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## Learned Hand and the Objective Theory of Contract Interpretation

Daniel P. O'Gorman

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Daniel P. O’Gorman

## Learned Hand and the Objective Theory of Contract Interpretation

18 U.N.H. L. REV. 63 (2019)

**ABSTRACT.** When scholars discuss Judge Learned Hand’s approach to contract interpretation, they refer to him as a “great formalist commercial lawyer” who was a “pure objectivist” exhibiting a “crusader’s zeal” for the objective theory of contract. He is identified as a leading advocate of the classical approach to contract interpretation, which dominated American law in the late nineteenth and early twentieth centuries. But Hand’s reputation—built from three of his opinions—clashes with his reputation as a pre-Realist critic of formalism and as an intentionalist in statutory interpretation. This Article explores just how far Hand applied a strict objective approach to contract interpretation and whether the three famous opinions responsible for his reputation portray a somewhat misleading—or at least incomplete—picture of Hand’s approach to contract interpretation. This Article concludes that while Hand did seem to exhibit a zeal for the objective theory of contract, his approach to contract interpretation was more modern than one would expect from a so-called great commercial formalist lawyer with a crusader’s zeal for the objective theory.

**AUTHOR.** Associate Professor, Barry University School of Law. J.D., New York University, 1993; B.A., University of Central Florida, 1990. The author is indebted to Dean Leticia M. Diaz for providing a research grant on behalf of Barry University School of Law, without which this Article would not have been possible.

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## INTRODUCTION

When scholars discuss Judge Learned Hand's approach to contract interpretation, they refer to him as a "great formalist commercial lawyer"<sup>1</sup> who was a "pure objectivist"<sup>2</sup> exhibiting a "crusader's zeal" for the objective theory of contract.<sup>3</sup> He is identified, along with Associate Justice Oliver Wendell Holmes Jr. and Professor Samuel Williston, as a leading advocate of the classical approach to contract interpretation, which dominated American law in the late nineteenth and early twentieth centuries.<sup>4</sup>

Hand's reputation comes primarily from three of his opinions, two written early in his career when he was a trial judge and the third when he was an appellate

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<sup>1</sup> Stewart Macaulay, *Transcript of Panel Discussion—Transactional Economics: Victor Goldberg's Framing Contract Law*, 49 S. TEX. L. REV. 469, 476 (2007).

<sup>2</sup> KEVIN M. TEEVEN, *A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT* 276 n. 175 (Greenwood Press 1990).

<sup>3</sup> E. Allan Farnsworth, "Meaning" in the Law of Contracts, 76 YALE L.J. 939, 943 (1967).

<sup>4</sup> Mark L. Movsesian, *Are Statutes Really "Legislative Bargains": The Failure of the Contract Analogy in Statutory Interpretation*, 76 N.C. L. REV. 1145, 1157 (1998); see also Lawrence Kalevitch, *Contract, Will, and Social Practice*, 3 J. L. & POL 379, 382 (1995) (referring to "the defeat of the consensualists and the estoppelists of the late nineteenth century at the hands of Holmes, Hand and Williston and their objective theory of contracts.").

judge. The first was *Hotchkiss v. National City Bank of N.Y.*<sup>5</sup> in 1911, which included the following memorable passage, considered a classic statement of the objective theory of contract:

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.<sup>6</sup>

The second was *Eustis Mining Co. v. Beer, Sondheimer & Co.*, in 1917.<sup>7</sup> Hand's opinion included a passage reminiscent of his dictum in *Hotchkiss*:

It is quite true that we commonly speak of a contract as a question of intent, and for most purposes it is a convenient paraphrase, accurate enough, but, strictly speaking, untrue. It makes not the least difference whether a promisor actually intends that meaning which the law will impose upon his words. The whole House of Bishops might satisfy us that he had intended something else, and it would make not a particle of difference in his obligation. That obligation the law attaches to his act of using certain words, provided, of course, the actor be under no disability. The scope of those words will, in the absence of some convention to the contrary, be settled, it is true, by what the law supposes men would generally mean when they used them; but the promisor's conformity to type is not a factor in his obligation. Hence it follows that no declaration of the promisor as to his meaning when he used the words is of the slightest relevancy, however formally competent it may be as an admission. Indeed, if both parties severally

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<sup>5</sup> *Hotchkiss v. Nat'l City Bank of N.Y.*, 200 F. 287 (S.D.N.Y. 1911), *aff'd*, *Ernst v. Mechanics' Metals Nat. Bank of City of N.Y.*, 201 F. 664 (2d Cir. 1912), *aff'd sub nom. Nat'l City Bank v. Hotchkiss*, 231 U.S. 50 (1913).

<sup>6</sup> *Id.* at 293; see also G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 Cal. L. Rev. 433, 440 n.33 (1993) (referring to the dictum as "a classic expression of the objective view of contract"); Michael J. Phillips, *Promissory Estoppel and Reliance on Illusory Promises*, 44 Sw. L.J. 841, 903 n.350 (1990) (referring to it as "the classic statement of [the objective theory's] effect"); Wendell H. Holmes, *The Freedom Not to Contract*, 60 TUL. L. REV. 751, 798 n.3 (1986) (referring to it as the "classic formulation of the objective theory of contract"). In Williston's 1920 contracts treatise, he cited Hand's dictum for the proposition that "[i]n regard to both torts and contracts, the law, not the parties, fixes the requirements of a legal obligation." SAMUEL WILLISTON, *THE LAW OF CONTRACTS* § 21, at 22 (1st ed. 1920). He also quoted the passage in full as the "sound view" as to whether a misunderstanding between the parties will prevent the formation of a contract. *Id.* § 94, at 176. In 1946, Judge Jerome N. Frank of the Second Circuit wrote a concurring opinion that included a lengthy and scathing attack on the objective theory of contract, and cited to *Hotchkiss* as an example a judicial pronouncement advocating for "complete 'objectivity' in contract." *Ricketts v. Pa. R.R.*, 153 F.2d 757, 762 & n.9 (2d Cir. 1946) (Frank, J., concurring).

<sup>7</sup> *Eustis Mining Co v. Beer, Sondheimer & Co.*, 239 F. 976 (S.D.N.Y. 1917).

declared that their meaning had been other than the natural meaning, and each declaration was similar, it would be irrelevant, saving some mutual agreement between them to that effect. When the court came to assign the meaning to their words, it would disregard such declarations, because they related only to their state of mind when the contract was made, and that has nothing to do with their obligations.<sup>8</sup>

The third was *James Baird Co. v. Gimbel Bros.* in 1933, in which Hand refused to infer from an offer a promise to keep the offer open, even though the promisor knew the promisee had to detrimentally rely on the offer to put itself in a position to accept the offer.<sup>9</sup> Hand famously wrote that “in commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves.”<sup>10</sup>

But Hand’s reputation as a great commercial formalist lawyer with a crusader’s zeal for the objective theory of contract—stemming from these three opinions—clashes with his reputation as a pre-Realist critic of formalism<sup>11</sup> and as an intentionalist in statutory interpretation.<sup>12</sup> This Article thus seeks to determine just how far Hand, in his court opinions, applied a strict objective approach to contract interpretation and whether the three famous opinions responsible for his reputation portray a somewhat misleading—or at least incomplete—picture of Hand’s approach to contract interpretation.

Part I of this Article provides a brief biographical sketch of Hand, paying

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<sup>8</sup> *Id.* at 984–85.

<sup>9</sup> *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344 (2d Cir. 1933); *see also* Avery Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Contract Negotiations*, 105 YALE L.J. 1249, 1261 (referring to *James Baird Co.* as “one of Judge Hand’s most celebrated opinions and a warhorse of the casebooks.”).

<sup>10</sup> *James Baird Co.*, 64 F.2d at 346.

<sup>11</sup> *See* Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 506 (2003) (identifying Hand as a pre-Realist critic of formalism); *see also* G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 267 (1988) (“In the early years of the [twentieth] century [Hand’s] insistence that judges were free, within limits, to be creative identified him with Holmes, Pound, Cardozo, and other critics of both mechanical jurisprudence and what Hand called the ‘dictionary school’ of literalist statutory interpretation.”) (footnote omitted).

<sup>12</sup> *See* Movsesian, *supra* note 4, at 1191 & n.101 (noting Hand’s approach to contract interpretation and then stating, “Interestingly, Hand took an intentionalist approach to statutory interpretation.”); Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 376 (1947) (“When Judge Hand went on the bench, the literalism demanded by conservative tradition was in ascendancy, and but few cases were not adjudged according to the words of the statute on the ground that they had a plain meaning not to be altered without judicial legislation. This attitude Judge Hand unequivocally rejected.”).

particular attention to any influences his background might have had on his approach to contract interpretation. Part II discusses formalism and the prevailing approach to contract interpretation in the early twentieth century when Hand was appointed to the federal bench. Part III is a brief summary of Hand's approach to the objective theory of contract interpretation, based on an analysis of his opinions. Part IV analyzes Hand's most important opinions regarding contract interpretation, providing support for the summary in Part III. Part V is a brief conclusion, explaining that Hand's reputation as a great commercial formalist lawyer with a crusader's zeal for the objective theory of contract is an overly simplistic view of his approach to contract interpretation.

## I. BIOGRAPHICAL BACKGROUND

Hand was born Billings Learned Hand in 1872 in Albany, New York.<sup>13</sup> He attended Harvard University from 1889 to 1893, and as an undergraduate studied psychology under the future pragmatist William James, who taught Hand that there were no unchallengeable truths, only questions.<sup>14</sup> James seems to have had a strong influence on Hand, as throughout Hand's life he would have a philosophy of skepticism and suspicion of absolutes close to James's.<sup>15</sup>

In 1893, Hand entered Harvard Law School.<sup>16</sup> While in law school, he studied contracts under Samuel Williston,<sup>17</sup> who would become the greatest contracts scholar of his time and who is considered the architect of classical contract law.<sup>18</sup> Williston would also come to be considered the greatest law teacher of his time.<sup>19</sup> The Willistonian model of contract law was grounded on the centrality of written agreements entered into voluntarily, with courts playing a limited role in enforcing and interpreting those agreements<sup>20</sup> and was based on the assumption that

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<sup>13</sup> THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 248 (Roger K. Newman ed., 2009) [hereinafter YALE BIOGRAPHICAL DICTIONARY].

<sup>14</sup> GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 33, 36 (1994).

<sup>15</sup> *Id.* at 37 n. \*; *see also id.* at 35 ("What struck the most responsive chord in Learned was James's distrust of absolutes, his doubts about metaphysics, and his emphasis on the empirical . . .").

<sup>16</sup> *Id.* at 43.

<sup>17</sup> *Id.* at 47 & n.187; *see also* SAMUEL WILLISTON, *LIFE AND LAW: AN AUTOBIOGRAPHY* 314 (1941) (identifying Hand as Williston's former pupil).

<sup>18</sup> Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207, 208 (2005).

<sup>19</sup> *See, e.g.,* Erwin N. Griswold, *In Memoriam: Samuel Williston*, 49 A.B.A. J. 362, 362 (1963) (noting that "Williston was, by common consent, the greatest law teacher of his time").

<sup>20</sup> Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 549 (2003).

contracts often have a plain meaning.<sup>21</sup> Williston also believed courts, when interpreting a contract, should not consider what the parties said to each other about the contract's meaning or what the parties subjectively believed the contract meant.<sup>22</sup>

Studying contract law under Williston, one might expect to find that the famed professor's formalist approach to contract law, coupled with his considerable teaching abilities, exerted a strong intellectual influence on Hand. But while Hand held legal scholars in high esteem,<sup>23</sup> he did not succumb to hero worship and he perceived both his teachers' strengths and weaknesses.<sup>24</sup> For example, he was critical of Dean Christopher Columbus Langdell's formalist approach to legal reasoning,<sup>25</sup> and he preferred professors who combined the use of logic with wisdom and judgment.<sup>26</sup> And Williston's teaching style greatly emphasized using logic to reach the correct result.<sup>27</sup> One commentator described Williston's classroom exchanges as follows: "When he had finished with the beautiful structure of one of his platonic interchanges on the law of contracts, the student saw the inevitability of the result, as Williston had intended that he should."<sup>28</sup>

While Hand portrayed Williston "as an example of his own preferred model of tempering the search for logical constructs with breadth, sensitivity to reality, and humanity,"<sup>29</sup> his other reflections suggest Williston was too rigid and theoretical for him. He wrote:

[H]e was so secure in his thinking, so prepared to encounter dissidence and gently dispose of it, that one wondered what was the perfect mechanism that his skull enclosed. *He seemed to be indifferent as to the effect of law, measured in human values, so long as it was consistent and clear.*<sup>30</sup>

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<sup>21</sup> *Id.* at 572; *see also id.* at 619 n.53 ("Willistonian formalism rest[ed] on two basic claims: (1) that contract terms can be interpreted according to their plain meanings, and (2) that written terms have priority over unwritten expressions of agreement.").

<sup>22</sup> JOSEPH M. PERILLO, PERILLO ON CONTRACTS 132 (6th ed. 2009).

<sup>23</sup> GUNTHER, *supra* note 14, at 413.

<sup>24</sup> *Id.* at 47.

<sup>25</sup> *Id.* at 46.

<sup>26</sup> *Id.* at 47.

<sup>27</sup> *Id.*

<sup>28</sup> ARTHUR E. SUTHERLAND, THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817-1967, at 217 (1967).

<sup>29</sup> GUNTHER, *supra* note 14, at 48.

