Case Western Reserve Law Review

Volume 37 | Issue 2

1986

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Volume 37 1986-87 Number 2

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A current focus of legal debate is the proper role of the courts in the interpretation of statutes and the Constitution. Are judges to look solely to the naked language of an enactment, then logically deduce its application in simple syllogistic fashion, as legal formalists had purported to do? Or may the inquiry into meaning be informed by perhaps unbridled and unaccountable judicial notions of public policy, using legal realism to best promote the general welfare?

Judge Posner considers the concepts of formalism and realism to be meaningful and useful in common law reasoning, but in interpretation to be useless and, worse, forbidden. He analogizes unclear "orders" from a legislature to garbled battlefield communications, and argues that the duty of the recipient of those orders (the judge) is to advance as best he can the enterprise set on foot by the superiors. Case studies elaborate this thesis. Judicial decisions interpreting fixed texts, Judge Posner concludes, can be neither logically correct or incorrect, philosophically sound or unsound, until the ultimate jurist, time, has adjudged their results.

INTRODUCTION

SEVERAL YEARS AGO I wrote a paper that tried to give "judicial self-restraint" and its opposite, "judicial activism," precise meanings, so that "restraint" would no longer be just an all-purpose

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term of approbation and "activism" just an all-purpose term of disapprobation.[1] The first purpose of the present Article is to perform a similar task of redefinition on an equally popular pair of highly charged terms in legal debate, "legal formalism" and "legal realism." I argue that when these terms are given a useful definition, it becomes apparent that they have no fruitful application to statutory (or constitutional) interpretation. The task of interpretation is fundamentally different from the tasks performed in formalist and realist analysis. Formalism and realism are useful concepts, but only for the analysis of common law cases and doctrines. For interpretation we need different intellectual tools. The second purpose of this Article is to suggest what they might be. I propose an analogy between the judicial interpretation of legislation and the interpretation of military orders in battlefield conditions where communications break down, and I defend the analogy with a series of case studies. The two divisions of the Article are linked by the idea of interpretation as a mental activity distinct from both logical reasoning and policy analysis.

Although I touch on constitutional issues, this is not an essay on constitutional law. I assume, rather than argue, what is no longer the universal view: that the function of judge-made constitutional law is to interpret the written Constitution.

I. FORMALISM AND REALISM DEFINED

The terms "legal formalism" and "legal realism" have a long history in legal thought.[2] Over the years they have accreted so many meanings and valences that each has become an all-purpose term both of approbation and of disapprobation, surpassing in this respect even "judicial self-restraint" and "judicial activism."[3] "Formalist" can mean narrow, conservative, hypocritical, resistant to change, casuistic, descriptively inaccurate (that is, "unrealistic" in

1. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1 (1983), *revised and reprinted in* R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 198 (1985).

2. The extensive literature on legal realism and legal formalism is well summarized in Comment, *Formalist and Instrumentalist Legal Reasoning and Legal Theory*, 73 CALIF. L. REV. 119 (1985). On formalism, Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983), is particularly good. On realism, see the authoritative collection of readings in Dennis J. Hutchinson, History of American Legal Thought II: The American "Legal Realists" (University of Chicago Law School, mimeo., 1984), and the excellent brief summary in Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 PHIL. & PUB. AFF. 205-14 (1986). For an effort, somewhat parallel to my own, to relate formalism, realism, and interpretation see Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151 (1981).

3. I plead guilty to vague use of "formalism" and "realism" throughout THE FEDERAL COURTS, *supra* note 1.

the ordinary-language sense of the word), ivory-towered, fallacious, callow, authoritarian—but also rigorous, modest, reasoned, faithful, self-denying, restrained. "Realist" can mean cynical, reductionist, manipulative, hostile to law, political, left-wing, epistemologically naive—but also progressive, humane, candid, mature, clear-eyed. These usages reflect the polemical character of so much writing about law. Legal realism is also used to refer to the work of particular academic lawyers, mainly on the Yale and Columbia faculties during the 1920's and 1930's, and to specific (and diverse) ideas held by those men. Legal formalism refers to the work of judges and academic lawyers whom the legal realists attacked and who attacked the realists in turn.

I want to give formalism a precise sense that is related but not identical to the "formalism" of Langdell[4] and the other nineteenth-century American legal formalists. I want it to mean the use of deductive logic to derive the outcome of a case from premises accepted as authoritative. Formalism enables a commentator to pronounce the outcome of the case as being correct or incorrect, in approximately the same way that the solution to a mathematical problem can be pronounced correct or incorrect. By "realism" I mean deciding a case so that its outcome best promotes public welfare in nonlegalistic terms; it is policy analysis. A "realist" decision is more likely to be judged sound or unsound than correct or incorrect—the latter pair suggests a more demonstrable, verifiable mode of analysis than will usually be possible in weighing considerations of policy. Such equity maxims as "no person shall profit from his own wrongdoing," which Professor Ronald Dworkin calls "principles,"[5] are in my analysis "policy considerations." My definitions of formalism and realism enable these terms to be used descriptively rather than evaluatively, and precisely rather than vaguely. One can speak of good and bad formalism, and good and bad realism. A more important point is that one can use formalism and realism, as I have defined them, only in discussing common law. The common law has a logical structure, and its premises are determined by notions of public policy. Statutes and constitutions are fundamentally different. They are communications, and neither logic nor policy is the key to decoding them (unless, of course, the communication, when decoded, is discovered to be saying to the courts, "make com-

4. Christopher Columbus Langdell, Dean of the Faculty of Law at Harvard University from 1870 until 1895.

5. *See* Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 23-24 (1967).

mon law"). This distinction, which is central to this Article, has now to be explained.

II. FORMALISM, REALISM, AND THE COMMON LAW

The common law (which I use broadly to mean all legitimately judge-made law) is a collection of concepts, such as negligence, consideration, possession, good faith, conspiracy, impossibility, and laches. These concepts furnish major premises for the decision of cases. The minor premises are the facts of the case. The model is: "All men are mortal; Socrates is a man; therefore Socrates is mortal." The major premise is a concept or definition, the minor premise a factual statement. So if an enforceable contract is a promise supported by consideration, and *A*'s promise to *B* was supported by consideration, the promise is a contract. Of course, the syllogistic structure of a real case is more complicated (because of defenses, exceptions, etc.), but that no more affects my analysis than does the fact that some mathematical problems are harder than others. Obviously the choice of premises is critical, and that is where public policy comes in. Why enforce only promises supported by consideration, or only promises that are consciously accepted? The reason, if it is a good reason, has to be traceable to some notion of policy rather than just be the result of arbitrary personal preferences or antipathies, or class bias, or some other thoroughly discredited ground of judicial action. It cannot be logic. Logic is used to go from the premises to the conclusion, not to obtain the premises. Of course, a premise may be the result of deduction from some more basic premise, but eventually one is forced back to a premise that cannot be obtained or proved by deduction. The nineteenth-century formalists sometimes overlooked (or perhaps deliberately concealed) this point. Since the correct choice of premises on grounds of policy is more uncertain than the correct deduction of a conclusion from its premises, the formalists preferred to focus on the process of deduction rather than on the choice of premises. They liked to give the impression that the premises were self-evident—meanwhile packing as much into the major premises as possible, to shorten the chain of deductions. The result is Platonism: the idea that concepts exist "out there," like trees or rocks, rather than are created.

Thus, Langdell said that a person who returns a lost article for which the owner has offered a reward has no contractual right to the reward if he did not know about the offer, because then the act of return could not have been a conscious acceptance of the offer,

and without such acceptance, there can be no contract.[6] But in so reasoning, Langdell was treating the concept of contract as if it were a thing which couldn't be altered without becoming something different. If you take the legs off of a table (permanently—not just for storage or moving), it is no longer a table. But it doesn't follow that if you don't have an acceptance you don't have a contract. A contract is just a promise that courts will enforce, and if there is a good policy reason for doing so they can decide to enforce a promise even though it was not consciously accepted. Nor is it a good reply that a contract without acceptance is like a table missing only one leg; that no essential, defining characteristic of the concept of contract is missing, as would be the case if there were neither offer nor acceptance. What should count as the essential, defining characteristics of contract is not a semantic question; it is a policy question. We may enforce any promise we want, and call it a contract, just as we can punish a drug dealer for his agent's possession of illegal drugs by saying that the dealer has "constructive" possession. In the reward case, the question for the court should be (putting aside the issue of adherence to precedent): ought the unconscious acceptance be deemed to create a contract? I would think the answer should depend on whether, if it is, more lost articles will be returned, at an acceptable cost to the legal system. This happens to be a difficult question.[7]

The problem was not that Langdell was a bad formalist, in the sense of making errors of logic, but that he was uncritical about his premises. Another example from his time was the generalizing of the rule of capture for wild animals—the rule that a wild animal, such as a rabbit, is not owned until you catch it—into the concept that ownership of natural resources without a fixed locus is governed by the rule of capture, and then the deducing from that concept that rights in fish, valuable fur-bearing animals, and oil and gas ought to be governed by the rule too.[8] The conclusion, in syllogistic form but only because too much has been packed into the major

6. *See* C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 1-3 (2d ed. 1880).

7. *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 89-90 (3d ed. 1986). In fairness to Langdell, I must point out that, considering when it was written, Langdell's treatise on contract law is a splendid piece of legal analysis, unjustly maligned by Oliver Wendell Holmes in an anonymous review, *see* 14 AM. L. REV. 233, 234 (1880) (Langdell is "the greatest living legal theologian") and more recently and less elegantly by Grant Gilmore, G. GILMORE, THE DEATH OF CONTRACT 13 (1974) ("To judge by the casebook and the Summary, Langdell was an industrious researcher of no distinction whatever either of mind or . . . of style.").

