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Richard A. Posner

United States Court of Appeals for the Seventh Circuit

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REPLY: THE INSTITUTIONAL DIMENSION OF STATUTORY AND CONSTITUTIONAL INTERPRETATION

*Richard A. Posner**

I.

Cass Sunstein and Adrian Vermeule argue in *Interpretation and Institutions*¹ that judicial interpretation of statutes and constitutions should take account both of the institutional framework within which interpretation takes place and of the consequences of different styles of interpretation; they further argue that this point² has been neglected by previous scholars. The first half of the thesis is correct but obvious; the second half, which the authors state in terms emphatic³ to the point of being immodest,⁴ is incorrect. Moreover, the authors offer no feasible suggestions for how the relation between interpretation and the institutional framework might be studied better than it has been by their predecessors. And the article is rife with unresolved tensions, for example between the article's theses and Sunstein's previous scholarship and between the article's insistence on rigorous empiricism, on the one hand, and, on the other, its empirically ungrounded praise for judicial formalism and "clause-bound interpretation" of the Constitution,⁵ its implicit skepticism whether constitutional rights (unless clearly stated in the text of the Constitution) should be judicially enforceable at all, and its explicit enthusiasm for administrative

* Judge, United States Court of Appeals for the Seventh Circuit; Senior Lecturer, University of Chicago Law School. A.B. 1959, Yale; LL.B. 1962, Harvard. — Ed. I thank Adele Grignon for her very helpful research assistance.

1. Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003).

2. Actually two points. Despite the title of the article, institutional capacities are only one of the supposed blind spots in previous discussions of interpretation that the authors want to highlight. The other is "the *dynamic effects* of any particular approach — its consequences for private and public actors of various sorts." for example by creating uncertainty. *Id.* at 886.

3. As in: "Institutional blindness remains a pervasive condition in the current scene." *Id.* at 904.

4. "We claim, in short, that a focus on institutional issues radically reframes the analysis of legal interpretation — and that it is long past time for those interested in interpretation to see what might be done with that reframing." *Id.* at 890.

5. *Id.* at 940-41.

agencies. The survey of previous scholarship lacks breadth and depth; an unkind critic might describe the article as a species of armchair legal scholarship that pitches its critique at so lofty an altitude that the authors have difficulty seeing the objects of their criticisms clearly.⁶ Nevertheless, the article contains a number of interesting observations and shrewd criticism, and is useful as a reminder of an important issue that, although it has not been overlooked, does deserve additional attention.

A more nuanced (to borrow one of the authors' favorite words) treatment of the subject would have produced a rather different article, of which the following might be the abstract:

The institutional dimension of legal interpretation — the fact that sensible principles of interpretation depend on the characteristics, in particular the capacities, of the various institutions that compose the legal system, including legislatures, agencies, and courts — has long been recognized. But it has not, in our opinion, been sufficiently emphasized or subjected to adequate empirical inquiry. Some scholars of interpretation, such as Dworkin and Lessig, ignore the institutional dimension entirely, though without necessarily denying its significance. Others, such as Easterbrook and Scalia and the “post-Thayerians” (such as Parker and Tushnet), premise their views of interpretation largely on institutional considerations, but do not discuss them at any length. Others, who do, such as Bickel, Hart and Sacks, Hayek, and Calabresi, have in our opinion erroneous conceptions of the relative capacities of judges and legislators. Even those who, like Breyer, Ely, Eskridge, and Posner, engage in detailed and realistic analysis of the institutional factors in interpretation, which they clearly regard as central, have not attempted the type of empirical analysis necessary to resolve the age-old debates over formalism, judicial activism, and the appropriate scope of administrative discretion. There is a rigorous empirical literature on legal institutions, but most of it is not focused on their significance for interpretation. We propose empirical studies of that significance, though we are mindful of the serious problems of feasibility that would beset such studies and are not inclined to conduct such studies ourselves. We acknowledge that our own analysis implies agnosticism regarding the interpretive questions that we discuss, such as the proper scope of judicial review of legislative and administrative action and whether constitutional rights should even be justiciable. This agnosticism has compelled us to abandon confident assertions about these matters that each of us made in his earlier scholarly writings.

6. As when John Marshall is dismissed as “the father, or the founder, of the kind of institutional blindness that we are criticizing.” *Id.* at 933. Almost the whole significance of Marshall is his commitment to institution-building. It was he who gave the Supreme Court and the federal system, two fundamental legal institutions, their recognizably modern form. On Marshall's pragmatism, see, for example, ROBERT JUSTIN LIPKIN, *CONSTITUTIONAL REVOLUTIONS: PRAGMATISM AND THE ROLE OF JUDICIAL REVIEW IN AMERICAN CONSTITUTIONALISM* 164 (2000); R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* 149 (2001).

II.

A court has, roughly speaking, a choice between two conceptions of its role. One is narrow, formalistic; the model is that of deducing legal outcomes from a major premise consisting of a rule of law laid down by a legislature and a minor premise consisting of the facts of the particular case. The other conception is broader, free-wheeling, pragmatic; judicial discretion is acknowledged and an outcome that is reasonable in light of its consequences sought. A court that takes the first route will be inclined to narrow, "literal," "strict," "originalist," or "textualist"⁷ interpretation of statutes and constitutional provisions, interpretation that sticks closely to the surface meaning of the text as its authors would have understood that meaning, as that is the kind of interpretation that minimizes (or at least pretends to minimize) judicial discretion. A court that takes the second route will be inclined to loose construction, recognizing and trying to adjust for the limitations of foresight of legislators and the framers of constitutional provisions, limitations that can make literal interpretation a trap; trying in short to reach reasonable results consistent with the broad purposes of the provision in question. The choice between these styles of adjudication and hence interpretation is relative to circumstances, and the circumstances are strongly influenced by institutional considerations. These include the structure and personnel of the judiciary and of the legal profession more broadly; the structure, personnel, and operating methods of the legislature; the relative competence of the different branches of government with respect to specific classes of issue;⁸ the power relations among the branches; and the political, economic, and social institutions of the society.

