (or classes of persons). See, e.g., Whitten & Robertson, supra note 7, at 265-75 (right to counsel); James L. Robertson, \textit{Of Bork and Basics}, 60 Miss. L.J. 439 (1990) [hereinafter Robertson, \textit{Of Bork and Basics}] (right of privacy); James L. Robertson, \textit{Discovering Rule 11 of the Mississippi Rules of Civil Procedure}, 8 Miss. C. L. Rev. 111, 118-23 (1988) [hereinafter Robertson, \textit{Discovering Rule 11}] (rule of civil procedure forbidding filing of frivolous lawsuits). My emphasis here on donative documents—legal texts essentially directory in their nature and effect—imports no change of approach.
II. THESIS AND CONTEXT: A PRELIMINARY SUMMARY

In August of 1969, the Uniform Probate Code ("U.P.C." or "The Code") landed in a legal world largely fossilized, if not petrified. Its apparent merit, and the crying need for reform, overcame recalcitrance and not wholly unreasonable resistance, so that by 1980, fourteen states had passed it into law. The Code had gained a permanent and significant beachhead. Almost as important, law schools began to teach the Code—a planting in time sure to bear fruit. Although only South Carolina acted during the 1980s, the U.P.C. remains on the legislative agenda of other states.

Still, people have begun to think anew, so that we remain in times of ferment and change in the law of donative transfers. The doctrine of substantial compliance is taking root. More and more courts are finding ways to avoid literalistic readings and mechanistic enforcements that lead to absurd or incongruent results. In the case of wills, we have begun to see ambiguities, even outright mistakes, not as grounds for surrender and stern lectures on the virtues of legal formalism, but as obstacles that we may and should hurdle en route to an intelligent reading of donative documents. Will substitutes have grown in acceptance and have achieved equal dignity with wills themselves as a means of donative transfers. In 1989, the U.P.C. moved to this view, but more needs to be done. More change is in the air. The last decade of the twentieth century promises to usher in further reforms as well as to broaden the acceptance of those of the recent past.

One prominent and nearly unanimous end of these reforms is a more complete realization of donor’s actual intent. This is not an unworthy end. It is grounded in history. I refer to our centuries old struggle with the sovereign over the power of testation and his grudging concession to each of us of the right to make a will and to have that will respected when we are dead and gone. This is an important chapter in the fight for

18. For example, a broad coalition has formed in Mississippi to work for its enactment in 1993. See R. James Young & Thomas C. Lacey, Jr., Project on Mississippi Enactment of Uniform Probate Code, The Miss. Law., Oct-Nov. 1992, at 12.
19. See Restatement (Second) of Property § 33.1 cmt. g (1990).
21. Most prominent here is the work of Professors John H. Langbein and Lawrence W. Waggoner. See Langbein & Waggoner, supra note 14. Shores and Professor de Furia also espouse this approach. See de Furia, supra note 14; Shores, supra note 14.
human freedom, notwithstanding that today we take it for granted or see it as a privilege only of the wealthy. We have had this right on paper from the inception of each of the several states—its forbearers dating back to the Mother Country and the first Statute of Wills. But the state has not acquiesced as fully as many think and, under the guise of thwarting frauds, has kept the right significantly encumbered, even in the U.P.C. In most non-U.P.C. states one false step and a will fails, though we sense that, of all possible courses, this is the one the testator least intended. In this setting, we think our increased fixation on the search for donor’s intent inherently necessary that the hard earned right remain secure and, indeed, be more fully realized. It has brought us beyond the crude mechanics in which we so long have been mired. It is slowly stripping away the strings that still restrict our power of testation. Yet, the search for intent is destined to fall short in the end, for it is ill-conceived and naive.

Our reform efforts, however well intentioned and however far they have brought us from what once was, proceed on four flawed premises of fundamental proportions.

To begin with, many appear to believe that they actually may find a donor’s subjective intent. The U.P.C. is typical when it declares one of our purposes is “to discover and make effective the intent of a decedent,” and enjoins one and all that we “liberally . . . [construe and apply the document] to promote” this end. If our public expressions are to be taken seriously, we believe, when we interpret texts effecting donative transfers, we are finding and enforcing the specific wishes the

25. 32 Hen. VIII, ch. 1 (1540).
26. In this world where all is relative (save that which is too abstract or mysterious to matter), the search for donor’s intent is clearly an advance. We accept the facilitative role of the statute of wills and the state’s essential indifference to whether a person makes a will or not. Our obsession with donor’s intent aside, at least most people no longer worry about the legislative intent behind the statute of wills. But this has not always been the case. For example, in the famous case of the homicidal heir, Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889), the New York Court of Appeals concentrated not on the meaning of the will but on what the legislature would or should have thought about its statute being used by an heir who murdered the testator in order to accelerate his access to the fruits of his estate, and, of course, to permit the testator’s changing his will. The problem here was one of will construction, the legislature having provided a statute that empowered persons to devise their property as they saw fit, even to heirs of homicidal tendencies. The will was the primary rule whose meaning controlled the disposition of the testator’s estate, the statute of wills was but an enabling secondary rule. See H.L.A. Hart, The Concept of Law, ch. 5 (1961). As a reading of the will, I have no trouble accepting the fact that the homicidal heir should not take. A circumstanceless external reading of the will easily accommodates the notion that no man shall profit by his own wrong. I am amazed that, to this day, highly intelligent people think the case presents a problem of legislative intent and statutory interpretation. See Posner, supra note 9, at 264; Dworkin, supra note 9, at 15-20; Ronald Dworkin, Taking Rights Seriously 23-31 (1977).
donor had in mind at the time he made the donative document, the text transformed into the donor's thoughts and their product. We see ourselves first finding the donor's intent and then construing the document in accordance with the intent so found, a process that, at the very least, puts the cart before the horse. Worse, we see the will as merely a door between the reader and the testator's intent. Once the door opens, we enter into the world of intent, and the textual door, having served its purpose, is laid aside. We then proceed blithely, oblivious to our inability to know but a part of the donor's mind, and that imperfectly. We have never had, and never will have, direct access to the property owner's "subjective will." Vain is the search for actual intent in a world where probable intent at one fleeting moment in time is the most we may ever know. There is no pot of gold at the end of the rainbow. We need to accept the reality that the donor's subjective individuated intent may not be known with sufficient certainty and completeness and frequency that we may successfully ground in it our jurisprudence of donative documents.

A second and related error committed by the more perceptive reformers accepts, in part, that there are times when a donor's actual subjective intent may not be known or even exist. These realists pursue actual subjective intent as far as may be and then fall back on an assortment of external rules of interpretation to complete the picture. Where these perceived aids falter, our seekers resort to still further external rules of construction or, if you will, constructional preferences. The error here is both conceptual and empirical. We fail to see that so-called aids to interpretation are also external to the donor and are no more a function of his actual intent than are constructional preferences. This point is worth a present pause, though I will say more below. In the work here, we find a number of cases as illustrations of how one should seek intent amidst ambiguity or mistake. But, as we plow through case after case, we soon see, without exception, we cannot find so-called intent without some significant resort to that which is external to actual intent. In the easier cases, we are referred to external aids to interpretation, if only ones that tell us to read the document in its entirety and to give its words and phrases their plain and ordinary meaning unless otherwise specified. In the other cases, weightier policies are involved, such as that favoring

29. Fellows, supra note 14, at 611-12.
31. See, e.g., Langbein & Waggoner, supra note 14; de Furia, supra note 14; Shores, supra note 14.
32. See Paine v. Sanders, 135 So. 2d 188, 191 (Miss. 1961); In re Hencke's Estate, 19 N.W.2d 718, 723 (Minn. 1945); In re Griffin's Will, 60 N.E. 284, 285 (N.Y. 1901).
33. See, e.g., Stuart v. Continental Ill. Nat'l Bank, 369 N.E.2d 1262, 1273 (Ill. 1977) (holding that if the testator's intention can be gathered from the language of the will, no resort will be made to technical rules of presumed intention), cert. denied, 444 U.S. 844 (1979).
The completeness of disposition.\textsuperscript{34} Of course, there is also resort to the external world of extrinsic evidence. To my mind, the document is also external to donor's intent, though originally, and in large part, the product of it.

The point in each of the cases is that what we find in the end is something other than donor's actual intent, which leads us to an important empirical error. We insist there is reason to believe external aids to interpretation are a viable means to the end that donor's intent may be found, but this is not so. Our minds are seduced so that we do not see donor's actual intent and donor's individuated intent as two very different things. We fallaciously fix our focus on the internal—the world of the human mind—when we must work and live in the external—the world of people and circumstances and trees and grass. This error causes us to ask what the donor may have meant, when we should be asking what the document most likely means. When we reflect upon all the cases and illustrations and hypothetical situations the reformers put forth, we see that an internal, donor's-actual-intent approach, without more, cannot do the hard interpretive work we need. It is incapable of occupying enough of the field. In contrast, a circumstanced external stratagem offers a broader principle that covers more turf and does more of what must be done, as I hope to show.

These observations imply the third error, which is theoretical. Presently, we are commingling a subjective, internal approach to meaning with a host of quasi-objective, external standards. To be sure, we do not confront an either/or. There is much overlap in the tools used and the products produced, but internal and external standards, when used together, yield, at best, a forced and awkward fit. Any interpretation emanating therefrom is inevitably a bit bastardized. Reflection suggests we will have a more successful strategy to intelligent legal interpretation if we ride one horse or the other, but not both. I would mount the external steed.

The fourth and final error lies in our failure to see how deeply interpretive our enterprise is. Because we are fixated on finding donor's intent, we think and talk in terms of findings of fact of the Rule 52(a)\textsuperscript{35} variety. We speak of burdens of persuasion by a preponderance of the evidence, or, at times, by clear and convincing evidence.\textsuperscript{36} When we find that the fact is contrary to the "plain meaning" of the text, we think and speak of reforming the donative document—literally changing its words—before carrying out its directives. We proceed as though there is a difference


\textsuperscript{35} See Fed. R. Civ. P. 52(a), which has its functional analogue if not identical counterpart, in the law of most of the states. See, e.g., Miss. R. Civ. P. 52(a) (substantially following the Federal Rule).

\textsuperscript{36} See Langbein & Waggoner, supra note 14, at 578-79.
between interpretation and construction and reformation and that these labels imply, conceptually and functionally, distinct processes. We engage in the pretense that construing a document to resolve an ambiguity ought be thought different than outright reformation.

But no law makes us see such documents only as wooden texts to be woodenly read. There is no reason we should approach ambiguities and mistakes as though we were carpenters. Our tools are not limited to those of the workbench—the hammer, the saw, the nail, and the like. Donative transfers are purposive endeavors, effected in writing and arising from a milieu of circumstances, all of which cry out for artistic interpretation that we grant them an integrated reading that their best meaning may be known. This never includes rewriting the literal text, only recognizing that often the words and phrases are but a part of the complex reality to be read. We read this reality through a single process: interpretation.

On the way to reform, I would take the road less travelled. A simple thesis channels my thoughts: I would have us jettison all word and action to the end of knowing a donor’s actual intent. We should put in their place circumstanced external standards for reading and interpreting donative documents. My suggestion has five dimensions. First, and most fundamentally, a circumstanced external approach to interpretation of donative documents is theoretically and practicably more satisfying than a subjective search for donative intent. Perhaps it is a matter of taste, but I feel more comfortable saying that a document made by a donor under certain circumstances means this or that, rather than saying I have found the donor’s actual intent and will force the text (a much more reliable source of meaning) to fit that intent. Second and more pragmatically, the difficulty of finding donor’s actual subjective intent with any acceptable level of confidence or comprehensiveness or frequency leaves us no choice but to pursue external standards. Third, a circumstanced external approach to interpretation of donative documents affords a better explanation of what courts, for the most part, have been doing in fact, albeit they invariably protest otherwise. Fourth and what is more, a donor who wants his actual intent honored may have it so, provided only he well expresses that intent in the donative document. The circumstanced external approach offers donor’s-actual-intent advocates one of life’s rare occasions when they may eat their cake and keep it, too. Finally, in reading donative documents, we should remember that their provisions are laws, and we should treat them as such. We must bring to bear all of the skills and experience that we employ when reading any other species of law.

One core obstacle we externalists face emanates from our fact-specific, situation sense approach to the art of adjudication. In the law of donative transfers, as in no other, the siren sings of donor’s freedom of disposition. We sense strongly that we have no business reading our preferences and prejudices into a donative document (or any other legal
text), and we see the search for donor's actual intent as a way of assuring his freedom of disposition. It is a way of keeping judges honest. These have combined to tempt us toward a jurisprudence of intent. But, not only have we never known a time when we found donor's actual intent, I suggest we can never know one, nor should we want to. To continue this search, as today's reformers seem so determined to do, simply proceeds upon perceived and inadequate realities that cannot be found in the empirical world or be demonstrated capable of doing the job—the job of adjudication.

It is certainly true the donative documents that give rise to litigation are but a tiny fraction of the whole and, no doubt, are a skewed sample. Every lawyer familiar with the field knows the overwhelming majority of donative documents are adequately drafted so that no questions arise or, in any event, so that they may be enforced and implemented efficiently, without resort to litigation. What is important is that cases calling for construction of donative documents—today as always—make up a significant percentage of the dockets of state appellate judges. So long as this is so, it does not matter whether the litigation-generating documents form ten percent or one-tenth of one percent of the universe.

In occasional fits of pique, I have thought we should profit if the word "intent" were stricken from the vocabulary of donative transfers law in its entirety. "Intent" is destined eternally to mislead and to be misunderstood. Professor Mary Louise Fellows, of whose work I will say more below, speaks of "imputing intent"—an oxymoron amidst comments otherwise insightful. I accept that this part of my prejudice may not, for the moment, be realized. For the present age, the word "intent" is not susceptible of being banished. If we must have it, I would redefine it, consistent with practical experience and with the proposition that practice and theory require external standards. We do and should seek circumstanced external meaning, not by invading the mind of the person who made the donative transfer, but by referring to the hypothetical, yet reasoned, intent of an external character, an imagined semi-sovereign donor ("SSD"), whose propensities and prejudices I will flesh out below.

No doubt these ideas would work a revolution in theory. They would change the way we think and talk of donative transfers. They would, on the other hand, be far less revolutionary in practice, for they are more about how we play the game than about who wins or loses. Sensitive neo-formalists would have no legitimate grounds for complaint, as the modernized mechanics of making donative transfers, properly understood, would retain—and in some instances be restored to—their proper generative and restrictive role. Though they are not and cannot be the sole subjects of our interpretive endeavors, the texts of donative documents would return to center stage in our search for meaning and be seen no more as mere transparencies through which we grope for the ever

37. See Fellows, supra note 14, at 612.
elusive will o' the wisp. On the other hand, the reformers of the past several decades would have nothing to fear from a circumstance external interpretive mode, as the substance of their "progressions" would remain realizable.

III. FROM AMONG THE MYTHS: WHAT THE FORMAL CRITERIA FOR LEGAL VALIDITY OF DONATIVE DOCUMENTS REQUIRE—AND WHAT THEY DO NOT REQUIRE

Our law by and large requires that all donative transfers be effected and evidenced by instruments in writing. From this requirement we confront sequential but related realities. Every legal text requires interpretation; that is, no legal text is self-interpreting. As Professor Wigmore put it, "words always need interpretation." There is no reason to believe that donative documents have been exempted from this truth. Beyond this, every legal text has a best interpretation, albeit not a perfect or ideal interpretation, nor even one we may show by logical proof to rout its competitors. To be sure, many texts will admit of only one sensible reading, but this in no way suggests meaning is not found through interpretation. Theoretically and practically, such a document has no less of a best interpretation than the more difficult document; it is just easier to find. I see today's reform chapters as simply the present stage in the historical evolution of our approach to donative documents, an evolution where, at each stage, we have sought to improve our methodologies for finding that best interpretation.

We need at once meet a meddlesome myth. Formalities have long attended wills and other donative documents. In the case of wills, the formalities are of a statutory species, thus, we have felt a special injunction that wills be strictly construed. We speak of "plain meanings," "four corners," and excluding extrinsic evidence. Unattested language is illegitimate language and is to be shunned. We do not feel we have the prerogative to enforce a disposition, or a clause or phrase en route, that has not satisfied the formalities of the statute of wills and its criteria for legal validity. Since one of these criteria is that a will be in writing, we may give no effect to words not there, or so we are told. I would be the last to deny the reality and centrality of criteria for legal validity, or their core generative power in any lawmaking process. No donative docu-
ment acquires legal power unless it satisfies the criteria applicable to it. It cannot be denied these criteria provide ritual formalities, and we rail at these from time to time.\footnote{See John H. Langbein, \textit{Substantial Compliance with the Wills Act}, 88 Harv. L. Rev. 489, 490-503 (1975).} What is important for present purposes is that none of these formalities—from the statute of wills on—prescribes criteria for interpretation. These empowering, enabling formalities, these secondary rules, as Professor Hart so blandly yet famously called them,\footnote{See Hart, supra note 26, at ch. 5. set out what must be done to create an enforceable donative document, but tell us little of the interpretive techniques we should bring to bear in reading these documents and deciding just what to enforce. For example, I know of no statute of wills that by its terms precludes resort to extrinsic evidence as an aid to reading a difficult document. Nor do I know of any statute of wills that mandates a search for donor’s actual subjective intent, much less that intent be the sole object of our search. The original 1969 U.P.C. text came close. After declaring its policy “to discover and make effective the intent of a decedent,”\footnote{U.P.C. § 1-102(b)(2) (1969).} the Code then provided a part on Rules of Construction that said something quite different. Most prominently, section 2-603 provided, “[t]he intention of a testator as expressed in his will [as distinguished from “as formulated in his mind”] controls the legal effect of his dispositions.”\footnote{U.P.C. § 2-603 (1969) (emphasis added).} But the whole question is how we determine what has been “expressed in his will,” and declaring this “the intention of the testator” has never been very helpful. Furthermore, in 1990 the U.P.C.’s sponsors withdrew section 2-603, leaving the Code without a formal expression of an interpretive stratagem.\footnote{The Comment explaining this action states in pertinent part as follows: \begin{quote} As originally promulgated, this section began with the sentence: “The intention of a testator as expressed in his will controls the legal effect of his dispositions.” This sentence is removed primarily because it is inappropriate and unnecessary in a part of the Code containing rules of construction. The deletion of this sentence does not signify a retreat from the widely accepted proposition that a testator’s intention controls the legal effect of his or her dispositions. A further reason for deleting this sentence is that a possible, though unintended, reading of this sentence might be that it prevents the judicial adoption of a general reformation doctrine for wills, as approved by the American Law Institute in Restatement (Second) of Property § 34.7 & comment d, illustration 11, and as advocated in Langbein & Waggoner, “Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?” 130 U. Pa. L. Rev. 521 (1982). The striking of this sentence removes that possible impediment to the judicial adoption of a general reformation doctrine for wills as approved by the American Law Institute and as advocated in the Langbein-Waggoner article. U.P.C. § 2-601 cmt., 8 U.L.A. 124 (Supp. 1992).}
stantial compliance is nothing but a relaxed formality that still must be met, though it is easier to meet than what went before. The conductor may wait until ten past eight to mount the podium, giving a few laggardly souls a chance to reach their seats. Ushers may be given discretion to seat latecomers. But at some point the performance must begin, and to those still not seated and who must wait in the wings, the relaxed rule is as harsh as any other formality.\textsuperscript{49} For the moment, the legislature has spoken regarding who may make a will and how (though it has not done so in the case of some will substitutes), and I feel no particular unhappiness about this fact.