8. *See, e.g.*, 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 203, at 26-28 (1985) (discussing the application of the rule of capture to oil and gas).

premise, can lead to inefficient exploitation of these natural resources even though the rule is efficient when applied to rabbits, ducks, and other wild animals of no great value. A rule of capture creates no incentive to defer exploiting a natural resource, since there is no way of obtaining a property right to future use. This is all right if the resource is not scarce, which is to say not valuable in an economic sense, but it is inefficient if the resource is scarce and we therefore want to conserve some of it for future use, or to make investments in expanding the supply of the resource that will bear fruit only in the future.[9] This distinction, which is crucial in choosing the premise for decision (that is, in determining the scope of the rule of capture), tends to be ignored if the rule is stated in its broadest, most "conceptual" form, and then is treated as a given rather than as an object of choice, and is not open to modification or qualification on the basis of experience. As this example shows, reasoning by analogy (e.g., from fish to gas) is often a form of logical reasoning, in which the first step is elevating the first thing compared to a general principle (any "fugitive" resource is governed by the rule of capture). But whether to elevate it or not is or should be a policy question; logic won't do the trick.

The fallacy in legal reasoning of smuggling the conclusion into the premise (as in this too simple argument against the legality of affirmative action: racial discrimination is illegal; affirmative action discriminates against whites; therefore affirmative action is illegal) is common enough to deserve a name, and let us call it "Langdellism." Let us also purge "formalism" of its pejorative connotations by using it simply to mean decision by deductive logic.

Holmes mounted a series of fierce realist attacks on Langdellism, insisting that the law was not a set of preexisting concepts of fixed scope but a tool of government which would and should be reshaped as the desires of the community or (more realistically) of its politically dominant groups changed. He made the point in his most memorable nonjudicial aphorism ("The life of the law has not been logic: it has been experience"[10]) and in his famous definition of law as a prophecy of what the judges would do when confronted with a given set of facts.[11] The definition is incomplete. It cannot be used by the judges of the highest court in the jurisdiction, or even by the judges of the lower courts in the absence of clear precedent on the question at issue or personal knowledge of their judicial

9. *See* R. POSNER, *supra* note 7, at 34, 58.

10. O.W. HOLMES, THE COMMON LAW 1 (1881).

11. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

superiors' views on it. Nevertheless, it is significant in pointing us away from concepts as the defining characteristic of law.

Despite much derision by Holmes of formal logic (the syllogism cannot wag its tail,[12] and so forth), there is no inconsistency between realism in Holmes' sense and formalism in the sense of deductive reasoning. Once the basic premises are chosen on realist grounds (e.g., once the rule of capture is given a scope coterminous with its economic rationale), deduction can proceed without violating realist norms. Holmes himself deduced some highly formal legal concepts, notably a concept of contract not far removed from that of Langdell.[13] Holmes was more likely, however, to deduce legal concepts from ideas of what was good for society or what its dominant classes wanted than merely to posit them as axioms for decision. He thought he was attacking logic; that is, formalist reasoning. He really was attacking what I am calling Langdellism.

The modern exemplar of formalism in common law is the positive economic analysis of that law which Professor Landes and I and others have expounded.[14] Taking as our premise the claim that the common law seeks to promote efficiency in the sense of wealth maximization (that is, abstracting from distributive considerations), and adding some data and assumptions about technology and human behavior, we deduce a set of optimal common law doctrines and institutions and then compare them with the actual common law. I use "deduction" in a literal sense. Microeconomic theory is a logical system like calculus or geometry (hence economic theory can be and often is expressed mathematically); more precisely a family of such systems. If the positive economic theory of the common law is right, the common law is a logical system, and deductive logic—formal reasoning—can be used (by the judge) to reach demonstrably correct results in particular cases or (by the scholar) to demonstrate the correctness of results in particular cases—provided, of course, that our major premise (that of wealth maximization), along with a slew of minor premises, is accepted. Whether it

12. Letter to John C.H. Wu, in THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS 419 (M. Lerner ed. 1943).

13. For example, Holmes agreed with Langdell that someone who returned a lost article without knowledge of the reward was not entitled to claim the reward, because the offer of the reward had not induced the return. *See* O.W. HOLMES, *supra* note 10, at 294. *See also* G. GILMORE, *supra* note 7, at 19-21. The notion that Holmes, by using formalist reasoning, showed he was not really a realist, reveals the potential for confusion in the use of these terms.

14. *See, e.g.*, W. LANDES & R. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (forthcoming, Harvard University Press, 1987); R. POSNER, *supra* note 7, 3-55.

is or is not belongs to the realm of policy analysis; that is the realist component of the economic theory of the common law. It is realist because the concepts which provide the major premises for common law reasoning (whether an overarching premise such as wealth maximization, or particular legal concepts such as negligence that can be deduced from it) could be, and no doubt would be (and to some extent have been), altered by the judges in response to changing perceptions of public policy. The pace of change is affected by the need to preserve a reasonable degree of stability in law but that is just another policy consideration.

The essence of common law is that the law itself is made by the judges. They are the legislators. They create and modify the doctrines of the common law, from which further doctrines are deduced. The entire doctrinal structure then supplies major premises and the trial process supplies the minor ones (the facts), thus enabling case outcomes to be produced by a deductive method. The actuality is far messier, in part because a number of minor premises involving motivation, information, and so forth are contested, but the nature and direction of the process are clear enough to suggest the utility of the terms legal formalism and legal realism, as I have defined them, in analyzing common law decisionmaking.

III. The Nature of Textual Interpretation: Decoding Communications

The major premise of a syllogism is a definition (like "All men are mortal"), or, what is the same thing, a rule (e.g., the perfect-tender rule), or, what is again the same thing, a concept (e.g., negligence, which stated as a rule or definition is "All persons are prima facie liable for accidents resulting from their failure to take due care, i.e., the cost-justified level of care"). The common law, like the system of real numbers, is a conceptual system—not a textual one. The concepts of negligence, of consideration, of reliance, are not tied to a particular verbal formulation, but can be restated in whatever words seem clearest in light of current linguistic conventions. Common law is thus unwritten law in a profound sense. There are more or less influential statements of every doctrine but none is authoritative in the sense that the decision of a new case must be tied to the statement, rather than to the concept of which the statement is one of an indefinite number of possible formulations.

Considering the importance that the common law attaches to decision in accordance with precedent, it may seem odd to divorce

common law from the verbal formulas in the judicial opinions that create it. A common law doctrine, however, is no more textual than Newton's universal law of gravitation. The doctrine is inferred from a judicial opinion, or more commonly a series of judicial opinions, but it is not those opinions, just as Newton's law is learned from a text but is not the text itself. Decision according to precedent means decision according to the doctrines of the common law, not according to specific verbal expressions of those doctrines.

Statutory and constitutional law differs fundamentally from common law in that every statutory and constitutional text—the starting point for decision, and in that respect (but that respect only) corresponding to judicial opinions in common law decision-making—is in some important sense not to be revised by the judges. They cannot treat the statute as a stab at formulating a concept which they are free to rewrite in their own words.[15] This might seem to entail just that formalist reasoning in statutory or constitutional law would be deduction from a text and therefore would be possible as long as the text was as precise as a common law concept. But there is no such thing as deduction from a text. No matter how clear the text seems, it must be interpreted (or decoded) like any other communication, and interpretation is neither logical deduction nor policy analysis. The terms formalism and realism as I have defined them thus have no application to statutory or constitutional law, except, as I have said, when the framers' command is simply that the judges go out and make common law.

A conclusion obtained by deduction is already contained in the premises in the sense that the only materials used to obtain the conclusion are the premises themselves and the rules of logic. But meaning cannot be extracted from a text merely by taking the language of the text and applying the rules of logic to it. All sorts of linguistic and cultural tools must be brought to bear on even the simplest text to get meaning out of it. This is not to suggest that all texts are ambiguous. A text is clear if all or most persons, having the linguistic and cultural competence assumed by the authors of the text, would agree on its meaning. Most texts are clear in this sense, which is the only sense that captures the meaning of the word "clear" as applied to texts.

I shall illustrate the distinction between logic and interpretation

15. *See, e.g.*, E. LEVI, AN INTRODUCTION TO LEGAL REASONING 6-7, 28-30 (1949); Simpson, *The* Ratio Decidendi *of a Case and the Doctrine of Binding Precedent*, in OXFORD ESSAYS IN JURISPRUDENCE 148, 165-67 (A.G. Guest ed. 1961). Hart and Sacks imply a contrary view, which I consider later. *See infra* text accompanying note 19.

by reference to the clearest of constitutional provisions—the provision that fixes thirty-five years as the age of eligibility for the Presidency.[16] It might seem that if the question were whether *X*, who is thirty-two years old, is eligible to be President, the answer would involve an application of formalist reasoning: one must be at least thirty-five to be eligible, *X* is not thirty-five, therefore *X* is not eligible. But the answer is open to attack along the following lines: the framers may not have intended to set a rigid limitation; they may have meant that the candidate must either be thirty-five years old or be at least as mature as the average thirty-five year old; they might have countenanced a change if life expectancy changed.[17] The attack is, as we shall see, very weak, but the only point I want to make here is that it cannot be repelled by formal logic. The legal task in this case is not to make deductions from a definition—it is not to apply a rule—it is to do something prior, to interpret a text. The proper riposte to the attempted "deconstruction" of the age thirty-five provision is not that the attempt is illogical or is bad public policy but that the meaning of the text is clear. We do not decide the clarity of texts, or decode communications generally, by syllogistic reasoning or appeals to policy (though logic and policy may enter indirectly, as we shall see). If a message is unclear we ask the sender to repeat or amplify it until we no longer doubt what he meant to say. We do not use that approach to solve a mathematical problem or to decide what course of action will best promote the public welfare.

Consulting post-enactment legislative history, and even hearing testimony by legislators in cases in which the meaning of legislation is contested, are methods by which courts sometimes try to get legislatures, in effect, to repeat unclear messages. These methods have plenty of problems, and I don't mean by mentioning them to endorse them, but they do serve to show that the enactment of legislation is a method of communication with judges, in a way that the statement of a common law doctrine is not. If we are puzzled about the formulation of the doctrine of consideration in some opinion, we are not likely to feel an urge to ask the author of the opinion what he meant. This is because we are always free to reformulate the

16. "[N]either shall any Person be eligible to that Office who shall not have attained to the age of thirty five Years . . . ." U.S. CONST. art. II, § 1, cl. 5.