<sup>30</sup> *Id.* at 49 (quoting Letter from Learned Hand to A. James Casner, Nov. 10, 1959) (emphasis added).

He also wrote of Williston: “[H]is serene intelligence [was] unshaken by dissent. In [the] classroom it were best not to cross swords with him, unless you were a master yourself, which no one was in my time.”<sup>31</sup> Thus, unlike the tremendous influence Professor James Bradley Thayer had on Hand’s approach to judicial review as a result of a third-year constitutional law course,<sup>32</sup> Hand’s reflections suggest Williston’s teaching did not have a notable impact on his future approach to contract law.

In fact, perhaps more important to Hand’s future approach to contract law was Thayer.<sup>33</sup> Thayer, for example, believed that the parol evidence rule was based on the idea that the parties intended prior agreements and negotiations to merge into the written contract and be superseded if not included,<sup>34</sup> an important rationale for the rule that Hand followed as a judge, as will be discussed.

Hand graduated from Harvard Law School in 1896,<sup>35</sup> and his biographer summed up Hand’s law-school experience as follows:

Hand drew important “legal lessons,” guidelines that would serve him well as lawyer and judge: a mix of conservatism and innovativeness, a loyal regard for legal traditions combined with an awareness that the legacy must be used “flexibly,” a recognition that the function of judges is confined but not uncreative, and a perception that “orderly change” is essential if civilization is not to perish “either by atrophy, or by convulsion.”<sup>36</sup>

After Hand graduated from law school, he practiced law in Albany (and also dropped his first name).<sup>37</sup> He, unfortunately, found his work there to be routine and unchallenging, and in 1902, he moved to New York City and started practicing at a Wall Street firm.<sup>38</sup> But he found his work at the new firm to be mundane—“administration of some old estates, insolvency claims, dull commercial

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<sup>31</sup> *Id.* (quoting Learned Hand Memo for Williston, Harvard Law School Bulletin, January 1949, 8).

<sup>32</sup> See YALE BIOGRAPHICAL DICTIONARY, *supra* note 13, at 248 (“At Harvard Law School, class of 1896, he heard James Bradley Thayer’s skepticism about judicial review, which made an indelible impression.”).

<sup>33</sup> GUNTHER, *supra* note 14, at 51 (noting that Hand first encountered Thayer in a second-year evidence course).

<sup>34</sup> JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 409 (1898).

<sup>35</sup> YALE BIOGRAPHICAL DICTIONARY, *supra* note 13, at 248.

<sup>36</sup> GUNTHER, *supra* note 14, at 52.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 101.

matters<sup>39</sup>—and in 1904 accepted a position at Gould & Wilkie, another Wall Street firm,<sup>40</sup> where he became a partner.<sup>41</sup> He did not, however, achieve much success as an attorney and was unhappy,<sup>42</sup> ultimately considering his years as a lawyer to have been a failure.<sup>43</sup>

Nothing about Hand's years as a lawyer suggest they created in him any particular zeal to defend commercial interests. During his years in practice he became more interested in politics than he had been (though he was by no means an activist), but rather than the political philosophy one would expect from a commercial formalist lawyer, he supported a mixture of socialism and *laissez-faire*.<sup>44</sup> He wrote that “in a vast multitude of cases the State must and should . . . modify the contractual relations which [individuals] assume toward one another.”<sup>45</sup> Thus, he did not believe in unbridled freedom of contract and, for example, considered it necessary for the government to regulate for the safety and health of women and children in factories.<sup>46</sup> He opposed the concentration of economic power in large companies<sup>47</sup> and supported curbing the abuses of economic power.<sup>48</sup>

Far from being a zealot for freedom of contract, in 1908 Hand wrote an article published in the *Harvard Law Review* criticizing the U.S. Supreme Court's decision several years earlier in *Lochner v. New York*,<sup>49</sup> in which the Court held unconstitutional on freedom of contract grounds a law limiting the hours of bakers.<sup>50</sup> Hand believed that “no one can with justice apply to the concrete problems

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<sup>39</sup> *Id.* at 102.

<sup>40</sup> *Id.* at 104.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 105–06.

<sup>43</sup> *Id.* at 107; see also WHITE, *supra* note 11, at 261 (1988) (“He was not comfortable as a law practitioner, either in Albany, where he worked from 1896 to 1902, or in New York City, where he practiced until his 1909 appointment to the United States District Court for the Southern District of New York.”); YALE BIOGRAPHICAL DICTIONARY, *supra* note 13, at 248 (noting that he had “middling” success practicing law in Albany and New York City).

<sup>44</sup> See GUNTHER, *supra* note 14, at 62.

<sup>45</sup> *Id.* (quoting Letter from Learned Hand to Augustus Hand (Nov. 6, 1898)).

<sup>46</sup> *Id.* at 62–63.

<sup>47</sup> *Id.* at 110.

<sup>48</sup> *Id.* at 114.

<sup>49</sup> Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495 (1908).

<sup>50</sup> *Lochner v. New York*, 198 U.S. 45 (1905), *overruled by* *W. Coast Hotel v. Parrish*, 300 U.S. 379 (1937).

the yardstick of abstract economic theory,”<sup>51</sup> and the only way in which the value of the law could be shown was by experiment, and the legislature was “the only public representative really fitted to experiment.”<sup>52</sup> He wrote that “it is too late for the adherents of a strict *laissez faire* to condemn any law for the sole reason that it interferes with the freedom of contract.”<sup>53</sup> Hand accused the justices of implementing their economic biases,<sup>54</sup> and he showed support for the government interfering with freedom of contract to correct the abuses of unequal bargaining power, writing:

For the state to intervene to make more just and equal the relative strategic advantages of the two parties to the contract, of whom one is under the pressure of absolute want, while the other is not, is as proper a legislative function as that it should neutralize the relative advantages arising from fraudulent cunning or from superior physical force.<sup>55</sup>

Later, in 1921, in correspondence Hand and Associate Justice Felix Frankfurter agreed that the “damned Bill of Rights” had permitted judges to put their *laissez faire* economic biases into the Constitution.<sup>56</sup>

Because of his unhappiness practicing law, Hand sought to obtain a federal judgeship.<sup>57</sup> His first attempt came in 1907, but it was unsuccessful.<sup>58</sup> His second attempt—in 1909—succeeded.<sup>59</sup> His friends in New York admired his independent mind,<sup>60</sup> which had been displayed in his article criticizing *Lochner*,<sup>61</sup> and Hand was fortunate that the national administration wanted to nominate an independent intellectual.<sup>62</sup> In New York, he had met the influential Charles C. Burlingham, a lawyer and reformer who advocated for better quality judges, and Burlingham recommended Hand to U.S. Attorney General George W. Wickersham for a judgeship.<sup>63</sup> In 1909, President William Howard Taft appointed Hand to the federal

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<sup>51</sup> Hand, *supra* note 49, at 507.

<sup>52</sup> *Id.* at 508.

<sup>53</sup> *Id.* at 502.

<sup>54</sup> *Id.* at 508.

<sup>55</sup> *Id.* at 506.

<sup>56</sup> GUNTHER, *supra* note 14, at 373.

<sup>57</sup> *See id.* at 106.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 107; YALE BIOGRAPHICAL DICTIONARY, *supra* note 13, at 248.

<sup>60</sup> GUNTHER, *supra* note 14, at 107.

<sup>61</sup> *Id.* at 123.

<sup>62</sup> *Id.* at 107.

<sup>63</sup> *Id.* at 107–08.

trial court in the Southern District of New York.<sup>64</sup>

Hand served as a federal trial judge for fifteen years,<sup>65</sup> during which time he earned a reputation among other judges as a great jurist.<sup>66</sup> New York's economic and intellectual importance and Hand's original and clear writing style helped gain him this reputation.<sup>67</sup> As early as the 1920s, and before being appointed to the Second Circuit, Justice Holmes recommended his appointment to the U.S. Supreme Court.<sup>68</sup> In 1925, Benjamin Nathan Cardozo (then a judge on the New York Court of Appeals) ranked Hand among the two or three judges he considered close to Holmes in his esteem,<sup>69</sup> and in the same year Hand was introduced at the annual meeting of the Association of American Law Schools as "an idol of the bench."<sup>70</sup>

In 1922, Hand's reputation was such that he was invited to join the Committee on the Establishment of a Permanent Organization for the Improvement of the Law, a committee with nearly forty members and "a virtual Who's Who of leaders of the profession."<sup>71</sup> The committee founded the American Law Institute (ALI) in 1923, which sought "to help make certain much that is now uncertain and to simplify unnecessary complexities, but also to promote those changes which will tend better to adapt the laws to the needs of life."<sup>72</sup> Although the ALI's original aim included "adapt[ing] the laws to the needs of life," Hand supported the ALI's self-imposed restraint of articulating the law "as it is," rather than articulating the law as the ALI thought it should be.<sup>73</sup> Hand believed that the ALI should "restate, not legislate," his biographer noting that "just as he was opposed to unelected courts dictating public policy, so was he critical of a legal elite's substituting its dictates for democratic choices on contentious issues."<sup>74</sup>

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<sup>64</sup> *Id.* at 132.

<sup>65</sup> WHITE, *supra* note 11, at 253.

<sup>66</sup> *Id.* at 263. *But see* Jerome M. Frank, *Some Reflections on Judge Learned Hand*, 24 U. CHI. L. REV. 666, 675 (1957) (stating with respect to Hand's trial-court years, "[e]xcept for a few articles and some notable judicial opinions, he would have been known for his efforts in those years to few other than the New York Bar.>").

<sup>67</sup> WHITE, *supra* note 11, at 264.

<sup>68</sup> *Id.* at 263.

<sup>69</sup> *Id.*

<sup>70</sup> GUNTHER, *supra* note 14, at 414.

<sup>71</sup> *Id.* at 410.

<sup>72</sup> AMERICAN LAW INSTITUTE, REPORT OF THE COMMITTEE 14 (1923).

<sup>73</sup> GUNTHER, *supra* note 14, at 412.

<sup>74</sup> *Id.*

Over the years, Hand was a faithful attendee at ALI meetings,<sup>75</sup> but there is little evidence that the ALI's work on the *Restatement of Contracts*,<sup>76</sup> published in 1932, made an impact on Hand's approach to contract interpretation. Hand was not on the Committee on Contracts,<sup>77</sup> and he rarely cited to the *Restatements* in his judicial opinions.<sup>78</sup> His involvement with the ALI did show, however, that he desired greater clarity in the common law. As noted by his biographer, he had a "concern with clarifying the legal framework [and] [d]uring most of his years on the bench, Hand confronted a body of law that ranged from useless generalizations to annoying technicalities."<sup>79</sup>

In 1924, shortly after joining the ALI, Hand was appointed to the United States Court of Appeals for the Second Circuit, the court on which he would sit until his death in 1961.<sup>80</sup> He served as a federal judge for fifty-two years, writing about 3,000 opinions.<sup>81</sup> Although never appointed to the U.S. Supreme Court, the Second Circuit provided Hand with an opportunity to hear important cases involving sizable sums of money argued by members of one of the country's leading bars.<sup>82</sup>

In 1929, not long after his appointment to the Second Circuit, Hand became a founding member of the National Advisory Committee of the Institute of Law at Johns Hopkins University, an organization dedicated to promoting empirical social-science research in the law.<sup>83</sup> In a letter to the University's president, Hand displayed an interest in studying the law in action, writing: "We are still largely living in adolescent dogmas, uncriticized, often emanating from purposes of which we are but dimly conscious. The Institute would at least make us aware of our assumptions; that is much."<sup>84</sup>

Hand's approach to judging has been described as combining creativity and restraint,<sup>85</sup> and seeking to "retain and revive the longstanding canon that judges

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<sup>75</sup> *Id.* at 410–11.

<sup>76</sup> *Id.* at 413.

<sup>77</sup> See RESTATEMENT (FIRST) OF CONTRACTS vi (AM. LAW. INST. 1932) (listing the committee members).

<sup>78</sup> GUNTHER, *supra* note 14, at 413.

<sup>79</sup> *Id.* at 313.

<sup>80</sup> YALE BIOGRAPHICAL DICTIONARY, *supra* note 13, at 248; GUNTHER, *supra* note 14, at 679.

<sup>81</sup> YALE BIOGRAPHICAL DICTIONARY, *supra* note 13, at 248.

<sup>82</sup> WHITE, *supra* note 11, at 276.

<sup>83</sup> GUNTHER, *supra* note 14, at 408–09.

<sup>84</sup> *Id.* at 409.

<sup>85</sup> WHITE, *supra* note 11, at 285.

were never truly free to decide in accordance with their personal views.”<sup>86</sup> But at the same time, for him “[i]t was not enough to base a decision on outdated formulas and on legal clichés; throughout his career he sought to adapt the law to the rapid changes in society and industry.”<sup>87</sup> Skeptical of absolute truths, the pragmatism he had learned from William James as an undergraduate student stuck with him—“the philosophy that ideas derive meaning from their practical consequences.”<sup>88</sup> And it was this pragmatism that was perhaps his most memorable attribute and most significant contribution to judging.<sup>89</sup>

During his judicial career, Hand rejected two extreme schools of jurisprudence—one was what he called the “dictionary school” that interpreted statutes literally and the other was the view that the judge should disregard the law (his view of Legal Realism).<sup>90</sup> Hand took a middle path, believing that legal doctrines contained elements of myth and fiction and that subjectivity was an important element of judging, and involved an attempt to weigh unquantifiable values.<sup>91</sup> With respect to statutory interpretation, he rejected the prevalent view in the late nineteenth century that courts should limit interpretation to the ordinary or plain meaning of a statute.<sup>92</sup> Rather, he sought to find a middle ground between the dictionary school and Realism by focusing on the statute’s purpose.<sup>93</sup>

Hand’s background and his general approach to judging thus suggests that, with respect to the law of contract interpretation, he would desire to clarify the rules of interpretation. At the same time, Hand understood that general statements of law cannot always determine outcomes in particular cases. Hand would reject the belief that the language used by the parties can have a plain meaning outside of the context in which it is used, and he would take account of the parties’ purpose in entering into the contract. This Article will turn to Hand’s approach to contract interpretation after a brief survey of formalism and the law of contract interpretation at the turn of the twentieth century, inasmuch as Hand’s approach to contract interpretation is viewed as quintessentially formalistic.