These issues have preoccupied scholars for many years, a point obscured by Sunstein and Vermeule's selective canvass of the literature on their subject. In a recent article that they do not cite, coauthored by a law professor and a political scientist, we read: "This Article presents an analysis of the institutional context of judicial decisionmaking and of how that context affects decisions."⁹ And in another, "comparative institutional analysis can inform how courts exercise their interpretative function."¹⁰ Indeed, most scholars of judicial interpretation have

7. These are not synonyms. But they are all ways of trying to minimize the discretionary element in judicial interpretation of statutory and constitutional provisions.

8. A judge might be a formalist with regard to contract interpretation or even statutory interpretation, yet a pragmatist with regard to constitutional interpretation. The downside of constitutional formalism. I shall argue later, is greater than that of statutory formalism.

9. Frank B. Cross & Blake J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 Nw. U. L. REV. 1437, 1437 (2001).

10. Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 573 (2001). To the same effect, see Jonathan T. Molot, *Reexamining Marbury in the Administrative State: A Structural*

placed institutional considerations and dynamic consequences (such as the feedback effect from free-wheeling interpretation to legislative drafting) front and center. Among those whom I shall be discussing are Guido Calabresi, Frank Easterbrook, Antonin Scalia, Henry Hart, and Albert Sacks. Others who could be mentioned include Bruce Ackerman, William Eskridge,¹¹ and John Hart Ely, whose influential theory of constitutional interpretation, which Sunstein and Vermeule do not discuss, is based on Ely's conception of the institutional limitations, specifically the democratic deficiencies, of the nonjudicial branches of government.¹²

Sunstein and Vermeule are correct, however, that the interpretive theories of Ronald Dworkin and Lawrence Lessig do not take account of institutional factors.¹³ Yet their criticism of those two scholars is not entirely just. Dworkin and Lessig want to show that loose construction is consistent with fidelity to the intent of legislators, including the framers and ratifiers of the Constitution. The question of consistency is different from the question whether loose construction is prudent given the institutional limitations of courts. The second question is important; but scholars are permitted to discuss one question at a time. By dubbing his model judge "Judge Hercules," Dworkin made clear that he was abstracting from institutional considerations, as he is aware that judges do not have herculean capacities. He is entitled to do that without being accused of institutional blindness. Where he can be faulted is in using his partial analysis as the basis for confident evaluations of particular interpretive issues, such as the assisted-suicide issue that Sunstein and Vermeule discuss.

But Dworkin and Lessig are actually in a minority in not discussing the institutional dimension of interpretation. For example, students of public choice theory, and political conservatives generally — who are skeptical about the good faith of legislators, fear the excesses of democracy, think of statutes as unprincipled compromises, and do not want to help legislators achieve their ends (these skeptics may doubt that legislation *has* ends worthy of assistance) — tend to favor strict interpretation. They doubt that statutes have a "spirit" or coherent purposes that might channel loose interpretation. They may also wish to hamstring legislatures, forcing them to make constant amendments

and Institutional Defense of Judicial Power over Statutory Interpretation, 96 NW. U. L. REV. 1239, 1292-320 (2002).

11. "The institutional features of the law implementation process offer exciting intellectual possibilities for the study of statutory interpretation . . ." WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 7 (1994); *see id.* at 433 (index references to "institutional competence").

12. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

13. And Akhil Amar, whom I will not discuss. They may also be correct with respect to John Manning, but I am not familiar with his work.

to adjust to changing conditions; courts committed to strict construction refuse to lend legislatures a helping hand.¹⁴ The skeptics make at least one good point: to the extent that a statute is a product of compromise, a court that interprets the statute to make it more effective in achieving its central goal may be overriding the legislative compromise.¹⁵

At the opposite end of the spectrum from the skeptics, Hart and Sacks, and Calabresi, urge loose interpretation (carried by Calabresi to the extreme of allowing courts to nullify statutes that have become obsolete) and do so on the basis of an explicit belief in the essential good faith, care, intelligence, and public spiritedness of legislators, who these scholars believe welcome a helping hand from judges.¹⁶ They may be quite wrong about legislators, but they can hardly be accused of being blind to institutional considerations — those are the very considerations that motivate their theories. As Professor Duxbury, in his survey of American jurisprudence, explains with reference to Hart and Sacks:

Adjudication, they recognized, is but one form of institutional activity within the legal process. Sometimes, within that process, legislatures, administrative agencies, arbitrators — even private parties themselves — may be better suited than the courts to deal with particular disputes It is to this end that Hart and Sacks develop a variation on the concept of institutional competence, which first surfaced in the work of [Lon] Fuller.¹⁷

14. See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 288-92, 301 (1990) [hereinafter POSNER, *PROBLEMS OF JURISPRUDENCE*] (discussing Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533 (1983)). Eskridge, in a major empirical study, concludes that formalist statutory interpretation promotes conflict between the courts and Congress. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 416 (1991). Sunstein and Vermeule, while citing Eskridge's article, do not mention this finding.

15. See, e.g., POSNER, *PROBLEMS OF JURISPRUDENCE*, *supra* note 14, at 276-78; Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179 (1986); Richard A. Posner, *Statutory Construction — In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983). On public choice theories of interpretation, emphasizing institutional constraints on judges, see, for example, MAXWELL L. STEARNS, *CONSTITUTIONAL PROCESS: A SOCIAL CHOICE ANALYSIS OF SUPREME COURT DECISION MAKING* (2000); Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the State Farm and Grove City Cases*, 6 J.L. ECON. & ORG. 263 (1990). Sunstein and Vermeule do not discuss public choice theories of interpretation, though those theories rest on institutional analysis and little else.

