〈제1주제〉

Judicial Interpretation and Social Science in the U.S.

Martin Shapiro*

In Europe there have long been two schools of thought about how to interpret statutes and constitutions. One stresses the formal meaning of the words, the general principles of law established by the codes and the general academic and judicial doctrines derived from those words and general principles. This approach is often called the formal approach. The other school of interpretation seeks to take into account the purposes for which the law was enacted and the extent to which one interpretation or another will best serve that purpose. This school is often called purposive or teleological.

In the United States the two schools are less distinct than in Europe. Instead some commentators and judges urge that the courts follow a traditional set of canons of statutory interpretation.[1] Others argue that there is not, and probably cannot be, a coherent set of canons.[2] There is, however, actually an American consensus on both statutory and constitutional interpretation. That consensus says "formalism first and teleological interpretation second". All American interpreters agree that when the statutory or constitutional words have a single, clear, unambiguous meaning "on their face", that is as written, courts should follow that "plain meaning" even if the results are undesirable in the judges view and even if such an interpretation does not best serve the purposes of the law. If, however, the legal text does not itself yield a single, clearly correct meaning, then judges should engage in purposive or teleological

* Professor, University of California, Berkeley

1) William Eskridge, Jr. and Philip Frickey, *Legislation* (1988) pp. 639-689.

2) *Id.* pp. 689-695.

interpretation.

Within purposive interpretation there are a great many differences of approach both in Europe and the United States. In general these differences can be reduced to two fundamental ones. The first concerns judicial approaches to the legislative process and the constitution making process. In a democratic state one way to look at a statutory or constitutional provision is as a statement of the purpose of the majority of legislators or constitution ratifiers. The judge's job is to discover what the majority wanted. The opposing approach is to argue that the imputation of a single unified majority purpose to a democratic legal text is a perverse fiction. In real democratic legislative or constitution making processes the final text is rarely a statement of a single purpose of a unified majority. Instead such a text is usually the product of a set of interests, each with its own purposes. They compromise with one another to form a coalition that controls enough votes to be the "majority of the moment." The judge's job is not to discern a single dominant purpose that is not really there, but to enforce the particular mix of purposes that the majority of the moment chose.[3)]

The second major American debate is about considerations of policy or social utility. No matter which view of purpose one takes, what should the judge do when a particular interpretation of legal language is likely to yield a bad social result? American judges constantly say that they do not and must not substitute their own policy views for those of the statutory or constitutional law maker. Yet American judges are famous for doing exactly that.[4)] Judicial policy preferences enter by a number of avenues. First, the legal text may be old and circumstances may have changed greatly since its purposes were originally stated. This problem is, of course, particularly acute in American constitutional law for the American constitution is old and difficult to formally amend. Thus we have the American debate between the "originalists" and the "non-originalists".[5)] Should judges follow the purposes of the Framers or should they interpret the Constitution so as to

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3) Frank Easterbrook, Statutory Domains, 50 *Univ. Chicago L. Rev.* 533 (1983).

4) See Lawrence Baum, *American Courts*, 4th ed (1998) pp. 290-292.

5) See Paul Brest, The Misconceived Quest for the Original Understanding, 60 *Boston Univ. L. Rev.* 204 (1980).

achieve good results under current circumstances? This debate boils down to an argument about whether judges should be more or less active in injecting their own policy preferences into constitutional interpretation. Originalism comes down to opposition to judicial policy activism. Non-originalism is a defense of new policy initiatives by constitutional courts.