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<sup>86</sup> *Id.* at 291.

<sup>87</sup> MARVIN SCHICK, *LEARNED HAND’S COURT* 189 (1970).

<sup>88</sup> YALE BIOGRAPHICAL DICTIONARY, *supra* note 13, at 249.

<sup>89</sup> James Oakes, *Personal Reflections on Learned Hand and the Second Circuit*, 47 *STAN. L. REV.* 387, 393 (1995).

<sup>90</sup> WHITE, *supra* note 11, at 267–68.

<sup>91</sup> *Id.* at 275.

<sup>92</sup> *Id.* at 284.

<sup>93</sup> *Id.*; see also NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 228 (1995) (“Learned Hand . . . had been advocating the purposive interpretation of law since the mid-1940s.”).

## II. CONTRACT INTERPRETATION AT THE TURN OF THE TWENTIETH CENTURY

From the mid-nineteenth century through the First World War, the predominant mode of legal thinking was referred to as “formalism” or “mechanical jurisprudence,” now referred to as “classical legal thought.”<sup>94</sup> Formalists believed that specific legal rules and court opinions could be traced to a few basic principles, which in turn could be linked to a few fundamental concepts, in particular the concept of respecting the will or autonomy of legal authorities, as well as private contracting parties.<sup>95</sup> Classical legal thought was thus associated with the economic principle of *laissez faire*.<sup>96</sup> This association of *laissez faire* and classical legal thought was reinforced by courts believing that the “right to property” and the “right to contract” were constitutionally protected by a person’s autonomy.<sup>97</sup> Thus, scholars and judges supporting social legislation criticized the reasoning of judges using classical legal thought.<sup>98</sup>

During this era, there also arose what is referred to as “classical contract law.”<sup>99</sup> Classical contract law is most commonly associated with Holmes and Williston, with Holmes providing the theory’s broad outlines in 1881 in his book *The Common Law* and Williston the details in 1920 in his treatise *The Law of Contracts*.<sup>100</sup> Its high-water mark is associated with the publication of the *Restatement of Contracts* in 1932, with Williston as its reporter.<sup>101</sup> By that point, however, formalism had been under attack from the Legal Realists, and the publication of the *Restatements* is viewed by some as a life-support effort to save formalism,<sup>102</sup> a “last long-drawn-out gasp of a

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<sup>94</sup> David Kennedy & William W. Fisher III, *Introduction to THE CANON OF AMERICAN LEGAL THOUGHT* 8–9 (David Kennedy & William W. Fisher III, eds., 2006) [hereinafter *CANON*].

<sup>95</sup> *Id.* at 9.

<sup>96</sup> *Id.* at 10.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 681 (1984).

<sup>100</sup> GRANT GILMORE, *THE DEATH OF CONTRACT* 6 & n.4, 15 (Ronald K. L. Collins ed., 2d ed. 1995); see also Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1193 (1998) (“Gilmore attributed the essential shape of classical contract law to three Harvard law professors: Langdell, Holmes and Williston. By 1880, the first two members of triumvirate of classical architects were already busily sketching the outlines of what would become the generally accepted structure of American contract law.”).

<sup>101</sup> See Knapp, *supra* note 100, at 1193–94; see also *RESTATEMENT (FIRST) OF CONTRACTS*, *supra* note 77, at ix (identifying Williston as the Reporter).

<sup>102</sup> GILMORE, *supra* note 100, at 74.

dying tradition.”<sup>103</sup> Professor Grant Gilmore believed that the *Restatement of Contracts* was itself schizophrenic, “poised between past and future.”<sup>104</sup> This early twentieth century assault on classical contract law would be led by Professor Arthur L. Corbin of Yale Law School, starting with a series of articles in the early twentieth century.<sup>105</sup>

Reminiscent of formalism, classical contract law was a general theory that applied to all types of contracts, rather than having separate theories for different types of contracts.<sup>106</sup> This process of creating a general theory of contract law is traced to Christopher Columbus Langdell, Dean of Harvard Law School, and his 1880 contracts casebook.<sup>107</sup> It continued throughout the era of classical legal thought, with Holmes’s efforts in *The Common Law*, Williston’s treatise, and the *Restatement of Contracts*. Holmes in the late nineteenth century sought not only to make sense of contract law, but of the common law as a whole.<sup>108</sup> In Williston’s introduction to his 1920 treatise, he wrote that the law of contracts “tends from its very size to fall apart,” and asserted that “[i]t therefore seems desirable to treat the subject of contracts as a whole, and to show the wide range of application of its principles.”<sup>109</sup> The ALI’s desire to restate the rules of the common law was designed to “clarify and simplify the law and to render it more certain . . . .”<sup>110</sup> The ALI stated that “the vast and ever increasing volume of the decisions of the courts establishing new rules or precedents, and the numerous instances in which the decisions are irreconcilable has resulted in ever increasing uncertainty in the law.”<sup>111</sup> Thus, classical contract law valued certainty.

Consistent with a desire for certainty, classical contract law preferred bright-

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<sup>103</sup> Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 833 (1935).

<sup>104</sup> GILMORE, *supra* note 100, at 71-72.

<sup>105</sup> See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 49 (1992) (identifying Corbin as challenging the will theory through “a series of monumentally influential articles on particular aspects of contract law between 1912 and 1918 . . .”).

<sup>106</sup> See LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 20–24 (1965).

<sup>107</sup> GILMORE, *supra* note 100, at 13.

<sup>108</sup> See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (1881).

<sup>109</sup> SAMUEL WILLISTON, *1 THE LAW OF CONTRACTS* iii (1920).

<sup>110</sup> RESTATEMENT (FIRST) OF CONTRACTS, *supra* note 77, intro. viii.

<sup>111</sup> *Id.*

line rules to vague standards,<sup>112</sup> the former having the benefit of restraining official arbitrariness.<sup>113</sup> This preference for rules over standards, and the desire for certainty, included preferring written documents to oral terms, and was manifested in doctrines such as the plain meaning rule and the parol evidence rule.<sup>114</sup>

These bright-line rules were to be derived through deduction from abstract, axiomatic principles.<sup>115</sup> And these principles were based on the idea of freedom of contract, the idea that individuals should have the power to enter into contracts and have the government enforce them without significant qualifications.<sup>116</sup> They were also, however, based on the idea of freedom from contract, in the sense that parties should not have contractual obligations imposed upon them to which they had not assented.<sup>117</sup>

While classical contract law might have been premised on the principle or policy of freedom of (and from) contract, adherents had different reasons for supporting it. Some considered it based on the natural law theory of liberalism, and an inalienable right to own property and dispose of it as you wished, in the sense that freedom of contract (and freedom from contract) was a fundamental right based on the right to autonomy.<sup>118</sup> This was known as the “will theory of contract.”<sup>119</sup> With respect to freedom of contract, it resembled a Kantian approach to being

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<sup>112</sup> See Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *FORDHAM L. REV.* 761, 767 (2002).

<sup>113</sup> CANON, *supra* note 94, at 633 (“It has been common ground, at least since Ihering, that the two great social virtues of formally realizable rules, as opposed to standards or principles, are the restraint of official arbitrariness and certainty.”).

<sup>114</sup> See Knapp, *supra* note 112, at 767.

<sup>115</sup> See *id.*; see also Melvin A. Eisenberg, *Why There is no Law of Relational Contracts*, 94 *NW. U. L. REV.* 805, 805 (2000) (“Classical contract law was axiomatic in nature. Axiomatic theories of law take as a premise that fundamental doctrinal propositions can be established on the ground that they are self-evident.”).

<sup>116</sup> See Knapp, *supra* note 112, at 767.

<sup>117</sup> See Lucas S. Osborn, *The Leaky Common Law: An “Offer to Sell” as a Policy Tool in Patent Law and Beyond*, 53 *SANTA CLARA L. REV.* 143, 147 (2013) (“[T]raditional contract law also seeks to ensure that individuals are free from having contractual obligations imposed on them unexpectedly. This freedom may be referred to as ‘freedom from contract’ . . .”).

<sup>118</sup> See W. DAVID SLAWSON, *BINDING PROMISES: THE LATE 20TH-CENTURY REFORMATION OF CONTRACT LAW* 10–11 (1996); P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 8–13 (1979) (discussing English judges).

<sup>119</sup> See Morris Cohen, *The Basis of Contract*, 46 *HARV. L. REV.* 553, 575 (1933) (discussing the will theory of contract).

morally responsible for your actions,<sup>120</sup> and was premised on a move away from paternalism and toward individualism, the idea that people could be trusted to look out for themselves.<sup>121</sup> Coupled with this was the notion that compelled sharing and sacrifice should be restricted (freedom *from* contract).<sup>122</sup> This led to a system of contract law under which it was hard to form a contract, but once formed it was hard to avoid.<sup>123</sup>

But classical contract law was also based on the policy of the free market,<sup>124</sup> and based on the benefits of competition and the freedom of parties to set prices and other contract terms.<sup>125</sup> Unlike the principle of autonomy, this was a utilitarian policy to increase social welfare.<sup>126</sup> For example, Holmes in his 1897 article *The Path of the Law* openly accepted utilitarianism as law's goal.<sup>127</sup>

One of the features of classical contract law was the objective theory of contract,<sup>128</sup> which “holds that the intentions of the parties to a contract or alleged contract are to be ascertained from their words and conduct rather than their unexpressed intentions.”<sup>129</sup> Holmes was a particularly strong advocate of the objective theory of contract.<sup>130</sup> He wrote in *The Common Law* that “the making of a contract does not depend on the state of the parties’ minds, it depends on their overt acts”<sup>131</sup> and that “[t]he law has nothing to do with the actual state of the parties’

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<sup>120</sup> See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1104 n.322 (2001) (equating the will theory with Kantianism).

<sup>121</sup> ATIYAH, *supra* note 118, at 8–10.

<sup>122</sup> Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1735 (1976).

<sup>123</sup> GILMORE, *supra* note 100, at 52–53.

<sup>124</sup> SLAWSON, *supra* note 118, at 10.

<sup>125</sup> *Id.*

<sup>126</sup> See Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1068 (1975) (“Economic efficiency is a collective goal: it calls for such distribution of opportunities and liabilities as will produce the greatest aggregate economic benefit defined in some way.”).

<sup>127</sup> William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to the Legal Process*, in HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* lvii (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

<sup>128</sup> Eisenberg, *supra* note 115, at 807.

<sup>129</sup> Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 427 (2000).

<sup>130</sup> See Sanford Schane, *Ambiguity and Misunderstanding in the Law*, 25 T. JEFFERSON L. REV. 167, 183 n.48 (2002) (noting that Holmes was “a staunch advocate of the objective theory of contracts.”).

<sup>131</sup> See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 307 (1881).

minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct.”<sup>132</sup> In 1897, in his famous article *The Path of the Law*, Holmes wrote that “the making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not on the parties having meant the same thing but on their having said the same thing.”<sup>133</sup>

Scholars disagree on whether the objective theory arose in the late nineteenth century or whether it has older origins. One view is that there was a shift in the late nineteenth century from a subjective theory to an objective theory based on the reasonable expectations of the promisee.<sup>134</sup> The reason for the ascendancy (according to this view) was that as transactions increasingly occurred between strangers, the need to rely on the other party’s external manifestations increased.<sup>135</sup> Support for this reason is based on contemporary writers such as Parsons, Langdell, Holmes, and Williston noting commerce’s need for predictability.<sup>136</sup>

The other view, which was advocated by Professor Joseph M. Perillo, is that the objective theory of contract has predominated in the common law since time immemorial, with a “brief but almost inconsequential flirtation with subjective approaches in the mid-nineteenth century.”<sup>137</sup> Perillo argued that this brief flirtation with a subjective approach came to an end—and the modern era of the objective theory ushered in—when courts started permitting parties to testify on their own behalf.<sup>138</sup> The objective theory persisted—according to Perillo—because of the legal profession’s distrust of the testimony of parties, and the modern objective theory thus arose as a response to the relaxed rules of evidence permitting parties to testify.<sup>139</sup>

While the two views might differ about whether the objective theory was present from time immemorial or was a product of the nineteenth century, there was no doubt that by the late nineteenth century the objective theory prevailed over a subjective theory.<sup>140</sup> The objective theory of contract, however, was surely in some

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<sup>132</sup> *Id.* at 309.

<sup>133</sup> O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897).

<sup>134</sup> KEVIN M. TEEVEN, *A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT* 239 (1990).

<sup>135</sup> *Id.* at 275 n.160.

<sup>136</sup> *Id.* at 239.

<sup>137</sup> Perillo, *supra* note 129, at 428.