16. See POSNER, *PROBLEMS OF JURISPRUDENCE*, *supra* note 14, at 301 (discussing HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1414-15 (tent. ed. 1958) (now HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 1378 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994))); see also GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1982).

17. NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 255 (1995).

Realists about the limited intellectual capacities and knowledge bases of Supreme Court Justices — judge skeptics as distinct from legislator skeptics, although there is much overlap between the two groups — advise hesitancy in invalidating statutory and other official action on the basis of constitutional interpretation. That was Holmes's position, and it is mine. We realists think it presumptuous of the Justices, who after all are merely lawyers (as are their academic kibitzers), to consider themselves competent to take sides on profoundly contested moral and political issues involving sexual and reproductive rights, capital punishment, the role of religion in public life, the structure of the political process, and national security.¹⁸ We think they should intervene in such areas only if utterly convinced of the completely unreasonable character of the act or practice that they are asked to prohibit. The realist insight is based precisely on the institutional limitations of the courts. Those of us who argue that courts should be extremely cautious about checking presidential initiatives in the current emergency do so in part at least on the basis of our assessment of the relative competence of courts and executive officials to deal with national security issues.¹⁹

Sunstein and Vermeule agree with the realist critique. They say, for example:

The overall effect of the legislative veto, or of its invalidation, is a major research question for experts in political science. There is little reason to believe that generalist judges, devoting a brief time to the subject and possessed of limited information, can form even a plausible view of the relevant complexities.²⁰

I couldn't agree more²¹ — but this implies that most of the decisions that I had thought Sunstein, at least, would have thoroughly approved of, such as the reapportionment decisions beginning with *Baker v. Carr*, were, he now believes, wrongly decided, for those decisions presented major and unanswered research questions for experts in political science.

The authors complain that the judge-centered character of legal education blinds the rest of the scholarly community to the institutional framework of judicial interpretation: "Legal education, and the

18. See, e.g., RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 144-82 (1999). As I have noted previously. "[c]onstitutional lawyers know little about their proper subject matter — a complex of political, social, and economic phenomena. They know only cases. An exclusive diet of Supreme Court opinions is a recipe for intellectual malnutrition." RICHARD A. POSNER, *OVERCOMING LAW* 208 (1995) [hereinafter POSNER, *OVERCOMING LAW*].

19. See RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 292-321 (2003) [hereinafter POSNER, *LAW, PRAGMATISM*].

20. Sunstein & Vermeule, *supra* note 1, at 943 (citation omitted).

21. See, e.g., POSNER, *OVERCOMING LAW*, *supra* note 18, at 204-05 (discussing reapportionment); *id.* at 207-14.

legal culture more generally, invite interpreters to ask the following role-assuming question: ‘If you were the judge, how would you interpret this text?’ *If the question is posed in that way, institutional issues drop out*” because “judges themselves naturally ask a particular question (‘How is the text best interpreted?’), and that question naturally diverts attention from the issue of institutional capacities.”²² The opposite is true. Being a judge, and therefore I should think imagining what it is like to be a judge, brings institutional issues to the forefront of consciousness. For the first thing a judge has to decide, in interpreting a statute, is what approach to take to questions of statutory interpretation. The judge who, like Scalia and Easterbrook — who are judges, not merely judge wannabes — doubts the capacity of judges to exercise discretion intelligently will approach the interpretive question with a predilection for strict rather than loose construction.

In any event, the “blindness” of which the authors complain is largely of their imagining. Here are additional examples. Students of legal development recommend rules over standards as the legal regime for developing nations with weak legal infrastructure.²³ When law consists of precise rules rather than loose standards, the scope of interpretive discretion is curtailed, and judicial corruption and incompetence are thereby held in check because it is easier to determine whether a judge is applying a rule properly than whether he is applying a standard properly. Sunstein and Vermeule do not mention this literature.

Hayek’s theory of law, which advocates both judicial and legislative passivity,²⁴ is based on a profound skepticism about the institutional competence of both courts and legislatures relative to that of the market, even in advanced modern societies.²⁵ It is another institution-based theory of interpretation that Sunstein and Vermeule do not discuss. It builds on the Continental tradition, capsulized in Weber’s term “formal rationality,” that deplores judicial discretion. One of its notable moments was von Savigny’s proposal that the German states (he was writing long before Germany became a nation in 1871) adopt the law of ancient Rome as the law of Germany — a highly formalistic version of Roman law, moreover.²⁶ I have argued that Savigny’s for-

22. Sunstein & Vermeule, *supra* note 1, at 888 (emphasis added).

23. See, e.g., Jonathan Hay & Andrei Shleifer, *Private Enforcement of Public Laws: A Theory of Legal Reform*, 88 AM. ECON. REV. PAPERS & PROC. 398 (1998).

24. See F. A. HAYEK, *LAW, LEGISLATION AND LIBERTY: A NEW STATEMENT OF THE LIBERAL PRINCIPLES OF JUSTICE AND POLITICAL ECONOMY*, VOL. 1: RULES AND ORDER (1973); F. A. HAYEK, *THE CONSTITUTION OF LIBERTY*, pt. 2 (1960).

25. Perhaps especially in such societies, since Hayek’s leading idea is that the information needs of modern society are so great that they can be met only by the market, in which dispersed information is impounded in price and coordinated by voluntary transactions.