17. *See* Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1174 (1985); Tushnet, *A Note on the Revival of Textualism in Constitutional Theory*, 58 S. CAL. L. REV. 683, 686-88 (1985).

doctrine in a way that will describe the underlying concept more accurately.

The idea of legislation as communication may seem to have no utility beyond showing the fatuity and confusion of applying the terms legal formalism and legal realism to the interpretation of legislation. For most of the time it is impossible to ask the legislature to repeat an unclear message. But by considering what the possible responses are to an unclear message when the sender cannot be queried about his intended meaning, we shall see that the notion of legislation as communication has considerable utility. One possible response of the receiver is to ignore the message, and this might seem the appropriate posture for a court faced with an enactment whose meaning, with respect to the case at hand, cannot be deciphered. Yet that kind of response can be profoundly unresponsive. Suppose the commander of the lead platoon in an attack finds his way blocked by an unexpected enemy pillbox. He has two choices: go straight ahead at the pillbox, or try to bypass it to the left. He radios the company commander for instructions. The commander replies, "Go—"; but the rest of the message is garbled. When the platoon commander radios back for clarification, he is unable to get through. If the platoon commander decides that, not being able to receive an intelligible command, he should do nothing until communications can be restored, his decision will be wrong. For it is plain from the part of the message that was received that the company commander wanted him to get by the enemy pillbox, either by frontal attack or by bypassing it. And surely the company commander would have preferred the platoon commander to decide by himself which course to follow rather than to do nothing and let the attack fail. For the platoon commander to take the position that he may do nothing, just because the communication was garbled, would be an irresponsible "interpretation."

The situation with regard to legislative interpretation is analogous. In our system of government the framers of statutes and constitutions are the superiors of the judges. The framers communicate orders to the judges through legislative texts (including, of course, the Constitution). If the orders are clear, the judges must obey them. Often, however, because of passage of time and change of circumstance the orders are unclear and normally the judges cannot query the framers to find out what the order means. The judges are thus like the platoon commander in my example. It is irresponsible for them to adopt the attitude that if the order is unclear they will refuse to act. They are part of an organization, an enterprise—the

enterprise of governing the United States—and when the orders of their superiors are unclear, this does not absolve them from responsibility for helping to make the enterprise succeed. The platoon commander will ask himself, if he is a responsible officer: what would the company commander have wanted me to do if communications failed? Judges should ask themselves the same type of question when the "orders" they receive from the framers of statutes and constitutions are unclear: what would the framers have wanted us to do in this case of failed communication? The question is often difficult to answer, but it is the right question to frame the interpretive issue in cases where the enactment is unclear. There are objections to this way of looking at the problem of statutory interpretation and to my military analogy but I defer them for the moment.

My analysis of common law and statutes casts doubt on the traditional view that common law reasoning resembles induction and statutory interpretation, deduction.[18] It is true that the common law concept must be extracted from a line of cases and that the facts of a new case may cause the judges to modify the concept (an example of the role of policy analysis in judicial decisionmaking), but from there on the analysis is conceptual, deductive. It is also true that judges interpreting a statute may extract from it a concept (such as the economic concept of monopoly, in the case of the antitrust statutes, discussed later), which then goes on to lead a life of its own, in common law fashion; but the essential step is interpretation, and it is not a deductive process. Elements of formalism, realism, and interpretation are differently mixed in common law reasoning and statutory application, and it is unhelpful and misleading to distinguish these two basic forms of legal reasoning by calling the first inductive and the second deductive.

IV. CLEAR VERSUS UNCLEAR CASES

I am naturally more interested in the unclear cases of interpretation than the clear ones. But it is important to insist that there are clear cases, though they are underrepresented both in appellate opinions and in academic debate. The age thirty-five case is easy, despite Peller's and Tushnet's efforts to make it seem hard. They are quite right, though, that no text is really "clear on its face." The provision is profoundly unclear to a person who does not know English; and if it is still in force in a thousand years, it may be as

18. For a carefully qualified statement of this view see E. LEVI, *supra* note 15, at 19-20.

unclear as Anglo-Saxon or Old English is to us. In India, where the official language is English but age is measured from conception rather than birth, it would mean something different from what it means to us. It would mean something different in a society that did not record the date of birth. A text is clear only by virtue of linguistic and cultural competence. What makes the age thirty-five provision clear is that American lawyers recognize it as part of a family of rules that establish arbitrary eligibility dates in preference to making eligibility turn on uncertain qualitative judgments. Legislatures set eighteen or twenty-one years as the age of majority rather than provide that one is legally an adult when one is mature. They also refuse to allow precocious twelve-year-olds to take the driving test. If eligibility for the Presidency were not fixed at a definite age, there would be great difficulty in determining in advance of the election who is eligible; after the election it's too late. When all these considerations are taken into account, as can be done only by people living in a certain kind of society (e.g., one where the date of birth is recorded and age is measured in years from that date), the age thirty-five provision becomes clear.

We shall see later that provisions that seem equally clear "on their face" may become unclear when the various contextual considerations that we use in decoding messages are taken into account. But the present point is that the rejection of formalism as a method of statutory interpretation doesn't condemn us to universal skepticism about the possibility of interpretation. Interpretation is no less a valid method of acquiring knowledge because it necessarily ranges beyond the text. No text is clear except in terms of a linguistic and cultural environment, but it doesn't follow that no text is clear. The relevant environment, and its bearing on the specific interpretive question, may be clear.

Nevertheless, it is true that many statutory and constitutional texts, including the most illustrious and also many that seem clear "on their face" (a pernicious usage), are unclear in the sense of my hypothetical company commander's order. But the lack of clarity does not entitle the court to say that it will not apply the text until the authors rewrite it. The court still has the duty to interpret, which requires, as I have suggested, figuring out what outcome will best advance the program or enterprise set on foot by the enactment. This conclusion is entailed by my assumption that the best way to look at the relationship between legislatures (or the adopters of the Constitution and its amendments) and courts is as superior

and subordinate officers, with the former often being unable to communicate clearly with the latter.

V. SOME OTHER APPROACHES TO THE INTERPRETATION OF LEGISLATION

Before defending and then illustrating my approach, let me contrast it briefly with some others. One that is particularly interesting in light of my desire to banish talk of formalism and realism from the interpretive domain is that of Hart and Sacks, which is broadly similar to my approach but differs crucially in requiring that courts deem the enacting legislators reasonable persons intending reasonable results in the public interest.[19] If this is a permissible assumption, and if there is broad agreement on what is reasonable and public-interested, the interpretive problem disappears; interpretation disappears. All statutes become pellucid and unequivocal directives to courts to achieve sound results. A court complies with these directives by creating concepts (like "concerted activities" under the National Labor Relations Act[20] or "public convenience and necessity" under common carrier and public utility statutes[21]) which the court then proceeds to apply formalistically, maybe after deducing subconcepts from them, to particular cases. Suppose—though this was not Hart and Sacks' view, nor is it mine—that all legislators are reasonable in the special sense of wanting to maximize society's wealth. Then they would want the court to "interpret" their every statute to make it conduce to this end. The same formal analysis used to explain, and for those accepting its substantive premises to justify, common law decisions could be used to explain and justify statutory decisions. In effect, the statutes would be precedents:[22] that is, tentative formulations of legal concepts. The courts would be free to revise the formulations.

Unfortunately, neither the specific assumption that legislators seek to maximize society's wealth nor the general assumption that they seek to achieve reasonable results in some consensus sense of reasonableness (for example, one that combined efficiency with the most widely accepted distributive norms, such as that condemning

19. *See* 2 H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1410-17 (tent. ed. 1958).

20. 29 U.S.C. § 151 (1982).

21. *See, e.g.*, 47 U.S.C. § 214 (1982).

22. This position was urged by one of Hart and Sacks' predecessors in the school of "progressive formalism." *See* Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213 (R. Pound ed. 1934).

racial discrimination) is tenable in light of intellectual and political developments since Hart and Sacks wrote in the middle 1950's. And if the second assumption were tenable, it would not be usable as a guide to applying statutes.

First, the spectrum of respectable opinion on political and social questions has widened so enormously that even if we could assume that legislators intended to bring about reasonable results in all cases, the assumption would not generate specific legal concepts. To learn what sense of reasonableness the legislators meant the courts to use would require interpretation of the legislative text. We cannot escape interpretation.

Second, recent studies of the legislative process stress the importance of interest groups, pursuing private goals rather than the public interest, in shaping legislation.[23] There is nothing new in the recognition that interest groups are important in the legislative process, but at the time Hart and Sacks wrote it was thought that the competition of interest groups would achieve a social optimum. The fact that differential ability to organize an effective interest group could well result in serious departures from optimality was not widely recognized, as it is today. The recognition of this danger has made it more difficult to regard statutory texts as the equivalent of precedents, reflecting the same values and goals as the judges hold; many statutes appear to reflect compromises between contending groups pursuing (but not avowing) selfish ends.

I have exaggerated Hart and Sacks' position in order to make its contrast with mine clearer. Far from thinking interpretation irrelevant, they devote most of their discussion of statutory interpretation to techniques for "decoding" the statutory communication. It is only when all else fails that a court is to assume that the legislators were trying to do the same thing that courts do; it is only the most difficult, the indeterminate, issues of statutory interpretation that are to be subjected to common law formalist-realist reasoning. The fact that the court is to decode first, and reason in common law fashion only if the effort to decode fails, suggests that Hart and Sacks were well aware that not all legislation is reasonable in a common law sense. Nevertheless their discussion implies a more com-

23. For recent and comprehensive reviews of this literature see Farber & Frickey, *The Jurisprudence of Public Choice: Empiricism, Cynicism, and Formal Models in Public Law Theory*, forthcoming in Texas Law Review, and Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986). For a briefer treatment, see R. POSNER, *supra* note 7, at 496-98.

fortable and confident view of "interpretation" (broadly conceived) than is likely to gain many adherents today.