<sup>138</sup> *Id.* at 428–29.

<sup>139</sup> *Id.* at 477.

<sup>140</sup> See Lauren E. Miller, *Breaking the Language Barrier: The Failure of the Objective Theory to Promote Fairness in Language-Barrier Contracting*, 43 IND. L. REV. 175, 177 (2009) (“Since

tension with the will theory of contract, the latter focusing on autonomy and the former focusing on what a reasonable person would believe was intended.<sup>141</sup>

### III. SUMMARY OF HAND'S APPROACH TO THE OBJECTIVE THEORY OF CONTRACT INTERPRETATION

An analysis of Hand's contract opinions (discussed in detail in the next section) shows that Hand's strain of objectivism was based on the belief that certainty is necessary in contractual relations, rather than the will theory of contract. He aimed to increase certainty in contractual relations by excluding what parties said to each other during pre-contract negotiations leading to a written agreement, as well as post-hoc declarations or admissions about their intentions. In this sense, he was in fact a strong advocate of the objective theory of contract, but he was not a formalist in the sense that he believed the rules of contract interpretation were derived from the axiomatic principle of autonomy and a right to freedom of (and from) contract. Rather, his support for the objective theory came from utilitarianism—a belief that predictability is necessary in contractual arrangements.

While Hand shared classical contract law's respect for the written contract, his approach was different from classical contract law in the sense that he rejected the idea that a contract's provisions could have a plain meaning. He would not consider evidence of what the parties said to each other during pre-contract negotiations and what the parties subjectively intended, and thus not all extrinsic evidence was fair game. But he otherwise aimed to implement the parties' intentions through consideration of any other relevant evidence, believing that the understanding of the parties should count rather than the understanding of others.<sup>142</sup> While he believed that the words chosen "are always the most important evidence of the parties' intention,"<sup>143</sup> he also sought to determine their intentions through a consideration of all other relevant extrinsic evidence. Thus, while he was a strong advocate of the objective theory of contract, in determining what a reasonable person would believe the parties intended he was willing to consider much evidence outside the written document.

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the late nineteenth century, courts have applied the objective theory to determine which manifestations amount to assent to form a contract.”).

<sup>141</sup> See Nicholas C. Dranias, *Consideration as Contract: A Secular Natural Law of Contracts*, 12 TEX. REV. L. & POL. 267, 296, 297 (2008) (“The theoretical justifications for the objective theory were largely pragmatic reactions to the purported problems of the will theory.”).

<sup>142</sup> See *Gaunt v. John Hancock Mut. Life Ins. Co.*, 160 F.2d 599, 601 (2d Cir. 1947) (“It is the understanding of such persons that counts”).

<sup>143</sup> *Eddy v. Prudence Bonds Corp.*, 165 F.2d 157, 161 (2d Cir. 1947).

## LEARNED HAND AND THE OBJECTIVE THEORY OF CONTRACT INTERPRETATION

An analysis of Hand's opinions discloses that he rejected the declarations by the parties about what they thought the contract meant because he believed it usurped the court's (or jury's) function in deciding what the parties' understanding was and because unexpressed intent is irrelevant. This former basis was consistent with Hand's (and classical legal thought's) general respect for separation of powers. The latter basis flowed from his belief—consistent with the other leading advocates of the objective theory at the time—of the importance of parties being able to rely on the apparent terms of a contract. Hand made it clear that excluding testimony about what the parties believed the contract meant was necessary to avoid uncertainty with respect to the interpretation of contracts. Importantly, however, Hand did not reject that particular type of evidence because he believed what the parties intended was irrelevant; he simply believed that *unexpressed* intentions were irrelevant. In fact, he maintained that if it appears from the parties' words or acts that they attributed a peculiar meaning to a term, that meaning would prevail.

With respect to what the parties expressed to each other during negotiations before reducing the agreement to writing, Hand rejected this evidence because he believed that when parties integrated their agreement, they *intended* the written document to exclude evidence of what the parties said during negotiations about its meaning. Hand viewed this as an application of the parol evidence rule, stating that “[t]he parol evidence rule means only this: That where the parties have in any form said that a writing shall completely embody their engagements, the court can enforce none but the written stipulations without disregarding the very contract they have made.”<sup>144</sup>

### IV. LEARNED HAND'S OPINIONS ON CONTRACT INTERPRETATION

The discussion in this section is organized into four subsections. The first section is an analysis of Hand's opinion in *Hotchkiss* and his approach to unexpressed understandings. The second section is an analysis of Hand's opinion in *Eustis Mining* and his approach to post-hoc admissions and expressed but unincorporated intentions. The third section is an analysis of the role of contextual evidence in Hand's approach to contract interpretation, and his rejection of the belief that words can have a plain meaning outside of their context. The fourth section is an analysis of Hand's decision in *James Baird Co. v. Gimbel Bros., Inc.*, and his approach to inferring promises.

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<sup>144</sup> *In re Canfield*, 190 F. 266, 267 (S.D.N.Y. 1911), *rev'd on other grounds*, 193 F. 934 (2d Cir. 1912), *aff'd sub nom.* *Houghton v. Burden*, 228 U.S. 161 (1913).

### A. *Hotchkiss and Unexpressed Understandings*

A review of the *Hotchkiss* opinion in its entirety, rather than just its famous dictum, shows that Hand in that case was concerned with self-serving testimony by one of the parties about how the parties to the contract allegedly understood the terms.<sup>145</sup> In *Hotchkiss*, the issue was whether a contract for clearance loans<sup>146</sup> between a bank and (now bankrupt) stockbrokers provided that securities purchased with the loans would be subject to a lien as collateral for the loans.<sup>147</sup>

Hand's famous dictum was in response to the testimony of a man named Carse, whose testimony for the bank went further than the actual practice of the stockbrokers and the bank (they had done business for many years), which Hand had already concluded did not support the finding of a lien.<sup>148</sup> Carse testified as to what the stockbrokers and the bank understood the legal status of the securities to be, testifying as follows:

It [the practice between the stockbrokers and the bank] has developed a form of trust, and the clear understanding implied between the broker and the bank is that whatever the broker obtains by the proceeds of the loan given to him is held in trust for the account of the bank. . . . If a broker pays for stocks or bonds, it is the understanding of the bank that they belong to them as collateral to their loan, and the broker simply retains possession of them long enough to make delivery and get payment . . . .<sup>149</sup>

Hand stated that the testimony was not competent evidence because “it in effect usurps the court’s function which is to decide what was the ‘clear understanding.’”<sup>150</sup> Hand, however, not wanting to imply that the parties’ actual understanding was relevant, even to the court, held that it was “of no consequence for another and deeper reason,” and explained:

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something

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<sup>145</sup> See generally *Hotchkiss v. Nat’l City Bank of N.Y.*, 200 F. 287 (S.D.N.Y. 1911), *aff’d*, *Ernst v. Mechanics’ Metals Nat. Bank of City of N.Y.*, 201 F. 664 (2d Cir. 1912), *aff’d sub nom. Nat’l City Bank v. Hotchkiss*, 231 U.S. 50 (1913).

<sup>146</sup> Clearance loans are loans for the day, enabling a stockbroker to buy stocks for his customers, repaid with the proceeds from the sale to the customer the following day. See *id.* at 289.

<sup>147</sup> *Id.* at 289–90.

<sup>148</sup> *Id.* at 289, 293.

<sup>149</sup> *Id.* at 293.

<sup>150</sup> *Id.*

else of the sort.<sup>151</sup>

While the phrase “usual meaning which the law imposes upon them” might lead one to believe Hand was referring to a provision’s “plain meaning,” such a belief is belied by Hand’s earlier analysis in the case. Hand, though stating that he was proceeding on the “*assum[ption]* that the written contracts may be varied by proof of a custom,”<sup>152</sup> had considered extensively the parties’ practices in seeking to determine the contract’s meaning.<sup>153</sup> This shows that he likely meant usual meaning based not only on the language used, but by also taking into account the deal’s context.

Also, Hand’s famous dictum did not stop there, and he added the following qualification, which is often omitted when Hand’s dictum is quoted<sup>154</sup>: “[o]f course, if it appear by other words, or acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent.”<sup>155</sup> Thus, “[w]hat must be rejected, according to Hand, is not the notion of intent, but rather, testimony based upon intent that was unexpressed [either verbally or through prior actions] at the time the contract is alleged to have been formed.”<sup>156</sup>

But Hand also made clear that the parties’ subjective intentions of the meaning of their prior actions were irrelevant. What was important was how the court believed a reasonable person would interpret those acts:

Now, in the case at bar, whatever was the understanding in fact of the banks, and of the brokers, too, for that matter, of the legal effect of this practice between them, it is of not the slightest consequence, *unless it took form in some acts or words, which, being reasonably interpreted, would have such meaning to ordinary men*. Of course, it will be likely that, if they both do understand their acts in the same way, usual men would have done so, too. Yet the question always remains for the court to interpret the reasonable meaning to the acts of the parties, by word or deed, and no characterization of its effect by either party thereafter, however truthful, is material. The rights and obligations depend upon the

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<sup>151</sup> *Hotchkiss*, 200 F. at 293.

<sup>152</sup> *Id.* at 290 (emphasis added).

<sup>153</sup> *Id.* at 290–92.

<sup>154</sup> Stephen F. Ross & Daniel Tranen, *The Modern Parol Evidence Rule and its Implications for New Textualist Statutory Interpretation*, 87 GEO. L.J. 195, 242 (1998) (“[T]he relevant passage contains an important additional, qualifying sentence. Judge Hand added, ‘[o]f course, if it appear by other words, or acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent.’ Courts will often quote the first portion of the paragraph, without the second.”) (citation omitted).

<sup>155</sup> *Hotchkiss*, 200 F. at 293.

<sup>156</sup> Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353, 377 (2007).

law alone.<sup>157</sup>

Hand thus disregarded this portion of Carse's testimony because the parties' understanding "was expressed only in acts, the natural meaning of which does not imply any trust relation, as he, and perhaps they, may have supposed."<sup>158</sup> Hand noted that "[h]ad they said that they meant to create a trust, such a trust would arise; but when they merely adopted a course of conduct, the supposed results of that conduct are immaterial."<sup>159</sup>

In 1928, Hand reiterated the often-overlooked qualifying point to his *Hotchkiss* dictum, noting that it was relevant whether something was "disclosed to change the normal meaning of the words."<sup>160</sup> In 1939, Hand wrote that although

with few exceptions the law attaches legal consequences to what parties do, quite independently of their private purpose or intent . . . [i]t is of course always possible that the parties to . . . a written contract, may agree between themselves that it shall not have the effect upon their rights or obligations which it purports to have . . . It is not necessary that such a mutual understanding shall be explicit or verbal; it may be gathered from the conduct of the parties in a series of transactions, or in any other way.<sup>161</sup>

In 1927, when Hand was on the Second Circuit, he provided insight into his famous dictum in *Hotchkiss*, revealing that it was based on the need for predictability in contractual arrangements.<sup>162</sup> In *United Constr. Co. v. Haverhill*, two towns and a contractor entered into a contract for the building of a bridge.<sup>163</sup> After the bridge was built, a pier gave way and sank, wrecking the bridge.<sup>164</sup> The towns sued for breach, arguing that the defendant had failed to excavate for the piers to "solid ledge," as required by the contract, and this was the cause of the piers giving way.<sup>165</sup> Hand held that "[p]erhaps it was natural for the contractor to conclude that the bed alone was intended, and to stop there; but that was not what he undertook when he agreed that the 'excavation . . . shall be done to the line shown.'"<sup>166</sup> In the final paragraph of the opinion, Hand stated:

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<sup>157</sup> *Hotchkiss*, 200 F. at 293–94 (emphasis added).

<sup>158</sup> *Id.* at 294.

<sup>159</sup> *Id.*

<sup>160</sup> *Moon Motor Car Co., of N.Y. v. Moon Motor Car Co.*, 29 F.2d 3, 4 (2d Cir. 1928).

<sup>161</sup> *Richardson v. Smith*, 102 F.2d 697, 699 (2d Cir. 1939).

<sup>162</sup> *United Constr. Co. v. Haverhill, N.H.*, 22 F.2d 256, 256 (2d Cir. 1927).

<sup>163</sup> *Id.* at 538–39 (prior opinion in 1925 setting forth facts).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 256.

So far as we can see, the contractor ignored the terms of his contract and substituted what he, perhaps correctly, supposed was everybody's understanding. It was a natural, but a perilous, course, and, having adopted it, the loss must fall where the words of the contract put it. *Contracts are written to avoid such uncertainties*, and, however hardly they may bear, we have no choice but to make them the measure of the parties' obligations.<sup>167</sup>

Hand thus made it clear that he followed the objective theory of contract, even in the face of what might have been both parties' actual (but unexpressed) understanding, because contracts were written to avoid such uncertainties. In 1940, he similarly wrote that "[t]he purpose of a contract is to define the promised performance, so that when it becomes due, the parties may know the extent to which the promisor is bound . . . ."<sup>168</sup> As recognized by a commentator, "[b]y requiring evidence beyond contested, post hoc descriptions of the parties' earlier states of mind, the system is able to increase the reliability of its decision-making process."<sup>169</sup>

### ***B. Eustis Mining, Post-Hoc Admissions, and Expressed but Unincorporated Intentions***

Hand's second famous opinion espousing the objective theory of contract interpretation—*Eustis Mining Co. v. Beer, Sondheimer & Co.*<sup>170</sup>—involved Hand's rejection of the relevance of a post-hoc damaging admission by a party about his state of mind, as well as evidence of what the parties disclosed about their intentions prior to or at contract formation, but that were not incorporated into the written contract.