26. See RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 193-221 (2001) [hereinafter POSNER, *FRONTIERS*].

malism was right for his time and place, where the urgent need (as in developing societies today) was for clear, uniform rules that could be applied mechanistically; and that Holmes's rejection of that formalism²⁷ was right for *his* time and place, which were very different from Savigny's. By Holmes's time, "[t]he American legal system . . . had the suppleness and enjoyed the public confidence to be able to adapt legal principles to current social needs without undue danger of sacrificing legitimacy or creating debilitating legal uncertainty."²⁸

It is therefore incorrect that the possibility "that interpretive formalism at the operational level would itself be the pragmatically best course of action . . . remains, for Posner, an abstract and unappealing one."²⁹ I have argued steadily that the choice between formalism and pragmatism in adjudication depends *precisely* on institutional factors that vary across nations, legal cultures, issues, and epochs. Though accused of "attempt[ing] to wall off institutional considerations from interpretive theory,"³⁰ I have actually been trying to do the opposite. The suggestion that an uncritical faith in judicial capacities has led me to assign too free-wheeling a role to the courts is again the opposite of my view. I am not as distrustful of judges as Sunstein and Vermeule, but, relative to most judges and law professors, I am a debunker of judicial pretensions.³¹ When Sunstein and Vermeule remark that during the Hitler era German judges employed free-wheeling statutory interpretation to increase the reach and scope of Nazi race law, they are repeating a point I made years ago.³² It was with reference to today's America, rather than to the Third Reich, that I made the suggestion with which they take issue, cautiously worded though it was, that it is "not insane" to view American judges as "wise elders" who can be entrusted with a measure of discretionary authority. Sunstein and Vermeule omit the institutional factors that I advanced in support of the suggestion.³³ They may disagree with my assessment of those

27. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW*, lects. 5-6 (1881).

28. POSNER, *FRONTIERS*, *supra* note 26, at 221.

29. Sunstein & Vermeule, *supra* note 1, at 911.

30. *Id.* at 913.

31. See, e.g., Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 *SUP. CT. ECON. REV.* 1 (1994).

32. See POSNER, *OVERCOMING LAW*, *supra* note 18, at 155.

33. See Richard A. Posner, *Pragmatic Adjudication*, in *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE* 235, 243-44 (Morris Dickstein ed., 1998).

Judges of the higher American courts are generally picked from the upper tail of the population distribution in terms of age, education, intelligence, disinterest, and sobriety. They are not tops in all these departments but they are well above average, at least in the federal courts because of the elaborate preappointment screening of candidates for federal judgeships. Judges are schooled in a profession that sets a high value on listening to both sides of an issue before making up one's mind, on sifting truth from falsehood, and on exercising a detached judgment. Their decisions are anchored in the facts of concrete disputes between

factors, but as with Hart and Sacks, so with me, the fact of disagreement on a specific weighting of institutional factors does not justify an accusation of “institutional blindness.”

When they say that “judicial discretion always has system-level effects that judges should consider,”³⁴ they are again making my point yet casting it as a criticism of me. And likewise when they say that “formalism as a decisionmaking strategy in statutory interpretation, or for that matter in any other setting, can be justified or opposed (solely) on the basis of a forward-looking assessment of the consequences of the competing alternatives.”³⁵ Amen. “The debate over interpretive formalism turns, most critically, on the structure of the lawmaking system rather than on claims about the nature of communication, democracy, or jurisprudential principles.”³⁶ Precisely — as I have insisted.

The European judiciary is more formalistic than the American. I have ascribed this to the difference between the bureaucratic structure of European court systems and the lateral-entry character of American court systems (we have no judicial career as such), to the difference between parliamentary and presidential government, and to other institutional and cultural differences.³⁷ Because of these differences, the legislative (including constitutional) product that American judges are asked to interpret is too unruly — chaotic even — to be treated as a series of rules from which the correct outcomes in particular cases can be deduced. Formalism is thus not an available strategy for American judges.

Sunstein and Vermeule argue that the causality may be the reverse³⁸ — that the “supposed irresponsibility”³⁹ or “sloppiness”⁴⁰ of American legislatures may be the product of overly helpful judges

real people. Members of the legal profession have played a central role in the political history of the United States, and the profession's institutions and usages are reflectors of the fundamental political values that have emerged from that history. Appellate judges in nonroutine cases are expected to express as best they can the reasons for their decisions in signed, public documents (the published decisions of these courts) and this practice creates accountability and fosters a certain reflectiveness and self-discipline.

Id. I wonder how much of this Sunstein and Vermeule actually disagree with; maybe they'll tell us in their response.

34. Sunstein & Vermeule, *supra* note 1, at 913 n.103.

35. *Id.* at 921-22.

36. *Id.* at 925. Inconsistently, they later offer “democratic supervision” as a reason for giving agencies a longer leash than courts. *Id.* at 928. Presumably they mean federal courts; they do not discuss the significance of the fact that most state judges are elected.

37. See, e.g., RICHARD A. POSNER, LAW AND LEGAL THEORY IN ENGLAND AND AMERICA 69-114 (1996) [hereinafter POSNER, LAW AND LEGAL THEORY].

38. Sunstein & Vermeule, *supra* note 1, at 912-13, 921.

39. *Id.* at 913.

40. *Id.* at 923.

who by cleaning up after legislators fail to housebreak them; the judges should instead be rubbing the legislature's collective nose in the offal that it produces. They do not mean this literally; they qualify their reverse-causation claim with "in part"⁴¹ and "partly."⁴² Loose construction cannot be the cause of our tricameral legislative system (tricameral because the veto power makes the President in effect a third house of Congress), our 200-year-old Constitution whose authors were sages but not seers, our federal system that overlays federal law on the legal systems of fifty different states, our weak, undisciplined political parties, our system of appointing or electing judges from other branches of the legal profession, including the academic branch, rather than making judging a career, and the division of governmental powers between the legislative and executive branches. In a parliamentary system the executive is selected by and answerable to the legislature, which usually is effectively unicameral. The result is a very great centralization of government power, which the United States lacks and which makes strict construction a quixotic judicial strategy. It is not because of loose statutory and constitutional construction by judges that the United States has a presidential rather than a parliamentary system of government.