Not only can few today accept the assumption that the legislative intent typically is to maximize the general welfare, but there is also greater awareness of the inherent uncertainties of interpretation.[24] The reason for this greater awareness may simply be that interpretation presupposes shared cultural values, and the United States—including its legal community—is politically, socially, and culturally more diverse than it was thirty years ago. But, whatever the reason, the grounds for skepticism about the feasibility of definitive interpretation in difficult cases are better understood today than they were then. There is, for example, greater awareness of the problem of intention about intention. Supposing that we knew for certain that the legislators whose votes were necessary for the enactment of the fourteenth amendment did not want it to prevent the southern states from operating a segregated public school system, we would still have to decide whether they intended the application of the amendment to be bounded by their knowledge and preferences, or instead wanted it to be informed by the knowledge and preferences of future generations—of judges.[25] Who knows? Probably they didn't think about the distant future. Can the gap sensibly be filled simply by assuming the framers of the fourteenth amendment were reasonable men seeking reasonable results? Or consider the key term of the Mann Act: "immoral practice."[26] In a case decided today, should this term be taken to refer to the moral ideas of 1910, when the Mann Act was passed, or to the moral ideas prevailing in 1987? An argument for the latter position is that the main purpose of the Mann Act is to back up state regulation of the family and sex; as that regulation changes in conformity with changes in the moral climate, so should the prohibitions of the Mann Act. But it is only an argument, for we have no good information on what the framers of the Act would have wanted courts to do with respect to future changes in sexual mores.[27]

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24. Of course, there is nothing new about interpretive skepticism. See the precocious work by F. LIEBER, LEGAL AND POLITICAL HERMENEUTICS (enlarged ed. 1839), especially chapter 5.

25. For inconclusive speculation on this specific question see Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 63-64 (1955). I return to this issue in the last part of this Article. *See infra* notes 70-77 and accompanying text.

26. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (1982)).

27. On the legislative history and judicial interpretation of the Mann Act see E. LEVI, *supra* note 15, at 33-46.

A famous example of the problem of intention about intention concerns state statutes that provide that jurors are to be selected from a list of persons eligible to vote. When these statutes were passed, women were not eligible to vote. Later they became eligible. Does this mean they could now be jurors?[28] We know that the legislators did not intend that women be jurors. But did they intend this intention to govern the indefinite future? I should think not. It would have been easy enough to provide that only men were eligible. Probably the legislators didn't care, or at least didn't care much, about the sex of jurors—they just wanted to tie juror eligibility to voter eligibility, figuring that anyone qualified to vote was qualified to serve on a jury. If so, there is no reason to exclude women. But the argument is no more than plausible.

Another general problem of interpretation is that no one knows for sure whether the framers of the Constitution intended federal courts merely to translate (so far as they were able) the specific commands of Congress into particular case outcomes, or instead, as suggested by Alexander Hamilton, to exercise a civilizing influence—to act as a buffer between the legislators and the citizenry even when no constitutional issue was raised.[29] The role of the judge in "civilizing" statutes was not problematic for Hart and Sacks because they were willing to assume in all doubtful cases that the statute was intended to achieve the civilized result. On such an assumption there is no difference between being a translator and being a buffer, so Hamilton could be left in peace.

Then there is the growing skepticism about the traditional props of statutory interpretation, such as reference to purpose, to legislative history, and to rules of interpretation. Public-choice theory makes the attribution of unified purpose to a collective body increasingly difficult to accept—though I think it is possible to overdo

28. The courts divided on the question. *Compare* Commonwealth v. Maxwell, 271 Pa. 378, 114 A. 825 (1921) (women became eligible), *with* People *ex rel.* Fyfe v. Barnett, 319 Ill. 403, 150 N.E. 290 (1926) (women remain ineligible) *and* Commonwealth v. Welosky, 276 Mass. 398, 177 N.E. 656 (1931) (same).

29. [I]t is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts.

THE FEDERALIST No. 78, at 227, 231-32 (A. Hamilton) (R. Fairfield ed. 1981).

one's skepticism in this regard. Institutions act purposively, therefore they have purposes. A document can manifest a single purpose even though those who drafted and approved it had a variety of private motives and expectations.

In addition, however, the canons of statutory construction, which purport to resolve specific issues of statutory interpretation, are (most of them, anyway) increasingly criticized as contradictory, fatuous, and unclear. And there is growing realization that legislative history is frequently unknown to the majority of the legislators who vote to enact the legislation in question.[30] The more we learn about legislation, the harder it becomes to extract definite meanings from particular statutes with any confidence. The new learning seems overwhelmingly negative.[31]

One possible inference from the skeptical literature about statutory interpretation is that courts should pull in their horns and stop trying to apply statutes to problems not specifically foreseen and resolved by the legislature. An equally plausible inference, however, is the opposite one—that the courts must do more to help the legislature, and in the process must free themselves from dependence on the incoherent guides to meaning on which courts traditionally rely. So it is possible to argue from the same data that statutory interpretation should be narrower than it once was and that it should be broader. One cannot choose between these positions by invoking bromides about democracy, because the issue is not whether the courts should exceed the limits of their role in the constitutional scheme but how they can best play that role given current knowledge of, or rather uncertainty about, the interpretive process.

I shall illustrate these points by reference to the contrasting positions taken by Guido Calabresi and Frank Easterbrook.[32] Writing

30. *See* Judge (now Justice) Scalia's concurring opinion in Hirschey v. Federal Energy Regulatory Comm'n, 777 F.2d 1, 7-8 (D.C. Cir. 1985). Judge Scalia "frankly doubt[ed] that it is ever reasonable to assume that the details, as opposed to the broad outlines of purpose, set forth in a committee report come to the attention of, much less are approved by, the house which enacts the committee's bill" and expressed concern over "the fact that routine deference to the detail of committee reports . . . [is] converting a system of judicial construction into a system of committee-staff prescription." *Id.*

31. *See, e.g.*, Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983); R. POSNER, *supra* note 1, at 223. For notable recent contributions to the growing debate over statutory interpretation see W. Eskridge, Jr., Dynamic Statutory Interpretation in Light of Changed Circumstances (University of Virginia Law School, mimeo., 1986); Farber & Frickey, *supra* note 23.

32. *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); Easterbrook, *supra* note 31.

from a liberal political standpoint, Calabresi urges that courts be empowered to declare constitutional statutes invalid by reason of obsolescence. At first I thought this was an "anti-legislation" position, surprising in a liberal, because it would expand the power of the courts to invalidate legislation that does not trench on constitutional rights, and liberals tend to support such legislation. I no longer think this evaluation correct. First, if you think the future belongs to liberalism (which many liberals believe, though with less confidence than in the 1960's and 1970's), then the systematic discarding of old legislation will make public policy more and more liberal. Second, the concept of statutory "obsolescence" is so vague that a liberal judge could easily believe, in good faith, that only illiberal statutes obsolesce. Third, Calabresi's proposal if adopted might actually make the enacting of legislation easier. Legislatures would not have to waste time repealing obsolete enactments and they could use the time thus saved for new legislative initiatives. They also would not be deterred from passing legislation by fear that it might become obsolete, and they would not have to worry about adding a "sunset" provision, either, which might make the statute lapse prematurely. But, supposing the dominant effect of Calabresi's proposal would indeed be more legislation, there is still the problem of justifying an expansion in the effective power of legislatures. The framers of the Constitution were suspicious of legislatures and hedged about the legislative power with many restrictions. If Congress passed the sort of law that Calabresi advocates, delegating to the courts the power to declare statutes obsolete, could one not argue that Congress was circumventing limitations on the legislative power that had been deliberately built into the constitutional structure?

Concern with preserving these limitations animates Easterbrook's quite different approach. He divides statutes into two categories. One, which includes the Sherman Act,[33] he treats as telling the courts to create common law doctrine—in the case of the Sherman Act, a common law of antitrust. The other category consists of statutes that, perhaps because worded very specifically, do not seem intended to authorize the courts to fashion common law. These statutes are to be strictly construed against the party to a lawsuit who seeks an advantage from them. Easterbrook thus proposes "[d]eclaring legislation inapplicable unless it either expressly addresses the matter or commits the matter to the common law."[34]

33. 15 U.S.C. §§ 1-7 (1982). *See infra* text accompanying note 61.

34. Easterbrook, *supra* note 31, at 552.

If adopted, this proposal might well reduce the effective power of the legislative branch. In the class of statutes that judges classified as authorizing common law, the legislature would have little or no effect on policy; policy would be made by the courts. In the residual class the legislature would have little power also, for its statutes would be given no effect beyond the applications "expressly addressed" by the legislators. Ordinarily, this would mean just the applications that the legislators, having actually foreseen, made express provision for; so the statute's application would be circumscribed by the vision of its enactors. Even in the best of circumstances, however, people find it very difficult to rule the future, and legislators do not work under the best conditions.[35] They are not chosen or rewarded for their foresight, they work under severe time pressures, and they are pulled hither and yon by special interest groups. If courts do not conceive their interpretive role as a helping one, much legislation will become obsolete within a few years of enactment. Easterbrook defends his approach to statutory interpretation by reference to the constitutionally in-built limitations of the legislative process, which he thinks are circumvented if judges allow themselves to interpret the spirit (when it has a spirit) as well as the letter of legislation.[36] And yet he would allow circumvention of those limitations through delegation, explicit and implicit, to the courts of the power to make common law. Although the framers of the Constitution were concerned with legislative excesses, they did not seek to curb them by making legislation expire with the enacting Congress. Easterbrook also defends his position by reference to the political principle of limited government. "There is still at least a presumption that people's arrangements prevail unless expressly displaced by legal doctrine."[37] But in the words "still at least" I sense an acknowledgment that the presumption is controversial. It is, in fact, ideological.

In some cases Easterbrook's position, which is textualist rather than intentionalist, may result in expanding a statute in unforeseen ways. For, to take an old chestnut, if the legislature declares it a crime to bring a vehicle into the park, might not the veterans' or-

35. *See* Sorenson v. Secretary of the Treasury, 106 S. Ct. 1600, 1610 (1986) (Stevens, J., dissenting). Justice Stevens cites an amusing New York Times report of the enactment of a bill, " 'with parts of it photocopied from memorandums, other parts handwritten at the last minute . . . some final sections hastily crossed out in whorls of pencil marks [and] such cryptic and acccidental entries in the bill as a name and phone number—"Ruth Seymour, 225-4844"—standing alone as if it were a special appropriation item.' " *Id.* n.2.