In *Eustis Mining*, the parties entered into an agreement in 1914 under which Eustis would provide cinders to Beer for ten years.<sup>171</sup> The agreement was set forth in two contracts, and the first contract provided for Eustis to supply the amount requested by Beer up to stated maximum amounts, but the second contract (which was a subsequent letter written over four months later) provided that Beer would purchase all of Eustis's production.<sup>172</sup> After the parties entered into the agreement, the First World War caused a substantial increase in Eustis's production because its production of cinders was tied to ore from sulphur producers, and the demand for

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<sup>167</sup> *Id.* at 259 (emphasis added).

<sup>168</sup> *Art Metals Constr. Co. v. NLRB*, 110 F.2d 148, 150 (2d Cir. 1940).

<sup>169</sup> Solan, *supra* note 156, at 380.

<sup>170</sup> *Eustis Mining Co v. Beer, Sondheimer & Co.*, 239 F. 976, 984 (S.D.N.Y. 1917).

<sup>171</sup> *Id.* at 978–80.

<sup>172</sup> *Id.*

sulphuric acid was greatly increased.<sup>173</sup> The issue was whether Beer was required to take all of Eustis's production, or whether it was limited to 12,000 tons.<sup>174</sup> The relevant language in the second contract was as follows: "[I]t has been agreed between us that we purchase from you for a period of ten (10) years beginning from July 1, 1914, and ending July 1, 1924, your total production of lump cinder, estimated to be twelve thousand (12,000) tons per year . . . ."<sup>175</sup>

The specific issue was whether the phrase "estimated to be twelve thousand (12,000) tons per year" limited the obligation to that amount.<sup>176</sup> It was undisputed that if just the language in the second contract was considered, the agreement would require the defendant to take all of the plaintiff's output.<sup>177</sup> The defendant argued, however, that construed in conjunction with the first contract it either became apparent that the limitation was intended, or that it created an ambiguity such that extrinsic evidence of the parties' meaning was admissible.<sup>178</sup>

With respect to reading the two contracts together, Hand noted that it was undisputed that the second contract, read alone, "would have bound the defendant to accept the total output, regardless of its amount."<sup>179</sup> In addressing whether this meaning could be changed by considering the first contract, Hand wrote that "we must recognize, not only that there is a critical breaking point . . . beyond which no language can be forced, but that in approaching that limit the strain increases."<sup>180</sup> Hand thus affirmed his belief that the most important aspect of contract interpretation was the words the parties chose. Hand's review of the two contracts led him to conclude that the defendant "was ready to take all that it could get."<sup>181</sup>

Hand then turned to the extrinsic evidence upon which the defendant relied. First, the defendant wanted the court to consider a "Proposed Combination Agreement of April 8, 1915," which was a document written by the plaintiff and apparently designed to subsume the two existing contracts, and that included the provision from the first contract with its quantity limitation.<sup>182</sup> Although the

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<sup>173</sup> *Id.* at 981.

<sup>174</sup> *Id.* at 982.

<sup>175</sup> *Id.* at 980.

<sup>176</sup> *Id.* at 982.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 984.

<sup>182</sup> *Id.*

defendant never assented to the proposed combination agreement, the defendant wanted to use this evidence to show what the plaintiff had intended with respect to the second contract.<sup>183</sup> Hand, however, would not consider it, even though it was written evidence sought to be used by the defendant as evidence of what the plaintiff intended, rather than simply self-serving testimony by one party of what the parties understood the contract to mean, like the evidence in *Hotchkiss*.<sup>184</sup> Hand explained:

This evidence is, I think, irrelevant to the issues, for a reason going to the very nature of a contractual obligation. It is quite true that we commonly speak of a contract as a question of intent, and for most purposes it is a convenient paraphrase, accurate enough, but, strictly speaking, untrue. It makes not the least difference whether a promisor actually intends that meaning which the law will impose upon his words. The whole House of Bishops might satisfy us that he had intended something else, and it would make not a particle of difference in his obligation. That obligation the law attaches to his act of using certain words, provided, of course, the actor be under no disability. The scope of those words will, in the absence of some convention to the contrary, be settled, it is true, by what the law supposes men would generally mean when they used them; but the promisor's conformity to type is not a factor in his obligation. Hence it follows that no declaration of the promisor as to his meaning when he used the words is of the slightest relevancy, however formally competent it may be as an admission. Indeed, if both parties severally declared that their meaning had been other than the natural meaning, and each declaration was similar, it would be irrelevant, saving some mutual agreement between them to that effect. When the court came to assign the meaning to their words, it would disregard such declarations, because they related only to their state of mind when the contract was made, and that has nothing to do with their obligations. This is, of course, a wholly different question from a preceding or subsequent agreement assigning an agreed meaning to any given words used in another contract.<sup>185</sup>

Hand thus went beyond *Hotchkiss* and the concern about a self-serving declaration, holding that a damaging admission (even a written admission) by a party as to his or her intent regarding the contract's meaning was irrelevant, even if it showed the parties shared the same understanding.<sup>186</sup> Hand's use of the phrase "severally declared" was important because it showed he rejected the relevance of separate declarations by the parties of what they intended the contract to mean,

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 984–85 (emphasis added).

<sup>186</sup> Hand's opinion in *Eustis Mining Co.* has been cited for the proposition that "[a] pure objectivist would say that an objective meaning should prevail even when there was an inconsistent common understanding." Kevin M. Teeven, *The Advent of Recovery on Market Transactions in the Absence of a Bargain*, 39 AM. BUS. L. J. 289, 310 (2002).

even if the declarations disclosed a shared understanding. To be effective, such a shared understanding must be part of a prior or subsequent *agreement* assigning that shared understanding to the given words. This requirement of an agreement can be viewed as a significant limitation on Hand's qualifying remark in *Hotchkiss* that "if it appear[s] by other words, or acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail . . . ."<sup>187</sup>

The defendant also relied on evidence of the negotiations that attended the execution of the second contract.<sup>188</sup> One might suspect this would be the type of evidence satisfying Hand's requirement that a shared understanding be part of a prior or subsequent agreement assigning that agreed meaning to the given words. But Hand refused to consider this evidence as well:

Since the parties certainly intended, as appears by the mere character of the document, to make out of the writing a definitive memorial of their words, that intent the law will effect, and it can do so only by disregarding everything but the writing itself. Hence all other verbal expression must be eliminated; the writing is agreed upon as the final verbal act. The ambiguity of the written language does not determine this question in any way whatever, in spite of some occasional confusion of language in the books; but the exclusion of such negotiations depends upon their agreement to exclude, and extends so far as the parties have agreed that it shall exclude all but the written words, and no further. In the case at bar it is plain enough that the parties meant not to rely on the oral negotiations; that they wished to have a complete and final written memorial of their obligations. That purpose, being lawful, the court will fulfill by disregarding all other verbal expression, except that selected.<sup>189</sup>

This too can be seen as a significant limitation on Hand's qualifying remark in *Hotchkiss* that would permit a showing that the parties attributed a peculiar meaning to their contract.<sup>190</sup>

A year after *Eustis Mining*, Hand reaffirmed his belief that the language chosen

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<sup>187</sup> *Hotchkiss v. Nat'l City Bank of NY*, 200 F. 287, 293 (S.D.N.Y. 1911), *aff'd*, *Ernst v. Mechanics' Metals Nat. Bank of City of N.Y.*, 201 F. 664 (2d Cir. 1912), *aff'd sub nom. Nat'l City Bank v. Hotchkiss*, 231 U.S. 50 (1913); *see also Howe & Rogers Co. v. Lynn*, 71 F.2d 283, 284 (2d Cir. 1934) (per curiam) ("While of course it is true that the intent of the parties is controlling in construing the language of a contract or deed, this canon is often misleadingly used. The private intents of the parties, even though they may be shown to be identical, are not the measure of their rights or duties; rather that meaning which the law will impute to the words they have used, which is, generally speaking, that which a reasonable person would suppose them to carry."). While the *Howe & Rogers* opinion was per curiam, it seems likely Hand (who was on the panel) was the author.

<sup>188</sup> *Eustis Mining Co.*, 239 F. at 985.

<sup>189</sup> *Id.*

<sup>190</sup> *Hotchkiss*, 200 F. at 287, 293.

for the written contract trumps the parties' contrary indications of intent. In 1918, in *United States v. Republic Bag & Paper Co.*,<sup>191</sup> Hand, sitting on the Second Circuit while still a trial judge, wrote the majority opinion finding that a contract between the government and a paper company was not to be construed as a requirements contract, despite language in a proposal suggesting that was the intention.<sup>192</sup> The proposal, standing alone, indicated that the government desired a requirements contract.<sup>193</sup> But the contract itself stated that the paper company was to "furnish . . . so much of the estimated quantity [of paper] as may be ordered by the party of the second part (the Public Printer)."<sup>194</sup> Hand wrote that "[t]he plaintiff . . . very properly argues that the contract is not to be taken by itself, but in conjunction with the Public Printer's proposal,"<sup>195</sup> which had been attached to the contract.<sup>196</sup> But he then noted, however, that the proposal and the contract conflicted and that "we must adopt that which occurs in the actual understanding of the parties, rather than in their preliminary negotiations. Therefore we conclude that the contract proper should prevail."<sup>197</sup> Hand continued: "Just why the contract varied from the proposals we cannot, of course, surmise, but we cannot with justice disregard the fact that it did vary . . ."<sup>198</sup>

In 1945, Hand reiterated his opposition to the use of what the parties said during negotiations as evidence of a term's meaning.<sup>199</sup> In *Rothkopf v. Lowry & Co.*,<sup>200</sup> he stated that "as an interpretative gloss upon the meaning of the words actually used, that testimony was incompetent, for the contract was plainly to be a final memorial of the promises . . ."<sup>201</sup> Rather, Hand relied on "the underlying purpose of the contract" to determine the language's meaning.<sup>202</sup> Hand apparently only

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<sup>191</sup> *U.S. v. Republic Bag & Paper Co.*, 250 F. 79 (2d Cir. 1918).

<sup>192</sup> *Id.* at 81.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 80.

<sup>195</sup> *Id.* at 81. The proposals being attached to the contract is presumably what made it proper for the defendant to rely upon them, as otherwise they would have been inadmissible evidence of what the parties said to each other during preliminary negotiations.

<sup>196</sup> *Id.* at 79.

<sup>197</sup> *Id.* at 81.

<sup>198</sup> *Id.*

<sup>199</sup> *Rothkopf v. Lowry & Co.*, 148 F.2d 517 (2d Cir. 1945).

<sup>200</sup> *Id.* at 519.

<sup>201</sup> *Id.* at 520 (citing RESTATEMENT (FIRST) OF CONTRACTS, *supra* note 77, at § 237).

<sup>202</sup> *Id.*

relented when required to follow state law. In 1949, following New York law in the post-*Erie* era, he wrote: “[T]he law of New York—to which we must look to learn the meaning of the contract—admits previous negotiations to show [the term’s] meaning . . . .”<sup>203</sup>

Hand’s refusal to consider statements of the parties’ intentions made during negotiations preceding a written contract was consistent with Williston’s approach, which was based on the idea that when parties adopt a writing as a statement of their bargain, they intend to exclude such evidence.<sup>204</sup> In such a situation, “[t]he parties have assented to those words as binding upon them.”<sup>205</sup> Williston wrote that “[w]here . . . they incorporate their agreement into a writing they have attempted more than to assent by means of symbols to certain things, *they have assented to the writing as the adequate expression of the things to which they agree.*”<sup>206</sup> Williston again expressed this view in the *Restatement of Contracts*, published in 1932. The *Restatement* provided that the interpretation of an integrated agreement should take into account “all operative usages and . . . all the circumstances prior to and contemporaneous with the making of the integration, *other than oral statements by the parties of what they intended it to mean.*”<sup>207</sup> Williston, Reporter for the *Restatement of Contracts*, wrote that where parties

integrate their agreement they have attempted more than to assent by means of symbols to certain things. They have assented to the writing as the expression of the things to which they agree, therefore the terms of the writing are conclusive, and a contract may have a meaning different from that which either party supposed it to have.<sup>208</sup>

Thus, for Hand and Williston, it was the parole evidence rule and Thayer’s merger rationale that precluded the use of statements made by the parties as proof of the parties’ intentions, even (at least for Hand) post-formation admissions of what a party’s intent had been at the time of formation. Traditionally, direct statements of intention had been excluded because of fear that they would be given too great weight by the judge or the jury.<sup>209</sup> For Hand, however, it was based on the belief that the parties intended the written terms (as interpreted by a court) to control over the parties’ beliefs about the contract’s meaning, even if the parties

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<sup>203</sup> Edward B. Marks Music Corp. v. Foulton, 171 F.2d 905, 908 (2d Cir. 1949).

<sup>204</sup> SAMUEL L. WILLISTON, 2 THE LAW OF CONTRACTS § 606, at 1165 (1920).

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 1165 (emphasis added).

<sup>207</sup> RESTATEMENT (FIRST) OF CONTRACTS, *supra* note 77, at § 230 (emphasis added).

<sup>208</sup> *Id.* cmt. b.