My concern is that we recognize that it is the document as a whole, and not its constituent parts, that is subject to the statute and to its formalities. Nothing in any statute of wills precludes our giving the validated document a circumstanced external reading and, if this means enforcing terms not literally there, so be it. We have seen this in a host of contexts. How else could a court imply a savings clause to avoid the Rule Against Perpetuities,\textsuperscript{50} or reread a literal text to escape the clutches of rapacious revenuers?\textsuperscript{51} In answer to the charge that we have not “explained why the Wills Act permits” such a reading,\textsuperscript{52} I answer simply that it is a needed tool toward sensible interpretation and nothing in the Wills Act precludes it. More fundamentally, the document we interpret is more than words and phrases and pieces of paper. It includes extrinsic circumstances and actions by people, and our means include a host of external processes and rules and standards. Why does the statute of wills allow us to give words and phrases their common and ordinary meaning, unless provided otherwise?\textsuperscript{53} How is it that the statute of wills permits us to favor completeness of disposition\textsuperscript{54} or, the saving of charitable bequests?\textsuperscript{55} Whatever? And so I insist, once the document has reached the threshold of legal validity, nothing but our legal judgment and common sense should stand in the way of an intelligent resort to viable interpretive techniques, the most viable in my view being the circumstanced external approach.

To be sure, donor’s actual intent is one eligible interpretive approach.

\textsuperscript{49} Of course, to the extent rule-style formalities are softened to standards-style, the gain in the form of greater justice in an occasional case will almost certainly be outweighed by costs in the form of increased incentives of litigation and the varying and inconsistent substantive results that invariably emanate from loose general standards. But cf. John H. Langbein, \textit{Excusing Harmless Errors in the Execution Of Wills: A Report On Australia’s Tranquil Revolution in Probate Law}, 87 Colum. L. Rev. 1, 37-41 (1987) (describing experience in South Australia as suggesting such fears may be exaggerated).

\textsuperscript{50} \textit{See In re} Estate of Anderson, 541 So. 2d 423, 430 (Miss. 1989).


\textsuperscript{52} \textit{See Langbein & Waggoner, supra} note 14, at 549.


\textsuperscript{55} \textit{See Tinnin v. First United Bank of Mississippi, 502 So. 2d 659, 670 (Miss. 1987).}
The point is that nothing in any statute of wills or other law gives it any special approbation. The better view is that donor's actual intent is but one interpretive stratagem to consider. In the end it should be required to submit itself to competition in the marketplace of ideas. When this is done, I believe the circumstanced external approach to interpretation will carry the day.

IV. EXCURSIONS INTO THE CIRCUMSTANCED EXTERNAL APPROACH TO LEGAL INTERPRETATION: HOLMES, FELLOWS, AND MY OWN RANDOM MUSINGS

My idea is not original, nor even of recent vintage. A hundred years ago, Holmes spoke often of external standards in the reading of legal texts. Contracts rested "not on the parties' having meant the same thing but on their having said the same thing."56 Further, "nothing is more certain than that parties may be bound by a contract to things which neither of them intended, and when one does not know of the other's assent."57 In the case of statutes, Holmes asked not "what the legislature meant; [but] what the statute means."58 Of legal documents generally, he insisted:

[W]e 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.59

Holmes then put it all in context:

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.60

The case for an external approach to interpretation has been made in the context of a great variety of legal texts, from constitutions to contracts.61 Of course, there remain many who resist, who insist that we

56. Holmes, Path of Law, supra note 6, at 464.
57. Id. at 463.
58. O. W. Holmes, Jr., Collected Legal Papers 207 (1920); see Holmes, Legal Interpretation, supra note 6, at 419. I have often relied on this truism. See, e.g., Estate of Stamper, 607 So. 2d 1141, 1145-47 (Miss. 1992) (interpretation of prior judgment of lower court); White v. Hattiesburg Cable Co., 590 So. 2d 867, 870 (Miss. 1991) (Robertson, J., concurring) (statutory interpretation); Chevron U.S.A., Inc. v. State of Mississippi, 578 So. 2d 644, 651 (Miss. 1991) (Robertson, J., dissenting) (constitutional interpretation); Bowe v. Bowe, 557 So. 2d 793, 795 (Miss. 1990) (interpretation of prior judgment of lower court).
59. Holmes, Legal Interpretation, supra note 6, at 417-18.
60. Id. at 418.
seek intent, and so we continue to hear talk of the intent of the Framers, the intent of the legislature, the intent of the contracting parties, and the like. But, even in the latter instance, it is difficult to deny that a contracting party assents to the external symbols that form the contract and not to some unexpressed or imperfectly expressed thoughts of the other party, and he conveys that assent with symbols of his own. The interpreting court must have access to suppletive rules where the contract fails of full expression. That these rules may yield a reading beyond the actual intent of the parties is seen necessary that we avoid letting the contract fail altogether, surely an infinitely greater offense to actual intent. In the case of statutes, the point is even more potent, given the diverse persons voting for the new law and the variety of thoughts each may have entertained as he activated the “aye” lever. So also in the case of constitutions.

Wills and other donative documents superficially differ. There is usually but a lone donor. The problems attendant upon finding and combining the actual intents of two or more diverse parties of often conflicting interests do not appear in the case of donative documents. Still, Holmes did not exempt wills from his preference for external standards of interpretation:

So in the case of a will. It is true that the testator is a despot, within limits, over his property, but [the court will apply an external standard and read the words of his will] in the sense in which they would be used by the normal speaker of English under his circumstances.

If we polled lawyers today regarding their thoughts of Holmes’ theory of interpretation, I suspect they would fall into two groups: (1) those who have forgotten it (if they ever knew it) and (2) those who would disagree with it (particularly with respect to wills). Likely, many would fall into both groups. I accept Holmes’ views may be a bit unsettling to those who have not thought about the matter, but he was right. Not that his text does not need a bit of refinement; it does. He assumes too

65. See Dworkin, supra note 9, at 318-27.
67. See Atkinson, supra note 39, at 810.
68. Holmes, Legal Interpretation, supra note 6, at 420.
69. Judge Richard A. Posner has charged Holmes with having given us the canonical formulation of the out-of-fashion “plain meaning” approach to reading legal texts. See Posner, supra note 9, at 262-69. This assessment is unfair. Holmes’ inclusion in his approach of “under his circumstances” in the quote above, and “using them in the circumstances in which they were used” in the more extended passage quoted on page 1059 shows that his thinking was well beyond the plain meaning fallacy. See id. at 262.
much. Still he saw with insight what so many, even today, are unable or simply refuse to see.70

Consider a simple illustration. I own a Chickering piano that has been in my family for three generations. I wish Maria, my daughter, to have it at my death, and I make my will to that effect. Upon my demise, the will is offered for probate. In the end, the court decrees that the piano belongs to Maria, and the question is, what matters moved the judicial hand to so provide? First, are the provable circumstances. I was, at the time of making the will, a competent adult "of sound and disposing mind, memory and understanding."71 At my death, I left one surviving daughter, Maria. I also owned a Chickering piano. The value of my estate was such that it was not necessary to sell the piano that my debts or taxes be paid, or that my wife receive her lawful share. Nor did my bequest offend any of the law's other limits on my freedom to dispose of my property as I saw fit. The point is that, in these circumstances, I left a duly executed will devising my Chickering piano to my daughter. The court gave Maria the piano not because I intended that she have it but because I said she should have it.

Change the example a bit. Assume that I have two daughters, Maria and Christina, and I always intended that Christina have the Chickering. But when I go to my lawyer's office to make my will, I—inadvertently, mistakenly, whatever—told him that the piano was to pass to Maria. My estate is a complex one and there are many matters regarding my business and investments that my lawyers and I discuss at length—not to mention my handicapped son for whom I wish to provide for life. My lawyer draws up a forty page will leaving the Chickering to Maria. Without noticing this and without my actual intent having changed or wavered in the slightest, I duly execute the will. For the reasons noted above, Maria gets the piano. I cannot imagine that anyone would seriously argue otherwise, for I never provided an observable external manifestation of my actual intent, much less did I mention it in my will. The important point here is that the result is the same in each case because in each I said the same thing, although my actual intentions were completely the opposite.

Law is a social fact that affects us all, and, while it may or may not be an inexorable presence, it is certainly a manipulable instrument and, as such, we should make it a means to the end of a society in which we should all want to live. It is demonstrable that we enhance the chance the law will play its instrumental role well when, and to the extent we

70. A half-century ago, and almost a like time removed from Holmes, Professor Zechariah Chafee, Jr., seem to sense these insights in The Disorderly Conduct of Words, 41 Colum. L. Rev. 381, 398-99 (1941).

71. I refer, of course, to the traditional formulation of the law's requirements for competence to make a will. See Conway v. Conway, 153 N.E.2d 11, 13 (Ill. 1958); Shimp v. Huff, 556 A.2d 252, 254 (Md. 1989); Estate of Briscoe v. Briscoe, 255 So. 2d 313, 315 (Miss. 1971); William D. Rollison, Clauses in Wills and Forms of Wills 13, 17 (1946).
relate it to, and premise it upon, the empirical and social realities of the phenomena we seek to regulate. A hundred years ago Holmes saw the search for subjective intent a problematic enterprise and hinted at the reasons therefor. Few have followed, but several years ago Professor Fellows spoke powerfully to the point when she reminded us that

[t]he state... has no direct access to the property owner's subjective will. It only can determine the manifestation of the property owner's will through words and actions.\(^72\)

And what flows from this undoubtedly correct realization? Fellows tells us:

The state's dependence on the property owner's manifestation of intent moves its inquiry from identifying subjective intent to imputing intent.

Donative transfer law, therefore, does not accomplish the property owner's will, but accomplishes only the property owner's will as the state identifies it.\(^73\)

Fellows carefully and painstakingly builds a case against the search for donor's actual intent. She takes her insight in a number of directions, some of which I find problematic.\(^74\) Fellows also stops short of realizing the full implications of how she begins. No matter. She has proclaimed a powerful but neglected truth. She deserves reading and rereading. I hope but to build on the blocks that she has built on Holmes' foundation and to offer insights I believe her insights suggest.

Professor Fellows suggests that we refer to what we do as "imputing intent." This strikes me odd. If we have to impute it, it is not intent. It is something other than the thoughts and wishes in the mind of a particular person that may be identified. "Imputing intent" imports a detour. Because we have no direct route of access to the donor's mind, we repair to an indirect path. But, imputing intent is nothing short of interpreting donative documents by external standards. Fellows seems about to see this when she acknowledges there are times when we do not have enough to work with to "impute individualized intent."\(^75\) On those occasions,

\(^72\). Fellows, supra note 14, at 611-12 (footnote omitted).

\(^73\). Id. at 612 (footnotes omitted); see also Restatement of Property § 241 (2) (1940) (aptly describing the product of the court's search for the meaning of the language of a will or deed not as the conveyor's actual or individuated intent, but as the "judicially ascertained intent").

\(^74\). Fellows argues for a "family preference" constructional goal. I disagree. Fellows admits this "places at risk nontraditional distribution schemes." Fellows, supra note 14, at 613. I would say it impinges unnecessarily and unfortunately upon a property owner's right to be eccentric. Still she insists on it, though conceding her approach "balances messily... contradictory individual values," arguing simply that the balance is nonetheless effective. Id. In my view family preference is a legislative policy and I am aware of no state where the legislature has not spoken to the matter, ultimately in statutes of descent and distribution that govern intestate succession. Further, in view of this plethora of statutes, I am not sure just what role Fellows would have family preference perform. I see no need for a judicially created family preference supplementing this legislation, and I fear that much mischief might result from this approach.

\(^75\). Id. at 613.
we must "impute generalized intent,"76 which she defines as "the probable intent of most property owners under similar circumstances."77 I am not at all clear how we are to know whether we have enough before us to impute individualized intent or how or when we should slide into the realm of generalized intent.

When we see that, in practice, our search for donor's intent is an interpretative process engulfed and subsumed by external standards, we see that we have no need for such a ranked distinction. Indeed, it is but a source of trouble. It imports the necessity for a judgment, and wherever this is so there is the potential for immediate error and consequential damage. In more practical terms, the distinction requires a decision that judges will, from time to time, get wrong, with the consequences ranging from a miscarriage of justice to reversal and remand for a new trial with all of its attendant costs. Worrying about whether a particular externality shows individuated or generalized (some may say "attributed") intent deflects our attention from the task at hand of deciding what this donative document means. Yet, we cling to these intent-based labels because we have been conditioned to believe that intent is so central to our endeavor that our failure to use such terms may mean others will reject our work out of hand.

I would have us declare forthrightly that we strive to find what the document means, that we do so by circumstanced external standards, and that we seek the donor's "intention . . . [only] as expressed in his [document]."78 I would abandon as well the pretense that there are two different kinds of intent—individuated and generalized intent. Both are inhabited and ruled by external aids to meaning. Both yield a single process of interpretation in which we have no need to worry over which controls in case of conflict. There is little to gain from games that deflect our thoughts from what we really are about.

When we think about it, none of this is anything very new. Notwithstanding our confident proclamations to the contrary, all of us—hide-bound formalist to enlightened realist—have, in practice, been using external standards through the years. We have, in fact, been imputing intent, as Fellows would put it, instead of finding it. A holding that a donor intended this or that is simply a holding that a reasonable donor, providing a particular text under these particular circumstances, would most likely have meant this or that. And, if I am correct that this is what we have been doing all along, why should we not say so? Candor seems to require such a confession, albeit shattering a cherished myth. The theoretical underpinning of the interpretive phase of our law of donative transfers should be grounded in circumstanced external standards.

There is a bonus in the end. The circumstanced external approach

76. Id.
77. Id.
centers on the donor's text, and when it does so it affords him a unique opportunity. Without sacrificing any of its benefits, this external approach tells each would-be donor that, to the extent he competently expresses his lawful intent in writing, he may expect the courts to honor that intent. If his wishes are complex and he secures competent estate planning advice and counsel, his skillfully drafted donative document will almost certainly enjoy judicial approval and realize in fact his actual intent. For all practical purposes, these well written wills mean the same under any approach to interpretation. Because they are well written, they seldom lead to litigation. But where the will is not so well written, where the donative document admits of ambiguity and mistake or its meaning is otherwise problematic, perhaps because it offends the enforceable positive law—aye, there's the rub! It is in these cases that our approach matters most.

V. PAGES OF LOGIC AND EXPERIENCE AND TRUTHS

The legal landscape pre-dating the Uniform Probate Code and other reform efforts of late is certainly important. The history of the American practice of donative transfers, which provides the circumstances in which the work today must be seen, if it is to be best understood, in much the same sense that a grasp of the circumstances giving rise to a donative document is necessary if its text is to be understood. That history has been described with thoroughness and competence elsewhere.79 I need not repeat the story. In a broad sense, a resort to history is vital for the light it may shed on the present. More narrowly, I think it a part of my story that we see, notwithstanding much rhetoric and lore, at no time in our history have we embraced full freedom of disposition; nor en route to interpretation of donative documents have we ever excluded all save the search for donor's actual intent, though we seem to try harder to do so today than before. A page of history may teach a lesson we would do well to heed. I take (a part of) my text from one of the most prominent of the traditional treatises, Page on Wills.80

Freedom of disposition has long been thought the core policy of any enlightened law of donative transfers. We say this, not in the sense that we may find in the positive law any canonical pronunciamento expressing a raison d'être for the law of gratuitous transfers, though many act and speak as if this were so. Rather, on value laden grounds, we have argued this should be the essence of our efforts. The right to own private property is seen as one legal condition of human freedom, the legal power to convey or devise is considered a prerequisite to enjoyment of the right.81

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79. See Langbein & Waggoner, supra note 14, at 524-54.
81. See Louis S. Headley, Inheritance—A Basic Personal Freedom, 88 Tr. & Est. 24 (1949); see also my opinions in Davis v. Deposit Guar. Nat'l Bank (In re Estate of Anderson), 541 So. 2d 423, 427-28 (Miss. 1989), and Tinnin v. First United Bank, 502 So. 2d 659, 662-63 (Miss. 1987).
We see ourselves taking freedom of disposition seriously, when in reading a donative document, we see ourselves seeking the donor's actual intent.

