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"Lit. Theory" Put to the Test: A Comparative Literary Analysis of American Judicial Tests and French Judicial Discourse

Mitchel de S.-O.-l'E. Lasser
Cornell Law School, ml355@cornell.edu

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"LIT. THEORY" PUT TO THE TEST: A COMPARATIVE LITERARY ANALYSIS OF AMERICAN JUDICIAL TESTS AND FRENCH JUDICIAL DISCOURSE

Mitchel de S.-O.-l'E. Lasser

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"LIT. THEORY" PUT TO THE TEST: A COMPARATIVE LITERARY ANALYSIS OF AMERICAN JUDICIAL TESTS AND FRENCH JUDICIAL DISCOURSE

*Mitchel de S.-O.-l'E. Lasser**

The formalism/policy dichotomy has structured American jurisprudential analyses of judicial decisionmaking for most of the twentieth century. In this Article, Professor Lasser analyzes and compares American multi-part judicial tests and French civil judicial discourse to demonstrate that the dichotomy reflects and informs the ways in which judicial decisions are written. Drawing on the works of Roman Jakobson, Roland Barthes, and Paul de Man, he constructs a literary methodology to analyze American and French judicial discourse. Professor Lasser contends that the formalism/policy dichotomy is part of a larger process by which the American and French judicial systems justify how they produce judicial decisions. He argues that both American and French judicial decisions construct and use the dichotomy in order to make similar ontological claims about the nature of adjudication — namely, that adjudication is both inherently stable and socially responsive.

I. INTRODUCTION

Rigid formalism vs. pragmatic policy orientation: for most of the twentieth century, American legal scholarship has deployed this fundamental dichotomy in an effort to describe, understand, and critique various forms of adjudication.[1] The dichotomy has functioned as a heuristic device that appears to explain everything from the law/equity distinction[2] to the development of American legal thought from nineteenth-century "classical" formalism to twentieth-century realism.[3]

In recent years, the dichotomy has played itself out in two very different contexts. It has dominated the analysis and discussion of

* Associate Professor, University of Utah College of Law. Ph.D. (Comparative Literature), 1995; M.A. (French Literature), 1990, Yale University; J.D., 1989, Harvard Law School; B.A., 1986, Yale College. Special thanks to Bruce Ackerman, André-Jean Arnaud, Jack Balkin, Nathaniel Berman, Peter Brooks, Karen Engle, Geoffrey Hartman, David Kennedy, Duncan Kennedy, Lee Teitelbaum, and Patricia White. This Article was completed thanks to a summer stipend provided by the University of Utah College of Law.

1 *See* ROBERT KEETON, JUDGING 112–36 (1990); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 36–37 (1913); Karl Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222, 1231, 1237 (1931); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 606–09 (1908).

2 *See, e.g.*, Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 71–82 (1993); Thomas D. Rowe, Jr., *No Final Victories: The Incompleteness of Equity's Triumph in Federal Public Law*, 56 LAW & CONTEMP. PROBS. 105, 117–21 (1993).

3 *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 169–216 (1992); JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 1–13 (1995); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, *in* 3 RESEARCH IN LAW AND SOCIOLOGY 3, 3–23 (Rita J. Simon & Steven Spitzer eds., 1980).

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"multi-part" or "multi-prong" judicial "tests" and thus has led to substantive arguments about the relative advantages of formal rules and policy discussion in American adjudication.[4] In addition, as I have recently argued, it has structured American comparative law analyses of foreign legal systems and has skewed descriptions of the "Common Law/Civil Law distinction."[5]

This Article is the next step in an ongoing analysis of contemporary judicial discourse. It examines both *how* judicial decisions construct their version of the formalism/policy dichotomy and *what* the dichotomy comes to mean — or signify — about a legal system's adjudication. In order to accomplish its task, this Article constructs a methodology out of assorted literary "theory" sources. It then deploys this methodology in the comparative analysis of American multi-part judicial tests and French civil judicial decisions.

This Article's methodology and analysis are premised on the basic claim that judicial decisions do more than simply resolve substantive legal issues. The decisions' form,[6] discourse,[7] and rhetoric[8] combine to make implicit assertions about the process that produced the decisions. Judicial decisions, and judicial arguments generally, are therefore texts that offer representations of judicial practice and of the judicial role. These representations may be thought of as portraits: they are images of judging. Insofar as these portraits are produced by judges in judicial texts, they may be termed judicial self-portraits.

Judicial self-portraits should be taken very seriously. Just as one might question the likeness or relation between a portrait and the person portrayed, especially if that person is also the artist, one also ought to question the relation between judicial practice and that practice as portrayed in judicial decisions, particularly because those decisions are judicially produced. Insofar as the formalism/policy dichotomy emerges in and informs judicial decisions, then, it should be carefully analyzed and reconsidered. The dichotomy, after all, does not merely exist in the abstract. It is a representation, judicially produced, of judicial interpretive practice. As such, the dichotomy is part and parcel of our received image of judging; it is a conceptual construction that informs the very substance of judicial self-portraits.

The construction of judicial self-portraits and of the formalism/policy dichotomy is therefore a meaningful enterprise in which ju-

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[4] *See, e.g.*, ROBERT F. NAGEL, *The Formulaic Constitution*, *in* CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW 121, 122–47 (1989); Frederick Schauer, *Opinions as Rules*, 62 U. CHI. L. REV. 1455 *passim* (1995).

[5] Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-)Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325, 1326–27 (1995).

[6] By "form," I mean the structure of a decision.