<sup>209</sup> THAYER, *supra* note 34, at 429–31, 440.

intended the same meaning.<sup>210</sup> Hand did not place the written words above the parties' intentions, he believed the written words were the parties' intentions. And a "preceding . . . agreement assigning an agreed meaning to any given words used in another contract" would not include agreements during negotiations that were not included in a subsequent written contract because the failure to include them indicated an intention to exclude them.

### C. *Rejection of Plain Meaning and the Importance of Context*

Hand, however, although believing that the parties' actual beliefs about a written contract's meaning were irrelevant, at the same time rejected the idea that words have a plain meaning. Throughout his judicial career, Hand demonstrated he was willing to admit other extrinsic evidence to determine meaning. As one commentator notes, "Judge Hand . . . recognized that there were certain individual transactions where strict standards of contract interpretation would not apply or would be overcome."<sup>211</sup> In fact, Hand displayed this willingness to find ambiguity and admit extrinsic evidence in his first notable contracts opinion in 1910, just a year after joining the bench.

The opinion—*Lorraine Manufacturing Co. v. Oshinsky*<sup>212</sup>—was a denial of a motion for a new trial.<sup>213</sup> The case involved a claim for breach of a contract of sale, with the plaintiff seller alleging that the goods were wrongfully rejected by the defendant buyer.<sup>214</sup> The defendant argued that the goods, delivered on November 16, were delivered one day late.<sup>215</sup> The issue was whether the following contract provision required delivery on November 15: "Below we hand you copy of your order for spring, 1908, which the mills have accepted, and which they will deliver to

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<sup>210</sup> This aspect of Hand's approach to contract interpretation—deeming irrelevant an admission by a party about a contract's meaning, one that would establish even a shared understanding by the parties—was particularly troublesome to Professor Arthur Corbin. In 1944, Corbin wrote an article on the parol evidence rule, and included a criticism of the view that statements about meaning made during preliminary negotiations should be considered irrelevant. See Arthur L. Corbin, *The Parol Evidence Rule*, 53 YALE L.J. 603, 625 (1944); see also ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 543 (one vol. ed. 1952) (again criticizing the view).

<sup>211</sup> Michael Z. Green, *Preempting Justice Through Binding Arbitration of Future Disputes: Mere Adhesion Contracts or a Trap for the Unwary Consumer*, 5 LOY. CONSUMER L. REP. 112, 112 (1993).

<sup>212</sup> *Lorraine Mfg. Co. v. Oshinsky*, 182 F. 407 (S.D.N.Y. 1910), *rev'd*, *Oshinsky v. Lorraine Mfg. Co.*, 187 F. 120 (2d Cir. 1911).

<sup>213</sup> *Id.* at 409.

<sup>214</sup> *Oshinsky*, 187 F. at 120–21.

<sup>215</sup> *Id.* at 121.

you \* \* \* at the specified dates: \* \* \* Stock: Nov. 15.”<sup>216</sup>

Hand had apparently permitted oral testimony about the provision’s meaning (the details of the testimony are not provided), and the jury thereafter returned a verdict for the plaintiff.<sup>217</sup> The defendant filed a motion for a new trial, arguing that admitting the testimony was error because the contract language was “too clear to require any oral explanation.”<sup>218</sup> Hand displayed little difficulty holding that the provision was ambiguous and that oral explanation about the provision was admissible, relying primarily on his own judgment about common speech rather than case law precedent.<sup>219</sup> He explained that when persons intend to specify a specific date, they say “on July 4th,” not “at July 4th,” and that when persons use the phrase “at Christmas” or “at Easter” they imply a certain latitude regarding the date.<sup>220</sup> Hand did not conclude that “at . . . November 15th” necessarily meant there was such latitude, only that there was doubt about its meaning and that it was a jury question, with extrinsic evidence admissible because of the ambiguity.<sup>221</sup> Interestingly, Hand was reversed on appeal, the Second Circuit writing:

We think that the language of the provision is plain, unequivocal, and free from ambiguity, and required delivery on November 15th, and not later. We fail to appreciate the contention of the plaintiff that the language may fairly be given two meanings. A provision for delivery at a specified date, followed by the specification of a date, requires delivery upon that date and none other. The preposition ‘at’ seems quite as definite and certain as any word that could be used. Consequently, as the goods were not delivered or tendered until after November 15th, we think that the plaintiff failed to establish its cause of action, and that judgment should have been directed for the defendants.<sup>222</sup>

Even if a contract provision seemed on its face to have a plain meaning, Hand believed that extrinsic evidence was admissible to give the provision meaning, maintaining that the literal meaning of a writing was not a reliable test.<sup>223</sup> Forty years after *Oshinsky*, Hand cited with approval the following *Restatement* comment:

The court in interpreting words or other acts of the parties puts itself in the position which they occupied at the time the contract was made. In applying the appropriate standard of interpretation even to an agreement that on its face is free from ambiguity

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<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 120.

<sup>218</sup> *Oshinsky*, 182 F. at 407.

<sup>219</sup> *Id.* at 408.

<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Oshinsky*, 187 F. at 121.

<sup>223</sup> *Fed. Liquidating Corp. v. SEC*, 187 F.2d 804, 807 (2d Cir. 1951).

## LEARNED HAND AND THE OBJECTIVE THEORY OF CONTRACT INTERPRETATION

it is permissible to consider the situation of the parties and the accompanying circumstances at the time it was entered into—not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning to be given to the agreement.<sup>224</sup>

Throughout his career, Hand followed this approach. In 1927, in *Crescent Insulated Wire & Cable Co. v. Pratt Chuck Co.*, the issue involved the interpretation of a satisfaction clause and when the parties intended title to pass under the contract.<sup>225</sup> Hand stated that the court's conclusion rested "both upon the language used and the situation of the parties," and he then described in detail the parties' situation to support the court's interpretation,<sup>226</sup> then stating that its conclusion was based upon "the whole setting."<sup>227</sup> In 1928, in *Moon Motor Car Co. of New York v. Moon Motor Car Co., Inc.*, Hand stated, with respect to a matter of contract interpretation, that "the setting in which words are used . . . is *always* competent, and usually necessary, to their understanding."<sup>228</sup> Hand therefore refused to interpret the contract at issue based solely on its language, and without the aid of additional evidence.<sup>229</sup>

In 1929, in *Companhia de Navegacao Lloyd Brasileird v. C. G. Blake Co.*, Hand stated that "parties must always be assumed to refer, to the past transaction between them . . ."<sup>230</sup> At issue in that particular case was a promise to deliver six "cargoes" of coal and the amount the parties intended to be shipped.<sup>231</sup> Hand held that "[c]argoes' meant cargoes as they had dealt in them, not as others had."<sup>232</sup> He then stated that "[t]his is, of course, a very common way to ascertain the meaning of language," and that recourse to custom might have been necessary had there not been such a course of dealing.<sup>233</sup> With evidence of how the parties had treated the term, Hand held that it was an error for the trial court to instruct the jury on the issue of custom.<sup>234</sup> In 1951, in *Rumsey Manufacturing Corp. v. U.S. Hoffman Machinery*

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<sup>224</sup> *Id.* at 807 (citing RESTATEMENT (FIRST) OF CONTRACTS, *supra* note 77, at § 235 cmt. e).

<sup>225</sup> *Crescent Insulated Wire & Cable Co. v. Pratt Chuck Co.*, 18 F.2d 734, 734 (2d Cir. 1927).

<sup>226</sup> *Id.* at 735.

<sup>227</sup> *Id.* at 736.

<sup>228</sup> *Moon Motor Car Co., of N.Y., v. Moon Motor Car Co.*, 29 F.2d 3, 4 (2d Cir. 1928) (emphasis added).

<sup>229</sup> *Id.*

<sup>230</sup> *Companhia de Navegacao Lloyd Brasileird v. C. G. Blake Co.*, 34 F.2d 616, 618 (2d Cir. 1929).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

Corp., Hand looked to a provision's purpose in interpreting it.<sup>235</sup> With respect to the type of extrinsic evidence that would be relevant, Hand believed that it could be anything "except [as previously discussed] what the parties said to each other outside the writing."<sup>236</sup>

Hand's opinion in *Eustis Mining Co. v. Beer, Sondheimer & Co.* provides the clearest insight into his belief about the interplay between the contract's words being the best evidence of the parties' intentions and surrounding circumstances being admissible to give meaning to those words.<sup>237</sup> Hand held that "[a]ll the attendant facts constituting the setting of a contract are admissible, so long as they are helpful," but the extent of their helpfulness is based on whether the language is ambiguous and the extent of the ambiguity.<sup>238</sup> Here, not only did Hand disclose a willingness to consider the contract's surrounding circumstances, he rejected the idea that words can have a fixed meaning:

The admissibility of the general surroundings in which the contract was written (*Merriam v. U.S.*, 107 U.S. 437, 441, 2 Sup.Ct. 536, 27 L.Ed. 531), rests upon quite a different basis [than the other extrinsic evidence relied on by the defendant], one which can be said with a nearer approach to accuracy to turn upon the ambiguity of the written words. All the attendant facts constituting the setting of a contract are admissible, so long as they are helpful; the extent of their assistance depends upon the different meanings which the language itself will let in. Hence we may say, truly perhaps, that, if the language is not ambiguous, no evidence is admissible, meaning no more than that it could not control the sense, if we did let it in; indeed, it might 'contradict' the contract—that is, the actual words should be remembered to have a higher probative value, when explicit, than can safely be drawn by inference from surroundings. *Yet, as all language will bear some different meanings, some evidence is always admissible; the line of exclusion depends on how far the words will stretch, and how alien is the intent they are asked to include.*<sup>239</sup>

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<sup>235</sup> *Rumsey Mfg. Corp. v. U.S. Hoffman Mach. Corp.*, 187 F.2d 927, 931 (2d Cir. 1951).

<sup>236</sup> *Moon Motor Car Co., of N.Y. v. Moon Motor Car Co.*, 29 F.2d 3, 4 (2d Cir. 1928).

<sup>237</sup> *Eustis Mining Co. v. Beer, Sondheimer & Co.*, 239 F. 976, 985–86 (S.D.N.Y. 1917).

<sup>238</sup> *Id.* at 985.

<sup>239</sup> *Id.* (emphasis added). The Court in *Merriam* stated that "[i]t is a fundamental rule that in the construction of contracts the courts may look not only to the language employed, but to the subject-matter and the surrounding circumstances, and may avail themselves of the same light which the parties possessed when the contract was made." *Merriam v. United States*, 107 U.S. 437, 441 (1883). Williston, in his 1920 treatise, referring to Hand's opinion, stated that "[t]he correct principle has been well summarized in [this] recent decision," 2 SAMUEL L. WILLISTON, *THE LAW OF CONTRACTS*, § 630 (1920), and he then quoted the above passage. *Id.* at 1216-17. Hand's language was included almost verbatim in the *Restatement of Contracts* in 1932. See *RESTATEMENT (FIRST) OF CONTRACTS*, *supra* note 77, at § 235 ("Yet, as all language will bear some different meanings,

Hand was clear, however, that evidence of the general situation of the parties, to be of assistance in understanding the meaning of their words, must have been disclosed to each other.<sup>240</sup>

Hand's rejection of the idea that words can have a plain meaning outside of their context is perhaps best exemplified by his opinion in *E. Gerli & Co. v. Cunard Steamship Co.*, in which Hand refused to apply contract language literally when it conflicted with the contract's purpose.<sup>241</sup> In *E. Gerli* the libellant sued the respondent for the loss of two bales of silk shipped on a steamship from Southampton to New York.<sup>242</sup> The respondent relied on a clause in the bill of lading providing that "[t]he carrier is not liable . . . for any claim for short delivery of, or damage to, the property hereby receipted for, unless notice of such claim is given in writing *before removal of . . . such part of the Goods as are discharged from the vessel at the port of discharge.*"<sup>243</sup> Hand recognized that:

Taken literally, this would mean, in case all the goods were discharged from the vessel, and some were later lost on the pier, that the notice need never be given, because all those discharged were never removed; and the clause would then cover only the case of goods lost on board.<sup>244</sup>

Because it was usually impossible to prove whether goods were lost on board or after discharge, Hand noted that the clause would usually have no effect.<sup>245</sup> Hand thus held that such a literal interpretation could not prevail:

It is indeed true that the language of a bill of lading must be taken against the carrier, but it appears to us that the interpretation suggested would too plainly contradict its purpose. Therefore, we read the phrase, 'discharged from the vessel,' as meaning not that the goods have merely gone over the ship's side to the wharf, but that they have been delivered to the shipper. Anything else, for the reasons just given, would upon most occasions delete it from the contract, and cannot be thought to be its meaning.<sup>246</sup>

Hand then held that "it would seem to be the only fair meaning of the clause that if he [the shipper] knows of the shortage, he must give notice at least before taking

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evidence of surroundings is always admissible. Its operative effect depends on how far the words will stretch, and how alien from the ordinary meaning of the words is the intent they are asked to include.").

<sup>240</sup> *Eustis Mining Co.*, 239 F. at 985.

<sup>241</sup> *E. Gerli & Co. v. Cunard S.S. Co.*, 48 F.2d 115, 116 (2d Cir. 1931).

<sup>242</sup> *Id.* at 115.

<sup>243</sup> *Id.* at 115–16 (emphasis added).