36. *See* Easterbrook, *supra* note 31, at 548-49.

37. *Id.* at 549.

ganization that placed a tank (in working order) there as a war memorial, be guilty, under Easterbrook's approach, of a crime? But probably he would regard this as a case where the statute was not really clear, so that the prosecution would fail. His basic position, as I understand it, is that if the command of the legislature is unclear, the court should ignore it by resolving the case against the party relying on the statute; and a superficially clear text may become unclear when context is considered. In any event his basic position does not, for me, solve the problem of unclear (and unclarifiable) "orders" within an organization, as I conceive the triple-branched government of the United States to be, having a common purpose. The task of interpretation is made neither irrelevant nor impossible by a failure of clear communication. The recipient must determine what his superiors would have wanted him to do to advance the common enterprise under conditions of broken communication.

VI. Objections to the Military Analogy

Before proceeding to illustrate my suggested approach, I take up some likely objections to it.

There is first the problem that the organization in question (i.e., the government) lacks the clear hierarchical command structure of a military organization or a business firm. But as we know from the literature on organizations and "agency costs," nominally hierarchical organizations are not monoliths either. The inevitable breakdown of communications in combat, which provides the model for my conception of statutory interpretation, is at least as serious as that which attends a legislature's trying to communicate its decisions to judges.

Nor (a related point) am I troubled by the fact that legislators and judges may not share the same values. A given piece of legislation may reflect nothing more exalted than the political muscle of an interest group able to obtain a legislative redistribution of wealth from a less well-organized group (though it would be incorrect to think that all legislation is exclusively of this character). The common enterprise that judges are pledged to advance is not a set of shared substantive values but the peaceable and orderly governance of the United States. One element of such governance is that judges make a good-faith effort to effectuate legislation regardless of their agreement or disagreement with its means or ends, subject to constitutional and institutional limitations. In this respect their position

is similar to that of military subordinates who may not share the strategic, tactical, or political goals of their superiors.

Third, and still related, it is not a legitimate criticism of my analogy to argue that if the platoon commander cannot decode the order he will just do what he thinks best, which a judge should not do. The platoon commander is a subordinate officer, like the judge, and one of the things he is subordinate to is a body of doctrine. It is not for a lieutenant to decide what shall be the offensive doctrine of the United States Army. No more is it for a judge interpreting a legislative text, even an unclear one, to decide the public policy of the United States in accordance with his personal conception of right and wrong, sound and unsound policy. (I thus reject Hamilton's suggestion that judges should try to "civilize" constitutional statutes.)

This point, and the military analogy generally, may help make clear that in arguing that judges have a duty to interpret, even when the legislative text is unclear, I am not arguing for judicial activism. The relationship between a military officer and his superiors and their doctrines, preferences, and values is, after all, the very model of obedience and deference. But the relationship does not entail inaction when orders are unclear. On the contrary, it requires "interpretation" of the most creative kind. And nothing less will discharge the judicial duty, even for those who believe, as I do, that self-restraint is, at least in our day, the proper judicial attitude. Creative and willful are not synonyms. You can be creative in imagining how someone else would have acted knowing what you know as well as what he knows. That is the creativity of the great statutory judge.

Another objection to my military analogy is that the real addressee of the legislative command, corresponding to the platoon commander, is not the judge but the executive or administrative officers, or private persons, whose conduct the statute regulates. If the command is garbled, it is they, not the judge, who, it can be argued, should have the power to act. But surely the command is addressed to both the regulated person and the judge. If the judge is to be placed outside the chain of command, as it were, it can only be because his competence is thought limited to interpreting clear commands. But as a trained and disinterested interpreter, the judge should be recognized to have a competence to interpret unclear, even garbled, commands, at least if I am right that interpretation is not impossible—only difficult—in such a case. On that issue my case studies may cast some light.

Before turning to them let me emphasize one more point. A theory of interpretation, such as I have been propounding, cannot in general be derived from the thing being interpreted. Few texts provide a guide on how to interpret them. This point is as true of the Constitution as of most of the statutes enacted pursuant to it. A theory of interpretation rests ultimately on political (in its philosophical, not partisan, sense) and epistemological premises. The theory I have sketched, for example, depends heavily on a conception of judges as properly subordinate to legislators, coupled with a rejection of extreme skepticism concerning the possibility of carrying out other people's unclearly formulated plans. Calabresi would, I suspect, reject the first premise (subordination); Easterbrook, the second (rejection of skepticism).

VII. Some Exercises in the Reading of Statutes

Written by Justice Harlan for a unanimous Court, the opinion in *Moragne v. State Marine Lines*[38] is generally considered a model of sensitive and creative use of statutes, but it can be pulled apart and shown to be arbitrary and uninformed. The issue was whether the survivor of a longshoreman killed aboard a ship docked at a Florida port could sue the shipowner for wrongful death caused by the ship's unseaworthiness. If the accident had occurred farther out, on the "high seas," she could have sued for wrongful death under the federal Death on the High Seas Act.[39] If it had occurred in the coastal waters of almost any state except Florida, whose wrongful death statute happened to be inapplicable to unseaworthiness, she could have sued under state law by virtue of the federal "savings to suitors" clause.[40] And if the victim had been a seaman rather than a longshoreman, the suit could have been maintained under the Jones Act.[41] The plaintiff fell among all these stools. The only basis for suit was the judge-made federal admiralty law, which had never recognized liability for wrongful death.[42] The Supreme

38. 398 U.S. 377 (1970). Justice Blackmun did not participate in the decision.

39. 46 U.S.C. §§ 761-768 (1982).

40. 28 U.S.C. § 1333 (1982) (original and exclusive district court jurisdiction in admiralty or maritime, "saving to suitors . . . all other remedies to which they are otherwise entitled").

41. 46 U.S.C. § 688 (1982).

42. In this respect it resembled its common law cousin, tort law (I am using "common law" in its technical sense here, not in the broad sense of Parts I and II of this Article), which likewise had never recognized liability for wrongful death. Such liability is the product of statutes stretching back to Lord Campbell's Act. Fatal Accidents Act, 1846, 9 & 10 Vict. ch. 93.

Court, noting the law's trend toward liability for wrongful death in maritime law—a trend illustrated by the Death on the High Seas Act itself—held that the judge-made admiralty law would, from this case forward, impose such liability.

The analysis and conclusion are flawed in several respects. First, the Court treats wrongful-death statutes in general and maritime wrongful-death statutes in particular (the Jones Act and the Death on the High Seas Act) as if they reflected obviously sound public policy and hence provided solid premises for deducing new judge-made admiralty doctrine. But this view bespeaks a limited acquaintance with legal developments in the field of industrial (i.e., workplace) accident liability. The overall trend has been from tort law to workers' compensation law—the Jones Act (and by extension the Death on the High Seas Act) being regarded in many quarters as an anachronism. Furthermore, even if liability for wrongful death caused by industrial accidents is a good idea, the specific form of that liability incorporated in the Federal Employers' Liability Act,[43] on which the Jones Act and the Death on the High Seas Act are closely modeled, can be criticized for eliminating such defenses as assumption of risk and waiver of liability, and for diluting the requirement of proving negligence. The Court did not discuss these issues. Another wrinkle is that unseaworthiness is not negligence, but rather is akin to strict liability,[44] so that the Court was actually going beyond the Federal Employers' Liability Act and the Jones Act in making new admiralty doctrine. In doing so it conferred a windfall on Moragne's estate, since the widow's suit for wrongful death under Florida negligence law had failed for lack of proof that the defendant had been negligent.

Second, the Court's implicit assumption that it makes a difference whether longshoremen are entitled to sue for wrongful death is contestable. The Coase theorem (not mentioned by the Court, and not in the forefront of judicial awareness back in 1970—or today, for that matter) suggests that in the absence of such an entitlement,

43. 45 U.S.C. §§ 51-60 (1982).

44. *See* Seas Shipping Co. v. Sieracki, 328 U.S. 85, 93-94 (1946); Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956); Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 317, 322-24 (1964). In 1972, Congress substituted negligence for unseaworthiness as the standard of liability in suits by longshoremen against shipowners. *See* 33 U.S.C. § 905(b) (1982) ("The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred."); Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 156-60, 162-69, 172 (1981); United States Fidelity & Guaranty Co. v. Jadranska Slobodna Plovidba, 683 F.2d 1022, 1024-25 (7th Cir. 1982).

longshoremen's wages will rise by an amount just sufficient to enable them to insure against the consequences of a fatal accident.[45]

Third, given the Court's emphasis on the Death on the High Seas Act as a source of guidance for judge-made admiralty principles, the decision, rather than expressing deference to legislative judgments, invites comparison to writing the age thirty-five provision out of the Constitution. Essentially the Court deleted the word "High" from the Death on the High Seas Act.[46] Congress thought it was legislating for the high seas. It thought wrong. The Court took the statute and applied it (the heart of it, at any rate) to coastal waters.

Fourth, by doing this the Court may have made it more difficult for Congress to enact such statutes in the future. If courts ignore the scope limitations built into statutes by using the statute minus the limitations as a model for a rule of judge-made law, a legislator can no longer defend a bill by reference to its limitations. A legislator who wanted a wrongful-death statute applicable to a particular activity but didn't want to universalize liability for wrongful death might vote against the statute out of fear that the statute would be used to do just that. The tradition of free-wheeling interpretation helped sink the Equal Rights Amendment, whose opponents conjured up all sorts of far-out interpretive possibilities.

These points do not prove that *Moragne* was decided incorrectly; indeed, words like "correct" and "incorrect" are generally misplaced when applied to hard questions of statutory interpretation. My view is that these points show that the Court did not have sufficient reason to overrule *The Harrisburg*,[47] which had held that wrongful death was not a part of maritime law. The creation of a remedy for wrongful death has traditionally been considered a legislative function, and no good reason for departing from that tradition was shown, especially since it was a workplace accident that did Moragne in. The enactment of the Death on the High Seas Act was not a good enough reason.