Few premises are recited so frequently and so reflexively as, "a will or other document of donative transfer should be interpreted so as to honor and implement the donor's actual intent." For example, we hardly raise our eyebrows at Page's bold declaration that the "[t]he sole purpose of the court in construing a will is to ascertain the actual intention of the testator,"\(^82\) and we intuit, as we scan the seven fine print pages of supporting citations from every jurisdiction in the land, that these are but a random, representative sampling of the cases that, in one way or the other, have made the point. So many are Page's citations that it is eight pages—but only one sentence—later that the treatise writer repeats, "the sole question for the consideration of a court of construction is what testator meant by the provisions of the will which he has seen fit to make."\(^83\) Similar expressions abound in other generic discussions\(^84\) and no doubt warm the hearts of today's reformers.

I do not doubt a careful study of our legal practice of donative transfers yields freedom of disposition as one major and partial explanatory principle. Fairly seen, our history shows more—a practice that is richer and more complex and about much more than pure freedom of disposition. We have been so well indoctrinated to search solely for donor's actual intent that we seldom see the limits, contradictions, and incoherences that have always been a part of our approach to meaning. For example, we have always required that the donor comply with the law's formalities before effecting the transfer. These include status formalities, such as age and competence, and performance formalities, such as a writing, signatures, and witnesses. Of late, some have relaxed these and have made them more accessible and less onerous, but in all jurisdictions there remain formalities that simply must be met.\(^85\) It matters not what the donor's intent may have been if he fails at any of these thresholds. The law treats unattested intention as though it were no intention at all. The enforcement of these formalities is a major departure from, or exception to, the view that our sole end is the donor's actual intent.\(^86\) Through them we begin to see that a property owner is not completely free to dispose of his property as he pleases. Formalities may facilitate freedom

\(^{82}\) See 4 Page on Wills, supra note 80, § 30.6, at 26 (emphasis added).

\(^{83}\) Id. at 34 (emphasis added).

\(^{84}\) See Atkinson, supra note 39; 80 Am. Jur. 2d Wills § 1140 (1975); 95 C.J.S. Wills § 590 (1957); Robert A. Weems, Wills and Administration of Estates In Mississippi 219-21 (1988).

\(^{85}\) See Restatement (Second) of Property (Donative Transfers) § 33.1 (1992) (formalities for Wills); id. chs. 31, 32 (formalities for inter vivos transfers including will substitutes).

\(^{86}\) See Duncan Kennedy, Form And Substance In Private Law Adjudication, 89 Harv. L. Rev. 1685, 1691-92 (1976) (making and explaining the point in a contracts context).
of disposition for those who are careful, but they do not ensure it for one and all.

On the other side of execution, Page qualifies his "sole purpose" declaration by adding in the same sentence, "as the same appears from a full and complete consideration of the entire will when read in the light of the surrounding circumstances,"\(^8\) seemingly unaware that he has just constricted and channelled his search for meaning by very important external, objective guiderails. Nor does Page (or his readers) seem to see that practically every paragraph that follows in his well known treatise reflects, in some shape, form, or fashion, judicial efforts that presume or attribute meaning in ways that may only be seen as further retreats from his general premise, if not outright contradictions of it. For example, Page declares, "the question always before the mind of the court is . . . what is the reasonable meaning of the words which he has actually used."\(^8\) Whatever its inadequacies, this surely imports an external standard quite at odds with the "sole purpose" declaration made a few pages earlier.

There is a cultural dimension as well. A will, by definition, is made in contemplation of death. It is a person's preparatory act second only to getting right with God. A will is made with great solemnity, which, when followed by the testator's death, imports a quality of the sacred. We are loathe to tamper with the sacred. Because of this, as well as our familiar but not always well founded fear of indicia of unattested intention, other traditional rules restrict access to extrinsic evidence and require enforcement of obvious mistakes. We think these rules necessary that frauds be avoided. So seen, the traditional view is a composite of means and ends, at tension, if not in conflict, one with the other. The point for the moment is that we have before us values beyond freedom of disposition pursued through a practice that is much more than a single-minded search for donor's actual intent.

The core truth in the traditional view—seen for what it really has been—is that, however much we may value and exalt freedom of disposition, no functional law of donative transfers could be shaped which did not bring to bear, in addition, two querulous qualities. First, through formalities, we must exclude some expressions of donor's intent from judicial cognizance and hold them for naught. Second, we must have substantial external aids in order to interpret documents of transfer.\(^9\) No doubt our traditional treatments of formalities, on the one hand, and rules of interpretation, on the other, have been a bit crude and have led to unfortunate results. But implicit in the approach of the ancients is the understanding that in the real world we would never find actual, individ-

\(^{87}\) 4 Page on Wills, supra note 80, § 30.6, at 26-33.
\(^{88}\) Id. § 30.7, at 44.
\(^{89}\) The standard practitioner's volume in my home state lists some 16 rules of construction and adds that these are only "the more important" ones. See Weems, supra note 84, §§ 9-11, at 224-25.
uated subjective intent with sufficient frequency or probability that the law's interpretive stratagems should be grounded in it exclusively. Rather, they saw or, perhaps, shaped the law as though they had seen, that external and necessarily arbitrary formalities and substantial external aids to interpretation would always be needed. They taught us a truth we should not lightly discard.

And so we see the informative force driving our recent reform efforts. Foremost among these efforts are (1) demands for relaxing both the form and substance of the formalities for making valid donative transfers; (2) a rule allowing courts to deem valid certain demonstrably defective documents;\(^9\) (3) a rule of substantial compliance;\(^9\) and (4) an increasing and more candid resort to extrinsic evidence to resolve would-be ambiguities and to correct probable mistakes in donative documents. These efforts spring from the laudable desire to sweep away all impediments to realizing donor's actual subjective intent. What we are trying to do is to be rid of everything that would keep us from getting inside the donors's mind and from finding out what was there when he made the document and from seeing that what we find is realized in a final judicial decree, all to the end that freedom of disposition may reign unfettered.

The problem is that those of us who would reform traditional doctrine have no greater access to the donor's mind, at the time he made the document, than anyone else. Additionally, we seem unaware that a donor may have a darker side, that he is a fallible being who forgets, acts in ignorance, has second thoughts, changes his mind, misunderstands, practices duplicity, lies, becomes confused, and is otherwise caught within the tensions of inconsistent yet simultaneous wishes as much as the rest of us. I have an abiding faith in the ambiguity of all things human, principal of which is the product of the human mind.

And so we concentrate our focus on but a moment in history. Although that moment is not wholly arbitrarily selected, it still does not show us everything we should see were we truly concerned to effect donor's actual intent. When we seek such intent, reflection makes clear that, at the very best, all we may ever hope to find is a donor's probable intent in this single slice of time.\(^9\) The simplest, most straightforward will, attended by the most potent of extrinsic evidence completely supportive of the will, considered together and transmuted into meaning by the judicial mind, can at best yield but a high probability that what we find is what the donor actually had in mind when he made the document.

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90. See Langbein, supra note 49, at 7, 45-54.

91. The Restatement (Second) of Property provides that one of our major expressions of the substantial compliance rule, including a most helpful relabeling of it as a "harmless error" rule. See Restatement (Second) of Property (Donative Transfers) § 33.1 cmt. g, at 122-23 (1992). But two pages earlier, we find quite an eye opener. Comment C carefully sets forth eight "steps," e.g., formalities, which if observed should assure the will "maximum . . . acceptability . . . in the various states." Id. at 120-21.

92. This point has been discussed in a variety of contexts about a vast array of legal texts. See Posner, supra note 9, at 102.
In such cases, we are in fact saying that under this text and these circumstances a reasonable donor could have meant only one thing. In more difficult cases, we make heavy resort to the positive law and its external aids and reconstruct the document's plan. In either case, in truth and in fact, we employ an external approach to interpretation.

No matter how much we would like to get inside the donor's mind, or think we should get inside his mind, and no matter how much we modernize—even individualize—the law of donative transfers, we have no choice but to regularly resort to a variety of external aids to interpretation. We pretend these augment our search for donor's actual intent when, in reality, they compromise it. No doubt they aid our search for meaning, but this is something quite other than seeking intent. We speak, for example, of interpreting the words, phrases and grammatical construction of a donative document according to ordinary English usage, absent unusual circumstances. Where a lawyer has drawn the instrument, we take it as a given that legal terms should be assigned their standard and accustomed legal meaning, again absent peculiar circumstances. We read the text as a whole, not isolating individual clauses or provisions. We do these things thinking they bring us closer to donor's actual intent, however much they may facilitate a sensible reading of the donative document. They are rules attendant upon an external approach to interpretation. The fact that the average donor may have intended these had he thought about them does not change the fact that practically no donor ever thinks of them. There is seldom evidence the donor at hand thought of them, much less actually intended them.

I sympathize with the anticipated results of most modern proposals. Yet even the reformers of the last several decades, their thirst whetted for achieving the holy grail of actual intent in the real world, give lip service to some of the limiting principles noted above. Upon studying the assorted reform proposals in the field, one cannot help but notice the artificial external qualifiers and limitations and aids to the search for donor's actual, individuated intent, and they are everywhere. These exist and remain a part of our law only on the premise we know, in the world of you and me, actual intent is an illusion destined ever to elude our grasp. To be sure, these aids are “modernized.” Arguably, the reformers sense the inevitability of these external qualifiers. What they appear not to see is we use these external aids to a significant extent in practically every interpretative exercise. The continued and pervasive use of these aids strips those of us who take seriously truth-in-legal-labeling of any right to call our interpretive product “donor's intent.” Acceptance and use of these aids give the lie to the notion that we are finding actual intent, and,

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93. See In re Estate of Anderson, 541 So. 2d 423 (Miss. 1989); Tinnin v. First United Bank, 502 So. 2d 659, 665 (Miss. 1987).
as well, that freedom of disposition is by itself a policy adequate to explain an enlightened practice of donative transfers.

VI. FREEDOM OF DISPOSITION AND ITS NATURAL AND POSITIVE LIMITS

There is a preliminary dimension, often overlooked, but quite important if you think about it. The law precludes a large portion of the options a donor may wish to pursue. It legally curtails freedom of disposition, however dear to our hearts, in a dozen ways before the donor ever gets started—curtailments that are hardly insignificant. We have noted the procedural, formal limits, and we now turn to those of more substance. For one thing, the donor's bona fide creditors must have their due, and the law makes this clear in rules ranging from prohibitions upon fraudulent conveyances to directives that executors and administrators give notice to creditors and receive and honor just claims upon due presentment.\textsuperscript{94} Then, the tax man takes his share—the state's most blatant withdrawal of a part of the power of testation it had once granted.\textsuperscript{95} Freedom of disposition at best applies to what is left, which sometimes is not very much.

Beyond these restrictions, state law limits, in varying degrees donors' legal powers to disinherit spouses and, on occasion, other family members.\textsuperscript{96} Other rules restrict freedom of disposition by prohibiting unreasonable restraints on alienation, perpetuities, and accumulations. It is one of the lessons of history that donor's freedom of disposition may yield donee's straightjacket. This straightjacket may often, in turn, strip the donated assets of marketability with consequent loss of value that demonstrably costs society, as well as the donee. In addition, freedom of disposition is subject to some impermissible racial or other categoric restrictions.\textsuperscript{97} There are anti-lapse statutes,\textsuperscript{98} slayer statutes,\textsuperscript{99} and statutes of mortmain are not entirely dead.\textsuperscript{100} Although there are others, this list should be sufficient to make the point. An actual intent approach to interpretation is thought necessary to implement freedom of disposition. If

\textsuperscript{94} See generally § 34.3 of the Restatement (Second) of Property (Donative Transfers) (1992) and accompanying notes and comments.
\textsuperscript{96} See U.P.C. §§ 2-201, 2-301, 2-302 (1989). An extensive treatment of this subject can also be found in Restatement (Second) of Property (Donative Transfers) §§ 34.1, 34.2 (1992) and accompanying Comments and Notes.
\textsuperscript{97} See Tinnin v. First United Bank, 502 So. 2d 659, 665-66 (Miss. 1987); In re Estate of Wilson, 452 N.E.2d 1228, 1232-37 (N.Y. 1983).
\textsuperscript{98} See U.P.C. § 2-605; Restatement (Second) of Property (Donative Transfers) § 34.6 (1992) and accompanying Statutory and Reporter's Notes.
\textsuperscript{99} See U.P.C. § 2-803 (1989); Restatement (Second) of Property (Donative Transfers) § 34.8 (1992) and accompanying Statutory and Reporter's Notes.
this many rules restrain disposition and necessarily limit a would-be donor's sovereignty over his affairs, there must be some major policy goals at work here beyond freedom of disposition. And, if every donative document is entailed by this many external rules, it would seem only sensible that these rules be assimilated into the document which we should then read as an integrated whole by the same external approach to interpretation as are the restraints themselves.101

I think the better reading of the history of our practice of donative transfers reveals that we have never truly pursued a donor's actual intent. Even where the law has left him or her free, our not-quite-so-sovereign donor's full intent is hardly what we have sought or found. At most, we have only enforced the donor's intent as of a particular moment when he has reduced it to writing and has formally executed a donative document. Such documents possess an inherently limited capacity to reflect a donor's actual intent, and—to return to the realm of the formal—there is an elementary context in which we should see this, though it is often overlooked.

Consider, for example, the case of the donor who made a will in 1980, thinking, "If I were wealthier, I would provide for my nephews and nieces and there are a couple of charities I would like to give to. As it is, with my means being rather modest, I will only provide, however inadequately, for my wife and children." This hypothetical donor did not foresee any substantial wealth at the time. Over the next ten years, his business became quite successful. By 1990, he formed the definite intention to revise his will and provide for the nieces and nephews and charities. He told others of this intent and was on the verge of calling his lawyer when he was killed in a car wreck.

Or, we may think of the case of the widow who has a will leaving everything to her two children, a son and a daughter, each of whom has apparently been very successful. Thinking that her children have more than adequate assets of their own with which to provide for her grandchildren, the widow changes her will, leaving most of her estate to charity. In fact, the widow's son is in deep trouble financially but was too embarrassed to tell his mother. If the widow had known of her son's circumstances, she would not have changed her will. She dies with the new will intact, and her son on the verge of bankruptcy.

Consider another example. Donor goes to his lawyer for estate planning advice and counsel. The lawyer assembles and studies the donor's circumstances and proposes a plan. Lawyer and donor discuss the plan and settle on who is to get what and when and with what strings attached. Lawyer drafts the documents and mails them to donor with a cover letter advising, "Please review these documents one last time, and if these are satisfactory with you and in accordance with your wishes, stop by my office at your earliest convenience and formally execute

them.” Donor looks over the papers at home that night, is fairly well satisfied, but has one or two questions. He goes to sleep and has a heart attack and dies that night.

Then there is the case of the donor-lawyer who has a will that provides a generous bequest to his alma mater law school. After making this will, he gradually becomes disenchanted with the school and its faculty who, in his view, are becoming increasingly liberal and are rejecting values (prejudices) he holds dear. Donor decides one night, unequivocally, that he is going to remove the school from his will, but the next morning he is run down and killed by a phalanx of taxis while crossing Fifth Avenue on the way to his office.

One could multiply these examples a hundredfold. I doubt anyone would suggest, in any of these cases, that a probate court enforce the donor’s actual informed intent. In each of these cases we would enforce the will as it stood, or the law of intestate succession if there were no will, and we would be quite right in doing so. We would enforce only those symbols of intent found in the whole of some document that satisfied the criteria of legal validity and its attendant circumstances. According to the formalities and the circumstances, we would ask of the donor, what did he say, not what did he intend. Donor’s intentions not apparent from the text and circumstances attendant upon a valid donative document are simply unenforceable.

These examples help us to see that the human condition itself curtails freedom of disposition. Intent is not and cannot be our sole referent. It is fluid, it evolves. It ebbs and flows. What is worse, we oppress donors with the imperative, “Do something even if it is wrong, or the tax man will get your estate, or expenses of administration will be much greater, etc.” And so, we make the donor write down his intentions and confirm those intentions according to ritual solemnities, knowing full well that they may and often will change. How many donors, leaving their lawyer’s office after executing a will are immediately struck with doubt—“Did I do right by Aunt Nellie?” “Have I been too generous with my son?”, and are comforted by knowing they can always change their will if they wish, for surely death is not nearly so imminent as it is. We read the donative document in the context of its text and the circumstances in which it was written and interpret that document and enforce it, though we know it often does not and indeed cannot reflect actual intent because the written word cannot reproduce actual intent.

All of this leads us to more prevalent problems with a search-for-donor’s-actual-subjective-intent approach to construing a donative document. Words are symbols—labels, if you will—for realities underlying and existing (partially) independent of the label. Words, by definition, are incapable of capturing completely the reality we have assigned and

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102. Professor Fellows makes some of these same points. See Fellows, supra note 14, at 631-34.
chosen them to reflect.\textsuperscript{103} And the same of rules of grammar. Of course, there is a risk in all of this. In our concentration on more interesting penumbral doubts, we may ignore the core of certainty that, in many words and expressions, may be quite large. Skepticism, not cynicism, nor nihilism, should attend our approach to legal language. We know that the maker of a will or other donative document meant for it to make sense, and we are obliged by this to try to make sense of his or her document and not nonsense. In his useful little piece, Clark Shores correctly criticizes one court's wooden efforts in a difficult case and offers insightfully, "The search should have been for meaning in a broader sense, for something . . . [the testatrix reasonably] could have meant."\textsuperscript{104} Such a search is not always easy. It does not make the linguistic or legalistic problems go away. It points to the circumstanced external approach. Perhaps, if these problems were all that stood in our way, that might not justify a reformulation of a century old approach in the law, though I am hardly prepared to concede the unimportance of (my rational) tastes. I am, for the moment, concerned with more practical problems of legal interpretation and with the search for individual subjective intent.

I have noted some of the difficulties with trying to learn with certainty what a speaker intends at the moment of his utterance. Further difficulties appear when the speaker attempts to reduce his thoughts to a writing. It is particularly hard to know what a writer meant at a past moment in time, when the determination is sought long after that moment in time and often after the writer is dead. This is so even though we have his writing to go by, often drafted and executed with substantial care and solemnity. It is even so where the donor has proceeded holographically. It is a reality of the human condition of legal authors that they (like the rest of us when we express ourselves in writing) are limited by their relative ignorance of fact and relative indeterminacy of aim.\textsuperscript{105} Few writings say everything the writer wants to say, as the writer wants to say it.