What Sunstein and Vermeule mean is not that our constitutional architecture itself is a product of loose construction, but that our legislatures are more unruly than they have to be because our courts insist on exercising discretion, rather than being content merely to apply statutes as they are written, come what may. This is possible, but as implausible as their criticism of Blackstone's "radical institutional blindness" with regard to the famous law of Bologna that provided "that whoever drew blood in the streets should be punished with the utmost severity."⁴³ Blackstone suggested that the law should not be interpreted to make punishable a surgeon "who opened the vein of a person that fell down in the street with a fit." If this is radical institutional blindness, we need more blind judges. Even strict constructionists would side with Blackstone, invoking the canon of lenity in the interpretation of criminal statutes,⁴⁴ or the principle that literal interpretations should be rejected when they produce absurd results — a principle that Sunstein and Vermeule criticize throughout their article. Even French judges, those paragons of formalism, will bend a statute to avoid absurdity. A French

41. *Id.* at 932.

42. *Id.* at 939.

43. *Id.* at 892 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *60).

44. Later in the article the authors express sympathy with that canon. *see id.* at 918 n.113, but they do not tie it back to the Bologna law.

[c]ourt will . . . openly ignore linguistic arguments only extremely rarely and when this would obviously lead to undesirable results. This is the case when such arguments would lead to an obviously absurd meaning or when the statute contains incompatible sentences. One famous example of such an interpretation is that of a statute containing an error in wording: it forbade passengers of trains to get on or off when it was not moving.⁴⁵

I am very curious to know what Sunstein and Vermeule would do with such a case.

Mention of the absurd-results exception to strict construction, taken together with my earlier suggestion that strict construction can hamstring legislatures, brings to the surface an unexamined assumption of Sunstein and Vermeule's article. It is that legislatures are strengthened when judges are strict constructionists, because then there is no danger that the judges will interpose their own policy views in the guise of (loose) interpretation. The other side of this coin, however, is that neither will the judges intervene to save legislation from being made obsolete by unforeseen changes of circumstance that cause strict construction to produce absurd results. The legislature can step in and eliminate those results by amendment. But at what cost? The legislative process is inertial, and the legislative agenda crowded; amendment is difficult and time-consuming — it has to be, or legislation would lack durability.⁴⁶ And if amendment is feasible, it can be used to cure pathologies of loose as well as strict construction.

Even if the legislature were able to address the absurdities wrought by statutory obsolescence, what is certain is that the correction of absurd results by *constitutional* amendment is difficult. In the constitutional context, strict construction could produce results that Sunstein, at least, would consider absurd, or at least extremely disturbing. For example, a plausible literalist interpretation of the Equal Protection Clause is that it forbids affirmative action, of the Sixth Amendment that it requires jury trials in courts-martial, of the First Amendment that it abolishes the tort of defamation, forbids legal protection of trade secrets, and forbids censorship of military secrets, of the Second Amendment that it entitles Americans to carry any weapon that a single individual can heft, including bazookas and surface to air missile

45. Michel Troper et al., *Statutory Interpretation in France*, in INTERPRETING STATUTES: A COMPARATIVE STUDY 171, 192 (D. Neil MacCormick & Robert S. Summers eds., 1991) (citation omitted). For a thorough discussion of the absurd results principle of interpretation, see Veronica M. Dougherty, *Absurdity and the Limits of Literalism: Defining the Absurd Result Principle in Statutory Interpretation*, 44 AM. U. L. REV. 127 (1994). Statutory drafting errors are not a French monopoly: they are not infrequent in American statutes, and they provide a major challenge to the formalist. See, e.g., Jonathan R. Siegel, *What Statutory Drafting Errors Teach Us About Statutory Interpretation*, 69 GEO. WASH. L. REV. 309 (2001).

46. See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 878-79 (1976).

launchers, and of article I, section 8 of the Constitution, that Congress cannot establish the Air Force as a separate branch of the armed forces or regulate military aviation at all. If this is where strict construction with no exception for absurdities leads (does it? I hope they will tell us), we shall have complete legislative paralysis, and a menu of proposed constitutional amendments so long that the amending process will break down also.

The "outrage" test for unconstitutionality that Holmes embraced and Sunstein and Vermeule deplore is an example of loose construction that grants a good deal of discretion to judges and *by doing so* would allow more scope to Congress and state legislatures than the kind of literalism that attracted Justice Black, for example. Restricting judicial discretion is more likely to curtail than, as Sunstein and Vermeule assume, expand legislative discretion because judges are sufficiently responsive to public opinion to avoid (though with notable exceptions) interpretations that have awful consequences for society. Formalism, blind to public opinion, has a robotic momentum that can wreak real havoc; the French case, where strict construction would have forbidden passengers to get on or off a train unless the train was moving, is the perfect symbol of formalism in action.

Pragmatic judges, I have argued elsewhere, balance two types of consequence, the case-specific and the systemic.⁴⁷ The term "systemic consequence" refers to a consequence for the adjudicative system itself, for example the undermining of legal predictability if judges fail to enforce contracts more or less as written, that is, fail to interpret contractual language strictly. Another term for systemic consequence is institutional factor. Sunstein and Vermeule argue that to advise judges to balance case-specific against systemic consequences is to assume uncritically that it is proper for judges to exercise discretion, since the balancing in question requires a judgmental rather than algorithmic determination by the judges. But I had explained why I believe that the institutional structure of American law (the unruly legislatures, and so forth) prevents American judges from being formalists. If they are to be pragmatists, they will have to balance case-specific against systemic consequences. My recommendation was meant for pragmatic judges, not for all judges.⁴⁸

Another institutional consideration bearing on judicial interpretation is whether a court has a specialized or a general jurisdiction. There is a literature on this too,⁴⁹ which Sunstein and Vermeule (while

47. See POSNER, LAW, PRAGMATISM, *supra* note 19, at 57-96. I had made the point earlier in the article they cite, but in a more abbreviated form.