45. *See* Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960). On wage premia for dangerous jobs see references in R. POSNER, *supra* note 7, at 183 n.5. It is unimportant that Moragne was not the *defendant's* employee. He was an indirect employee in an economic sense. For the more dangerous his work was, the higher would be the wage that his employer (the stevedore company) would have to pay him; and the employer would demand compensation from the shipowner, who would therefore in effect be paying Moragne his wage premium for dangerous work.

46. Except that the details of the admiralty wrongful-death doctrine that the Court created in *Moragne*, as subsequently elaborated, are not identical to those of the statute. *See, e.g.*, Mobil Oil Corp. v. Higginbotham, 436 U.S. 618 (1978).

47. 119 U.S. 199, 213 (1886).

United States v. Locke[48] is another hard case that seemed easy to the Justices, though this time to only six of them. *Locke* involved a federal statute requiring a firm that has an unpatented mining claim on federal public lands to reregister the claim annually, "prior to December 31."[49] Claims not reregistered in time are forfeited. Mines are frequently abandoned; the requirement of annual registration provides an easy means of determining abandonment. The plaintiffs in *Locke* filed on December 31, and the government declared the plaintiffs' mine forfeited. The Supreme Court upheld this determination.

The decision is impeccable as a matter of lexicography: "prior to December 31" means no later than December 30. It seems more than probable, however, that the statute contains a drafting error and that what Congress meant was that you must file before the end of the year, i.e., on or before December 31. Further evidence of inadvertence in the use of "prior to" is that the same section of the statute distinguishes between claims "located prior to October 21, 1976" and claims "located after October 21, 1976," thus leaving a void for claims located on October 21, 1976—if "prior to" is read literally. No one has ever suggested a reason why Congress might have wanted the filings made before December 31. It is not enough to say that all deadlines are arbitrary and that if the plaintiffs in *Locke* had won, then the next plaintiff would file on January 1 and say that his filing was timely too. The end of the year is a natural and common deadline and is almost certainly what Congress intended, so a claim filed on January 1 would be too late. Anyone familiar with the workings of the legislative process knows how easily drafting errors are made and how frequently they escape notice. The statute as drafted by Congress and as enforced by the Supreme Court became a trap for the unwary, destroying valuable property rights (and thereby precipitating a constitutional controversy which the plaintiffs also lost) because of a natural and harmless inadvertence. Nor is there any reason to think the trap was set by some interest group. No purpose, whether self-interested or public-interested, can be ascribed to the December 30 deadline. Finally, no one relied on the December 30 deadline, as by snapping up the "abandoned" Locke mining claim.

What makes the case appear difficult, rather than plainly incorrect, is that the plaintiff seems not to have been asking the Supreme

48. 105 S. Ct. 1785 (1985).

49. Federal Land Policy and Management Act of 1976, § 314(a), 43 U.S.C. § 1744(a) (1982).

Court to interpret an ambiguity or fill in a gap, but to rewrite clear statutory language. The language is clear, however, only if significant contextual circumstances are ignored. The Court's approach was analogous to that of a platoon commander who (in a variant of my previous example), having received an order that is clear, but also clearly erroneous because of a mistake in transmission, nevertheless carries out the order as received, rather than trying to determine what response would advance the common enterprise.

Is my preferred interpretation of *Locke* consistent with refusing to read the Constitution's age thirty-five requirement nonliterally? I think so. As I said before, the framers' selection of a fixed age for eligibility, like a legislature's selection of a fixed age to denote the assumption of adult rights and responsibilities (or a fixed period for a statute of limitations), reflects a preference for a definite rule over a standard uncertain in application. To interpret age thirty-five to mean as mature as the average thirty-five year old would thus undo a choice deliberately made by the framers. The Federal Land Policy and Management Act of 1976 also reflects a preference for a fixed deadline but not necessarily for a fixed deadline of December 30 rather than December 31. Congress (by which I mean those members who took an interest in this provision of the Act) almost certainly thought it was making December 31 the deadline, even though it said December 30.[50]

Here is another example, this one decided in favor of the plaintiffs. The Federal Employers' Liability Act, which I mentioned in connection with the *Moragne* case, makes railroads liable to their workers for the negligence either of the railroad (meaning, the negligence of persons in positions of authority with the railroad) or the

50. With *Locke* compare Stock v. Department of the Air Force, 186 F.2d 968 (4th Cir. 1950). In 1948, the year following passage of the statute which made the Air Force a separate service, Congress provided that "the Articles of War and all other laws now in effect relating to" military injustice "shall be applicable to" the Air Force. Under those Articles, confirmation by the President was required for certain sentences imposed by courts-martial. Shortly before the statute quoted above was passed, Congress had passed an act substituting confirmation by the judicial councils of the services for confirmation by the President—but the alteration did not become effective until after the statute quoted above took effect. Stock's sentence was confirmed by a judicial council, not the President, and he argued that this was illegal, since the statute providing for confirmation by the President was "now in effect" when Congress made the laws relating to military justice applicable to the Air Force. The court rejected this argument, noting that Congress' purpose in enacting the statute was to provide uniformity among the services, rather than to freeze the rules of military justice for the Air Force in the form in which they existed at the date of the statute's enactment. This is a sensible result though it could be described as rewriting the words "now in effect."

railroad's other workers.[51] Thus, if worker *A* injures worker *B* through negligence, the railroad is prima facie liable to *B*; and since the Act abolishes the principal defenses in negligence cases, the railroad will find it difficult to escape liability once *A*'s negligence is shown. In addition, only minimal negligence is required. But what if worker *A* injures worker *B* deliberately in circumstances where under ordinary principles of respondeat superior their employer would be liable for *A*'s intentional tort? If the Act, which displaces these ordinary principles, is read literally, *B* is out of luck. Yet the Supreme Court held many years ago, with a minimum of fuss in an era by no means liberal, that such an accident is covered by the Act.[52] Any other result would be hard to understand, for the purpose of the FELA was not to cut back the railroad's common law liability but to expand it by abolishing various defenses and enlarging the plaintiff's choice of forum. (The Act entitles him to sue in either state or federal court, and denies the railroad any right of removal.) Perhaps, however, such result would be no harder to understand than the Court's result in *Locke*.

Can my analysis of the FELA case be reconciled with what I have suggested would have been the proper result in *Moragne*? I think so. In *Moragne*, Congress had legislated with regard to one class of accidents, those occurring on the high seas, and the Supreme Court in effect applied the legislation to another class of accidents. It is as if the Court had used the Federal Employers' Liability Act itself as the basis for creating a right of action for wrongful death in maritime cases. Since the whole idea of the FELA, however, was to curtail the railroad's defenses to personal injury suits by railroad workers, it is hard to imagine why Congress might have wanted to distinguish between intentional and unintentional torts in circumstances where at common law the railroad would have been liable for either type of tort under the doctrine of respondeat superior. Nothing in the legislative history of the Act suggests a desire to make such a distinction (whether based on a "deal" between the railroads and the unions or on any other circumstance). In these circumstances the most plausible interpreta-

51. Every common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

45 U.S.C. § 51 (1982).

52. *See* Jamison v. Encarnacion, 281 U.S. 635, 641 (1930).

tion of the statutory word "negligence" was wrongfulness under common law principles, not only carelessness.

Here is another example where the courts quite sensibly have overridden the "plain language" of a statute.[53] The Bankruptcy Act, until its overhaul in 1978,[54] allowed interlocutory as well as final orders by federal district courts in bankruptcy "proceedings" to be appealed; but in bankruptcy "controversies," only final orders.[55] A bankruptcy controversy is a discrete dispute within the overall framework of the bankruptcy proceeding; an example of such a controversy is a tort claim against the bankrupt. A bankruptcy proceeding is a stage in the administration of the bankrupt estate. Thus, an order appointing a trustee in bankruptcy would be an order in a bankruptcy proceeding, and though interlocutory would be appealable. The problem is that the courts of appeals would be flooded if they had to entertain appeals from every order issued in a bankruptcy proceeding. In a major reorganization there might be a thousand such orders. The courts of appeals therefore carved out an exception for "trivial orders," under which rubric most discovery orders, orders granting or denying continuances, and other routine nonfinal managerial orders were not appealable.[56] Nothing in the language of the statute gave any purchase for such a doctrine. On the other hand there were no outcries of judicial usurpation, and when Congress finally got around to revising the Bankruptcy Act, it simply struck out the provision allowing interlocutory appeals.[57] It may seem, however, that, sensible as it was, the "trivial orders" doctrine could not possibly be thought an exercise in interpretation. However, if I am correct that interpretation embraces efforts to repair a broken communication in the interest of the overall enterprise, the doctrine is a valid interpretation. No interest of Congress would be promoted by flooding the courts with trivial appeals in bankruptcy cases. That would merely slow down those cases, increase the expense of bankruptcy, distract the courts from enforcing other congressional legislation, and thus impede rather than advance the enterprise established by the enact-

53. For others, see Harris, *The Politics of Statutory Construction*, 1985 B.Y.U. L. REV. 745, 770-73, 785-86.

54. Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified in scattered sections of 11 U.S.C.).

55. Bankruptcy Act of 1898 § 24(a), 11 U.S.C. § 47(a) (1976) (omitted in 1978 revision).

56. *See In re* Chicago, Milwaukee, St. Paul & Pac. R.R., 756 F.2d 508, 511-13 (7th Cir. 1985), and cases cited therein; 9 J. MOORE, B. WARD & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 110.15 (2d ed. 1986).

57. *See* 28 U.S.C. § 158(d) (Supp. II 1984).

ment of bankruptcy laws and the creation of a federal judicial system.

The difference between *Locke* and the FELA and trivial-order cases, on the one hand, and *Moragne* on the other, is that the former cry out for judicial correction of a minor and fairly obvious oversight in the legislative drafting process, while the latter involves judicial legislation free of any substantial moorings in the legitimate legislative process. There is no evidence that Congress accidentally confined the Death on the High Seas Act to the high seas. Though there is an appealing symmetry in treating all maritime workers the same no matter where they are injured, doing so just aggravates the asymmetry in the treatment of railroad and maritime workers compared to other workers (I recognize that a similar argument can be made in the FELA case)—making the decision hard to defend as a pure exercise in common law reasoning either.