Think, for example, of the many donative documents today that are, in fact, pre-printed forms. These range from life insurance policies, to joint tenancy certificates of deposit or account, to wills themselves. Then, there are documents drafted by lawyers using form books, the lawyer's boiler plate, his legalese. The most conscientious estate planner will find

\textsuperscript{103} Chief Justice Traynor explores this truism about language and provides a plethora of citations in Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co., 442 P.2d 641, 644-45 (Cal. 1968). \textit{Pacific Gas} is worth reading, although I find its search for the intent of the parties quite flawed.

\textsuperscript{104} Shores, supra note 14, at 497. Shores drops a footnote worth repeating:

An aged and distinguished professor of philosophy was once asked how he consistently managed to use student questions to great pedagogical advantage. He replied, "The trick is to find something for them to have said, since frequently there is nothing there except confusion."

\textit{Id.} at 497 n.150.

\textsuperscript{105} See Hart, supra note 26, at 125.
it difficult to suppress his value judgments when drafting a client's donative document.

Add to these examples those instances where the donor's intent is a bit soft. Donors who seek the aid of counsel may frequently have immediate donees or beneficiaries in mind, but have seldom thought through all of the contingencies that might arise. The competent lawyer will ascertain the facts of the client's circumstances as fully as possible, and will advise of various contingencies for which his client should provide. The client will ponder these contingencies for a time and then make a decision, often at the lawyer's prompting, and often with the thought that this contingency will not likely to come to pass. Often, we will never know what the donor might have done had he seriously contemplated the possibility of the remote contingency. The donor's actual intent theory suggests we ought account for the human reality of hard and soft intentions. No judicially sanctioned approach to reading donative documents takes such a stand, nor should it.

Finally, there are the directions the donor (or his scrivener) forgot (did not know) to include but which are essential if the donation is to be realized in fact. Conversely, there are the many terms in donative documents with respect to which the donor had no actual intent at all. Fellows points to the will versus the will substitute problem, where courts often ask whether the donor intended to make a present transfer of a future interest or a testamentary transfer. She correctly observes that the average donor “is unlikely to have formulated any intent regarding that legal question.” What donative document of any sophistication does not include administrative provisions regarding the handling of the donor's affairs that are beyond the donor's thought and which he never even read, simply relying upon the lawyer to do what was appropriate. The law allows that a man or woman may create a highly intricate and legally enforceable estate plan but makes no demand that he personally understand it all or be able to pass an examination on its legal meaning or effect.

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106. See Estate of Bunch v. Heirs of Bunch, 485 So. 2d 284, 286 (Miss. 1986).
107. See Harvard Trust Co. v. Duke, 24 N.E.2d 144, 145 (Mass. 1939); In re Halde-
108. See Fellows, supra note 14, at 617.
109. Id.
110. One might in such circumstances reply that the testator has delegated his intent or that he intended to adopt administrative powers and procedures that his lawyer had recommended. In a certain practical sense, this description may capture what has occurred. In law it has nothing to do with why the executor or trustee and ultimately the court regard and enforce these powers and procedures. What matters is that testator duly executed a will providing them, not that he or his delegate intended them.
111. We noted above the model formalities suggested in the Restatement (Second) of Property § 33.1, cmt. c (1990). Prepared no doubt by Prof. Casner, Step 3 is of particular interest:

3. The lawyer supervising the execution of the will should ask testator the following question: "Do you declare in the presence of [witness 1], [witness 2],
VII. FURTHER REASONS WHY WE SHOULD HAVE A CIRCUMSTANCED EXTERNAL APPROACH TO INTERPRETATION

Pragmatic considerations, some external to donor or document or sometimes both, augment the case for a circumstanced external approach to interpretation of donative documents. Experienced litigators will agree that intent is one of the most elusive of trial targets. Proving the state of a person's mind with the level of confidence we would wish is hard enough when that person is available to testify. It is ever so much more problematic without the one whose mind we seek to enter. What is more, most important interpretations of donative documents occur long after their making, many years removed from donor's actual intent. This is particularly true of the sorts of donative documents that become the objects of contested interpretation and litigation. Many wills, of course, are made a number of years before their makers die, and the same is so of most will substitutes. Inter vivos donative documents may create legally effective rights during the donor's lifetime, but litigation, if in the offing, will seldom occur before the donor's demise or, at the very least, until after the donor has become incompetent.

Familiar statutes of limitations afford a perspective. One policy imperative that limitations law accepts is the difficulty in reliably recreating realities far removed in time. Principal among the reasons statutes on oral contracts are customarily shorter than limitations on written contracts are the problems inherent in proving unmemorialized expressions. But, even if we look to the more analogous limitations on suits on written contracts, we find these often limited to three to six years, and at most ten years after making, depending on the state and the type of written contract. It is not at all uncommon that a donative document becomes the centerpiece of litigation as many as twenty years or more after its making, at a point far removed in time. After such a lapse in time, sensible persons should not expect that unwritten and unformalized expressions of intent may be found with any semblance of certainty.

There is a further perspective. Many donative documents are placed on public record. They must be recorded if they are to be effective against third parties who deal and trade in the rights so created and perfected. This dealing and trading is often done long after the document

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and [witness 3] that the document before you is your will, that its terms have been explained to you, and that the document expresses your desires as to the disposition of the property referred to therein on your death?" The testator should answer "yes," and the answer should be audible to the three witnesses. Restatement (Second) of Property, § 33.1 cmt. c, at 120 (1990). This strikes me as an implicit admission that we cannot expect donors to understand the intricacies of their donative documents. How can someone intend what he does not understand?


has been made and, indeed, often after the value of the rights has become greatly enhanced. Practical imperatives suggest that these parties must be able to rely substantially on the recorded text for the legal meaning of the conveyance. These third parties examining the public record have even less access than courts to donor's actual intent. Consider, for example, a gift or reservation of mineral interests made in 1940 when nothing had been produced and the prospect was at best a gleam in the eye. Two generations and ten oil wells later, litigation erupts concerning the meaning of the donative document—was it a mineral deed, a royalty deed, or some hybrid of the two?\textsuperscript{114} In such a circumstance any suggestion that we search for donor's actual intent may only be labeled absurd.

Our drive for donor's actual intent may bring with it evils we would not wish. I think it demonstrable today that our current course toward substantial compliance and reformation for mistake is slowly forcing from the field any factual issue other than, "what did the donor intend?" But, as we proclaim to the world the centrality and the increasing exclusivity of the quest for donor's actual intent, we should not be surprised that people will take us seriously and that, among these, are sure to be disappointed would-be donees. I fear in our current course an incentive to unnecessary and undesirable litigation. Our message to many, for example, is that a substantially formalized donative document is but a ticket to the courtroom wherein one and all may litigate to their heart's content a lone question of fact—the intent of the donor—with the actual document being but one among many items of evidence. Disappointed daughters and sons will surely see a reason to sue as they convince themselves, "Daddy didn't really intend to treat me so shabbily." They will bring these suits and will trot out anecdotal evidence by the hundredweight that "Mama really loved me more and intended to benefit me,"\textsuperscript{115} and thus subject innocent bona fide donees, not to mention the courts, to expensive and time consuming litigation. There is, of course, the further risk that the (trial) court will take seriously the argument that it ought only to seek donor's actual intent and will credit such a suit. Likely imbedded in the current reform theology are increased transaction costs in the form of burdens upon the parties, the public and its courts, and an increased risk of mischievous adjudications.

This suggests a neglected perspective. The law of donative transfers necessarily fixes its focus upon the donor. The property is his at the outset and, as noted above, within not inconsiderable limits the donor may do with it as he pleases. Courts are obligated to enforce what he has done. But what the donor has done necessarily creates rights in others, and, that these rights may not have been acquired in a bargained-for ex-


\textsuperscript{115} Langbein and Waggoner recognize and address this would-be problem and urge that "reformation . . . confine relief to situations where the alleged mistake involves a fact or event of particularity . . . ." Langbein & Waggoner, \textit{supra} note 14, at 578.
change does not denigrate their status or importance. Relationships born of family or affection or the merely gratuitous or philanthropic wish are, in my view, no less worthy than those of bargain and consideration, and the same of property rights arising therefrom. And so, beyond Holmes' question, we ask what the document's words would mean in the mind of a normal hearer of English seeing them in the circumstances in which they were spoken. Rights reasonably received and enjoyed and relied upon by donees are entitled to legal respect.\footnote{Cf. Collier v. Shell Oil Co., 534 So. 2d 1015, 1018-19 (Miss. 1988).}

There is a further public interest. We are dealing with property rights, and the interpretive stratagem we select should respect what this implies. No doubt many donative documents transfer family heirlooms and properties of sentimental value or, at the least, properties the donee will likely keep for some time. In the great majority of donative transfers, however, value in exchange is of paramount importance. Even donees who plan to hold their donations need the flexibility to sell or pledge when and if reasonably necessary and without legal impediments. Marketability is essential to enhanced value. Relative stability of title and certainty of right are the sine qua nons of maximum marketability. For these reasons, the closer we come to an unadulterated donor's-actual-intent interpretive stratagem, the more likely we are to encourage litigation and mischievous results—results inconsistent with a circumstanced external approach to interpretation. The donor's intent approach compromises certainty and places at risk precisely those features regarding the donative document likely to move a rational wealth maximizer considering purchase. Over the long haul, a circumstanced external approach to interpretation yields greater predictability in the meaning of the document and in the outcome of litigation.

\section*{VIII. Fleshing Out the Circumstanced External Approach: The Hypothetical Semi-Sovereign Donor}

I have conceded that we cannot banish "intent”—word or concept—from the legal lexicon, as much as I wish it were otherwise. We are too accustomed to using it when thinking about the meaning of legal texts. I do, however, think it feasible that we redefine intent to facilitate the use of our circumstanced external approach. While not wholly in vogue, external and objective standards reflect concepts with which most lawyers are familiar.

In approaching the external standard that courts should enforce, Holmes would have us ask what the document's "words would mean in the mouth of a normal speaker of English, using them in the circumstances in which they were used."\footnote{Holmes, \textit{Legal Interpretation}, supra note 6, at 417-18.} We need reference to a hypothetical donor, and we need be clear who he is. He is, to be sure, a "literary form,
so to speak, of our old friend the prudent man," but the hypothetical donor is more than that. Because we will read through his eyes (for we assume he has written) the circumstanced text of the donative document before us, we need insight into what he sees, and, to this end, we make certain assumptions about this hypothetical donor. We make the assumptions that a real, rational, self-interested, knowing, wealth-maximizing would-be donor would make of himself.

We assume first that he is an intelligent and informed person, pursuing deliberate purposes deliberately. He has the capacity for reason but is by no means bound to use it. He is self-interested—as distinguished from altruistic—although he reserves the right to be charitable as he sees fit, and even to buy his way into heaven insofar as the law allows. He acts to his own advantage but he defines his own advantage. Within limits, he may act in ways others would think prejudiced, vindictive, eccentric or idiosyncratic. He knows the dimensions of his estate, his assets and his liabilities, and the values—market and otherwise—of his property. Within limits, he is free to dispose of his property as he wishes, and he is aware of this fact.

We say "within limits" because the positive law puts a number of strings on each would-be donor's property. There are some things the law says he may not do with his property, many of which we have already noted. He is only partly lord and master of his own estate. He is, at best, an SSD. Finally, but quite importantly, our SSD knows the American way of estate planning, and the law that facilitates and restricts it in the jurisdictions to which his property is subject. He knows of all viable estate planning techniques and of the pitfalls to be avoided—he knows, so to speak, the tricks of the trade and uses them to his advantage.

No doubt much more may be said, but what we have said gives SSD enough flesh that we see what he is about. If I were to banish intent talk altogether, we would not need SSD. In what follows, I do not invoke his aid perhaps as much as some would prefer. I think it important, however, that we know he is there and available to help us find meaning when our more abstract and theoretical pursuits seem elusive.

IX. ADDING FURTHER FLESH: THE ROLE OF INTERPRETIVE FACTS IN THE CIRCUMSTANCED EXTERNAL APPROACH

When we seek the meaning of a donative document, we seek a fact. But it is important to understand that we seek a special form of legal fact.

118. Id. at 418; see supra notes 58-61 and accompanying text.
119. John Rawls' proverbial "veil of ignorance" affords a viable thought experiment for testing the realism and validity of these assumptions. See John Rawls, A Theory of Justice (1971). If any one of us, not knowing who we are, had to describe ourself and have that self make our estate plan, what would we say? If we were placed behind the veil of ignorance, how would we construct our planner selves?
120. See supra Part VI, at 76-92.
We are not trying to find the truth of some isolated occurrence somewhere in our past. We certainly do not seek some state of being, i.e., the donor's thoughts and intentions, at an isolated moment in history. Donative documents are a species of law—privately made law, as we have noted. When we face fundamentals, the distinction between fact and law collapses. Like all law, in the end a donative document is a social fact, albeit with a rather limited and discrete sphere of influence. We are interpreting a law the donor has made, but we are also interpreting a text that has acquired the power of law and, when we have settled upon its meaning, we enforce it against specific persons. It controls what is to be done with designated properties, for how long and with what strings, and the sheriff may be summoned to ensure all submit.

This insight in mind, the circumstanced external approach has several dimensions we need to review. First, we inquire of the validity of a donative document, and we must see that we do so in the same sense that we inquire of the validity of a statute. In each instance, we ask if it has been "enacted" according to the law's formalities. We sense the similarity in these seemingly disparate types of fact—statute and will—when we recall how courts determine questions of foreign law. Rules customarily and correctly provide for treating such questions as ones of fact: What, in fact, is the law of Greece on this point or that? Our rules also provide that, beyond the text, the court "may consider any relevant material or source, including testimony." The fact that these sources are not subject to the technical limitations of rules of evidence in no way eviscerates the reality that what we are doing, at least initially, is unusually similar to a finding of fact. One thing meant by the freedom these rules afford is that the court, of necessity, must interpret what it finds. For the present we must see that evidence—testimony, documents, and the like—is properly considered in determining what is forthrightly labeled "a ruling on a question of law." This, of course, does not revive our collapsed law-fact distinction. It is only a way of saying the question is for the court and not the jury.

Finding the meaning of a will or any other donative document is not unlike what many call a finding of ultimate fact. A legal standard is a part of what is found by reference to other legal standards. In other words, finding meaning is like building on a mixed finding of law and fact. We take that point in the process when the aggregate of all evidentiary facts conjoins with the rules the court has identified as relevant and has brought to bear in assessing the virtue of those evidentiary facts. Then, and upon this conjunction, at least a partial adjudication has occurred. But there is more. Meaning may be an ultimate fact, but it is seldom self-evident. The court must interpret what it has found. The court must take the evidentiary facts found and the relevant rules of in-

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121. For our most influential discussion of law as a social fact, see Hart, *supra* note 26.
122. Fed. R. Civ. P. 44.1
123. *Id.*
interpretation and understand that no mechanical process of application may yield meaning. What is required are reflection and judgment.

The evidence of our ultimate law-fact comes in three forms: words, actions and circumstances. We center upon the text but look beyond to all matters that affect meaning. A donative document, conforming to the legal formalities the law demands for that type of document will invariably be our most powerful piece of evidence. It should and will carry the day over extrinsic evidence in the overwhelming number of cases (though no quota or even a goal is implied). And it is because the document is words—and only the product of circumsanced actions—our ultimate rendering will be so much like that we give a statute. But, as with a statute, there is more to meaning than text and fact, i.e., there is legislative history. We cannot complete the task without rules of interpretation, canons, constructional preferences, suppletive rules—call them what you like. There are always a host of external standards, hopefully neutral and quasi-objective, that must be brought to bear on the circumsanced text before we may assign meaning. In the end, the court must sense the tripartite dialogue between the words and phrases that make up the text and the circumstances that yielded that text and all the external aids to interpretation we have learned from experience and that careful contemplative thought may add. Where the court is called upon to enforce private law—a contract or a will—we have at this moment found the content of the private law standard, and our end product is no different in form or effect than if we had just found the meaning of a statute.

With these general givens well in mind, the court should read all of the words, phrases, and provisions of the text of each document suggesting a donative transfer. We should read these in light of the American practice of donative transfers and seek in these a purposeful and coherent whole. More particularly, we should read each text in the light of all relevant circumstances. These include the identity of the donor's known family and other possible objects of his bounty, an accurate inventory of his estate, its values and his financial affairs, but are by no means so limited. No circumstance importing meaning may be ignored. The court should give the text so circumsanced a reading answering the two tests: First, the reading must fit that text in those circumstances. The court is construing a particular donative document made in particular circumstances which shed light. The court must render a reading that fits that document in those circumstances and not others the court may

124. See Fed. R. Evid. 401:
"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. This standard assures that admitted extrinsic evidence is particularized. See Langbein & Waggoner, supra note 14, at 578, 581-82.
125. Readers familiar with the writings of Ronald Dworkin will notice similarities at this point. See Dworkin, supra note 9, at 238-58. I make no claim to complete allegiance to Dworkin's approach.
wish it had before it. Of course, we should neither seek nor expect a perfect fit. A reasonable fit is fine enough. What is important is that the fit must extend to the circumstanced text, not just the words and phrases seen in vacuo.

Legal texts are purposive endeavors. No legal text comes into being without someone instrumental in its making having had some reason for making it, and some reason for making it (somewhat) in the form in which it appears. This being so, there is no reason why we should not try to make of it the best, the most competent, the most coherent, the most effective donative document it can be.¹²⁶ Since we have no reliable access to the maker’s mind, we must work backwards. We take the text before us—and the circumstances in which it was made—and ask what donative plan best explains and implements that text so circumstanced. Not every element of this plan need be in the text in so many words. The best donative plan may include points inferred by or flowing from the text. The law accepts that, even on the best of days, donors do not think of everything, nor do they reduce to writing every thought, nor give full and perfect expression to what they think. An interpretation becomes excludable from our consideration only if, upon careful study of the package that is the text and its circumstances, we find that no SSD so circumstanced and so intending could have given us this package.