48. "[L]egal formalism could be a sound pragmatic strategy by analogy to rule utilitarianism." *Id.* at 64.

49. See, e.g., RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 254-57 (1996); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1990).

glancing at the issue⁵⁰) do not mention. Specialized judges can be expected to be loose constructionists. Having a stronger sense than generalists of how the issues in cases within their jurisdiction should be decided, they are more likely to see themselves as helping the legislature achieve the goals of a program than as being obliged to stop with the legislative text; this is a notable characteristic of the patent jurisprudence of the United States Court of Appeals for the Federal Circuit.⁵¹

Sunstein and Vermeule so reason in arguing that administrative agencies, because they are specialized, should be permitted to engage in loose construction of the statutes they administer.⁵² They overlook the fact that even generalist courts are specialized to a degree, sometimes a considerable degree. All experienced trial judges, for example, and all appellate judges (a substantial fraction) who were promoted from the ranks of the trial judges, are specialists in the law of evidence. Should they therefore be accorded the privilege of loose construction when interpreting the Federal Rules of Evidence?⁵³ The federal courts these days have such a heavy concentration of criminal cases that federal judges can fairly be described as specialists in criminal law. Individual judges are specialists in a variety of other fields; think only of Justice Breyer (the federal sentencing guidelines, of which he was a principal author), Judge Easterbrook (securities law), and Judge Leval (intellectual property). Should they be accorded the privilege of loose construction of the fields of which they have specialized knowledge? In other words, is "competence," that ambiguous word in law, to construe statutes loosely to be bestowed on institutions on the basis of a formal, categorical, and often fictitious judgment of relative competence (all specialized agencies and specialized courts, but no generalist courts or judges of generalist courts)? Or should specialists wherever found claim a broader interpretive latitude, and should so-called "specialists" who don't live up to the name (think only of the Immigration and Naturalization Service, which repeatedly in the cases that come before us displays its ignorance of foreign countries) forfeit the deference of reviewing courts? These are important questions of the relation between institutional capacity and inter-

50. Sunstein & Vermeule, *supra* note 1, at 922-23.

51. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 411-23 (forthcoming 2003); John R. Allison & Mark A. Lemley, *Empirical Evidence on the Validity of Litigated Patents*, 26 AM. INTELL. PROP. L. ASS'N Q. J. 187, 252 (1998); Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 26 (1989); Gerald Sobel, *The Court of Appeals for the Federal Circuit: A Fifth Anniversary Look at Its Impact on Patent Law and Litigation*, 37 AM. U. L. REV. 1087 (1988).

52. See, e.g., Sunstein & Vermeule, *supra* note 1, at 889, 949-50.

53. Unlike the other federal procedural rules, the Federal Rules of Evidence were actually enacted by Congress; they are statutes.

pretive discretion that Sunstein and Vermeule do not discuss. To remark without elaboration the “superior degree of technical competence” of agencies⁵⁴ is on a par with Hart and Sacks’s unsubstantiated claim that legislators must be assumed to be competent and well-meaning.

III.

Even if previous legal scholars deserve the scolding that Sunstein and Vermeule administer, their article can be faulted for its poverty of feasible suggestions for moving the study of the institutional framework of judicial interpretation forward. It is no good spanking a child if you cannot show him how to emend his behavior. They say that “a great deal might be done to build on [William] Eskridge’s findings” (concerning congressional rejection of judicial interpretations of statutes).⁵⁵ No doubt; but it is one thing to issue a clarion call for more research, and another to propose a feasible research program. They do propose some empirical studies, but without addressing the serious problems of feasibility that the proposals pose. (Maybe they will address them in their response.) They want, for example, a test of the hypothesis that Congress is more willing to “oversee judicial decisions in the areas of tax and bankruptcy” than decisions interpreting the Administrative Procedure Act and the Sherman Act and that “[i]f so, different judicial approaches might be sensible in the different areas.”⁵⁶ They mean that loose construction would be more sensible in the latter two areas. Maybe, but one would have to know why Congress is more active in tax and bankruptcy, and the likeliest answer has nothing to do with strict versus loose construction, but rather with the heavy concentration of interest groups in these areas of law.

They suggest testing the hypothesis that states that reject the absurd-results exception to strict construction — states to the right, as it were, of Scalia — will have more legislative activity. Are there any such states? They do not tell us. If there are, still the courts of those states may strain to avoid absurd results, while courts in states that

54. Sunstein & Vermeule, *supra* note 1, at 928.

55. *Id.* at 919 n.115. Although they criticize Eskridge for institutional blindness, he is one of the few scholars who has conducted an empirical analysis designed to illuminate the institutional dimension of statutory interpretation. See Eskridge, *supra* note 14; see also ELY, *supra* note 12. Another such study is Joseph A. Grundfest & A. C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627 (2002). See also Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) (an article that could be subtitled: “An Institutional Perspective”); Jane S. Schacter, *The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: Implications for the Legislative History Debate and Beyond*, 51 STAN. L. REV. 1 (1998).

56. Sunstein & Vermeule, *supra* note 1, at 917-18.

have the exception may not enforce it consistently or sensibly. What is needed therefore is some index of absurdity in statutory interpretation. A more feasible study would involve correlating state legislative activity with salary, tenure, and other characteristics of a state's judiciary (such as how experienced the judges are and how heavy their caseload is), to see whether the more competent a state's judiciary is likely to be, the more willing the state's legislature is to allow the judges to do the work of keeping statutes sensible and up to date.