[7] By "discourse," I mean the way in which a decision speaks.

[8] "Rhetoric" is an important subset of a decision's discourse: it refers to the tropes (metaphors, etc.) that the decision uses. *See infra* Part V.

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dicial texts define their own origins and justify their relation to the law they "apply," "interpret," or "create." Judicial texts engage in this complex process by adopting particular modes of discourse — that is, by speaking or writing in particular ways. These discourses are significant because they portray their judicial authors as engaged in specific modes of interpretation. In other words, the way in which a judge expresses herself in a judicial decision constitutes a representation of the type of interpretation that the judge has performed in order to reach the decision. Furthermore, this representation, which links particular modes of discourse with particular modes of reading, is significant in its own right. It portrays the judicial decision as related, in specific ways, to "governing" law. Viewed in this light, judicial decisions emerge as complex — and value-laden — systems of signs: by adopting certain forms, discourses, and rhetorics, judicial decisions present themselves as deploying particular modes of reading, and therefore portray themselves as meaningfully related to governing law.

This Article examines how judicial decisions make implicit claims about the types of adjudication that are operative in a legal system. Specifically, it analyzes how judicial decisions distinguish, link, and align particular modes of discourse, particular modes of reading, and particular modes of relating judicial decisions to governing law. From this analysis emerges a detailed map of the value-laden significations that contemporary judicial decisions produce.

In order to perform its analysis, this Article focuses on two discrete types of judicial decisions: United States Supreme Court decisions that establish and apply multi-part or multi-prong judicial tests, and French civil judicial decisions. These two types were selected because they are easily identifiable examples of judicial decisions, are representative of contemporary judicial discourse in each country's legal system, and appear, at first glance, to be radically different from one another.[9]

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[9] This Article analyzes and compares the judicial decisions of the United States Supreme Court and of the French Cour de cassation, the courts of final appeal in each country. A significant distinction exists, however, between their respective jurisdictions. The Supreme Court adjudicates public law and constitutional law cases that would, in France, be adjudicated by the Conseil d'Etat and the Conseil constitutionnel instead of the Cour de cassation. The Cour de cassation is the court of final appeals in civil, private-law matters. *See* ROGER PERROT, INSTITUTIONS JUDICIAIRES 176, 192–93 (3d ed. 1989). The Cour, however, somewhat like the Supreme Court, is the hierarchical head of the civil law courts, the only truly "judicial" branch of the French government. The Conseil d'Etat heads the public law or administrative law courts, which are part of the executive branch of the French government; the Conseil constitutionnel is not part of the judicial branch either, and is not, strictly speaking, a court at all. *See* JOHN BELL, FRENCH CONSTITUTIONAL LAW 53, 55 (1992).

The significant jurisdictional difference and important structural similarity between the Cour and Supreme Court do not, however, concern this study. This Article analyzes and compares the decisions of the Supreme Court and of the Cour de cassation not because the two institutions are similar, but because they are emblematic of each country's legal system and because they appear, at first blush, to be so different from one another.

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The analysis proceeds as follows. Part II of the Article briefly presents the discourse and decisions of the French civil judicial system.[10] As this Part explains, French civil judicial discourse has bifurcated into two distinct discursive spheres: the official sphere, which is apparently dominated by rigid formalism, and the unofficial sphere, which is largely oriented toward pragmatic policy considerations. Part III examines four lines of United States Supreme Court decisions that establish and apply multi-prong judicial tests. As this Part demonstrates, American judicial discourse resembles the French in that it too deploys both formalism and policy analysis in the interpretation of legal texts. It differs from the French model, however, in that it does not bifurcate into distinct spheres. Rather, the American judicial system integrates the discourses of formalist application and policy analysis in a single space: the American judicial opinion. Supreme Court cases that establish and apply multi-prong judicial tests constitute a particularly clear example of this characteristic form of American discursive integration.

Part IV offers an interpretation of the work of two literary theorists, Roman Jakobson and Roland Barthes, and brings that interpretation explicitly to bear on the comparative analysis of French and American judicial discourse. This literary approach permits the comparison of the two legal systems to proceed without the pitfall of analyzing one of the systems in terms of intellectual constructs particular to the other. This Article thus avoids falling into the trap that has typically ensnared twentieth-century American comparatists: namely, analyzing civil law systems from a parochial — and loaded — post-Llewellynian perspective.[11]

The deployment of literary theory as the conceptual framework for comparative analysis therefore offers some semblance of intellectual neutrality. This neutrality, however, is hardly unbiased. Rather, the use of literary theory shifts the analytic biases from the biases of a par-

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This Article analyzes Supreme Court decisions that establish and apply multi-prong judicial tests and treats such decisions as a representative form of contemporary Supreme Court practice. The Court's recurrent use of such tests, and the explicit academic debates about the advisability of this practice, *see* NAGEL, *supra* note 4, at 121–55; Morton Horwitz, *The Supreme Court, 1992 Term — Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 98–102 (1993); Schauer, *supra* note 4, at 1456–66, bolster the underlying claim that such decisions do indeed constitute a representative form of contemporary Court practice. I might well be prepared to extend this Article's analysis to almost any other representative form of contemporary Supreme Court decision-writing, as long as those decisions explicitly establish judicial norms that are understood to govern, via stare decisis, a particular doctrinal field. Under such an extensive reading of this Article's analysis, the multi-prong test would merely represent a particularly identifiable (and perhaps caricatural) form of Supreme Court decision-writing. Unfortunately, a demonstration of this extensive reading lies beyond the scope of this Article.