But more than one reading may fit a particular circumstanced document. From among these the court must select the best and most coherent and most effective estate plan that a hypothetical SSD may reasonably have provided. This is not a search for an historical fact in the sense of some event or phenomena that occurred at an identifiable moment in time.¹²⁷ Moreover, this is not asking what a particular donor intended or even what he most likely intended. It is asking what a hypothetical SSD, given this text and its circumstances, most reasonably and most sensibly may have meant. Subject to the limits of fit, I have much in mind what Fellows calls “equal planning under the law.”¹²⁸ That is, unless precluded by the requirement of fit, a circumstanced donative doc-

¹²⁶. I have pursued this view in interpreting documents of all genera and species. See, e.g., Richardson v. Canton Farm Equip., Inc., 608 So. 2d. 1240, 1247-52 (Miss. 1992) (construing two overlapping statutes); Whittington v. Whittington, 608 So. 2d. 1274, 1284 (Miss. 1992) (Robertson, J., dissenting) (interpreting oil and gas conveyance); Estate of Stamper, 607 So. 2d 1141, 1145 (Miss. 1992) (construing judicial decree); Simmons v. Bank of Mississippi, 593 So. 2d 40, 43 (Miss. 1992) (interpretation of a lease); Chevron U.S.A., Inc. v. State of Mississippi, 578 So. 2d 644, 651 (Miss. 1991) (Robertson, J., dissenting) (constitutional interpretation); Denley v. Peoples Bank of Indianola, 553 So. 2d 494, 499-500 (Miss. 1989) (Robertson, J., concurring) (statutory interpretation); Stuart’s, Inc. v. Brown, 543 So. 2d 649, 654-55 (Miss. 1989) (same); Knox v. Shell Western E & P, Inc., 531 So. 2d 1181, 1189 (Miss. 1988) (Robertson, J., concurring) (interpreting oil and gas conveyance).

¹²⁷. In seeking the meaning of statutes and trashing the notion we should seek legislative intent, I have often emphasized that “we seek no historical fact.” Denley v. Peoples Bank of Indianola, 553 So. 2d 494, 499 (Miss. 1989) (Robertson, J., concurring); Mississippi Ins. Guar. Ass’n v. Vaughn, 529 So. 2d 540, 542 (Miss. 1988).

¹²⁸. Fellows, supra note 14, at 613.
ament should be read so as to "reflect competent estate planning tech-
niques." For example, courts may imply a savings clause in enforcing
document that, on its face, offends the Rule Against Perpetuities. Such
stratagems have the advantage of extending "the benefits of competent
legal advice and drafting to all property owners," and, to my mind, no
disadvantages.

X. EXTRINSIC EVIDENCE QUA EVIDENCE, OR, A ROSE BY ANY
OTHER NAME . . .

Many may find this jarring. I suggest their fears are unfounded. I
believe I can show this with a few reflections on resort to extrinsic evi-
dence. Traditionalists recoil in horror at the thought. Experience and
common sense suggest they need not.

From the beginning, courts have eschewed consideration of extrinsic
evidence when construing donative documents. Extrinsic evidence is
thought inherently unreliable. It is seen easily manufactured to fit the
convenience of the moment, the product of selfish interests and baser
motives. And so we long ago developed specially restrictive rules that
have come to be seen to serve cautionary functions. These have been felt
necessary to prevent frauds and the dismantling of a testator's plan when
he is dead and no longer available to defend it. The solemnity of the will-
making process seems to demand no less.

We have formalities for donative documents whose function is to en-
able courts to identify reliably what the donor has done. Extrinsic evi-
dence evades and avoids the formalities. But this is hardly an objection
that withstands scrutiny as extrinsic evidence must satisfy other exacting
formalities in the form of rules of evidence. Like all other evidence, it
must be relevant. It must be offered in non-hearsay form and by
one who has taken an oath to speak the truth. And, unlike the form-
ally executed donative document, extrinsic evidence is finally cured in
the crucible of cross-examination. Thus seen, it comes before the court
with guarantees of trustworthiness equivalent to, if not exceeding, those
of the document itself.

I do not mean to make light of the risk that interested parties may offer
perjured or prejudiced testimony or falsified or fabricated evidence to the
end that a donative document may be distorted or thwarted altogether.
But is this not a risk we run in every litigation where something of value
is at issue? It strikes me unlikely this danger is any greater when we

129. Id.
130. See Fellows, supra note 14, at 613.
131. See In re Estate of Anderson, 541 So. 2d 423, 430 n.13 (Miss. 1989).
132. See Rules 401 and 402 of the Federal Rules of Evidence and comparable rele-
vancy rules in state codes of evidence. See, e.g., Miss. R. Evid. 401, 402.
133. See Rules 801 through 804 of the Federal Rules of Evidence and comparable
hearsay rules in state codes of evidence. See, e.g., Miss. R. Evid. 801-804.
134. See Fed. R. Evid. 603; Miss. R. Evid. 603.
seek the meaning of a donative document than when we seek a fact in any other litigation. We have in each jurisdiction a whole code of rules of evidence. These rules reflect decades of experience and lawyerly contemplation, insisting first that evidence be relevant and thereafter balancing the need for probative evidence against the risk that speculative or false evidence may generate an unjust result.\footnote{This fundamental premise has been widely codified. See Fed. R. Evid. 401-403; Miss. R. Evid.; cf. McInnis v. State, 527 So. 2d 84, 88 (Miss. 1988).} We enforce these rules in a myriad of contexts, where the stakes are small and large, where even life is on the line. These rules are not perfect. From time to time, justice miscarries despite our best preventive efforts. We have improved our rules of evidence over the years and, no doubt, as experience and reflection sharpen our insights, we will make more improvements. Be that as it may, I see no reason why the rules of evidence generally prevailing should not govern the admissibility of a la carte proofs of extrinsic acts and of circumstances that may shed light on the meaning of a donative document. The sort of factual questions we approach here are at the pre-interpretive stage and are, in no principled way, different from those in any other litigation. There is no reason why the balance on which our general code of evidence has been made should not suffice as well in the present context.

In time, many have come to see exclusionary rules as too harsh. All too often many cases have presented texts that left important matters open to doubt, matters easily resolved by resort to extrinsic evidence. D's bequest "to my favorite nephew in Boston" should not fail because of some rule of law that prevents the court from knowing the testator had only one nephew who lives in or had ever lived in Boston and that his name was Sam Jones. We call this a patent ambiguity and often allow extrinsic evidence to resolve it. Still, some would hold the line on latent ambiguities, cases where the text on its face is perfectly clear but where extrinsic evidence might reveal an ambiguity. A bequest of Blackacre in Suffolk County is not ambiguous until we looked behind the will to find the testator owned no such property, but did own Whiteacre in Essex County. Even in this case, many have come to allow extrinsic evidence to show the ambiguity but not to resolve it.

More important and more problematic, we have begun to act upon a distinction of imagined importance between using extrinsic evidence to resolve problems with language in the will—attested language—but never to supply or to enforce unattested language, much less to reform the will by correcting well-proved mistakes. But what we have done is to create a distinction that is ambiguous, if not incoherent. We pretend there is a difference between construing language in a will, on the one hand, and reforming a will to add new language, on the other. But the difference is, at most, one of degree. Each is a process of creative interpretation. And, if extrinsic evidence is unreliable and unworthy of
credit, it is so whether our object is interpretation or construction or reformation. Perhaps more important, if courts have the power to receive and consider extrinsic evidence to resolve a patent ambiguity, there is no principled reason why we should exclude it when offered to show or resolve a latent ambiguity. And if courts have the power to receive and consider extrinsic evidence to show and resolve a latent ambiguity, there is no reason on principle why we should exclude it when offered to show and correct an outright mistake. Such evidence is no more attested in the one case than in any of the others.

The question whether the court will consider extrinsic evidence, however, has not turned exclusively on evidentiary relevance. Quasi-substantive rules are implicated. For years, as we have just seen, we have thought legitimate access to extrinsic evidence a function of whether the donative document was ambiguous in one form or another. But ambiguity is not an either/or. Assuming there to be an ambiguity when there are two or more plausible but inconsistent constructions of a donative document, there remains in practice, and in this very definition, much ambiguity about ambiguity. Documents and texts do not fall into nice neat categories—the ambiguous and the unambiguous. We deal in shades of gray, not black and white. The point becomes clear when we see that most competent lawyers can make a plausible argument that most documents worth arguing about are both ambiguous and unambiguous.

The traditional rule stands reason on its head. Many who would exclude extrinsic evidence do so because they are scared of it. We think it problematic, less than reliable, a source of risk and mischief. So what do we do with extrinsic evidence? We reserve it for those cases where we are having trouble with the text itself. Ironically, only in those cases where we are not sure what the donor's words and phrases mean do we resort to evidence we are similarly unsure of. But, if we do this, if we are willing to use risky evidence to help us lessen the risk of misreading a problematic text, it is difficult to imagine why on principle we should exclude such evidence in cases of seemingly less uncertainty. Where a donative document is clear and unambiguous, it is hard to see what harm can follow from receiving and considering extrinsic evidence. That there will be times when it will change our whole way of thinking about the text is no minus. For the most part it will be harmless. And, if courts do their job and accord texts the primacy they deserve, the costs of extended trials and frivolous proofs are likely to be minimal.

On the other hand, present doctrine creates the continual risk that we preclude extrinsic evidence that we really need by mistakenly finding a document to be unambiguous. Consider, for example, the case where extrinsic evidence may disclose—and easily resolve—a latent ambiguity,

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the product of mistake. In such a case, there often is no ambiguity until
the extrinsic evidence is brought to bear. Sensitive reflection suggests
that, only after all of the extrinsic evidence is on the table may we know
the full dimensions of our interpretive task.

The ambiguous/unambiguous distinction today serves but a lone func-
tion in law of donative transfers: determining whether extrinsic evidence
may be considered. But nothing in common sense suggests we need that
function. No legislature put any language in any statute of wills that
precludes our resort to extrinsic evidence, be the text ambiguous or not.
If the evidence may always be considered, subject to the rules of evidence
on admissibility, we can dispense with a problematic doctrine and elimi-
nate much profitless litigation. Take a look at the number of reported
cases where parties have contested whether a text is clear or ambiguous.
Common experience will add that these are but the tip of the iceberg.
How much time and energy must litigants and lawyers and courts ex-
pend to the end of finding whether a given document is ambiguous, with
the cost of error, reversal and retrial. I would declare such litigation
much ado about very, very little and hold extrinsic evidence of the cir-
cumstances at the time of the execution of the donative document may
always be considered, so long as it satisfies the otherwise applicable stan-
dards of the state's code of evidence. This said, in litigation regarding the
meaning of donative documents, extrinsic evidence should be declared
admissible on the same terms and conditions as in other contexts. I
would abolish the traditional rules on this score and have us hold that
courts may always consider extrinsic evidence where and to the extent it
sheds light on the meaning. We should consider such evidence in the
same sense and to the same extent that legislative history sheds light on
the meaning of a statute, or, as noted above, as in determining a question
of foreign law.

XI. AN UNFORTUNATE PROPOSAL FOR THE BURDEN OF
PERSUASION, AND OUR FAILURE TO SEE ITS LIMITED PRE-
INTERPRETIVE ROLE

The reformers who argue for abolition of the no-reformation-for-mis-
take rule tender a quid pro quo. They insist courts should always be
allowed to consider extrinsic evidence that tends to shine new and needed
light on the facially unambiguous text of the will. I concur. While mak-
ing their quite modest proposal, however, some curiously conclude, only
if the extrinsic evidence rises to the dignity of clear and convincing evi-
dence, should it be held to overcome the text of a donative document.

Reflecting on this idea, I am not sure whether its genesis lies in some

137. See, e.g., Patch v. White, 117 U.S. 210 (1886) (an otherwise clear will became
ambiguous only in light of parole evidence).
138. See Dworkin, supra note 9, at 352.
139. See Langbein & Waggoner, supra note 14, at 578-79, 584.
subconscious guilt its proponents sense for giving credit to unattested testamentary language. Perhaps it comes from an excessive pragmatism—the abolition of the no-reformation-for-mistake rule cannot be bought for any lesser price. Taken at face value, the best justification that may be given for this concession is that it is necessary to perform the cautionary function otherwise performed by compliance with the statute of wills. Some offer another ground. In the case of analogous non-probate transfers and in contract law, we often require clear and convincing evidence before reforming mistakes. Reasoning by analogy, we should apply a similarly heightened burden of persuasion here. Coherence in principle seems to mandate no less.

The case collapses upon careful examination. At the level of conception, the rule ignores the post-evidence interpretive dimension of our process. It proceeds on the erroneous assumption that we are concerned with an ordinary Rule 52(a) finding of fact. At the pre-interpretive stage, where we do seek to find a fact, the sort of fact we seek—looking across the adjudicatory process at the range of findings of fact courts are called upon to make—is most often found by the preponderance standard. Coherence in principle at the macrolegal level counsels against the clear and convincing standard. Finally, and functionally, the proposal is unnecessary. The general rules of evidence are up to the job of winnowing out any dubious proofs and performing any cautionary or screening function we need.

To elaborate, what—and all—coherence in principle requires is that the burdens be the same in all analogous cases. The rule of relevant resemblances looks at the range of private law-making circumstances in which we need to address claims of ambiguity or mistake and tells us that the proponent’s burden of showing the problem and the solution should be the same across the board. With this, I agree, but nothing in the premise informs us of what that burden should be—preponderance of the evidence or clear and convincing evidence, whatever. The rule of relevant resemblances is satisfied if we adopt a preponderance standard for all analogous cases.

Harkening back to my Legal Process days, I find profit in revisiting a problem in which many of us were once schooled. In Oppenheim v. Kridel, the court was confronted with a wife’s tort action for criminal conversation against the woman who had debauched the plaintiff’s husband. New York law had recognized such a suit by a husband against another man, and the question was whether coherence in principle, rea-

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141. I, myself, have made the case. See, e.g., McGory v. Allstate Ins. Co., 527 So. 2d 632, 637-38 (Miss. 1988) (civil arson defense to fire insurance claim held subject to clear and convincing standard because it charges insured with a species of fraud).
142. See 2 Hart & Sacks, supra note 1, at 478-500.
143. 140 N.E. 227 (N.Y. 1923).
soned elaboration, or the rule of relevant resemblances, or whatever one wanted to call it, required that the right of action be made available to a wife so offended by another woman. We all answered a resounding “Yes!” as the commands of laudatory legal reasoning and public policy banning unequal treatment of the sexes seemed to converge. Many of us, myself included, failed at the time to take much note of the brief suggestion buried deep within the materials that the inequality could have been remedied “by denying the husband’s right of action no less than by recognizing the wife’s.” 144 Now, a generation later, we see this was the answer to the problem. 145 I think it demonstrable on policy grounds that the preponderance standard should apply in all mistake and ambiguity cases.

The same imperative for reasoned elaboration that haunts us here presses our concerns beyond today’s context. Worth noting is the work of Professor McBaine who surveyed the fact-finding field and found a three-tiered structure. 146

Beginning with the lowest level of scrutiny, we employ the preponderance standard in cases where we wish the fact finder to proceed once he has found what “probably has happened.” 147 The second tier is reserved for cases demanding a higher level of confidence in fact finding, cases where we insist upon knowing “what highly probably has happened.” 148 These are the cases where we demand clear and convincing evidence. Finally, there are the criminal cases, where liberty and sometimes life are on the line, where we enjoin our juries that they find “what almost certainly has happened” 149—the familiar standard of proof beyond a reasonable doubt. In point of fact, our law has been less successful in practice than in theory. Assume we were to assemble all non-criminal law’s questions of ultimate fact and divide them into those the law subjects to the enhanced clear and convincing standard and those left to the preponderance standard. If we did this, we should expect to find some principled way of distinguishing the cases on either side of the divide. I am fairly confident we would instead find something approaching a crazy quilt pattern, a prime proof of Holmes’ aphorism that “a page of history is worth a volume of logic.” 150

In the midst of this, we increasingly sense and see inordinate difficulties in achieving a congruence between declared rule and official action.

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144. 2 Hart & Sacks, supra note 1, at 486. Such a course was one for the legislature, not the court, or so we were taught at the time.
145. I am pleased the court on which I once sat has recently recognized that it created the tort of criminal conversation and has had the responsibility to abolish it. See Saunders v. Alford, 607 So. 2d 1214, 1219 (Miss. 1992).
147. Id.
148. Id. at 246.
149. Id. at 246, 255.
With issues assigned the clear and convincing standard, we have good reason to believe the fact finder often may not enforce it. Perhaps we should rethink in its entirety our law's approach to burdens of persuasion. Still, the three-tiered structure is well imbedded in our law, and with regard to the problematic intermediate tier—proof by clear and convincing evidence—I agree with John Langbein. "Even granting, as some allege, that the C&C standard is hard to define and to enforce, its hortatory effect, cautioning the trier that the issue is one of special seriousness, is worth preserving."

I find force and value in the trichotomous rationale the Supreme Court has from time to time announced, particularly in *Santosky v. Kramer*. The preponderance standard applies in "civil dispute[s] over money damages." These are lawsuits between two or more private persons where the public has a "minimal concern with the outcome," and where policy concerns require that the litigants should "share the risk of error in roughly equal fashion." I think it fair to include here most civil litigations over possession or title to property.

The clear and convincing evidence standard is reserved for matters "more substantial than mere loss of money." It is enforced in cases where an individual is threatened with "a significant deprivation of liberty or stigma." I do not doubt the power of gratuitous transfer is an important requisite to enjoyment of the right of private property, nor that the right to own a modest quantity of property may be classified as a basic liberty. Still, I think it fair to hold that reasonable external observers objectively see the overwhelming majority of litigations regarding the meaning of donative documents as battles over money and property, as distinguished from cases where someone is faced with a significant deprivation of personal liberty or stigma.