The proposal for a study to determine whether a formalist or nonformalist judiciary "will produce mistakes and injustices"⁵⁷ is a nonstarter unless there is some objective method of determining which decisions are mistaken or unjust; and while it might be possible to study whether "a nonformalist judiciary will greatly increase the costs of decision,"⁵⁸ it is unclear how the necessary data would be obtained. Sunstein and Vermeule predict that such a study would find that "courts will perceive themselves as most constrained when planning is necessary,"⁵⁹ yet in the previous sentence they had cited with approval a study finding the opposite: "that formalism might increase planning costs by encouraging strategic behavior."⁶⁰ Indeed it might, since formalism implies that judges will not use interpretive discretion to close loopholes.⁶¹

Sunstein and Vermeule cite with approval book-length studies by Neil Komesar⁶² and Jeremy Waldron⁶³ of the relative competence of different legal institutions. One might have expected them to say: here are what Komesar and Waldron have to say about the issue of comparative institutional competence in relation to judicial interpretation and here is what we have to add to what they say. They barely tell us what either author said (Komesar receives half of two sentences⁶⁴) or what they have to add to what either author said. Waldron's analysis of legislative capacities contrasted with judicial capacities, though particularly rich and particularly pertinent to judicial interpretation,⁶⁵ re-

57. *Id.* at 918 (emphasis omitted).

58. *Id.* (emphasis omitted).

59. *Id.*

60. *Id.* at 918 n.112 (citing David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860 (1999)).

61. See POSNER, PROBLEMS OF JURISPRUDENCE, *supra* note 14, at 57-60 (debating this issue with a proponent of formalism in the judicial interpretation of the tax code).

62. See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994).

63. See JEREMY WALDRON, LAW AND DISAGREEMENT (1999).

64. To Komesar they attribute the view that "judges are prone to stumble into empirical pitfalls." Sunstein & Vermeule, *supra* note 1, at 937. That is a point that Holmes and the legal realists made repeatedly.

65. See POSNER, FRONTIERS, *supra* note 26, at 19-24.

ceives a half-sentence summary. Waldron shares with Hart and Sacks a sunny view of legislatures, yet Sunstein and Vermeule dismiss Hart and Sacks as institutionally sightless; how then to explain approval of Waldron?

Although they are critical — maybe, as I am about to suggest, excessively so — of casual empiricism, they engage in it themselves as when they offer a single instance of a legislative response to an absurd decision as evidence for the proposition that strict construction of statutes producing absurd results causes legislatures to update their statutes;⁶⁶ or when they say in reference to the snail-darter decision⁶⁷ (the single instance I just referred to — they are working with a small body of data) that “judicial unreliability, on conflicts between environmental and economic goals, might well be taken to argue in favor of formalism.”⁶⁸ They do not explain why in this instance judicial unreliability is greater than legislative unreliability. Elsewhere they say that “[i]t is reasonable to think that by virtue of their specialized competence and relative accountability, agencies are in a better position to make these decisions [resolving statutory ambiguities] than courts.”⁶⁹ No mention is made of the other institutional features of agencies, such as politicization, rapid turnover in membership, deformities resulting from specialization, and lack of actual technical competence, that would have to be weighed in the balance in order to enable a sound comparison between agencies and courts as statutory interpreters. These possibilities are acknowledged later in the article but are not integrated with the earlier suggestion and with the continued insistence — notably in the article’s conclusion — that agencies should have a longer leash than courts in interpreting statutes. Maybe when the deficiencies of administrative agencies — of which Sunstein has written at length⁷⁰ — are taken into account, it is *not* reasonable to think agencies better interpreters than courts.

In defending *Chevron*,⁷¹ they fail to note that, insofar as judges are competent and more or less faithful interpreters of statutes (which they may or may not be), the effect of the decision was to displace legislative by administrative discretion,⁷² contrary to their suggestion that the decision promotes democratic accountability.⁷³ In short, they

66. See Sunstein & Vermeule, *supra* note 1, at 903 & n.70.

67. *TVA v. Hill*, 437 U.S. 153 (1978).

68. Sunstein & Vermeule, *supra* note 1, at 904.

69. *Id.* at 927.

70. See, e.g., CASS R. SUNSTEIN, *RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT* 4, 229-50 (2002).

71. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

72. An institutional insight of Eskridge’s. See *ESKRIDGE*, *supra* note 11, at 164-67.

73. See Sunstein & Vermeule, *supra* note 1, at 928.

have a soft spot for agencies, and no empirical evidence to back it up. And while they do not explicitly endorse formalism as the dominant strategy for American judges, they lean strongly in that direction,⁷⁴ creating tension with Sunstein's rejection of formalism and endorsement of activist Supreme Court decisions in his other writings.⁷⁵ Though having formerly joined the chorus castigating Justice Scalia as excessively formalistic,⁷⁶ Sunstein now joins Vermeule in criticizing Scalia for having *accepted* Blackstone's proposition that literal interpretations of statutes may be rejected when they would produce absurd results.⁷⁷ In other words, Scalia's vice is insufficient rather than excessive formalism.

Here is Sunstein on the absurdity exception to interpretive literalism:

A legislature's failure to anticipate an absurd application of a statutory term, and to make a correction before the fact, is usually not a result of sloppiness or negligence. . . .

The courts' institutional position, allowing judges to see particular applications that legislatures cannot anticipate in advance, puts them in an especially good place to correct absurd applications.⁷⁸

Blackstone and Scalia couldn't have put it better. In a footnote Sunstein acknowledges a change of heart since an article he wrote in 1989; but the present article is in tension with considerably later work of his. In an article published in 1999 he stated that "while formalism captures part of the territory, I believe that it is an inadequate approach to statutory and constitutional interpretation in the United States."⁷⁹ In the same article he cited, with apparent approval, the "imaginative reconstruction" approach to statutory interpretation,⁸⁰ the antithesis of formalism.