Lest the reader think me too cavalier about statutory language, I shall give a controversial instance where I believe that the pull of statutory language is so strong that it cannot be overcome once *some* rational purpose can be assigned to the literal interpretation. (This condition was not satisfied in *Locke*, and cannot be satisfied in the FELA or trivial-orders cases either.) I refer to Rule 35(b) of the Federal Rules of Criminal Procedure, which before its 1985 amendment provided, "The [district] court may reduce a sentence within 120 days after the sentence is imposed"[58] or becomes final on appeal. A number of courts read this language to require that the motion for reduction of sentence be filed within 120 days; if it was filed within that period, the court could act on the motion within a reasonable time, even if this meant acting after the 120 days had passed.[59] This interpretation, flatly contrary to the language of the rule, was motivated by an understandable concern that, if the rule were read literally, many defendants would lose their chance for a reduction in sentence merely because the district judge had not acted on their motion within the 120-day period. There was, however, an argument of policy for the literal reading: it served to enforce the division of responsibilities between the sentencing judge and the parole authorities.[60] If the judge waited to see how the defendant was adjusting to prison before the judge decided the Rule 35(b) motion (which was in fact a common reason for judges missing the 120-day deadline), he would be treading on the authority of

58. Fed. R. Crim. P. 35(b) (1983).

59. *See* FED. R. CRIM. P. 35(b), advisory committee's note on 1985 amendment.

60. *See* United States v. Kajevic, 711 F.2d 767, 770-71 (7th Cir. 1983).

the Parole Commission to fix—based in part on the defendant's behavior in prison—the actual length of the defendant's imprisonment. Maybe as an original matter this reason for a 120-day deadline on reductions of sentence is overborne by other considerations; I don't mean to suggest that I disagree with the amendment to the rule. But it is a sufficient reason to enforce the rule as written. For suppose the draftsmen of the original rule in fact wanted to impose a 120-day deadline on the judge. How could they have done it more clearly? By saying, "And we really mean it"? Or (what is the same thing) by saying, "And the court shall have absolutely no authority to consider a motion to reduce sentence after 120 days"? But if draftsmen started adding emphatic language of this sort, judges would wonder, whenever such language was missing, whether that meant that the interpretation of the provision was up for grabs. The currency of communication would be devalued. Perhaps, unlike *Locke*, the draftsmen did want to impose such a deadline. With this a real possibility, the prudent judicial course was to defer to the language of the rule and let those responsible for promulgating rules change it if they so desired (as they subsequently did with no great fuss).

My last example involves the Sherman Act.[61] It was enacted in 1890, but is interpreted today as if Congress had enacted the evolving economic analysis of monopoly and competition. Today the Act means, not what its framers may have thought, but what economists and economics-minded lawyers and judges think.[62]

The Act makes it a crime to conspire in restraint of trade, or to monopolize, attempt to monopolize, or conspire to monopolize. The problematic terms are "restraint of trade" and "monopolize." The legislative history makes clear that the Act was aimed at the great trusts (cartels and monopolies) of the time, but is not single-minded concerning what aspect of the trusts was reprobated. Some members of Congress wanted to punish the trusts because the trusts restricted output and raised price, and thus hurt consumers. Others believed that the trusts, whether through economies of scale or

61. 15 U.S.C. § 1 (1982).

62. For a striking recent example, see Matsushita Electric Industrial Co. v. Zenith Radio Corp., 106 S. Ct. 1348, 1360 (1986). *See also* Broadcast Music, Inc. v. Columbia Broadcasting System, 441 U.S. 1, 19-20 (1979); Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979); Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 228-29 (D.C. Cir. 1986); Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986); *In re* Wheat Rail Freight Rate Antitrust Litigation, 759 F.2d 1305, 1315-16 (7th Cir. 1985); Products Liability Ins. Agency, Inc. v. Crum & Forster Ins. Cos., 682 F.2d 660, 663-64 (7th Cir. 1982).

other efficiencies, produced a greater output at lower price, thus helping consumers (in both the short and long run) but hurting inefficient competitors.[63] Still other members of Congress relied on both reasons for supporting the Act, believing that it would both help consumers and help the trust's competitors. The modern economic analysis of monopoly has made the inconsistency of these two reasons transparent. But no one in 1890 understood the economic concept of efficiency; it hadn't been developed yet.

Although both restraint of trade and monopoly were concepts in the common law of unfair competition at the time, the statute would be nonsense if interpreted to forbid all agreements that would have been deemed restraints of trade at common law. Any covenant not to compete, however harmless and reasonable, given by the seller of a business to the buyer is a restraint of trade in the common law sense, though lawful if it is reasonable in extent and duration.[64] Indeed, an agreement between two partners not to compete while they are in partnership is a restraint of trade. The fact that the statute carried criminal penalties (though at first very weak ones) adds a further note of uncertainty about its intended meaning.

From these unpromising beginnings a vast decisional edifice has been constructed which at present is more or less committed to the economic-efficiency, as opposed to the competitor-protection, conception of the statute. A critical intermediate step was to perform reparative judicial surgery on the statute by inserting the word "unreasonable" in front of "restraint."[65] Is it a legitimate edifice? It cannot be shown to coincide with the intentions of a majority of the

63. For contrasting interpretations of the legislative history of the Sherman Act see Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. L. & ECON. 7 (1966); L. Kaplow, Antitrust, Law & Economics, and the Courts 50-59 (Harv. L. School, unpublished; forthcoming, LAW & CONTEMP. PROBS.); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982); W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 53-99 (1965).

64. *See, e.g.*, Mitchel v. Reynolds, 1 P. Wms. 181, 197, 24 Eng. Rep. 347, 352 (K.B. 1711):

> In all restraints of trade, where nothing more appears, the law presumes them bad; but if the circumstances are set forth, that presumption is excluded, and the Court is to judge of those circumstances, and determine accordingly; and if upon them it appears to be a just and honest contract, it ought to be maintained.

65. As Justice Stevens has explained with a candor uncharacteristic of judges, "One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. The statute says that 'every' contract that restrains trade is unlawful. But . . . restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law. Yet it is that body of law that . . . enables competitive markets . . . to function effectively." National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 687-88 (1978) (footnotes omitted).

Congress that passed the Sherman Act or any of its subsequent amendments and elaborations (e.g., the Clayton Act,[66] or the 1950 amendments thereto), which are also now interpreted in conformity with the efficiency theory. Essentially the courts treat the Sherman Act as if Congress had dumped the trust problem in the lap of the courts and said, "You solve it." And they have done so, more or less. Is this a proper approach for the courts to have taken? I think it is. Setting a goal of promoting economic efficiency makes it possible to derive rules of antitrust law that are reasonably objective, that draw on a large body of economic learning, that are coherent, and yet that are related to the purposes, or some of the purposes, that animated the framers—so that it is not a case of looking for the lost coin where the light is good rather than where you dropped it. In contrast, if courts tried to create antitrust doctrine out of a judicious mixture of conflicting political and distributive goals that some legislators and commentators have assigned to antitrust law, they would be completely at sea and might also shipwreck the economy. Nevertheless, the statute does not purport to delegate a common law rulemaking power and it would be curious to find such a delegation in a criminal statute, though the mail- and wire-fraud statutes[67] come close. There is nothing unusually vague (by statutory standards) about such terms as "restraint of trade" and "monopolization," nor is there any evidence in the legislative history that Congress thought it was simply handing the courts a set of policy issues that it could not resolve itself. By making "*Every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . illegal,"[68] Congress might have been thought to be limiting judicial discretion rather than conferring it.

It might seem that the present body of judge-made antitrust law could be tied to the purposes of Congress by noting that the main purpose, as expressed by statements made on the floor of Congress, was to help consumers, and modern economics teaches how to do this. But the limitation of this approach can be seen by imagining that modern economics shows that cartels and monopolies—the loose-knit and tight-knit "trusts" that Congress was worried about—actually benefit consumers on balance, by enabling cost reductions that more than offset the power over price created by elim-

66. Clayton Act, ch. 323, § 7, 38 Stat. 730, 731-32 (1914) (current version at 15 U.S.C. § 18 (1982)).

67. 18 U.S.C. §§ 1341, 1343 (1982).

68. 15 U.S.C. § 1 (1976) (emphasis added).

inating competition.[69] Then the Sherman Act would have no effect at all; it would have been repealed by economic theory. But it is hard to read the statute as a delegation to the courts to repeal it if and when expert knowledge teaches that the statute can no longer achieve its framers' purposes.

The Sherman Act is a standard instance of a statute that is poorly thought through, that is delivered to the courts in a severely incomplete state, that begs—though it doesn't actually ask—the courts to do what they can to make it reasonable. What the courts have done with the Sherman Act in reading "restraint" to mean "unreasonable restraint" is more aggressive—certainly as regards consequences—than what the Supreme Court would have done if it had read "prior to December 31" to mean "no later than December 31" in the *Locke* case. So I would have difficulty understanding a theory of statutory interpretation that approved both the currently dominant interpretation of the Sherman Act and the decision in *Locke*. The body of antitrust doctrine that the courts have developed in the name of the Sherman Act and the other antitrust statutes is best understood and justified as an effort to complete an enterprise set on foot, in the normally unclear fashion of major legislation, when those statutes were enacted.

VIII. THE ROLE OF POLICY IN INTERPRETATION: THE SEGREGATION DECISION

I have said that "legal formalism" and "legal realism" are not useful terms in which to discuss interpretation; interpretation is different from either logical deduction or policy analysis. Nevertheless it should be apparent from my discussion of cases that policy considerations affect the interpretation of unclear statutory and constitutional provisions. Notions of policy are part of the cultural setting in which interpretation takes place. The uncertainty that would be injected into the electoral process is one reason why a "literal" reading of the age thirty-five provision in Article II is the correct reading, or, stated otherwise, one reason why the provision means what it says. It is a policy reason.