Before we sign on in support of the quid pro quo, we need to consider the case where the court is satisfied from the evidence more likely than not that a mistake has been made in a donative document, but cannot in candor say the proof rises to the dignity of clear and convincing evidence. I am thinking of the case where the court is sixty percent sure a mistake has occurred but thinks clear and convincing imports a sixty-five percent

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153. *Id.* at 755.
154. *Id.* at 755 (quoting *Addington v. Texas*, 441 U.S. 418, 423 (1979)).
155. *Id.* at 755 (quoting *Addington*, 441 U.S. at 423).
156. *Id.* at 756 (quoting *Addington*, 441 U.S. at 424).
level of probability.\(^6\) Enforcement of the clear and convincing standard requires the judge to award the disputed property in accordance with a view that he finds only forty percent likely correct. In what is in essence a litigation between two or more private parties over possession or title to money or property, with but minimal public interests on the line, the C&C standard will often allow the party whose proof reaches only the forty percent level to carry the day. It is not clear to me how one might defend such a view.

The cautionary function ruse won't wash either, for extrinsic evidence is subject to the protective seine of the law of trial evidence, including cross-examination. I have previously explained that the cautionary rules regulating our access to and consideration of extrinsic evidence enforce greater caution than the formalities through which the disputed document was made.

To be sure, we are undoing century-old doctrine, and not so subtly. But, as I have noted, nothing in the statute of wills or the formalities attending any other donative transfers precludes resort to extrinsic evidence. The no-extrinsic-evidence rule is court-made and can be court-unmade, and, beyond tradition, there is no reason why it should not be so unmade. This is certainly not the circumstance where a rule has long existed and citizens in good faith have relied on its stability and made their estate plans accordingly. The point for the moment is there appears no good reason why we should give credit to and enforce the literal terms of a donative transfer when all relevant facts and circumstances combine and preponderate that the document means something different. We secure and deny fortune and fame by a preponderance standard in a myriad of other contexts where, on principle, the proofs are no less risky than here. I would urge that we cease talking of proof by clear and convincing evidence while admitting all that is relevant, and concentrate instead upon finding the most probable meaning of the donative document that both fits the text and extrinsic circumstances and affords the best and most coherent and most effective reading available.

A variation on a familiar and not so hypothetical case\(^{161}\) may illustrate my approach. Assume that D dies and leaves a will in which he bequeaths to B Lot 6, Square 403 in Gotham City. D's executor discovers that D not only did not own Lot 6, Square 403 at his death, but he never owned that lot. Because we always consider extrinsic evidence, we allow competent proof that D did own Lot 3, Square 406, which in fact is the only significant parcel of land not otherwise disposed of in his will. Assuming no other extrinsic evidence of note, the court should apply the

\(^{160}\) It is well documented that judges have widely varying views of the percentage figures that reflect the different burdens of persuasion. See United States v. Fatico, 458 F. Supp. 388, 409-11 (E.D.N.Y. 1978), aff'd, 603 F.2d 1053 (2d Cir. 1979), cert. denied, 444 U.S. 1073 (1980); Barbara D. Underwood, The Thumb On The Scales Of Justice: Burdens Of Persuasion In Criminal Cases, 86 Yale L.J. 1299, 1311 (1977).

\(^{161}\) See Patch v. White, 117 U.S. 210 (1886).
circumstanced external standard and hold that B gets Lot 3, Square 406. An SSD, having made this will in these circumstances, most certainly thought he was devising the lot he owned to B. The most sensible and most coherent external circumstanced reading of D's will is that Lot 3, Square 406 passes to B.162

But suppose the extrinsic evidence shows that, at the making of his will and at his death, D owned both Lot 3, Square 406 and Lot 4, Square 603, neither of which he disposes of in his will. Assume the extrinsic evidence includes B's testimony that, two years before D's death but only two weeks after he made his will, D and B were out for a Sunday afternoon drive and happened to pass Lot 3, Square 406 whereupon D stopped the car, got out and walked with B on to the lot and said to B, “someday that lot is going to be yours.” All of this may come before the court, notwithstanding the hearsay rule.163 Of course no donor would make such a will without intending that B have some lot in Gotham City. There being but two that are reasonably eligible, B's testimony of the Sunday afternoon drive would seem to tip the scales, absent other evidence. D's donative document most likely means that D is giving Lot 3, Square 406 to B. The point is that D has made a mistake in his will. There is no way to enforce its literal terms. The court must seek a sensible way out, and a clear and convincing evidence standard could only impede that course.

When we look further, we see that even the familiar preponderance burden of persuasion has but a limited utility. Its force is spent at the pre-interpretive fact finding stage. Consider this same example without the evidence of the Sunday afternoon drive. On the face of the circumstanced text, there is no rational basis for choosing between Lot 3, Square 406 and Lot 4, Square 603. In that case, we have no need for conventional burdens of persuasion. We resort instead to external aids to interpretation. We know that the will gives B one of the lots. Fairness to the residuary legatees, and ultimately D's heirs at law, suggests we select for B the lot with the lower fair market value.

There is a further dimension. Today's donor's-actual-intent reformers would draw a distinction between clerical errors, which they believe to have been the problem in *Patch v. White*,164 and mistakes of fact or law which affect the specific terms of the documents.165 Only the latter would be subject to the clear and convincing evidence rule. I find this distinction quite problematic. First, I am not at all clear of the distinction between a clerical mistake and a mistake of fact or law. In a *Patch-

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162. To this point, of course, this case is decided the same under any half-way intelligent approach to interpretation.
163. See Miss. R. Evid. Rule 803(3).
164. 117 U.S. 210 (1886).
165. See Langbein & Waggoner, *supra* note 14, and compare their discussions of interpreting latent ambiguities, see *id.* at 531-35, with their discussion of reformation in case of mistake, see *id.* at 577-90.
type case, it is entirely possible the donor could have furnished accurate
information to his lawyer and his lawyer could have dictated accurate
information to his secretary who mistakenly transposed the numbers in
the lot and square. This, I would assume, would be classified as a clerical
error. But the donor could make the same mistake, and might initially
furnish the incorrect information to his lawyer. It could be in fact, in
keeping up with his properties over the years, the donor has consistently
misdescribed the lot and square. This would be a mistake of fact and
presumably subject to the clear and convincing evidence rule. But a mo-
ment’s thought makes clear that it makes no sense that the quantum of
proof a party must offer turns on such an ephemeral distinction.

What is clear is, if this clerical error/mistake of fact distinction be-
comes law, it will inevitably, and at best, see the evolution of a substan-
tial twilight zone between the two categories. Even if the distinction is
not as elusive as I see it, this twilight zone and the shades of gray certain
to cloud it will be sure to generate troublesome litigation. In such cases,
we will have to contest the question of whether we have a clerical mis-
take or a mistake of law or fact before we can even decide what burden of
persuasion to apply. Obviously, such litigation bears the risk of error
which, if made, would cause the trial court to apply the wrong burden
and the appellate court thereupon to reverse.166 These problems are
bound to result from the present proposals but disappear if we abandon
the clear and convincing standard.

All of this leads to the analogous and similarly elusive distinction be-
tween a latent ambiguity and a mistake of fact. Many would describe the
circumstance in the Patch case as a latent ambiguity. The document was
perfectly clear and unambiguous on its face. It provided that the donor
devised “Lot No. 6, in Square 403 . . .” Extrinsic evidence showing the
donor never owned Lot 6 in Square 403, but did own Lot 3, in Square
406 is said to reveal a latent

167. See Langbein & Waggoner, supra note 14, at 530.
others. That this meaning differs from the literal wording of the will does not mean we have changed the wording of that will, anymore than we have changed the wording of the Eleventh Amendment to the Constitution of the United States as we have interpreted it over the years. The example is quite instructive. For more than a century the Supreme Court has read the Eleventh Amendment to provide the states with immunity to suit in federal court—while its literal words say nothing of the sort. The Court has also interpreted the Amendment to provide that immunity for suits against the state by citizens of the same state—their literal words do not support. Notwithstanding all of this, no one would suggest we have reformed the Constitution, nor have we in Patch v. White reformed the will.

Consider the case where G's will devised "$500 to A." Extrinsic evidence, including the testimony and files of the drafting attorney, shows this to have been a mistake in transcription. G told his lawyer he wanted A to have $5000. The lawyer told his secretary to make the devise to A in the sum of $5000. Beyond this, G's net worth at the time of the making of the will was in excess of one million dollars and A was a long time, loyal, and valued employee. Absent further evidence suggesting otherwise, a circumstanced external approach to interpreting this will suggests the devise to A be in the sum of $5000. Change the example. Assume the secretary mistakenly typed in "$50,000" instead of $500. Absent further evidence, the result should be the same. The circumstanced external meaning of the will is A gets $5000. The question is what would be gained by imposing a clear and convincing evidence burden of persuasion. We can readily think of dozens of contexts in which parties may litigate over $5000, or $50,000, and have a judgment rest upon a preponderance of the evidence standard. There is no reason on principle why this hypothetical litigation should be any different.

XII. APPLICATION OF THE CIRCUMSTANCED EXTERNAL APPROACH: DOES IT MAKE A DIFFERENCE?

A. Some General Remarks and the Semi-Sovereign Donor

To this point, much of what I have said is abstract and argumentative. I have outlined the theoretical and practical deficiencies of the donor's-actual-intent approach to interpretation. I have sought to sketch a circumstanced external approach and to explain its attractions, but have not yet confronted the hard question of just what difference all of this makes in the real world. My variations on a theme by Patch v. White provided a

169. The Eleventh Amendment withdraws a part of the judicial power granted in the original Constitution, Article III. It is a limitation on federal court's subject matter jurisdiction and, by its terms, that is all. It has been interpreted to say something quite different, to provide states with broad substantive immunity to suit. See Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985). In particular, see Justice Brennan's dissenting opinion, id. at 258-302.
few tentative insights. I accept that it is incumbent upon me that I say more, and so I turn to specific cases—some real, some hypothetical, most familiar to those knowledgeable in the field.

There is a perspective we should remember as we proceed. There are a number of measures of the success of any legal enterprise. My prejudices run in the direction of the pragmatic and the instrumental—the belief that law is supposed to make this existence a little less solitary, nasty, brutish and short than it would otherwise be. Experience has taught the legal process at its best yields but a crude approximation of justice. I am convinced we approach nearer to that best approximation when we act on principle and by reference to the practical realities of our processes and the phenomena they seek to regulate. No imperative of legitimate adjudication is more important or more elusive than that we achieve a congruence between declared rule and official action.\(^1\) In the present setting, we must take great pain that our circumstanced external approach to the interpretation of donative documents is formally realizable in the courts of this land and, if that be so, that it is competently and faithfully implemented.

Those who have addressed the field have considered a number of troublesome cases and illustrations.\(^{171}\) They range from cases involving difficulties with descriptions of the property transferred, problems with the descriptions of the transferee, ambiguities on the face of the donative document, as well as those revealed by extrinsic evidence. There are cases where textual material has been included apparently by mistake, and those where something has been inadvertently omitted. In some cases, ambiguities arise from the donor's personal usage, as where he has an unusual nickname for a donee or some form of expression not common or commonly understood. There are also cases where a mistake of fact or law affected the terms of the document. There is no need to repeat all of these illustrations, but I will speak to a representative few.

Preliminarily, I note that many of these illustrations are hypothetical cases—either pure hypotheticals or hypotheticals based upon the facts of some well known reported case. As valuable as such illustrations may be, a word of caution is in order. Because these cases will necessarily require receipt of extrinsic evidence, specifically including the testimony of important witnesses, a proper decision necessarily requires a trial wherein the judge hears the witnesses and their cross-examination, observes their demeanor, and throughout "smell[s] the smoke of the battle."\(^{172}\) A just adjudication includes, as well, sifting through and evaluating the contents of preliminary writings and other documentary evidence.

I am struck by several things as I read these real and imagined cases.

\(^{171}\) See Langbein & Waggoner, supra note 14, at 530-65; de Furia, supra note 14, at 21-29; Shores, supra note 14, at 476-80, 483-94; Fellows, supra note 14, at 641-52.
\(^{172}\) Culbreath v. Johnson, 427 So. 2d 705, 708 (Miss. 1983).
In each, the prominent reformers of today would without hesitation allow the court to consider extrinsic evidence both to establish the ambiguity or discrepancy and to resolve it. I could not agree more, although I would note the significance of the fact that, invariably, this extrinsic evidence is external to the document and the thought processes of the donor, and, on occasion, this evidence consists of a third-party version of objective manifestations of that thought process. Moreover, I am struck by the fact that in each of these examples we have resort to some external rule or aid to interpretation. Meaning is assigned to the document by reference to some standard or rule that rather obviously was not in the mind of the donor when he made the document. These things notwithstanding, we find a repeated refrain: We should approach interpretation so that we consider the text and extrinsic evidence, and from these find the donor's intent, and, only after we have found the donor's intent, do we reach the decisional point, the point at which we construe the document in accordance with that intent. Redundantly, in none of these cases, hypothetical and real, do we find more than probable intent. I would remain much more comfortable inquiring carefully of the text of the document, sifting through the extrinsic evidence which has passed the test of relevancy and has been subjected to scrutiny under the rules of evidence and the trial process, and then asking not what the donor meant but what this circumstanced text means, read and interpreted so that it is seen in its best light. To the extent it is necessary to have resort to someone's mind in order to understanding meaning, I feel better asking what our semi-sovereign donor, given this text and these circumstances, most likely meant.

B. My Central Point Revisited

Unless I am missing something, in this host of examples, the finding of donor's actual intent is an unnecessary and superfluous step toward the ultimate interpretation of a legal text. This core point is worth repeating and re-illustrating. Consider the case where a mother gives her daughter "my diamond ring" in her will. Assume the extrinsic evidence reveals that the mother has two diamond rings and has left a letter indicating which diamond ring the donee was to get. The evidence further shows that the mother acquired the second diamond two years after she made her will. A combined circumstanced external reading of the document shows it to mean that the donee daughter gets the first ring, the one referred to in the letter, and the one her mother had at the time the document was made. As in my Chickering piano example in Part IV, we add nothing when we say that the document is construed in accordance with D's "intention." Our law does not and should not act upon a donor's intentions except they be captured in a text satisfying the criteria for its legal validity, as that text may be augmented by observable objective manifestations of such intent. Courts do and should act upon those
texts and attendant manifestations. Resort to or even thought of donor's actual intent adds nothing to the interpretive task that follows.

C. In re Estate of Dorsen and In re Estate Calabi

In re Estate of Dorsen and In re Estate Calabi were each decided by the Surrogate's Court of New York in December 22, 1959 (though not by the same judge). They are frequently discussed together, as some see a substantial inconsistency. In Dorsen, in relevant part, the testator was providing for his wife and three daughters. By his will, he divided the residue of his estate into two trusts, Fund A and Fund B. This scheme apparently contemplated one trust obtaining the maximum benefit of the federal estate tax marital deduction. There was no other explanation implicit in the will or in the circumstances for dividing the residue into the two trusts. In any event, the initial beneficiary of each trust was the testator's widow. What is important for present purposes are the residuary clauses. In the case of each Fund, the will provided that, when the widow's interest terminated, each Fund was to be divided into three parts, one part for each of the testator's three children. A scheme was then provided whereupon in Fund A each child was to enjoy the income of his one-third part so long as the trust continued, but the trustee was to pay to each child one-third of his corpus at ages 35, 40 and finally, 45, respectively. Fund B appeared to follow the same scheme, but a problem arose in the case of the testator's daughter, Marjorie, viz, the language directing payment of one-half of the remaining corpus to her at age 40 was nowhere to be found. The court correctly held this provision—that one half of the then-remaining corpus of Marjorie's share of Fund B would be paid to her at age 40—should be treated as a part of the terms of the document to be enforced, stating "the testator's general scheme is clearly discernable from a reading of the will." This view is correct and is satisfactorily explained by the circumstance external approach to interpretation. One can easily interpolate the provision for a distribution to Marjorie at age 40 from the rest of the text. As Fellows well explains it:

First, the two funds contained virtually identical provisions. Second, both funds referred to the age of forty, which is meaningless unless connected to a distribution of corpus. Finally, Trust B used the words "on the balance of principal still remaining," which mean nothing unless some part of the principal was to be distributed between the ages of thirty-five and forty-five.

There is no need for any reference to donor's intent and, indeed, a search

175. See Langbein & Waggoner, supra note 14, at 539-41; Fellows, supra note 14, at 646-52.
176. Dorsen, 196 N.Y.S.2d at 347.
177. Fellows, supra note 14, at 647.
for donor's intent in no way aids the analysis. The evidence suggests "that through inadvertence of the typist, three lines were omitted from the text."\(^{178}\) This, of course, should have been admissible and available for consideration, as was the tax consideration available by virtue of the marital deduction rules. The point, for the moment, is that no hypothetical SSD providing a will in these circumstances could reasonably have failed to provide for a distribution of one-half of the remaining corpus to Marjorie at her 40th birthday.

No matter how you slice it, \textit{Dorsen} is an easy case. The result should be the same under any view of how the court should read a will. \textit{Estate of Calabi}, however, is quite another matter. Here, the court was concerned with a will which divided the testator's estate into four parts, denominated as Trust A, Trust B, Trust C and Trust D. In the aggregate, Trusts A and B consisted of 5/6ths of the decedent's residuary estate. The will contained lengthy provisions and directions naming the beneficiary of Trusts A and B and providing for the administration and ultimate disposition of each of the trusts. "No mention is made anywhere in the will as to the disposition of 'Trust C' and 'Trust D.' "\(^{179}\) It was argued that Trust C and Trust D should be held for the benefit of two of the decedent's grandchildren, but this position could be in no way be inferred from the language of the will and "no supporting evidence [was] submitted."\(^{180}\) If supporting extrinsic evidence had been offered and had passed muster under the rules of evidence, it should have been admitted and considered by the court.