[10] I have presented this analysis at length elsewhere. *See* Lasser, *supra* note 5, at 1340–55.

[11] *See id.* at 1327–34 (criticizing the work of John Dawson and John H. Merryman).

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ticular legal tradition to those of another discipline. Insofar as the biases of literary theory tend toward a careful examination of language and textual interpretation, and insofar as textual interpretation represents a prime judicial and jurisprudential concern, the adoption of such biases appears to offer a reasonable match between the method and the object of analysis.

At the same time, the deployment of literary theory in comparative legal analysis offers the possibility of reinvigorating American jurisprudence. By analyzing the complex ways in which judicial discourse constructs the formalism/policy distinction, and by stressing the literary mechanics that underlie this judicial discursive practice, this Article seeks to readdress old jurisprudential questions in terms that might move the analysis of contemporary judicial discourse beyond the understandings permitted by a realist jurisprudential tradition that had already run its course by 1960, the time of the publication of *The Common Law Tradition*.[12] In particular, the literary approach demonstrates that it is a mistake to limit jurisprudential analysis to the study of the formalism/policy distinction. In short, the discourses of formalism and policy and the distinction they represent are part of a larger process by which the French and American judicial systems justify how they produce judicial decisions and claim to promote particular values of adjudication. Part V discusses French and American judicial decisions in terms of one additional literary concept, the trope, and presents conclusions.

II. FRENCH JUDICIAL DISCOURSE: AN OVERVIEW

Traditional American comparative analyses often misdescribe and misunderstand the French judicial system by presenting it as the American system's formalist other. According to these canonical analyses, the French system is dominated by a rigid conception of adjudication that requires the French judge to apply codified law in a passive and mechanical fashion.[13] This formalist conception of adjudication supposedly forecloses the opportunity for the French judiciary to perform the important policy function — apparently taken up by the American judiciary — of mediating between the old and the new, of reconciling established applications of the law with the "inevitable process of new [caselaw] creation."[14]

This caricatural description of the French judicial system, one that has dominated American comparative law for at least thirty years,[15]

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[12] KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960).

[13] *See* JOHN P. DAWSON, THE ORACLES OF THE LAW 400–31 (1968); JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION 36–42 (1969).

[14] DAWSON, *supra* note 13, at 431.

[15] Dawson's immensely influential analysis was published in 1968. The portrayal of the French system — and of civil law systems generally — as formalist, however, long predates Daw-

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suffers from a basic flaw: it fails to recognize that the rigid conception is but one of two fundamental conceptions of adjudication that currently operate in the French judicial system. The rigid conception merely represents what I have previously termed the "official French portrait" of the judicial role.[16]

The official French portrait consists of a representation of the civil judge in the performance of her proper role. It posits that the French civil judge engages in a perfectly formalist or grammatical mode of reading:[17] she mechanically applies the dictates of the all-encompassing Civil Code by plugging fact scenarios into the matrix of the Code, thus unproblematically generating legal solutions.[18]

The official French portrait consists of three basic elements: a small core of legislative provisions that define the role of the judiciary, judicial interpretations of these provisions, and the very form of French judicial decisions. The legislative provisions, as interpreted by the judiciary, deny the French judge all normative or lawmaking power. Thus, the judiciary is forbidden to interfere with legislative and executive action,[19] and judicial precedent carries no binding legal force.[20]

The form and discourse of French judicial decisions further emphasize the passive and mechanical quality of official French adjudication. For example, each decision of the French, private-law supreme court — the Cour de cassation — is composed of a single sentence that routinely runs less than a single typewritten page in length and always takes the form of a rigid syllogism:

Major premise: Having seen Article 312 of the Civil Code . . . ;

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son. *See, e.g.*, Roscoe Pound, *What Is the Common Law?*, *in* THE FUTURE OF THE COMMON LAW 3, 17–18 (Grenville Clark ed., 1937).

16 Lasser, *supra* note 5, at 1334–43.

17 The notions of grammar and grammatical reading are borrowed from Paul de Man. *See* PAUL DE MAN, ALLEGORIES OF READING 3–19, 57–78 (1979) [hereinafter DE MAN, ALLEGORIES OF READING]; PAUL DE MAN, THE RESISTANCE TO THEORY 14–20 (1986) [hereinafter DE MAN, THE RESISTANCE TO THEORY]. Grammatical reading, which de Man associates with formalism, aspires to an unproblematic "decoding of text" based on "a model . . . applicable to the generation of all texts." *Id.* at 14–15. In this way, the decoding achieves "the impersonal precision of grammar." DE MAN, ALLEGORIES OF READING, *supra*, at 16. Grammatical reading assumes that a text's vocabulary and syntax (i.e., its grammar) can mechanically generate the proper reading of that text. In the French legal context, it is a mode of reading premised on the notion that the vocabulary and syntax of the Civil Code can be applied directly to any fact scenario in order to generate the required legal solution.

Ronald Dworkin refers to such "grammatical" reading as "acontextual." *See* RONALD DWORKIN, LAW'S EMPIRE 17–18, 89 (1986).

18 *See* Lasser, *supra* note 5, at 1334–43.

19 *See* Loi sur l'organisation judiciaire tit. II, arts. 10, 13, Aug. 24, 1790, *in* 1 LOIS ET ACTES DU GOUVERNEMENT 368 (1834).