There is a second avenue to judicial policy making. If in reality most legislative decisions are compromises among various legislative factions, then statutory language is likely to be ambiguous or to declare or imply a number of policy goals somewhat in conflict with one another. For the only way differing factions can build a coalition is by papering over their differences in ambiguous language or incorporating their differing policy goals into a single legal text. Because of the nature of American parties and elections, the U. S. Congress is particularly prone to such ambiguous or multi-purpose statutes. A judge may falsely impute a single purpose to a statute which actually was produced by a coalitional compromise among several purposes. Or the judge may acknowledge that the statute before him or her balances and compromises among somewhat conflicting interests. Either way judges tend to inject their own policy preferences. Those judges who wish to see a single majority purpose in a statute when in reality there are several related but partially conflicting purposes are likely to choose as the favored "majority" purpose the one they themselves favor. Judges who see a statute as a subtle blend or balance of a number of interests or policy preferences are likely to see the balance struck by the statute as the one nearest their own preferences.

American interpretation favors formal interpretation but acknowledges the legitimacy of purposive interpretation. American statutory and constitutional language, however, does not provide great opportunity for formal interpretation. The American Constitution is old and its language not very precise. American statutes are typically the product of momentary coalitions of legislative factions not in total agreement on any single purpose. Thus they tend to be ambiguous or internally contradictory. Thus whatever the preference for formalism, American interpretation is pushed toward the purposive. And purpose interpretation always leaves the judges a great deal

of room to confuse their own policy preferences with those of the legislators or constitution makers.

How does this inclination toward purposive interpretation relate to the use of social science evidence in judicial decision making? If judges ask themselves "Which interpretation is more likely to lead to the real world changes that it is the purpose of the legislation to achieve?", they open the way to social science in law. If they ask that question they invite lawyers to submit evidence and argument to show that a particular interpretation will most efficiently achieve what the legislators were seeking to achieve. Social science methods and findings are obviously relevant to determining what interpretation will work best in the real world. If judges view themselves as implementors of legislative purposes, they must listen to arguments about how they can best implement those purposes. Social science evidence is one highly persuasive mode of making such arguments.

Let me take the obvious example of antitrust law. American judges have concluded that the purpose of American antitrust laws is *not* to prevent the emergence of large firms. Instead, the purpose is to insure that consumers receive the best products and services at the lowest cost. Thus certain actions which reduce competition, but nevertheless benefit consumers more than unlimited competition would, should be permissible. American judges accept so-called efficiency defenses in antitrust cases.[6] For instance, it may be lawful for a manufacturer to refuse to sell to any but its own authorized dealers. This arrangement may be lawful if the manufacturer can show that only its authorized dealers can insure that the ultimate consumer will receive the product in good condition and provide proper servicing. Work by economists in economic theory initially showed the general legitimacy of efficiency defenses. In particular cases, efficiency defenses offered by particular defendants for their specific practices are supported by economic data and economic analysis prepared by economists. They are submitted to the court through the briefs and oral arguments of the defense lawyers and through the testimony of economists called by the defense. Government antitrust prosecutors rely on exactly the same kind of economic

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6) See E. Gellhorn, *Antitrust Law and Economics*, 3rd ed. 1986.

analysis to try to show that the particular practice being prosecuted does not result in net benefits to the consumer. The social science of economics rather than amendments to antitrust statutes has brought efficiency defenses into American antitrust law.

Antitrust is perhaps the area of law in which social science is most obviously relevant. Yet today if one looks at the lawyers' briefs submitted to the Supreme Court in many areas of both statutory and constitutional law, one finds about half the brief devoted to conventional legal argument and about half devoted to policy analysis. This policy argument is usually based on social science data and analysis. The great school desegregation case, *Brown v. Board of Education*,[7] is a highly controversial example. The Supreme Court relied on social science studies to conclude that segregation laws violated the equal protection clause of the Constitution. These studies concluded that black children were not able to learn as well in segregated classrooms as they could in unsegregated ones.