In a superficial sense \textit{Calabi} is the other side of the coin from \textit{Dorsen}. Deciding \textit{Dorsen} is like deciding the value of Z in the equation "6 + 3 + 5 + 7 + Z = 25." On the other hand, \textit{Calabi} is much more like deciding the value of Z in the equation "6 + 3 + X + Y + Z = 25."\(^{181}\) Given no more than is provided in the opinion, it is difficult to differ with the court's decision. My experience and intuition suggest there is much we have not been told, that there is more in the record and in the text of the entire document. Even if we assume no extrinsic evidence was offered to support the view that the two grandchildren should be the beneficiaries of Trust C and Trust D, the circumstanced external approach would require pursuit of interpretation much further. The will itself negates an inference of partial intestacy. We know that the will divided the residuary estate into parts, and that one-twelfth was placed in Trust C and one-twelfth was placed in Trust D. This seems inconsistent with a plan that this part of the estate pass under the laws of descent and distribution, the result, in fact, decreed by the court. We know as well that the two beneficiary grandchildren are given a contingent remainder in Trust

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\(^{178}\) \textit{Dorsen}, 196 N.Y.S.2d at 345.


\(^{180}\) \textit{Id.}

\(^{181}\) \textit{Compare} Pace v. Owen, 511 So. 2d 489, 492 (Miss. 1987) \textit{with} Tricon Metals & Servs., Inc. v. Topp, 516 So. 2d 236, 238 (Miss. 1987).
A. No SSD would create such Trusts C and D without more. Common sense makes it certain that there is an explanation somewhere out there, be it within the "general dispositive scheme . . . clearly discernible from a reading of the will,"\textsuperscript{182} or in extrinsic evidence, or some combination of the two.

Langbein and Waggoner take the Calabi court to task for saying it would have excluded extrinsic evidence.\textsuperscript{183} If no extrinsic evidence was offered, as the court says, the exclusionary language of course is mere dicta. Fellows chastises the court for denying a remedy in the face of a "clear" drafting error.\textsuperscript{184} "Equal planning under the law provides a sufficient reason to reform."\textsuperscript{185} I agree, except that the court has to have something on which to base its interpretation. The court may know with reasonable certainty that $X$, $Y$, and $Z$ have a value in the equation, but unless there is something before the court that offers a clue what those values might be, the court cannot be faulted for not finding them.

Finally, I see no reason for offense in the mere fact the Calabi court held Trust C and D "must pass as intestate property."\textsuperscript{186} The state affords each of us the facility to devise our property by will or will substitutes, which reflects a respect for individual freedom. But this hardly implies intestate succession is per se to be feared. The laws of descent and distribution are not disfavored alternatives to testation. They reflect a public policy determination made by the legislature, and may be fairly said to reflect dominant values in the community. Indeed, here is a proper role for what Fellows has called "family preference." Many donors' estate plans resemble the distributory scheme of the statute of descent and distribution. Were it not for tax and probate and survivor administration matters, no doubt many more testators would be content with intestate succession.

D. Mahoney v. Grainger

\textit{Mahoney v. Grainger,}\textsuperscript{187} has been the cause and source of much ink among commentators.\textsuperscript{188} Langbein and Waggoner call it "famous,"\textsuperscript{189} although before they are through it is clear they mean "infamous." I am not so sure. In \textit{Mahoney}, the testatrix was a 64-year-old school teacher who had never married. She had a maternal aunt whose age was not given; the opinion simply says "who is still living,"\textsuperscript{190} but it may be presumed that she is some years older than the testatrix. We know also that

\textsuperscript{183} See Langbein & Waggoner, \textit{supra} note 14, at 540-41. If no extrinsic evidence was offered, as the court says, the exclusion language, of course, is mere dicta.
\textsuperscript{184} See Fellows, \textit{supra} note 14, at 652.
\textsuperscript{185} Id.
\textsuperscript{186} In re Estate of Calabi, 196 N.Y.S.2d 443, 446 (Sur. Ct. 1959).
\textsuperscript{187} 186 N.E. 86 (Mass. 1933).
\textsuperscript{188} See Fellows, \textit{supra} note 14, at 642-44.
\textsuperscript{189} Langbein & Waggoner, \textit{supra} note 14, at 536.
\textsuperscript{190} \textit{Mahoney}, 186 N.E. at 86.
she had "about twenty-five first cousins." Testatrix lived alone, but
the evidence reflects that "her relations with her aunt . . . and with sev-
eral first cousins were cordial and friendly." Some ten days before her
death, testatrix summoned a lawyer who prepared a will which she duly
and solemnly executed. The will provided "legacies in considerable sums
to two of her first cousins." It then provided that her residuary estate
pass "to my heirs at law living at the time of my decease, absolutely."
There is no question that testatrix' maternal aunt was her sole heir at
law. The aunt was related in the third degree, while the first cousins
were related in the fourth degree. At trial, the first cousins offered
hearsay evidence through the lawyer who drafted the will to the effect
that the testatrix had instructed him to leave the residuary estate to the
first cousins. The lawyer testified that, in response to his question to
whom she wished to leave "the rest of your property", testatrix replied,
"I've got about twenty-five first cousins . . . let them share it equally."

The Massachusetts court held that the residuary estate passed to the
aunt. The court offered no-reformation-for-mistake reasoning and ig-
nored the extrinsic evidence, stating, "There is no doubt as to the mean-
ing of the words 'heirs at law living at the time of my decease' as used in
the will. Confessedly they refer alone to the aunt of the testatrix and do
not include her cousins." Langbein and Waggoner call this "a magnific-
iently conclusory pronouncement," but I take it no one would dis-
pute that it is legally correct. Langbein and Waggoner credit the hearsay
evidence offered by the attorney and declare Mahoney to have been incor-
rectly decided. "Why the aunt when the testatrix meant the cousins?"
Fellows concurs that the court erred in excluding the extrinsic evidence,
but is not so quick to condemn the decision. To Fellows, the fly in the
ointment "might be that the cousins proffered no evidence at trial ex-
plaining why the testator would want to disinherit her aunt in favor of
them."

191. Id.
192. Id.
193. Id.
194. Id.
195. See The Nolan Chart of Relationships and Degrees of Kindred According to the
Civil Law, reprinted in Owen v. State, 51 So. 2d 541, 542 (Ala. 1951); Jefferson v. Dixon,
573 So. 2d 769, 772 (Miss. 1990).
196. Mahoney v. Grainger, 186 N.E. 86 (Mass. 1933). The opinion states that the trial
judge "made a report of the material facts," id. at 86, and in the "report" recited the
lawyer's hearsay testimony. I do not take this "report" as suggesting the trial judge
found as a fact that testatrix said what her lawyer says she said. The context suggests to
my mind the court is but summarizing the pertinent testimony. The fact that the trial
court was of the view the lawyer's hearsay was of no legal effect would in the ordinary
course mean the court never made the hard credibility choice whether to find its truth as
a fact. At most the "report" means "assuming without deciding . . . ."
197. Id.
198. Langbein & Waggoner, supra note 14, at 536.
199. Id. at 536-37.
It strikes me the decision may be correct, although for reasons other than those put in the opinion. Proceeding with a certain temerity, because, as always, we are not given all of the facts we need, a circumstanced external approach would concentrate on the language of the will, the undisputed legal meaning of the terms used, and the facts about the testatrix' relationship with her aunt and cousins. We are told that testatrix' relations "with several first cousins were cordial and friendly." It seems not unlikely that she gave those legacies to the first cousins with whom she was "cordial and friendly." The words "several" and "two" in this setting might be fairly seen as synonymous. If so, that leaves a third person with whom the testatrix had cordial and friendly relations: Her maternal aunt. We are told nothing about the aunt's circumstances or needs, but it is certainly not irrational that in these circumstances an SSD would provide for the aunt. It is true that the language of the residuary clause suggests that there are multiple "heirs at law," as it provides that the residuary estate is "to be divided among them equally, share and share alike." But an eminently sensible reading of this language in the circumstances would contemplate a devise of the residuary estate to the maternal aunt, with whom the testatrix had been cordial and friendly, provided the aunt be "living at the time of my decease." We know the testatrix died ten days after making the will. The circumstances certainly suggest that she acted in contemplation of death, but it is by no means clear that she anticipated so prompt an end. She may reasonably have thought of living six months, a year, or somewhat longer, but nevertheless she lived a relatively brief time after the making of the will, and she may also have reasonably anticipated that the maternal aunt—I wish we knew her age and state of health—just might not be around when testatrix died. The language as written would suffice for both eventualities: the residuary estate would go to the aunt if she were "living at the time of... [testatrix's] decease" and to the twenty-five first cousins, "to share and share alike" if the aunt predeceased the testatrix. Such a course would also avoid the problems that might arise should the aunt predecease testatrix with testatrix incompetent or otherwise practically unable to revise her will.

A circumstanced external approach to interpretation of this will takes quite seriously the legal meaning of the phrase "heirs at law living at the time of my decease." Even if, as Fellows suggests, a layperson might have a looser understanding of the word "heirs," it is a bit much to stomach a lawyer coming before the court and confessing that he did not know the meaning of "heirs at law." Without sitting in the courtroom,

202. Id.
203. Id.
204. Id.
and hearing the evidence and observing the demeanor of the witness and the like, one cannot with confidence make this finding. The extrinsic evidence, including the testimony of the attorney, was properly before the court for its consideration.

Still, the estate plan the court ultimately decreed was entirely reasonable for an SSD similarly situated. Without resort to any clear and convincing burden of persuasion, from what I know and given the reasonable assumptions which necessarily must be made, I would decide Mahoney in favor of the aunt. I would do so in an opinion along the lines suggested, but would hope it would not become "precedent for restrictively interpreting legal terms of art," as Fellows fears of the actual Mahoney opinion.205 I do not think "restrictive" is a fair adjective for an opinion holding a phrase "heirs at law" to have the same legal meaning that one hundred percent of the lawyers in the universe would attribute to it. Affording terms and phrases used by lawyers their legal meaning is an external aid to interpretation that we do and should take seriously. That testatrix executed a will containing such a term or phrase is a legal fact entitled to great respect. Without the slightest equivocation, as the trial judge, I would approach this case open to idea that extrinsic evidence may show that a mistake has been made and that a reasonable SSD under the circumstances had by this will given her residuary estate to her twenty-five cousins. Without apology, on the facts before us, I doubt a reasonable trial judge would be so convinced.

E. Moseley v. Goodman

Langbein and Waggoner comment that, if in Mahoney there had been extrinsic evidence that the testatrix habitually referred to her first cousins as her "heirs," that evidence could have been admissible and the case could have been decided in favor of the cousins.206 No doubt this is so, although I am not prepared to go so far as to say that this evidence, without more, would carry the day. Moseley v. Goodman207 concerns personal usage evidence and lets us see how such evidence of appropriate quality and standing might affect the outcome.208 Acting without benefit of counsel, the testator dictated his will to a nurse in the hospital two days before he died,209 setting forth thirteen specific bequests, the one at issue simply reading "Mrs. Moseley, $20,000."210 The court held that the bequest passed to a Mrs. Lillian E. Trimble based on overwhelming

205. Fellows, supra note 14, at 643.
206. See Langbein & Waggoner, supra note 14, at 537. Langbein and Waggoner proceed on the premise the trial court found as a fact that the testatrix told her lawyer what the lawyer said in court she had said. With deference, I think this is reading something into the opinion that is simply not there. See supra note 196.
207. 195 S.W. 590 (Tenn. 1917).
208. See discussion in Langbein & Waggoner, supra note 14, at 535-38.
210. Moseley, 195 S.W. at 590.
The court rejected the claims of Mrs. Lenore Moseley, whose husband had been a long time business acquaintance of testator but whom he had personally never met.

The evidence reflected that, for many years, the testator had been in business in the city of Memphis in the sale of tobacco and cigars. Over this time, the testator had bought his cigars from a man named Moseley. Moseley had a salesman, F.S. Trimble, who made regular sales to the testator. Testator always refer to Trimble as "Moseley" and in time came to refer to Trimble's wife, Lillian, as "Mrs. Moseley." During this same period of time, Mrs. Trimble regularly bought goods from the testator and his mother. "The testator called her 'Mrs. Moseley,' and ad\-mired her character very greatly. He spoke of her to others as a fine woman." The evidence further reflects that, during the last two or three weeks of his life, testator lived alone in an apartment known as the Monarch where Mrs. Trimble was the manager and that Mrs. Trimble and her housekeeper "gave the testator very devoted attention." The will also reflected that the testator provided a $20,000 bequest to "Mrs. Moseley's housekeeper," this being "a descriptive mark furnishing an addi\-tional indication of the testator's meaning when he gave the legacy of $20,000 to 'Mrs. Moseley.'" The opinion reflects far greater detail of the facts, leaving no question that the testator generally referred to Mrs. Trimble as "Mrs. Moseley," and that he had every reason to be generous toward her in his will. On the other hand, the testator had never met Mrs. Lenore Moseley and had no reason to prefer her in his will. Under any test, Moseley is an easy case, unless, as the court recited from another authority, "we go so far as to say that a person is not described by the name by which he is known."

Langbein and Waggoner agree with the result in Moseley, but are quick to point out that the extrinsic evidence of the testator's oral decla\-ration is not unlike that rejected in Mahoney, and that there is "[no] serious difference in the reliability of the evidence." Insofar as we con\-centrate in the nature of the evidence, I would agree. Comparing the two cases, however, the quantum and quality of evidence that Lillian E. Trimble was "Mrs. Moseley" is light years greater than the evidence in Mahoney that the twenty-five cousins were the testatrix's "heirs at law."

F. In re Estate of Bergau

In re Estate of Bergau presents a case not unlike Mahoney. The

211. See id. at 594.
212. Id. at 591.
213. Id.
214. Id. at 594.
215. Id. at 592.
216. Langbein & Waggoner, supra note 14, at 537.
217. 693 P.2d 703 (Wash. 1985).
testator had made a will granting his daughter and son-in-law an option to purchase certain farmland and/or cattle from his estate. The dispute arose over the meaning of the language of the will which described the purchase price should the option be exercised, as follows: "The price of farm land shall be 110% of the County assessed fair market value at the date of my death. Cattle shall be at fair market value." Following the practice of many states, Washington has a current use or open space valuation program for the assessment of property for ad valorem tax purposes. Under that program, the county assessor carried the property on his books, listing separately both the fair market value and the current use or open space value, the latter invariably a value considerably lower than fair market value. The daughter and son-in-law sought to exercise the option and argued that the property should be valued according to use value. At issue was a possible savings of $156,805. "The lawyer who drafted the will testified that the decedent intended the land be valued under the ‘current use assessment.’"  

What we have in Estate of Bergau is a term or phrase "fair market value" which has a widely known and accepted meaning. Fair market value by anyone's definition refers to value in exchange. By way of contrast, the state of Washington had an alternative valuation program by reference to which the property could be valued at current use. As in Mahoney, the litigants contested over terminology in the will which had a well settled objective meaning. As in Mahoney, a circumstantial external interpretation would take very seriously this language that was included in a will solemnly executed by the testator.

The claim of the daughter and son-in-law can only be seen as a claim of mistake. The testimony of the lawyer can only be seen as testimony that he goofed when he drafted the will contrary to his instructions and that the testator signed the will without noticing the error. Without doubt, this mistake evidence should be admitted and considered. Beyond this, the court should admit and consider facts and circumstances about the location of the land, and the relationship between the testator and his daughter and son-in-law. The court should also examine evidence to the effect that the land at issue was "sandwiched by the decedent's land, they jointly rolled back the two miles of fence and farmed the parcels as one." How convincing this evidence may have been in another matter. The mistake urged—and admitted by the lawyer—is of night-and-day dimensions. To be sure, there is no reason in law or policy why the testator may not have set the sales price at current use value. At the time he made his will, this was an issue as to which the state was indifferent. 

Bergau held for the daughter and son-in-law in a quite dubious opinion. Compounding its likely error on the mistake issue, the court discussed the highly problematic fact that

218. Id. at 704.
219. Id. at 705.
220. Id. at 707.
there was a concern in the general farming community for the economic hardships created by the excessively high prices paid for land and for the result of loss of farmland when land payments exceeded operational profits.²²¹

No doubt this type of policy consideration and these legislative facts are among the extrinsic matters to which courts may resort under the circumstances external approach. These are circumstances external to the will. The court swung the bat as the pitch was thrown. The only problem was the pitch was about five feet outside the strike zone. The court's reasoning ignores the common sense fact that the setting of the option purchase price was as much as anything a matter of equity and fairness to the testator's other two daughters and to his wife, who at the time was incompetent. As before, we cannot confidently resolve this case based on such a scant record. We need to hear the evidence and "smell the smoke of the battle." The circumstances external approach to interpretation would by no means be hostile to the argument of mistake. But, without more, this approach would be inhospitable to a claim of mistake based solely on the drafting lawyer's hearsay testimony that the will meant something other than what its phraseology was commonly understood to mean.