20 *See* CODE CIVIL [C. CIV.] arts. 5, 1351; Cass. 2e civ., Apr. 5, 1991, 1991 Bull. Civ. II, No. 109; Cass. 3e civ., Mar. 27, 1991, Bull. Civ. III, No. 101; Cass. soc., Feb. 27, 1991, 1991 Bull. Civ. V, No. 102; Cass. crim., Nov. 3, 1955, D. Jur. 1956, I, 557, note Savatier; Cass. req., Dec. 21, 1891, D.P. 1892, I, 543.

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Minor premise(s): Whereas Plaintiff did *X*, Defendant did *Y*, and Lower Court ruled *Z* . . . ;

Conclusion: Judgment for the Plaintiff.[21]

Furthermore, the court speaks collegially as a unit. Not only are there no dissents or concurrences, but the decisions are also not signed.[22] The French judicial decision is an impersonal affair.

The form of the official French judicial decision therefore conveys a perfectly formalist portrait of French adjudication. The judge is reduced to a "syllogism machine."[23] It is the statutory law, and only the statutory law, that appears to govern all adjudication and to generate all judicial solutions. Facts, presented in only a few lines, exercise no independent force in shaping the development of the law, but rather merely trigger the necessary application of the appropriate Code provision. Policy considerations are simply irrelevant.

Given this official portrait of French adjudication, it is hardly surprising that American comparative analyses have traditionally presented the French judicial system as terribly formalist. These analyses have failed to consider, however, that the official portrait is merely the public face of French adjudication. Within the French judicial system, the discourse used by French judges evinces a conception of the judicial role that appears to be rather at odds with the official portrait. This discourse, however, is essentially inaccessible, even to French practitioners.[24] It manifests itself in an internal and institutionalized discursive sphere in which members of the French judiciary argue among themselves about how to resolve litigated controversies.

In this hidden, "unofficial" discursive sphere, two judicial characters take center stage: the reporting judge and the advocate general. The reporting judge is the particular member of the appellate court panel who is assigned, in a given case, to review the lower court records, research the legal issues, and propose a solution to the panel.[25] The document that she produces and circulates to the court is known as her *rapport*.[26] The advocate general is a member of the *ministère public*, a ministry that argues before the courts in an amicus curiae capacity; speaking on behalf of the public welfare, society's interest, and the proper application of the law, he too proposes a solution to the court, in a document known as his *conclusions*.[27] The reporting judge and the advocate general are both *magistrats* — that is, they have each

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21 *See* Lasser, *supra* note 5, at 1340.

22 *See id.* at 1342.

23 1 JEAN CARBONNIER, DROIT CIVIL 18 (1967).

24 *See* Lasser, *supra* note 5, at 1357.

25 *See id.* at 1356–57.

26 *See id.*

27 *See* PERROT, *supra* note 9, at 260. Whenever I refer to a particular *conclusions*, I treat it as a singular noun. This avoids confusion when I refer to several *conclusions* at once or to *conclusions* in general, in which case I treat the noun as a plural.

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received their post-law-school education and training in the same school, L'Ecôle nationale de la magistrature, and can transfer back and forth between the bench and the *ministère public*.[28]

The unofficial discourse of the *rapports* and *conclusions* demonstrates that the French judicial system possesses all of the attributes that traditional American comparative analyses have claimed that it lacks. The *rapports* and *conclusions*, often fifty pages in length,[29] address in detail the facts of individual cases and extend their legal analyses far beyond the confines of relevant legislation. These documents demonstrate that the French judiciary views judging as more than the passive and mechanical application of the dictates of a perfectly clear and complete Code. The *magistrats* closely scrutinize academic publications, known as *doctrine*, and typically summarize, quote, and analyze numerous articles.[30] Furthermore, the *conclusions* and *rapports* always refer to, quote, and analyze prior cases; they routinely cite over a dozen judicial decisions.[31] Finally, these prior decisions, known as *jurisprudence*, carry significant normative force: they are presented, for example, as part of existing "positive law"[32] or as decisions that have "settled" a legal issue once and for all.[33] In the internal discursive sphere of the *rapports* and *conclusions*, *jurisprudence* is understood to have "evolved" over time under the guiding hand of the judiciary.[34] The fundamental legal issue, when viewed from inside the *magistrats'* unofficial discursive sphere, most often amounts to a decision about whether to apply, maintain, modify, or overturn *jurisprudence*.

How, then, do French judges, in their unofficial sphere, discuss and resolve legal controversies? First, instead of using the impersonal and mechanical style that characterizes their official decisions, they argue in an eminently personal style and even write in the first-person singular.[35] In this sphere, the French *magistrat* understands herself to be intercalated between the *loi* and the decision and to exercise interpretive agency; she is not merely applying the dictates of the Code, but is also interpreting the law.[36]

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[28] *See id.* at 264–65, 310.

[29] *See* Lasser, *supra* note 5, at 1370.

[30] *See id.* at 1374–76.

[31] *See id.* at 1376. I have never found a *rapport* or *conclusions* that did not analyze prior judicial decisions.

[32] *See, e.g.*, *Conclusions* of Advocate General Mourier, Judgment of July 12, 1991, Cass. ass. plén., 1991 Bull. Civ. V, No. 5, at 7, *in* 1991 RAPPORT DE LA COUR DE CASSATION 105, 111 (1992).

[33] *See, e.g.*, *Rapport* of Justice Massip, Judgment of Dec. 13, 1989, Cass. 1e civ., 1990 D.S. Jur. 469.

[34] *See, e.g.*, *Conclusions* of Advocate General Mourier, *supra* note 32, at 109–11.

[35] *See* Lasser, *supra* note 5, at 1388–89.