The controversy over *Brown* should not obscure the reality that social science evidence and analysis is today routinely presented in all constitutional cases where it might be relevant. A prayer in a public school case will almost invariably involve the presentation to the court of findings from dozens of studies of student attitudes toward prayer and of the sociological and psychological dynamics of school teachers and students. A death penalty case will involve the presentation of crime statistics, studies of police and prosecutorial behavior, studies of the quality of death penalty case defense lawyers, econometric and psychological studies of the deterrent effect of the death penalty and sociological studies of the "population" of death penalty recipients. The Supreme Court decided that the "cruel and unusual punishment" clause of the U.S. Constitution is *not* to be interpreted by simply looking up the words cruel and unusual in the dictionary. As a result, it is impossible for the judges to refuse to listen to all sorts of social science evidence on how and to whom the death penalty is assigned.

Examples in constitutional law could be endlessly multiplied. The point is even more obvious in many areas of regulation. Congress often enacts

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7) 347 U.S. 483 (1954).

statutes that state general purposes and delegate implementing decisions to administrative agencies. The agency decisions are subject to judicial review to determine whether the agency decisions actually do carry out the purposes of the legislature. In many instances judicial review necessarily involves evidence from the physical and biological sciences. Suppose a statute says companies must employ "the best available technology" to prevent pollution, and the EPA has ordered companies to install a certain kind of smoke filter. The question for a reviewing judge is whether that particular filter is the best available technology. The legal case will proceed largely by the presentation of chemical and engineering data and analysis.

If the question is one of banking regulation or price regulation of natural gas or securities law, just as obviously the case will proceed largely in terms of economic data. If the question is one of electoral districting law, political science evidence will be presented. If education regulation or welfare is at issue, the evidence will come from psychology and sociology.

American judges play an active role in determining whether administrative agency rules and regulations achieve the purposes of Congressional statutes. They ask whether agency rules are the best rules for carrying out Congressional purposes.[8] Where the Congressional purposes are economic, social or political, it would be hard for judges to ignore economic, social or political evidence bearing on how well the agency rule fulfilled the Congressional purpose. That evidence is necessarily the product of research by social scientists.

There is, of course, a judicial alternative. Judges can simply say that they cannot understand scientific evidence and so defer to the administrative agencies on all technical questions. Given the modern world and modern regulatory legislation, if judges take this route they are really abandoning any effective level of judicial review of administrative agency action. American judges have not chosen to abandon judicial review. Thus they have no choice but to cope with evidence from the physical, biological and social sciences.

The argument made here is a simple one. Legislators and constitution

8) See Martin Shapiro, *Who Guards the Guardians* (Athens, Ga.: University of Georgia Press, 1988).

writers sometimes clearly state non-conflicting purposes and the precise means by which those purposes are to be achieved. American judges will follow such directions. Statutes and constitutional provisions may incorporate conflicting policy goals or be unclear as to which of several policy goals has been chosen or announce several policy goals without clearly stating priorities among them. When this happens American courts will engage in purposive interpretation and will make policy choices of their own. Where courts make policy choices they need and want precisely what all policy makers should want. They need knowledge of the real world circumstances in which the policy will operate. Thus American lawyers' arguments to courts, and often even the judges' opinions, contain extensive presentation of social science data and analysis supporting a parti-cular choice among the number of alternative policies and means of implementation that the legal text might be interpreted as having enacted into law.

By its very nature and language, the relatively short, relatively general U. S. Constitution, with its sweeping Bill of Rights, is often unclear or ambiguous as to its purposes, often announces two or more conflicting purposes at once, and rarely announces fixed priorities among its goals. It almost never specifies fixed means for achieving whatever purposes it announces. American judges nearly always engage in purposive constitutional interpretation. Only rarely do they announce that they are following constitutional language or their own previous case law without regard to real world consequences. Even when they do mechanically follow constitutional language or case precedent they will usually explicitly argue that they are doing so because to do otherwise would do more real world harm than good. The lawyer's briefs to the Supreme Court in major cases typically contain about half policy and half law. The most professional, craftsman-like constitutional argument is one that says two things to the Court. Here is the data and analysis showing that the policy choice I am urging you to adopt would be the best public policy in terms of results. Here is the legal analysis that shows that this best public policy choice is also compatible with the language of the Constitution and serves the purposes of the Framers.