<sup>244</sup> *Id.* at 116.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

that which he understands to be the last installment.”<sup>247</sup> In 1945 Hand, in the context of statutory interpretation, reiterated this point, writing:

[I]t is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.<sup>248</sup>

Hand also had no difficulty deviating from a language’s literal meaning when the parties had acted in a way consistent with a different meaning. In *Town of Readsboro v. Hoosac Tunnell & W. R. Co.*,<sup>249</sup> the town and the defendant’s predecessor (who owned a railroad) entered into a contract under which the parties agreed to share equally the expense of maintaining a bridge.<sup>250</sup> The predecessor conveyed the railroad to the defendant, and the defendant promised to comply with all contracts binding on the predecessor.<sup>251</sup> The defendant argued that the contract between the town and the defendant’s predecessor was *ultra vires*, and thus the defendant had no obligation to comply with it because the defendant only promised to assume those obligations that were “binding” on the predecessor.<sup>252</sup> Hand, however, rejected this argument, even if the original contract had not been binding on the predecessor:

We do not forget that in each deed the grantee undertakes to assume only those obligations which are “binding” upon the grantor, and that strictly the contract was binding on the Deerfield River Company only in case it was *intra vires*. Yet it is plain, from the subsequent conduct of the parties, that by that language they meant to include the contract in suit among the obligations of the Deerfield River Company which its two successors assumed. We think it too late now to raise the question whether as matter of strict construction the Deerfield River Company was originally bound. Hence, even though the original contract was *ultra vires*, an action lies as upon a new promise made for the benefit of a third person . . . .<sup>253</sup>

Similarly, a year later, in *Nolte v. Hudson Navigation Co.*,<sup>254</sup> Hand held that ambiguous language would be construed in accordance with how the parties

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<sup>247</sup> *Id.*

<sup>248</sup> *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff’d*, 326 U.S. 404 (1945).

<sup>249</sup> *Town of Readsboro v. Hoosac Tunnel & W.R. Co.*, 6 F.2d 733 (2d Cir. 1925).

<sup>250</sup> *Id.* at 734.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 734–35.

<sup>253</sup> *Id.* at 735.

<sup>254</sup> *Nolte v. Nudson Nav. Co.*, 16 F.2d 182 (2d Cir. 1926).

treated it during the life of the contract, writing:

At least, when parties choose such equivocal language, they must be content with the interpretation which they put upon it immediately thereafter, and to which they continuously adhered for nearly 25 years. While the new pier and bulkhead were building, the company asserted its right under the contract to a new shed located relatively to the new bulkhead as the old shed was located relatively to the old bulkhead, and the city assented, not as the grant of a new right, but as something included within the old.

Nobody read any other meaning into the words until this claim was filed, and everybody concerned acted on the assumption that the first interpretation had been right. The canon of contemporaneous and subsequent construction of a contract applies . . . . Hence we conclude that the contract meant to give the company, for the maintenance of the new shed, whatever rights it had had to maintain the old shed.<sup>255</sup>

Thus, consistent with Hand's concern for predictability in contractual relations, if the parties had engaged in a course of performance that suggested a shared understanding, that shared understanding would control. Hand obviously believed this was different from post-formation admissions about meaning, which had not been acted upon.

For Hand, the parties' purpose in entering into the contract or including a particular provision was important. Consider the following from a 1953 opinion:

[A]lthough they were used of a statute, the often quoted words of Holmes, J. apply with even greater force to a contract: "The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and we shall go on as before." It is as impossible to lay down any postulates for 'strict construction' as it is for ordinary 'construction.' When parties have not explicitly covered the occasion which has arisen, a court will always strive to ascertain whether their disclosed purpose does not demand a more inclusive 'intent.' And by their 'intent' we can understand nothing else than how they would have disposed of the occasion had they been faced with it at the outset. There is a hazard about doing that; but it is inevitable if the purpose is not often to be defeated and all courts do it more or less. When we say that we will adopt a 'strict construction,' we mean that we will press with unusual persistence the doubts that cannot but inhere in the function anyway, and that we will be satisfied with no extension of the literal meaning unless it satisfies every logical compunction.<sup>256</sup>

If, however, context did not support a party's argument much, it would not override the meaning suggested by the contract language chosen by the parties. For

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<sup>255</sup> *Id.* at 184.

<sup>256</sup> *Prudence-Bonds Corp. v. State St. Trust Co.*, 202 F.2d 555, 563–64 (2d Cir. 1953) (quoting *Johnson v. U.S.*, 163 F. 30, 32 (1st Cir. 1908)).

example, returning to *Eustis Mining Co. v. Beer, Sondheimer & Co.*,<sup>257</sup> Hand found in that case that the general surroundings did not support the defendant's argument much, and that the language of the contract indicated no limit on quantity:

I agree that the production occasioned by the Great War was a surprise to both sides, and that it was not within their forecast of the future. It is altogether likely that the defendant would have cried off upon the whole bargain, had they thought it probable. Contracts cannot, however, be treated so loosely; if parties wish more certainty, they must use more certain words. The case, therefore, ends where it starts, with the initial acceptance clause as the best indication of what the meaning was; it admits of no interpretation which does not distort it beyond what the words will bear.<sup>258</sup>

Thus, if the parties wanted more certainty regarding the amount of output, "they must use more certain words."<sup>259</sup>

Hand therefore rejected the idea that words can have a plain meaning outside of the context in which they are used. As previously discussed, he would enforce an agreement where the words would have a peculiar meaning, provided that the parties had made such an agreement. But Hand was also willing to consider a broad array of other evidence in determining meaning, provided that the words were sufficiently susceptible of the meaning proposed. He made clear that surrounding circumstances were always relevant, and that a requirement of ambiguity meant no more than that the extrinsic evidence, if admitted, must be capable of giving the language the asserted meaning. Hand would also enforce a shared understanding of a contract's meaning when the parties had acted upon that meaning. And when deciding whether the words were sufficiently susceptible to the meaning proposed, Hand was willing to find an agreement to give words a meaning that conflicted with their literal meaning.

#### **D. James Baird Co. v. Gimbel Bros., Inc. and Implied Promises**

Hand also had little difficulty using context to find an implied promise, as he showed in 1910, just a year after joining the bench. In *Colgate v. James T. White & Co.*,<sup>260</sup> the parties entered into a contract under which the plaintiff agreed to provide the defendant with information about the plaintiff's life for use in a cyclopedia.<sup>261</sup> The plaintiff thereafter sought an injunction to prevent the information from being used, arguing that the defendant had represented that the cyclopedia would be

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<sup>257</sup> *Eustis Mining Co.*, 239 F. 976 (S.D.N.Y. 1917).

<sup>258</sup> *Id.* at 986.

<sup>259</sup> *Id.*

<sup>260</sup> *Colgate v. James T. White & Co.*, 180 F. 882 (S.D.N.Y. 1910).

<sup>261</sup> *Id.* at 885.

issued under the auspices of the U.S. Government, and that it was in fact to be published in a cyclopedia that was not under such auspices.<sup>262</sup> Hand found the defendant promised to publish the biography in a cyclopedia under the auspices of the U.S. Government, noting that the defendant “let the interview proceed after it would have been apparent to any reasonable man that Colgate was acting under a misapprehension, and supposed that the facts would not be published in the usual kind of biography.”<sup>263</sup> Hand then found that this promise implied a negative covenant to not publish it elsewhere, stating that “[t]he commonest good faith requires the implication that he would not abuse the opportunity so given him by publishing them in a work which he from the outset found it necessary to assure Colgate that this was not.”<sup>264</sup>

In *Moon Motor Car Co.*,<sup>265</sup> Hand stated that the fact that a contract did not include an express promise to sell would not be final as to whether there was such a commitment.<sup>266</sup> He cited, in addition to other cases, Benjamin Cardozo’s famous opinion in *Wood v. Duff-Gordon*, in which the New York Court of Appeals inferred a promise to use best efforts to market products.<sup>267</sup> And in one case Hand found an implied promise to forbear in exchange for a lien, stating:

It is quite true that here there was no express reference to forbearance in the contract and no statement that the lien was in exchange for it, but the situation reasonably implied that the parties so intended it. . . . The cause of its inaction was the promised lien; it cannot be supposed that the connection between that inaction and the agreement to give security was wholly unconscious.<sup>268</sup>

But Hand’s most famous opinion dealing with implied promises is his 1933 opinion in *James Baird Co. v. Gimbel Bros., Inc.*, in which he refused to infer a promise by a subcontractor to keep its bid open long enough for a general contractor to rely on the bid in obtaining the prime contract and then accept the subcontractor’s

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<sup>262</sup> *Id.* at 883.

<sup>263</sup> *Id.* at 885.

<sup>264</sup> *Id.* at 886.

<sup>265</sup> *Moon Motor Car Co., of N.Y., v. Moon Motor Car Co.*, 29 F.2d 3 (2d Cir. 1928).

<sup>266</sup> *Id.* at 4.

<sup>267</sup> *Id.* (citing *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917)).

<sup>268</sup> *In re All Star Feature Corp.*, 232 F. 1004, 1009 (S.D.N.Y. 1916).

offer.<sup>269</sup> This opinion has been described as “purely formalistic,”<sup>270</sup> “a model of the formalistic application of contract doctrine”<sup>271</sup> and “a pillar of traditional, formal, Willistonian contract analysis.”<sup>272</sup> According to one commentator, this was a case in which “Hand viewed the commercial transaction at issue through the lens of individualism and formalism”<sup>273</sup> and resting “on the twin related ideological insights of ‘protect yourself’ and ‘indifference’; in other words, the central tenets of atomistic individualism embodied in the law of contracts.”<sup>274</sup> In fact, the opinion was even too Willistonian for Williston.<sup>275</sup> Several years later, Hand’s former professor rejected the result in the second edition of his treatise published in 1936.<sup>276</sup> One commentator wrote in 1990 that Hand’s opinion in *Baird* “died on the vine. Even now, fifty-seven years later, not a single decision follows it.”<sup>277</sup>

*Baird* arose out of a subcontractor who submitted a bid to general contractors for all the linoleum needed for a public building project, the bid being subject to “prompt acceptance” after the general contractor was awarded the prime contract.<sup>278</sup> The subcontractor, however, had underestimated the amount of linoleum required by the specifications.<sup>279</sup> A general contractor used the subcontractor’s bid in calculating its own bid for the prime contract.<sup>280</sup> When the

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<sup>269</sup> *James Baird Co. v. Gimbel Bros., Inc.*, 64 F.2d 344 (2d Cir. 1933); see also Avery Katz, *When Should an Offer Stick? The Economics of Promissory Estoppel in Contract Negotiations*, 105 YALE L.J. 1249, 1261 (1996) (referring to *James Baird Co.* as “one of Judge Hand’s most celebrated opinions and a warhorse of the casebooks.”).

<sup>270</sup> Alfred S. Konefsky, *Freedom and Interdependence in Twentieth-Century Contract Law: Traynor and Hand and Promissory Estoppel*, 65 U. CIN. L. REV. 1169, 1197 (1997).

<sup>271</sup> *Id.* at 1196.

<sup>272</sup> *Id.* at 1199.

<sup>273</sup> *Id.* at 1173.

<sup>274</sup> *Id.* at 1200.

<sup>275</sup> 1 SAMUEL L. WILLISTON, *THE LAW OF CONTRACTS* § 139 n.25 (rev. ed. 1936).

<sup>276</sup> *Id.*; see also *Subcontractor’s Offer for Bilateral Contract Held Irrevocable Because of Contractor’s Foreseeable Reliance*, 59 COLUM. L. REV. 355, 356 (1959) (noting Williston’s rejection of Hand’s opinion in *James Baird Co.*); Kevin M. Teeven, *Origins of Promissory Estoppel: Justifiable Reliance and Commercial Uncertainty Before Williston’s Restatement*, 34 U. MEM. L. REV. 499, 539–40 (2004) (noting Williston’s criticism of Hand’s opinion in *James Baird Co.*).

<sup>277</sup> W. David Slawson, *The Role of Reliance in Contract Damages*, 76 CORNELL L. REV. 197, 202 (1990). But see *Se. Sales & Serv. Co. v. T. T. Watson, Inc.*, 172 So. 2d 239, 241 (Fla. Dist. Ct. App. 1965) (refusing to apply promissory estoppel to make subcontractor’s bid irrevocable).

<sup>278</sup> *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344, 345 (2d Cir. 1933).

<sup>279</sup> *Id.*

<sup>280</sup> *Id.*

subcontractor learned of its mistake, it telegraphed the general contractor, but the telegram was not received until after the general contractor had submitted its bid for the prime contract.<sup>281</sup> The deadline for submitting bids to the public authorities had passed, and because the linoleum was just a small part of the whole project, and a withdrawal of the general contractor's bid would have cost it the prime contract and probably resulted in the forfeiture of its deposit, the general contractor did not withdraw its bid.<sup>282</sup> The public authorities accepted the general contractor's bid, and the general contractor then attempted to accept the subcontractor's bid, but the subcontractor refused to recognize a contract.<sup>283</sup> The general contractor then sued the subcontractor for breach.<sup>284</sup> The general contractor argued that when it used the subcontractor's bid, "they accepted the [subcontractor's] offer and promised to pay for the linoleum, in case their bid was accepted."<sup>285</sup>

Citing to the *Restatement (First) of Contracts*, Hand began his analysis by stating the general rule that an offer must be accepted before it is revoked, noting that the acceptance was therefore too late "[u]nless there are circumstances to take it out of the ordinary doctrine . . ."<sup>286</sup> Hand viewed the case as one involving the interpretation of the transaction, "and the question is merely as to what they meant; that is, what is to be imputed to the words they used."<sup>287</sup>

Hand rejected the argument that the general contractor accepted the subcontractor's offer merely by putting in a bid to the public authorities.<sup>288</sup> Hand relied on the fact that there would be no claim for breach against the general contractor if the general contractor repudiated the prime contract, or went bankrupt, after being awarded it.<sup>289</sup> Also, the subcontractor's bid stated that it was only available for acceptance upon being awarded the prime contract,<sup>290</sup> and its reference to the bid being subject to "prompt acceptance" after being awarded the prime contract indicated "the usual communication of an acceptance, and

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<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.* at 346.