[36] *See id.*

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This shift in French judicial self-conceptions — from the judge as one who applies to one who interprets the law — represents a significant break with the official portrait. In the unofficial discursive sphere, the French *magistrat* overtly recognizes, and even emphasizes, that the *loi* contains gaps, conflicts, and ambiguities.[37] The recognition of such shortcomings thrusts the French judge into a new role, for the grammar of the Code has failed: the judge must now give meaning to the *loi* by interpreting it in terms of something external to the Code's grammar. In the parlance of contemporary literary theory, the French judge must now engage in a hermeneutic mode of reading:[38] she must consider *how* and *why* a given Code provision *should* be interpreted in a particular fashion.

When the French *magistrat* believes that the formal application of the Code's grammar does not adequately resolve a controversy, she tends to base her hermeneutic analysis on a small number of considerations. These considerations, which constitute the primary concerns of French academic *doctrine*, surface under a few rubrics, the most notable of which are "equity" and "legal adaptation/modernization."[39]

In her hermeneutic mode, the *magistrat* adopts a conception of her role that guides her in making interpretive decisions. She understands her role to possess social and political meaning and frames her adjudication in terms of goals to be achieved. In short, once the French judge recognizes a failure in the formal grammar of the Code, she finds herself engaged in policy discussion. It is precisely in the unofficial discursive sphere of the *conclusions* and *rapports* that social, eco-

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[37] *See id.* at 1373–74.

[38] De Man defines hermeneutics as "a process directed toward the determination of meaning," a process that "postulates a transcendental function of understanding, no matter how complex, deferred, or tenuous it might be, and [that] will, in however mediated a way, have to raise questions about the extralinguistic truth value of literary texts." DE MAN, THE RESISTANCE TO THEORY, *supra* note 17, at 55–56. Hermeneutic reading seeks to produce the meaning of a text by interpreting it in terms of some historical, political, social, economic, religious, or other theory. *See id.* at 57. In his model analysis of the "rules of courtesy," Dworkin describes hermeneutic approaches, which he calls "the 'interpretive' attitude," as possessing two components. DWORKIN, *supra* note 17, at 47. Dworkin explains:

> The first is the assumption that the practice of courtesy does not simply exist but has value, that it serves some interest or purpose or enforces some principle — in short, that it has some point — that can be stated independently of just describing the rules that make up the practice. The second is the further assumption that the requirements of courtesy . . . are . . . sensitive to its point, so that the strict rules must be understood or applied or extended or modified or qualified or limited by that point. Once this interpretive attitude takes hold, the institution of courtesy ceases to be mechanical . . . . People now try to impose *meaning* on the institution . . . and then to restructure it in the light of that meaning.

Id. This Article uses the term "hermeneutic reading" to describe a mode of reading that seeks to derive the meaning of a text by interpreting it in terms of something external to the grammar of the text. This external source of meaning may be some general sociopolitical or other theory, which would yield, for example, Marxist hermeneutics, or it may be the purposes or policies ascribed to the text, which would yield purposive or policy hermeneutics.

[39] *See* Lasser, *supra* note 5, at 1344–50.

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nomic, institutional, or other policy considerations, apparently absent from the official French judicial decisions, come to the fore.

As is readily apparent, the French *magistrat* is not simply, as the official portrait might suggest, a rigid formalist who mechanically applies the Code to litigated fact scenarios. Another portrait of the French civil judge emerges from the internal discursive sphere that exists within the French judicial system. According to this unofficial portrait, the *magistrat* is engaged in a hermeneutic project; she seeks to produce coherent, policy-driven, and normative judicial responses to contemporary legal problems.

This is not to say, however, that the official portrait's formal grammar is a mere "front" that masks "what is really going on" in the French judicial system — namely, the unofficial portrait's policy analysis. Both modes of analysis — formal grammar and policy hermeneutics — operate simultaneously, and each apparently dominates its own sphere. *French judicial discourse has simply bifurcated.* As a result, the official French judicial decision maintains its predominantly formalist discourse of grammatical application, whereas the hermeneutic discourses of legal adaptation and equity — that is, of policy discussion — surface elsewhere, in the *rapports* and *conclusions*. This bifurcation resolves the tension between the traditional French distrust of the judiciary[40] and the twentieth-century French impulse toward socially responsive adjudication.[41]

The French judicial system faces, however, a fundamental dilemma: how to rationalize and justify the coexistence of its two, seemingly contradictory portraits of the judicial role. The system has done so by erecting a conceptual framework that encompasses and mediates between both sides of its bifurcated discourse. This framework rests on a few mediating concepts that emerge as the dominant concerns of unofficial French judicial discourse and French academic *doctrine*.

Two of these fundamental mediating concepts are "legal adaptation" and "equity." Neither concept explicitly or seriously threatens the formal grammar of the Code. To the extent that the French *magistrat* engages in policy hermeneutics in order to adapt and modernize the law, it is only the *interpretation* of the Code provision — and not the formal wording of the provision itself — that changes. Similarly, the fact that *magistrats* occasionally perform an equity function that re-

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[40] As Dawson explains, the French appellate courts exercised extraordinary powers prior to the French Revolution. *See* DAWSON, *supra* note 13, at 375–76. They not only decided cases, but also enacted regulations and claimed the power to suspend the enactment of royal legislation. *See id.* They often used these powers to hamper royal attempts to pass liberalizing legislation in the days leading up to the Revolution. *See id.* The result was a lasting French distrust of the judiciary, a distrust that led to the post-Revolution attempts to minimize judicial power and to establish a particularly rigid separation of governmental powers. *See id.*; MERRYMAN, *supra* note 13, at 19, 40–41.