69. A firm's profit-maximizing price is determined by the elasticity of demand facing the firm and by the firm's marginal cost. The lower the elasticity of demand, the higher the profit-maximizing price; the lower the marginal cost, the lower the profit-maximizing price. The formation of a monopoly or cartel will reduce the elasticity of demand facing the monopolist (or the cartel members) and thereby push up price. However, if marginal cost also falls, the monopoly or cartel price may turn out to be lower than the competitive price, and consumers will be better off than under competition.

The murkier a provision is, the more important policy considerations are in interpreting it. Indeed, when we say a provision is "unclear" we mean that the elements in the linguistic and cultural environment that enable us to get meaning out of words and sentences are uncertain or contested, and often this is true because of disputes over policy. Because such disputes can be extremely difficult to resolve, the interpretation of unclear statutory and constitutional provisions will never achieve the certainty of formalist reasoning. So not only is logic misplaced in statutory analysis; interpretation of unclear provisions can never attain the certainty of logical reasoning. This raises the question: how can we ever know whether the interpretation of an unclear provision is the correct interpretation?

I want to approach this question through a brief examination of *Brown v. Board of Education*.[70] *Brown*, of course, held that racial segregation in public schools denies black schoolchildren the equal protection of the laws guaranteed by section 1 of the fourteenth amendment even if the black schools are not demonstrably inferior to the white ones. I have selected this example not because I disagree with the *Brown* decision—I do not disagree with it—but to make clear that the Court's interpretation of equal protection does not have the inevitability of the interpretation of the age thirty-five provision as "meaning what it says." The *words* "equal protection" are not incompatible with a system of segregated schools, provided the black schools are as good as the white ones. If they are not as good, the logical remedy, one could argue, would be to order them improved. (I will not discuss the question whether the fourteenth amendment's privileges and immunities clause would have provided a firmer ground of decision.) It is no doubt true that since the motive for segregated schools is to keep blacks from mixing with whites, segregation stamps the blacks with a mark of inferiority which common sense suggests could be very damaging to them psychologically, although there is surprisingly little evidence of this point and "separatist" blacks would disagree with it. Public school segregation also denies black people the opportunity for associations that are more valuable to members of a minority than to members of the majority[71] and is likely to produce more racial segregation than a free market would. Moreover, it had costly spillover effects in the northern states to which blacks migrated. It is

70. 347 U.S. 483 (1954).

71. *See* R. POSNER, THE ECONOMICS OF JUSTICE 355 (1981) (criticizing Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959)).

also no doubt true that a white majority that insists on segregation will be unwilling to support truly equal public schools for the blacks and yet the disparity will be difficult to rectify by judicial decree, making a goal of "separate but equal" unattainable as a practical matter.

But against this powerful case for interpreting the equal protection clause to forbid public school segregation it can be argued that the framers of the fourteenth amendment did not intend to bring about true equality between the black and white races but merely wanted to give the blacks certain fundamental political rights which did not include equal education.[72] Many white Northerners, as well as almost all white Southerners, would have thought it right and natural in 1868 that black people should attend segregated and inferior schools (though as a result of Reconstruction many white Southerners did not participate in the decision to ratify the fourteenth amendment). In 1896, the Supreme Court decided that racial segregation in public facilities was constitutional.[73] The public institutions of the South were built in reliance on that ruling; any change, one could argue, should come from Congress. It is true that congressional action was blocked because of the domination of committee chairmanships by southern Democrats who had safe seats, but maybe this is not a proper thing for a court to consider.

The Supreme Court's unanimous decision to hold segregation unconstitutional was, despite the turmoil and delays encountered in effectuating the decision, politically right and even inspired, but it is not a *demonstrably* correct legal decision. It was not and could not have been derived by a process of logical deduction. Viewed as an effort to carry out the command of the framers of the equal protection clause, it runs up against the standard problem of interpretation—blockage of the channels of communication. The Supreme Court had to balance a variety of policies, including the policy of stare decisis, in order to decide what interpretation would advance the enterprise set on foot by the enactment of the fourteenth amendment. The ultimate justifications for the decision have to be sought in such essentially political or (what are not sharply distinct) ethical desiderata as: (1) improving the position of blacks, (2) adopting a principle of racial (and implicitly also ethnic and religious) equality to vindicate the ideals for which World War II had been fought, (3) raising public consciousness of racial injustice, (4) eradicating an institution that was an embarrassment to America's foreign policy,

72. *See* Bickel, *supra* note 25, at 56-59.

73. Plessy v. Ferguson, 163 U.S. 537 (1896).

(5) reducing the social and political autonomy of the South ("completing the work of the Civil War"), (6) finding a new institutional role for the Supreme Court to replace the discredited one of protecting economic liberty (a transformation begun in the second flag-salute case[74]), and (7) breathing new life into the equal protection clause. Some of the items on this list, such as "finding a new institutional role for the Supreme Court," I would rule out of bounds on the ground that they cannot be referred back to the enterprise set on foot by the enactment of the fourteenth amendment. Most of the items, though, seem relevant to the interpretation of an unclear text.

Among efforts to ground the decision in logic, I find Robert Bork's particularly interesting. His premise is that "Where constitutional materials do not clearly specify the value to be preferred, there is no principled way to prefer any claimed human value to any other. The judge must stick close to the text and the history, and their fair implications, and not construct new rights."[75] Applying this premise to the issue of public school segregation, he says that all that we as readers can get out of the equal protection clause and its history is that the clause "was intended to enforce a core idea of black equality against governmental discrimination."[76] A court, Bork continues, must avoid intruding its own values and "choose a general principle of equality that applies to all cases. For the same reason, the Court cannot decide that physical equality is important but psychological equality is not. Thus, the no-state-enforced-discrimination rule of *Brown* must overturn and replace the separate-but-equal doctrine of *Plessy v. Ferguson*."[77]

Bork uses a conception of the institutional limitations of courts (they mustn't intrude their own values) to precipitate a concept out of the equal protection clause, a concept from which the result in *Brown* can be deduced. But the logical form is deceptive. Bork assumes, rather than demonstrates, that the only way the Supreme Court could accommodate its institutional limitations to the "core idea of black equality" was to define the core as including psychological as well as physical equality. The Court could have said, however: "We do not know how large the core was supposed to be, so we will enforce only physical equality, which is easier to police and avoids our getting mired in psychological conjectures." This

74. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

75. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971).

76. *Id.* at 14.

77. *Id.* at 14-15.

would not be a value judgment about the relative importance of physical and psychological equality. It would be a drawing in of the judicial horns, consistent with Bork's conception of a modest judicial role, one that avoids the making of value judgments.

Bork's second tacit premise is that achieving a better approximation to the (as Bork stresses) largely unknown intent of the framers of the equal protection clause is worth the sacrifice of the values of stare decisis that is entailed. Those values are not trivial, even in constitutional cases. The conventional view that the Supreme Court must feel free to correct its previous mistakes of constitutional (but not statutory) interpretation because of the difficulty of correcting them by a constitutional amendment is superficial. The correction itself may be mistaken, in which case the difficulty of passing a constitutional amendment will entrench the mistake. This point, by the way, undermines the even more deeply seated view that constitutional provisions should be more flexibly interpreted than statutory ones because it is difficult to adapt the Constitution to changing circumstances through the amendment process. Although the difficulty indeed makes the benefits of a correct flexible interpretation greater in the constitutional than in the statutory sphere, it makes the costs of an incorrect flexible interpretation greater, too, because Congress can't correct it, as it can correct an erroneous statutory interpretation.

Bork's third implicit premise is that courts should read "equal protection of the laws" more broadly than the words themselves might be thought to imply when taken in conjunction with the breakdown in law and order in the South following the Civil War. They imply merely that a state cannot discriminate in the provision of police, fire, and other protective services—cannot make black people (or members of some other unpopular group) outlaws, thereby exposing them to the tender mercies of private terrorist groups such as the Ku Klux Klan. Bork might reply that the words "equal protection of the laws" were deliberately chosen as a vague formula to give the courts maximum flexibility. But are they so vague?

The point of all this quibbling with Bork's ingenious analysis is not to question the soundness of the *Brown* decision but to suggest that its soundness is not demonstrable, whether by deductive logic, or by the "shock of recognition" test by which we comprehend clear communications, or by the slightly more elaborate process, illustrated by my discussion of the age thirty-five provision of Article II, by which one shows that policy and other environmental considera-

tions on which almost everyone agrees demonstrate that the words of a text can be taken in only one sense. In other cases, illustrated by my examples in Part VII and most dramatically by *Brown* itself, the judge's task is inescapably problematic because it involves decoding the garbled communications of his constitutional superiors in circumstances where merely ignoring a garbled communication is not an adequate discharge of judicial responsibilities. The judge must examine the enterprise that the framers launched when they enacted the particular statute or constitutional provision in issue and then see what he can do to promote the enterprise, subject to the usual constraints. I wish I could be more precise about the nature of the inquiry in such cases but I am able to do no better than give examples of how I think it can be conducted.

This brings me to my final question, which is how judicial decisions in cases of garbled communications, of unclear commands, can ever be shown to be right. I believe, without being able to develop the point here, that the only test of correctness in such cases is the test of time. This is the same test by which great works of art, or for that matter of statesmanship, are validated.[78] It is the test used whenever the criteria of excellence are in dispute or the application of the criteria to specific works is highly uncertain. Judicial decisions that are overruled or ignored flunk the test of time. So far, *Brown* has passed it triumphantly. Whatever doubts may attend the soundness of the decision, and there are few, are confined to the academy. An even clearer example, however, is the "trivial orders" doctrine which, ratified by Congress after a successful trial period, has to my knowledge attracted no criticism.[79]

Although I believe that neither legal formalism nor legal realism, nor the art of interpretation, can be used to demonstrate—to prove—that the *Brown* decision is correct as a matter of law, I do not infer from this that the decision was lawless and can be justified, if at all, only on political grounds. The case studies in this Article show that it is possible to reason about difficult cases of interpretation even though it is not possible to arrive at irrefutable conclusions. The importance of the test of time is that it offers a method of verifying decisions that when rendered cannot be adjudged more than probably correct or probably incorrect.

78. *See* A. SAVILE, THE TEST OF TIME: AN ESSAY IN PHILOSOPHICAL AESTHETICS (1982).

79. *See supra* notes 54-57 and accompanying text.