<sup>286</sup> *Id.* at 345 (citing *RESTATEMENT (FIRST) OF CONTRACTS*, *supra* note 77, at § 35).

<sup>287</sup> *Id.* at 346.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

precludes the idea that the use of the offer in the bidding shall be the equivalent.”<sup>291</sup> Hand noted that “[i]t may indeed be argued that this last language contemplated no more than an early notice that the offer had been accepted, the actual acceptance being the bid, but that would wrench its natural meaning too far . . . .”<sup>292</sup> Hand then noted that “[t]he contractors had a ready escape from their difficulty by insisting upon a contract before they used the figures; and in commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves.”<sup>293</sup>

This portion of Hand’s opinion is uncontroversial, as the general rule to this day is that a general contractor’s use of a subcontractor’s bid is not an acceptance, absent a contrary agreement between the parties.<sup>294</sup> In fact, this is true even if the subcontractor states that any use of its bid by the general contractor is an acceptance.<sup>295</sup>

The plaintiff also argued, however, that even if a bilateral contract had not formed, the defendant should be liable under the doctrine of promissory estoppel.<sup>296</sup> Hand rejected the argument, holding that an offer is not a promise because “an offer for an exchange is not meant to become a promise until a consideration has been received, either a counter-promise or whatever else is stipulated.”<sup>297</sup> The subcontractor’s offer would become “a promise to deliver” only “when the plaintiff promised to take and pay for it.”<sup>298</sup> Merely using the bid was a matter of indifference to the subcontractor and not what it was seeking in return.<sup>299</sup> Without a promise by the subcontractor, there was “no room . . . for the doctrine of ‘promissory estoppel.’”<sup>300</sup>

Hand also held that the offer could not be considered an option, making the

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<sup>291</sup> *Id.*

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> See *Holman Erection Co. v. Orville E. Madsen & Sons, Inc.*, 330 N.W.2d 693, 696 (Minn. 1983) (“It is a settled common law contract principle that utilizing a subcontractor’s bid in submitting the prime or general contract bid does not, without more, constitute an acceptance of the subcontractor’s offer conditioned upon being awarded the general contract by the awarding authority.” (quoting *Mitchell v. Siqueiros*, 582 P.2d 1074, 1077 (Idaho 1978))).

<sup>295</sup> *W. Const., Inc. v. Fla. Blacktop, Inc.*, 88 So.3d 301, 304–05 (Fla. Dist. Ct. App. 2012).

<sup>296</sup> *James Baird Co.*, 64 F.2d at 346.

<sup>297</sup> *Id.*

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

offer irrevocable and giving the general contractor the power, after being awarded the prime contract, to either accept the offer or get a better deal from another subcontractor.<sup>301</sup> Hand stated that “[t]here is not the least reason to suppose that the defendant meant to subject itself to such a one-sided obligation.”<sup>302</sup> As noted by a commentator, “In justifying the result in *Baird*, Hand maintained his vision of freedom of contract. He would not force commercial actors into agreements that they did not wish to enter.”<sup>303</sup> Hand acknowledged, however, that if the subcontractor’s bid could be construed as including a promise to keep the offer open, the doctrine of promissory estoppel might apply.<sup>304</sup>

Although Hand’s opinion is viewed as formalistic, this ignores important parts of Hand’s analysis. Critics view Hand’s analysis as simply implementing a formalistic syllogism as follows:

Major premise = An offer can be revoked before an acceptance, unless the offeror promises to keep it open.

Minor premise = The subcontractor did not promise to keep its offer open.

Conclusion = The subcontractor could revoke its offer before the general contractor accepted it.

What is often overlooked, however, is that Hand was willing to entertain the use of promissory estoppel if the subcontractor had promised to keep the offer open, but the circumstances of the transaction suggested that the subcontractor had not made such an implied promise, as it would open the subcontractor up to a “one-sided obligation.”<sup>305</sup> Before Hand would infer such an obligation, he expected, as always, some extrinsic evidence that the parties intended that obligation, and there was no evidence the subcontractor intended to be subject to such a one-sided obligation. In fact, Hand’s opinion in *Baird* has been cited as an example of his belief

that contracting parties can adapt quite well to formal categories so long as the application of such categories remains clear and stable, and that substantive approaches [to contract interpretation], especially when applied by nonspecialist judges operating at a distance from the commercial setting and susceptible to influence by a host of popular and ideological considerations, tend to undermine the certainty of exchange and to defeat the parties’ intentions.<sup>306</sup>

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<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> Konefsky, *supra* note 270, at 1202.

<sup>304</sup> *James Baird Co.*, 64 F.2d at 346.

<sup>305</sup> *Id.*

<sup>306</sup> Avery Wiener Katz, *The Economics of Form and Substance in Contract Interpretation*, 104 COLUM. L. REV. 496, 501 (2004).

In fact, a study of the industry determined that general contractors themselves do not want to be bound until after they are awarded the prime contract, and

There is evidence that the principle reason why a general [contractor] might wish to preserve freedom of action is to be in a position to 'shop' or 'peddle' the particular sub's offer, after securing the contract for the main job.<sup>307</sup>

The study's author concluded

that a legal rule making the sub's offer irrevocable [in a case in which a subcontractor revoked the offer because of a rise in the cost of materials] was not needed and would put subs at a still greater disadvantage, and that it would be wiser to leave the problem to be worked out by voluntary action of the interested parties.<sup>308</sup>

This suggests that Hand's reluctance to infer a promise without sufficient evidence, and to leave the matter to agreement between the parties, was the correct response.<sup>309</sup>

As recognized by one commentator, it was the lack of evidence to infer a promise that in one respect distinguishes Hand's opinion in *Baird* from the contrary holding by Justice Roger Traynor in *Drennan v. Star Paving Co.*:

Evidence or absence of evidence of business usage explains in part why Learned Hand thought the general contractor in *James Baird Co. v. Gimbel Brothers, Inc.* was foolish for relying on the subcontractor's bid before entering into a bilateral contract with the subcontractor, but Roger Traynor found that the general contractor's reliance in *Drennan v. Star Paving Co.* was "reasonable" and "foreseeable." In *Drennan*, the "plaintiff testified that it was customary in that area for general contractors to receive the bids of subcontractors by telephone on the day set for bidding and to rely on them in computing their own bids." In *Baird*, there was no evidence that, as a matter

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<sup>307</sup> JOHN P. DAWSON ET AL., *CASES AND COMMENT* 275 (9th ed. 2008).

<sup>308</sup> *Id.* at 276.

<sup>309</sup> See Charles Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention*, 100 HARV. L. REV. 751, 752 & n.10 (1987) ("I also once thought the American Law Institute's Restatement of Contracts was right to use promissory estoppel to hold subcontractors to the unbargained-for unilateral offers that they supply to general contractors putting together bids on large projects. I am beginning, however, to see the wisdom of Judge Learned Hand's remark in *James Baird Co. v. Gimbel Brothers, Inc.* that 'in commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves.' Interestingly, empirical research appears to vindicate the terse hard-headedness of Learned Hand as against the more prolix—and I now think sometimes sentimental—ruminations of Roger Traynor.") (footnotes omitted); Michael J. Cozzillio, *The Option Contract: Irrevocable not Irrejectable*, 39 CATH. U. L. REV. 491, 556 n.74 (1990) ("Arguably, the *Drennan* approach exceedingly tilts in favor of the general contractor/offeree."); Note, *The Uniform Commercial Code as a Premise for Judicial Reasoning*, 65 COLUM. L. REV. 880, 889 (1965) ("In the case of a construction contract, for example, when a firm bid is required of a subcontractor, the *Code* rule making firm offers enforceable might well aggravate his already inferior bargaining position.").

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of trade usage, contractors relied on subcontractors' bids.<sup>310</sup>

Thus, Hand was willing to infer a promise if there was sufficient evidence to infer a promise, but he was unwilling to infer a promise as a matter of policy in the absence of such evidence.

Even Justice Traynor in *Drennan* seemingly acknowledged the court was abandoning notions of agreement and implementing social policy, stating that “[w]hether implied in fact or law, the subsidiary promise [to not revoke the offer] serves to preclude the *injustice* that would result if the offer could be revoked after the offeree had acted in detrimental reliance thereon.”<sup>311</sup> Traynor was apparently willing to infer such a promise as a matter of law if there was insufficient evidence to infer it from the facts. The *Restatement (Second) of Contracts*, which adopts *Drennan* as black letter, as much as admits any such promise is implied in law, making no reference to an implied promise to keep the offer open but referring to foreseeable reliance on the offer.<sup>312</sup> For Hand, it was not the courts' role in contracts cases such as *Baird* to implement such social policy, since the parties had the ability to protect themselves.

## CONCLUSION

An analysis of Hand's opinions involving contract interpretation, rather than simply relying on his famous dicta about the objective theory of contract, shows that Hand's reputation as a great commercial formalist lawyer with a crusader's zeal for the objective theory of contract is an overly simplistic view of his approach to contract interpretation. Hand believed certainty in the interpretation of contracts was vital and that courts should ultimately determine a contract's meaning based primarily on the contract's words. He rejected, however, the notion that words can have a plain meaning outside of their context, and he believed that the contract's meaning should be based on what a reasonable person would believe the parties intended.

In determining meaning, the court should consider many types of evidence, including the contract's purpose, the surrounding circumstances, and how the parties treated the particular contract term during performance. Hand simply

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<sup>310</sup> Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 WIS. L. REV. 1, 28–29 (footnotes omitted).

<sup>311</sup> *Drennan v. Star Paving Co.*, 333 P.2d 757, 760 (Cal. 1958) (emphases added).

<sup>312</sup> RESTATEMENT (SECOND) OF CONTRACTS § 87(2) (AM. LAW INST. 1981); see also Sidney W. DeLong, *Placid, Clear-Seeming Words: Some Realism About the New Formalism (With Particular Reference to Promissory Estoppel)*, 38 SAN DIEGO L. REV. 13, 14 n.3 (2001) (referring to § 87(2) as “offertory estoppel”).

believed that the language chosen was the best evidence of intent and believed that at a certain point extrinsic evidence of meaning would be so at odds with the language used that it would stretch the provision's meaning to the breaking point. But that breaking point was surprisingly far, such that he believed "at November 15"<sup>313</sup> could be reasonably interpreted to mean "about November 15,"<sup>314</sup> "discharged from the vessel"<sup>315</sup> could be reasonably interpreted to mean "delivered to the shipper,"<sup>316</sup> and "binding"<sup>317</sup> obligations could be reasonably interpreted to include a non-binding *ultra vires* contract.<sup>318</sup> Hand's reasonable person was not a strict constructionist who simply looked at a contract's four corners when interpreting a contract.

Hand was also willing to infer promises, even relying on Cardozo's famous opinion in *Wood v. Lady Duff-Gordon*.<sup>319</sup> But he would only do so if he believed there was sufficient evidence to infer them and was unwilling to infer a promise without evidentiary support simply to save a party from the consequences of insufficient foresight. He believed that it was the role of the legislatures and the parties, not that of the courts, to protect parties from their failure to make their contractual intentions clear to the other party.

Likewise, Hand's rejection of the relevance of post-hoc declarations by the parties of what they thought the contract meant was based on his belief that predictability in contractual relations requires that contracts be created by agreement, not undisclosed intentions. His position that statements made during negotiations leading to a written contract were irrelevant was in fact his attempt to effectuate the parties' intentions—his belief that parties intend an integrated agreement to supersede such negotiations, even when those negotiations suggested a shared understanding.

While Hand did seem to exhibit a zeal for the objective theory of contract, some of that apparent zeal is likely attributable to his original writing style and his desire to clarify the law, which surely led to his memorable dicta. In any event, recognizing that he had a zeal for the objective theory should not lead one to believe he shared all of the characteristics commonly associated with formalism and classical contract

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<sup>313</sup> *Oshinsky v. Lorraine Mfg. Co.*, 187 F. 120, 121 (2d Cir. 1911).

<sup>314</sup> *Id.*

<sup>315</sup> *E. Geril & Co. v. Cunard S.S. Co.*, 48 F.2d 115, 116 (2d Cir. 1931).

<sup>316</sup> *Id.*

<sup>317</sup> *Town of Readsboro v. Hoosac Tunnerl & W.R. Co.*, 6 F.2d 733, 734 (2d Cir. 1925).

<sup>318</sup> *Id.*

<sup>319</sup> *Moon Motor Car Co., of N.Y. v. Moon Motor Car Co.*, 29 F.2d 3, 4 (2d Cir. 1928) (citing *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917)).

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law. His rejection of a constitutional right to freedom of contract, his belief that language cannot have a plain meaning outside of its context, his willingness to admit a broad array of contextual evidence to interpret contract language, and his willingness to infer a promise when the evidence supported such an inference, shows that his approach to contract interpretation was more modern than one would expect from a so-called great commercial formalist lawyer with a crusader's zeal for the objective theory of contract.