[41] *See* Lasser, *supra* note 5, at 1344–53.

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quires them to make interpretive decisions in light of "social reality" does not mean that they have to abandon the statutory law or the process of formalist statutory application. It simply means that, on some marginal occasions (that equity itself will correct), the interpretation of a Code provision will vary from its literal language; on all other occasions, one can infer, the *magistrat* will grammatically apply the formal law.

The final, and perhaps most important, mediating concept is the notion of "the sources of the law." The recognition by French *magistrats* and academics that civil judges exercise normative power does not indicate their acceptance of the notion that these judges make law. As the official portrait makes abundantly clear, only the legislature can create bona fide law.[42] Although judicial decisions must, for example, occasionally fill gaps in the Code, by definition these decisions cannot qualify as law. They are therefore regarded as mere "authorities," juridical entities that exercise persuasive — but not "legal" — force.[43]

The mediating concepts of legal adaptation, equity, and "the sources of the law" therefore facilitate and justify the judicial exercise of policy discretion and normative power without overtly jeopardizing the official portrait's notion of absolute legislative supremacy. Thus, these concepts alleviate the tension between the official and unofficial portraits, between grammatical application and hermeneutic interpretation of the *loi*.

I do not mean to suggest, however, that the French judicial system maintains two *contradictory* modes of reading (the grammatical/formalist and the hermeneutic) and segregates them into two distinct discursive spheres (the official and the unofficial, respectively). Although the French system does in fact maintain two distinct modes of reading, they are actually completely interdependent, constantly leaking into one another, and at no point pure.

Traces of policy hermeneutics, for example, surface incessantly in the official discursive sphere's judicial decisions, although the discourse of these decisions appears to be purely grammatical. Their emergence, however, is cryptic and difficult for the comparatist to detect. They manifest themselves as extremely short, but often repeated, statements of judicial norms, or as slight textual modifications of Code provisions paraphrased in the decision. These brief linguistic moments, recognizable to French judges, academics, and practitioners, are usually the most important ones in any official French judicial decision. They are traces of, or gateways to, the internal discursive sphere, in which French *magistrats* construct their legal interpretations

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[42] Some French academics have also considered "custom" to be a valid "source" of law. *See, e.g.*, 1 FRANÇOIS GÉNY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF 50–52 (2d ed. 1919).

[43] *See* 1 CARBONNIER, *supra* note 23, at 115–17, 242–44; 1 GÉNY, *supra* note 42, at 50–52.

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on the basis of elaborate policy hermeneutics. The grammar of the official decision therefore relies to a significant extent on the unofficial discourse's policy hermeneutics.

Conversely, traces of grammatical reading surface constantly in the unofficial discursive sphere. For example, *rapports* and *conclusions* often begin with a gesture toward traditional grammatical application: they open their analyses with a statement of the statutory law.[44] The French *magistrat* only overtly deploys policy hermeneutics when she perceives a gap, conflict, ambiguity, or other failure in the Code's grammar.[45]

Grammar also reemerges in the unofficial sphere in another, quite fascinating, way. Once the formalist application of the Code's grammar is perceived to have failed, and the shift to policy hermeneutics has therefore occurred, French unofficial discourse does not remain purely hermeneutic. Instead, the turn to hermeneutics precipitates the production of formal judicial norms. These norms are then deployed — complete with a discourse of "application" — in the unofficial sphere and even surface in an encrypted fashion within the body of the official judicial decision.

The production of formal judicial norms, which the official portrait explicitly forbids, is therefore precisely what permits the return of formal grammar to the French judicial system. These judicial norms, like the Code provisions they displace, are then read both grammatically and hermeneutically. Depending on the assorted equity, adaptation, or other policy considerations in play, the French *magistrat* will then maintain, modify, or overturn the established *jurisprudence*.

Grammar and hermeneutics not only coexist in the French civil judicial system, but have also proven to be utterly interdependent. I have explained this phenomenon elsewhere:

> The cycle of the French civil judicial system can be summed up in the following sequence: (i) formal grammar of the statutory law; (ii) the perceived breakdown of the statutory law's formal grammar; (iii) the turn to policy hermeneutics in order to fix the breakdown; (iv) the return of grammar as formal judicial norms; (v) the perceived breakdown of the formal grammar of the judicial norms; and (vi) the turn to policy hermeneutics in order to fix the breakdown, and so on. Grammar is salvaged and reproduced by hermeneutics, which [exists precisely] because of the perceived failure of grammar.
>
> . . . The French judicial system has apparently found that it cannot simply choose between formalism and hermeneutics. Both modes of reading are always available, but each relies on, implicates, and resorts to the other.[46]

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[44] *See* Lasser, *supra* note 5, at 1370, 1381–82.

[45] *See id.* at 1381.

[46] *Id.* at 1409–10.

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III. AMERICAN JUDICIAL DISCOURSE

A. *Introduction: The "Judicial Test"*

Having briefly introduced the discourses of the French civil judicial system, this Article now examines the portraits of judging and interpretation that United States Supreme Court decisions offer. The analysis focuses on a readily identifiable genre of Supreme Court writing — in particular, Supreme Court decisions that establish and apply "judicial tests."[47] Do these Supreme Court decisions offer discourses, judicial portraits, and interpretive ideologies that differ from or correspond to those presented by the French legal system?