G. Estate of Mittleman v. Commissioner

Estate of Mittleman v. Commissioner²²² provides a vehicle for examining another feature of the circumstances external approach to interpretation. Jerome Mittleman died in 1965 leaving a will in which he created a trust for the use and benefit for his wife, Henrietta, and the question was whether the value of the estate left in trust qualified for the marital deduction on the federal estate tax return. Settled law required that, to qualify for the marital deduction, the property had to be given virtually outright to the spouse. In this particular context, the surviving spouse had to be entitled to the entire income of the trust and that the income had to be payable no less frequently than annually. The trust addressed these points. It provided that its sole purpose was to "provide for the proper support, maintenance, welfare and comfort" of the testator's surviving wife and to this end the trustee in his discretion could invade the corpus from time to time.²²³ The trust also conferred upon the wife a power of appointment by will over all assets which remained at her death.²²⁴

Tax consequences aside, the common law rule provides that, in such a circumstance, the income beneficiary is entitled to only so much of the income as is reasonably necessary to fulfill the declared purposes of the trust. Any income not needed for this purpose is to be accumulated and

²²¹ Id.
²²² 522 F.2d 132 (D.C. Cir. 1975).
²²³ Id. at 133 n.1.
²²⁴ See id.
added to corpus, ultimately to pass to the trust remaindermen. On the other hand, there is a not so subtle constructional preference, that donative documents be construed where possible to provide tax treatment favorable to donor and donee.226

Candor requires concession that up to this point either interpretation—allowance or disallowance of the marital deduction—would fit the text and the applicable rules of construction. The court did not exaggerate when it said:

the task on this appeal is a full-scale interpretation of Jerome Mittleman's will to resolve the question whether his wife is entitled to distribution of all of the income from the trust at intervals no greater than annually.227

The court first attempted to immerse itself in the linguistics of the document to the end of construing the trust that the deduction be allowed. The circumstanced external approach approves the effort. The effort in fact was less than successful. The court found a bit more imbedded in the text than was really there. External circumstances began to tip the scales. The court found:

the relatively small size of the trust itself readily substantiates the thesis that the beneficiary is entitled to all of the income. The corpus of the trust is not large, and by the same token the income it can produce is modest, and falls far short of the family income before Mr. Mittleman died.228

The court went on to note that the beneficiary's station in life was highly relevant in establishing the proper level of maintenance and support through the trust. It found no reason why, in view of the foregoing circumstances, a surplus should be left after the wife's needs were met. During the time that the trust had in fact been administered, the court found that "substantially all of the income, and to some extent principal, have been distributed to Ms. Mittleman upon her request." Beyond this, the court took note of the substantial tax consequences of allowance or disallowance of the marital deduction:

In light of the all-pervasive influence of the tax laws on estate planning, it seems entirely reasonable for courts to presume, absent contrary language, that testamentary provisions in favor of spouses are designed to qualify for the marital deduction.230

Finally, the court noted the testimony of the lawyer who drafted the will, who stated that the testator had asked whether the trust would qualify

225. See Restatement (Second) of Trusts § 128 cmt. e. (1959); Langbein & Waggoner, supra note 14, at 552-53.
228. Id. at 139.
229. Id.
230. Id.
for the marital deduction and that he, the lawyer, advised that in his opinion it would.231

To repeat, the trust is silent as to whether the trustee was directed to distribute to the wife all of the income and whether these distributions were required to be made at least annually. It cannot in candor be said that an interpretation disallowing the marital deduction would not fit the terms, interpretational standards, and surrounding circumstances. All things considered, however, particularly the external circumstances, strongly suggest the best, most intelligent and most coherent reading of this trust was to imply into it the provisions for complete distribution of income to the wife no less frequently than annually. Under these circumstances, the court correctly interpreted the will and trust to satisfy the prerequisites for the marital deduction.232

To be sure, the Mittleman court makes the usual excursion into the ephemera of donor’s intent. With deference, I think it a bit silly to speculate whether the donor had any intent as to his wife’s absolute entitlement to distribution of the all the income or the intervals thereof. At most we might say that the donor intended that his lawyer do whatever was necessary to make sure the estate given in trust qualified for the marital deduction. My point as before is that none of these speculations are necessary or productive. We can say with substantial confidence that the best interpretation of this circumstanced text is that the wife is entitled to all of the income at least annually, and, therefore, that the trust qualifies for the marital deduction. We can say with equal confidence that our hypothetical SSD would certainly have so intended. Next case.

Langbein and Waggoner discuss Estate of Mittleman at length.233 Writing within the context of the old order, wherein interpretation and reformation were somehow different, they criticize the court for disguising the fact that it was really rewriting the trust. Literally speaking, there is no question that the court gave effect to words and phrases that could not expressly be found in the text. As I have indicated, I think the court was correct in so doing, but I take exception to the premise that the court has rewritten the text. Rather, the court has taken a circumstanced text in the context of legal principles and constructional preferences and the reality that there is no perfect or certain interpretation which may be given, and out of all of this has read the document that the marital deduction be allowed. That the court uses some donor’s intent language I would prefer it had not does not keep me from applauding.

231. See id. at 139-40. Given the precise language used in the trust and the intricacies of federal specifications of what had to be done to qualify for the estate tax marital deduction, the lawyer’s advice is not nearly so deserving of condemnation as that of the lawyer in Mahoney, who did not know the meaning of “heirs at law,” or of the lawyer in Bergau, who did not know the difference between “fair market value” and “current use value.” While the Mittleman lawyer might deserve a D+ or, charitably, a C—, the Mahoney and Bergau lawyers clearly deserve an F.


233. See Langbein & Waggoner, supra note 14, at 552-54.
For those of us who see interpretation and construction and reformation as but different labels for a single, consolidated process, there is nothing more to say.

H. In re Estate of Anderson

I turn now to a case it was my privilege to write. In In re Estate of Anderson, the testator's will provided a substantial trust, the income of which was to be applied for the education of a class of persons described as the descendants of testator's father. More importantly, the testator provided that the educational trust would continue "for a period of twenty-five (25) years from the date of the admission of this last will and testament for probate." At the end of the twenty-five year period, the trust was to terminate and any remaining property was to be given to the testator's nephew, Howard W. Davis. Davis promptly challenged the trust on grounds it violated the traditional Rule Against Perpetuities on remoteness-of-vesting. As of the date of testator's death it was theoretically and physically possible that all of the descendants of testator's father would die more than twenty-one years before the scheduled termination of the trust. Our court concluded that the interest created in the trust "might not vest within twenty-one years after the death of all persons in being on December 12, 1984, who could affect the vesting of the interest." We held the trust enforceable according to its terms, invoking three alternative grounds. Most prominently, under the wait-and-see doctrine, we were able to uphold the trust as written. The litigation had taken more than four years and we had waited and seen, and on the date we decided the case, February 22, 1989, we saw that none of the "lives in being" had ended. We could then say with confidence that the interest must vest within twenty-one years. Alternatively, we recognized a legal power to reduce the term of the trust from twenty-five years to twenty-one years. Finally, we held that the court had the power to imply a savings clause that also could have the effect of cutting back the term of the trust to the twenty-one year period of vesting tolerated by the Rule Against Perpetuities.

Confessedly, I used intent terminology en route to this holding. Such is the nature of one's responsibility when writing for a court whose predecessors recognize a doctrine with which one personally disagrees. I dare say that, had I jettisoned intent terminology, I would have had a difficult time convincing my colleagues to join the opinion. For present purposes, however, the only thing that may be said with fair confidence about the testator's intent was that he intended for the trust to provide for the edu-

234. 541 So. 2d 423 (Miss. 1989).
235. Id. at 424.
236. Id. at 431.
237. See id. at 432; Carter v. Berry, 140 So. 2d 843 (Miss. 1962).
238. See Estate of Anderson, 541 So. 2d 423, 430 n.13 (Miss. 1989).
cational needs of his father's descendants who turned out to be the testator's nieces and nephews and their children. Given the wait-and-see rule, we were able to uphold the trust without changing so much as a word. Under other circumstances, the case recognizes clear authority for the court to employ an external circumstanced approach to interpretation and to find the trust to bear such terms as may co-exist with the Rule Against Perpetuities. So long as the modification in terms one must make—by interpretation, construction, reformation, or implication—was relatively insubstantial, given the total context and circumstances, one may say with confidence that the best interpretation available is one that adds or amends the fewest terms necessary to conform to the rule.

I remain unimpressed with the argument that these amended terms are unattested. It is the donative document itself that must satisfy the criteria for legal validity and not the particular terms and provisions thereof. I would reiterate that the donative document is a circumstanced text, bearing a scheme tending to coherency and utility, and it is always a mistake to treat the document as though it were nothing but words and phrases and sentences and paragraphs, however important those might be. In the context of Anderson, to those who argue that we have not satisfactorily explained how the court might amend the twenty-five year term of the trust, so that it read twenty-one years (had this been what we did with the case), when the twenty-one year provision is not literally a part of the attested will, I would answer that the alternative, causing the trust to fail in its entirety, would have been even less attested. As we stated in an earlier case:

The ultimate authority for the construction of a will lies in the judicial department of the state. The exercise of that authority from time to time requires enforcement of directives not in so many words a part of an otherwise valid will, a task we perform according to certain familiar canons of construction.239

I. Tinnin v. First United Bank

_Tinnin v. First Bank_,240 was a difficult case. Allan Hobgood, a bachelor, died leaving a seven-page holographic will creating a testamentary charitable trust designed to provide financial assistance to college students. The zinger was that the aid would be limited “to students of a state college or university of and operated by the State of Mississippi who are found worthy and who are of the Caucasian [sic] race and to none other.”241 In time, four adult children of Hobgood’s half-aunt came out of the woodwork and challenged the trust and urged it should fail, whereupon they would take its assets. All agreed that these four children of the half-aunt were Hobgood’s heirs at law, although it appeared in

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239. _Tinnin v. First United Bank_, 502 So. 2d 659, 663 (Miss. 1987).
240. 502 So. 2d 659 (Miss. 1987).
241. _Id._ at 661.
reality that he hardly knew them. Moreover, all agreed that the racially discriminatory clause in the will was unenforceable. We phrased the question:

[T]he alternatives below and here are (a) striking the racially restrictive clause and continuing the trust and (b) causing the trust to fail and the property to be distributed to the Tinnins, the testator's heirs at law. We know for a fact that Allan Hobgood did not wish either of these alternatives. The question is which is less offensive [to] the general plan of his reconstructed will.242

We were unable to resolve the question on the record before us and remanded to the trial court to receive and consider "parol or extrinsic evidence."243 On remand, the court proceeded to inquire into the full facts and circumstances and entered an order striking the racially restrictive clause and continuing the trust in effect. On a second appeal we affirmed.244

What is important is that a circumstanced external approach required a rather relentless pursuit of interpretation. Intestate succession may bear no particularly negative stigma, but it does not follow merely because the trust could not be implemented precisely as the will provided. Here the court was charged to find the best and most coherent and most sensible meaning this circumstanced text could be given, although it would have to ignore one condition important to the overall scheme—the racially restrictive clause. The circumstanced external approach does not balk at such barriers. It accommodates text, circumstances, and state-sanctioned public policy in order to makes the donative document the best it can be.

J. Estate of Bunch v. Heirs of Bunch

*Estate of Bunch v. Heirs of Bunch,*245 is a simple case teaching fundamental lessons. Roxie Bunch, the testatrix, left a short holographic will which ended, in relevant part, "I request if there is any cash left it will go to help one or two young men through medical school."246 That is all. It turned out there was indeed some cash left, approximately $113,000. The heirs at law attacked the bequest on grounds that it was "'void because of uncertainty and indefiniteness.'"247 The question was whether the will was sufficient to create a charitable trust. If the trust were to survive, the court would have to supply quite a few details regarding its management. The heirs argued that the court had no business writing the terms of the trust for the testatrix. We held that the court may "make such supplementary and administrative provisions as

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242. Id. at 669.
243. Id. at 670.
244. See Tinnin v. First United Bank, 570 So. 2d 1193, 1196 (Miss. 1990).
245. 485 So. 2d 284 (Miss. 1986).
246. Id. at 284.
247. Id. at 285.
may be necessary”248 to carry out the trust provided in the will.

Roxie Bunch wrote but a single short sentence. As a part of a valid will, that sentence provided that the residuary estate be used for the benefit of young medical students. It said nothing more. I was pleased we held that interpretation included construction and that construction included direction that all kinds of administrative details be provided and that the case be remanded to the lower court with instructions to appoint a trustee, to direct the trustee as to the method of selecting beneficiaries and the distribution of trust funds, and to provide otherwise for the administration of the trust property.249 The core concept of a charitable trust was present in the text, and there was no sensible reason why the court should not have drawn on its creative ingenuity to make the trust a reality. The circumstanced external approach to interpretation will not let a will such as this die.

K. In re Estate of Russell

The discussion of Estate of Bunch leads to one of my favorite cases, In re Estate of Russell v. Quinn.250 Thelma Russell died in 1965, leaving a valid holographic will written on a small card. On one side she made a modest bequest to a niece. On the other side she wrote, “I leave everything I own Real & Personal to Chester H. Quinn & Roxy Russell.”251 Quinn was Russell’s close friend and companion for over twenty-five years prior to her death. Roxy was her pet dog. Had Roxy been a person, the law was clear that this language would have devised the residue of Russell’s estate to Quinn and Roxy as tenants in common.252 The question was, what legal consequence flowed from the fact that Roxy was a dog?

Quinn argued that all of the property should be given to him subject to the condition that he be obliged to attend to the dog’s reasonable needs. The Supreme Court of California rejected this argument and held that the dog’s share passed to Russell’s niece, her sole heir at law. The court said several sensible things at the beginning of its opinion. It rejected the latent/patent ambiguity distinction as inconsequential, and appropriately so. The court held the trial court properly considered a full range of extrinsic evidence. Nevertheless, the California court stands convicted three-fold. First, the court limited the use of the extrinsic evidence received to simply explaining and revealing the ambiguity, when it should have allowed this evidence for the further and more important purpose of making sense of the bequest to Mrs. Russell’s dog. Second, as usual, the opinion is chock full of intent rhetoric. If one is to play the intent game,

248. Id. at 286. Confessedly, we put this in intent language, again succumbing to institutional responsibility.
250. 444 P.2d 353 (Cal. 1968).
251. Id. at 355.
252. See id. at 363.
there can be no doubt that Russell intended her money to care for her
dog, which leads to my third point.

Not unlike *Estate of Bunch*, this was a case where a short holographic
will provided something so simple that the legalistic mind could hardly
grasp it. It appears never to have occurred to the court to try to find
some sensible way to read the will. Without question, if Russell had
made a bequest to a humane shelter or a veterinary society for the care
and treatment of dogs, the bequest would have stood. I dare say no one
would have seriously challenged Russell’s power to create a formal trust,
directing her trustee to use the income for the care and benefit of her dog
Roxy. Can there be any doubt that this is what Russell’s will does?
Thus, the Supreme Court of California stands convicted of the most un-
forgivable of legal sins: lack of imagination.

CONCLUSION

The donor’s intent approach to interpretation has long had broad ac-
ceptance in the legal community. I accept that those who would chal-
lenge it bear the burden of persuasion. I have the burden of showing that
the circumstanced external approach to interpretation does the work we
need and does it better.

With some temerity, I think I have at least shown that the burden may
be carried. My preliminary polemics point the way, but I believe the
cases discussed in the last section make the required points. There are
hundreds of other cases, real and imagined, we might consider. No
doubt these could flesh out further nuances of the circumstanced external
approach to the interpretation of donative documents. These are enough
that a few important points may be made.

Take first the easy cases: *Patch v. White*, *Estate of Dorsen*, and *Moseley
v. Goodman*. These would be decided the same way under any sensible
interpretive approach, though I do not consider this an argument against
my thesis. I have always heard that Newtonian and Einsteinian physics
produce the same answers over a great range of everyday problems but
have never known this grounds to think Einstein was wrong. I cite cases
like *Patch* and *Dorsen* and *Moseley* to show that, however different in
theory my approach may be, it often produces results today’s reformers
should find congenial.

*Mahoney v. Grainger* and *Estate of Bergau* provide several lessons. Ex-
trinsic evidence was appropriate in each case, as in each the contestants
pursued a claim of mistake. Each illustrates the existence of a post-
factfinding, Dworkinian-style interpretive stage. I say this in the sense
that each case presented a text in which the challenged language had a
firm and long settled and well understood meaning. Such language
presents a powerful claim that courts read it as other informed persons
read it. Such language labels lawyers, who take the stand and attack
their own work, as liars or incompetents or both, and in no event worthy
of much credit as witnesses. *Mahoney* taunts us with its sketchy facts and loose language and just may have been a case where more diligent and detailed pursuit of the relevant extrinsic circumstances may have shown the donative text in a rational and quite favorable light.

*Estate of Mittleman* illustrates the dimensions of fit and best fit. I find both the executor’s interpretation and that of the Commissioner of Internal Revenue to fit a circumstanced external reading of the text of the testamentary trust. Proper inquiry into the external circumstances and accepted aids to interpretation of donative documents reveal the executor’s view as the best fit.

*Estate of Calabi, Estate of Anderson, Tinnin,* and some of our variations on *Patch v. White* present difficult interpretive tasks. Each of these shows the importance of external factual exploration, and, as well, fact finding in the conventional sense limited to the pre-interpretive stage. In each, we are challenged to go beyond and beneath the facts, to consider the facts for the light they shed, but to pursue relentlessly the elusive text and to tease from it and its circumstances the most coherent and effective meaning that may be found. Each of these cases reminds us we are reading a law, a legal text in no qualitative sense different from a contract or a statute or a constitution.

Finally, we have *Estate of Bunch* and *Estate of Russell v. Quinn* which, in their simplicity, teach us the most necessary weapons in the lawyer’s arsenal are common sense, imagination, and the ability to hold in check one’s legal preconditioning and hear what the writing is saying.

I believe I have carried my burden of persuasion. I suggest I have shown the donor’s actual intent approach to interpreting donative documents, however well intended, is inadequate in theory and practice. I suggest I have shown the circumstanced external approach better suited to the task at hand. It arises from the realities of the American legal practice of donative transfers and respects the realities of what courts do, though not necessarily what they say. It respects the practical abilities and circumstances of the task of legal interpretation and recognizes in the end that interpretation includes a creative, even artistic, dimension beyond the nuts and bolts of finding facts. I can’t help believing a circumstanced external approach to the interpretation of donative documents, faithfully and competently employed and applied, would, in time, give us a bit more justice than we now have and even a bit more than implementing the most thoughtful of today’s intent based reforms may yield. I can’t help believing the intent based views rest on much myth, while the circumstanced external approach appropriately regards reality.

I know that most others think caviar divine, though it does not move me. I know most others think fine red Burgundy wines the most wonderful of all—they are certainly the most expensive, while I find them invariably disappointing. And knowing these things, I am prepared to accept that one’s favored approach to interpreting donative documents may also be a matter of perception and taste.
SYMPOSIUM

THE PRIVACY RIGHTS OF RAPE VICTIMS IN THE
MEDIA AND THE LAW

ESSAY: PERSPECTIVES ON DISCLOSING RAPE
VICTIMS' NAMES
Deborah W. Denno
Associate Professor
Fordham University School of Law

PANEL DISCUSSION
Michael Gartner
President, NBC News

Linda Fairstein
Chief, Sex Crimes Unit
New York County District Attorney's Office

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