74. Vermeule, unless he's changed his mind since 2000, is definite that formalism is the right strategy for judges. See Adrian Vermeule, *Interpretive Choice*, 75 N.Y.U. L. REV. 74 (2000) [hereinafter Vermeule, *Interpretive Choice*].

75. See, e.g., CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 242-43 (1999).

76. See CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 182-84 (1996) [hereinafter SUNSTEIN, LEGAL REASONING].

77. See Sunstein & Vermeule, *supra* note 1, at 916 n.110.

78. SUNSTEIN, LEGAL REASONING, *supra* note 76, at 184. For a similar assertion, see Cass R. Sunstein, *Must Formalism Be Defended Empirically?* 66 U. CHI. L. REV. 636, 640 (1999) [hereinafter Sunstein, *Formalism*].

79. Sunstein, *Formalism*, *supra* note 78, at 643 n.28.

80. *Id.* at 646 (citations omitted).

IV.

Casual empiricism is often unavoidable in law. Sunstein and Vermeule deny this. They say the fact that “relevant empirical and institutional variables are costly to measure” (they are speaking of the variables relevant to the choice between loose and strict construction) is “hardly an argument for nonempirical interpretive theory.”⁸¹ It is, in fact, a compelling argument. Unavailability of empirical data does not excuse the judge from having to interpret statutes in the cases that come before him for decision; and to decide how to interpret them he will perforce have to decide whether he is a loose or a strict constructionist. He may not be articulate about the choice, but he will make it nonetheless. Sunstein was employing casual empiricism when he embraced the “absurdity” exception to literal interpretation,⁸² as was Vermeule when he urged the American judiciary to embrace formalism.⁸³ In a recent article, Vermuele acknowledges the inevitability of casual empiricism in regard to choice of interpretive approaches, saying,

There are undoubtedly factual questions that are both relevant to the choice between interpretive formalism and antiformalism and also answerable by the usual methods of empiricism. But judges must choose doctrines now, and empiricism probably cannot close out enough of the relevant questions quickly and cheaply enough to provide much aid in the short and medium term.⁸⁴

His pessimism is supported by his and Sunstein’s inability to propose feasible empirical studies of the issue.

Yet there are a number of empirical studies of legal institutions extant, including courts, juries, administrative agencies, and legislatures. And some of these, unlike Komesar’s and Waldron’s, are even quantitative.⁸⁵ What is lacking are rigorous empirical studies of the relative

81. Sunstein & Vermeule, *supra* note 1, at 907 (citation omitted).

82. See also Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277 (2001).

83. See Vermeule, *Interpretive Choice*, *supra* note 74.

84. Adrian Vermeule, *Interpretation, Empiricism, and the Closure Problem*, 66 U. CHI. L. REV. 698, 708 (1999).

85. For examples of such empirical studies, see Allison & Lemley, *supra* note 51, at 205-06; Donald R. Dunner et al., *A Statistical Look at the Federal Circuit’s Patent Decisions: 1982-1994*, 5 FED. CIR. B.J. 151 (1995); Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 HARV. J.L. & PUB. POL’Y 233, 271-93 (1999); Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997); Richard A. Posner, *Is the Ninth Circuit Too Large? A Statistical Study of Judicial Quality*, 29 J. LEGAL STUD. 711 (2000); Richard A. Posner, *The Behavior of Administrative Agencies*, 1 J. LEGAL STUD. 305, 325-47 (1972); William F. Shughart II & Robert D. Tollison, *Interest Groups and the Courts*, 6 GEO. MASON L. REV. 953, 963-67 (1998); Roselle L. Wissler et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751 (1999).

quality of the output of courts, legislatures, and administrative agencies that would enable a confident choice to be made among different standards of judicial review and different modes of judicial interpretation. Specifying, let alone measuring, the “quality” of legal outputs presents a daunting challenge yet to be met.

V.

I want to end on a constructive rather than critical note, putting to Sunstein and Vermeule some questions that may help focus further consideration of the institutional dimension of legal interpretation:

1. Why are American judges not, on the whole, formalists?
2. May the answer be connected to the nature — or rather absence — of the judicial career in the United States, namely the fact that our judges come to the bench after a career in another branch of the legal profession and generally do not expect further promotion (e.g., few district judges are promoted to circuit judge and few circuit judge to Supreme Court Justice)?⁸⁶ If so, and if therefore our judges, not being subjected to the tight control over judicial discretion that a career judiciary involves, are bound to throw their weight around more, may there not be offsetting advantages? Or do Sunstein and Vermeule believe that the American judiciary should be restructured, radically or otherwise?
3. Could the type of persons who become judges in a Continental-type career-judiciary system be entrusted with common law responsibilities, that is, with actually making law, or is their experience too narrow? If they could not be entrusted with lawmaking, does not the American commitment to common law preclude a radical restructuring of the judiciary in the Continental direction? Or has the time come to codify common law?
4. If they do not favor reorganizing the American judiciary, do they think that articles such as theirs, or the empirical studies that they envisage, are (depending on the outcome of the studies) likely to persuade American judges on their own initiative to become more formalistic?
5. Do they *want* to influence judicial behavior, or is their interest in the subject matter of their article purely academic?

86. In most countries, the judiciary is a career that one enters upon graduation from law school (or shortly afterwards), starting at the bottom, for example in traffic court, and working one's way gradually up to a higher level. In England judges are appointed from practice, but, until recently, only from the ranks of the barristers (i.e., trial and appellate lawyers); for a variety of reasons, the English judiciary is actually closer to the Continental (with its career judges) than to the American. For a longer discussion of these issues, see POSNER, *LAW AND LEGAL THEORY*, *supra* note 37 (looking at comparative systems); *supra* note 85 (an analysis of American judges).

6. What would they consider persuasive evidence against the choice of formalism as the method of statutory or constitutional interpretation employed by judges?