Unlike the French judicial system, which offers two relatively segregated modes of discourse (the official/grammatical and the unofficial/hermeneutic), the American judicial system tends to combine the grammatical and hermeneutic discourses in a single space — the judicial opinion. The judicial Test[48] offers one of the best examples of this characteristic discursive integration.

This Part analyzes a specific variant of the American judicial Test — that is, the kind of Test that is referred to by name and that tends to be composed of two to four sets of rules or criteria (known as "parts" or "prongs") stated in the rather categorical fashion of a legislative statute.[49] Such judicial Tests are part of a distinctive form of judicial analysis that I call the "Test Method." This Part focuses on the discursive and interpretive effects produced by judicial employment of the Test Method.

The Test Method's fundamental effect is the displacement of apparently controlling, nonjudicial, primary texts.[50] This displacement correspondingly installs specific judicial language as the controlling legal text. The Test Method thus represents a transition from nonjudicial to judicial text. This analysis investigates how and why the initial displacement takes place, how it is maintained, and what kind of judicial discourse follows on its heels.

In order to answer these questions, this Part discusses four lines of Supreme Court decisions that utilize judicial Tests: the Commerce Clause cases stemming from *Complete Auto Transit, Inc. v. Brady*,[51]

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[47] In recent years, judicial tests have become something of a hot topic in American jurisprudence. *See, e.g.*, NAGEL, *supra* note 4, at 121–22; Horwitz, *supra* note 9, at 98–102; Schauer, *supra* note 4, at 1455–59.

[48] For clarity's sake, I capitalize the word "Test" whenever it refers to a multi-part or multi-prong test of the type this Article analyzes.

[49] For reasons of space, this analysis does not address the ubiquitous judicial "balancing test." The structure, discourse, and rhetoric of balancing tests differ significantly from those of multi-prong judicial Tests.

[50] In the lines of cases relevant to this analysis, the primary texts are federal statutes and constitutional clauses.

[51] 430 U.S. 274 (1977).

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the "collateral order" cases stemming from the Court's interpretation of 28 U.S.C. § 1291 in *Cohen v. Beneficial Industrial Loan Corp.*,[52] the "ineffective assistance of counsel" cases stemming from the Court's Sixth Amendment analysis in *Strickland v. Washington*,[53] and the First Amendment obscenity cases stemming from *Memoirs v. Massachusetts*[54] and *Miller v. California*.[55]

Section B of this Part studies, in the context of the first three of these lines of cases, the basic discursive devices that the Court uses to displace the controlling constitutional or legislative text from the center of its analysis. Two such discursive techniques — "purposive discourse" and "effect orientation" — recur in each of the cases in which the Court establishes a judicial Test.[56]

Purposive discourse and effect orientation are remarkably simple, yet singularly effective, displacement techniques. When the Court makes the transition to purposive discourse or effect orientation, it discusses the supposed purposes and practical effects of a given primary text rather than focusing on the language of the text itself. However, in order to do this, it must first attribute these purposes and effects to the primary text. Regardless of how well-justified the Court's particular attribution may be, the mere attribution and discussion of purposes and effects results in an important discursive shift: the Court's analysis comes to focus on purposes and effects that the Court itself has produced. In short, judicial text displaces primary text.

This process of displacement can be recast in interpretive terms. The shift to purposive discourse and effect orientation represents a shift away from grammatical reading; it represents the deprioritizing of a certain "literalist" — or, in current legal terms, "formalist" — mode of reading in favor of an explicitly hermeneutic approach. This new approach seeks to generate the meaning of the controlling legal text by reading the language of the text *in terms of something else*: its purposes and practical effects.

This change in interpretive approach leaves at least two traces in the body of the judicial text. The first, already mentioned, is the displacement of the primary text by judicial text. This displacement should not, however, come as a surprise, because meaning is extrinsic to the grammar of a text. Hermeneutic modes of reading are premised on the guiding logic of historical, social, political, or other metatheories that are extrinsic to the grammar of a given text. Such hermeneutic approaches therefore entail the reading of a text in terms of something

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[52] 337 U.S. 541 (1949).

[53] 466 U.S. 668 (1984).

[54] 383 U.S. 413 (1966).

[55] 413 U.S. 15 (1973).

[56] One should not confuse these terms with the "purpose tests" and "effects tests" that the Supreme Court uses in determining the constitutionality of state action in, for example, the equal protection context.

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external to that text's grammar.[57] The analytic centrality of *judicial* text in the Court's Test Method cases marks the very *externality* of purposive discourse and effect orientation to the grammar of the legislative or constitutional text at issue.

The second trace, far more noticeable than the first, is the remarkably persistent and vehement attack against "formalism" that permeates so many of the Court's Test Method decisions.[58] This characteristic trait demonstrates the close link between the establishment of judicial Tests and the Court's explicit attempt to adopt a new interpretive approach to adjudication.

Section C of this Part focuses on the state of the Supreme Court's discourse once the initial displacement of the controlling primary text and the establishment of a judicial Test have taken place. Although the shift to the discourse of purposes and effects — characteristic of the Test Method — represents a transition from a grammatical mode of reading to a hermeneutic one, one can only regard the establishment of a judicial Test as a return of the formalist repressed.

It is precisely this admixture of the formal or grammatical with the purposive or hermeneutic that characterizes the Test Method,[59] gives it its discursive strength, and distinguishes it from the one-dimensional French official judicial decision. Yet as is discussed in section D of this Part, the Test Method itself runs into its own characteristic problems, problems that pose fascinating interpretive and theoretical questions.

B. The Judicial Test's Displacement of Primary Text

1. Commerce Clause Cases: The Complete Auto *Test.* — The *Complete Auto Transit, Inc. v. Brady*[60] line of Commerce Clause cases involves the constitutional validity of state taxes levied on out-of-state corporations engaged in interstate commerce.[61] The first case in this line, *Spector Motor Service, Inc. v. O'Connor*,[62] was the last important Supreme Court decision to strike down a state statute on the ground that the states are categorically forbidden under the Commerce Clause to levy taxes on corporations for the privilege of engaging in exclusively interstate commerce.[63] *Complete Auto*, decided in 1977, ex-

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[57] *See supra* note 38.

[58] It is somewhat ironic that Frederick Schauer praises Test Method decisions for their production of formal rules, when the decisions themselves disparage "formalism." *See* Schauer, *supra* note 4, at 1459–66.

[59] Robert Nagel makes a similar claim. *See* NAGEL, *supra* note 4, at 129–31.

[60] 430 U.S. 274 (1977).

[61] The Commerce Clause grants Congress the power to "regulate Commerce . . . among the several States." U.S. CONST. art. I, § 8, cl. 3.

[62] 340 U.S. 602 (1951).

[63] *See id.* at 608–10.

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pressly overruled *Spector*.[64] The decision also established a set of criteria, known as the *Complete Auto* Test, for reviewing state taxation of interstate commerce.[65]

(a) Purposive Discourse. — *Spector* had stood for a certain "literalist" reading of the Commerce Clause. Its reasoning, a perfect example of argument *a contrario*, led to a blanket rule against state taxes levied for the privilege of engaging in exclusively interstate commerce. The straightforward reasoning, centered entirely on the constitutional text, proceeded as follows: because the Commerce Clause states that Congress has the power to "regulate Commerce . . . among the several States," the states are strictly forbidden to tax interstate commerce.[66]

The full extent of *Spector*'s text-centered, grammatical approach surfaced in the Court's response to an argument presented by the State of Connecticut in defense of its tax scheme. The State argued that it could have used alternative tax schemes to raise — constitutionally — the same amount of money from the same out-of-state corporations.[67] Thus, Connecticut maintained, no valid ground existed to strike down its particular tax scheme.[68] The *Spector* Court ardently rejected that argument:

> It serves no purpose for the [Connecticut] State Tax Commissioner to suggest that, if there were some intrastate commerce involved or if an appropriate tax were imposed as compensation for petitioner's use of the highways, the same sum of money as is at issue here might be collected lawfully from petitioner. Even though the financial burden on interstate commerce might be the same, the question whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so.[69]

The Court's response evinces a categorical rejection of purposive interpretation. The purposes of the state tax scheme and of the Commerce Clause were utterly irrelevant, because consideration of the Commerce Clause's text was dispositive of the tax scheme's unconstitutionality. Insofar as the *Spector* Court was concerned, the constitutional text says what it says, and therein lay the beginning and the end of the question.

For the purposes of this analysis, the fact that *Complete Auto* expressly overturned *Spector* is relatively unimportant compared to the way in which it did so. The key to *Complete Auto* is its switch to purposive discourse, and thus its change in interpretive approach.

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64 *See Complete Auto*, 430 U.S. at 288–89.
65 *See infra* pp. 706–07.
66 *Spector*, 340 U.S. at 607–08.
67 *See id.* at 608.
68 *See id.*
69 *Id.*

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Complete Auto's fundamental discursive maneuver consisted of making *Spector* stand for an "underlying philosophy."[70] The Court stated: "The [*Spector*] rule reflects an underlying philosophy that interstate commerce should enjoy a sort of 'free trade' immunity from state taxation."[71] This statement represents a recharacterization and transformation of the *Spector* approach. *Spector* was not, at least on its face, generated by an "underlying philosophy." Quite to the contrary, *Spector* explicitly purported to be the necessary outcome of the Commerce Clause itself.

By recharacterizing *Spector* as it did, the *Complete Auto* Court liberated itself from *Spector*'s formalist interpretive approach, a move that allowed it to discuss the purposes of the Commerce Clause rather than having to focus on its language. The Court then proceeded to attribute a purpose, or rather a non-purpose, to the Clause. The Court stated: "it was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business."[72] The Court therefore framed the issue in *Complete Auto* as a conflict between the "just share" purpose and the "free trade" philosophy.

Framed in these terms, *Complete Auto* represents the defeat of the "free trade" philosophy at the hands of the "just share" purpose. In fact, *Complete Auto* also marked the defeat of *Spector*'s text-centered, grammatical interpretive approach: *Complete Auto* made *Spector* stand for, or "reflect," an "underlying philosophy," and thus absorbed *Spector* into *Complete Auto*'s purposive, hermeneutic analysis. In so doing, the Court displaced the *text* of the Commerce Clause from the center of its analysis, which came to focus on the *purposes* that the Court had itself attributed, in *its* own words, to *Spector* and to the constitutional text.

The Court continued to reframe its Commerce Clause analysis in purposive terms in *Commonwealth Edison Co. v. Montana*,[73] the first Supreme Court case to label the criteria established in *Complete Auto* a "test." *Complete Auto* had only attributed a non-purpose to the Commerce Clause; *Commonwealth Edison* attributed a veritable purpose, the source of which is somewhat surprising. The Court stated: "The premise of our [interstate commerce] discrimination cases is that '[t]he very purpose of the Commerce Clause was to create an area of free trade among the several States.'"[74] In other words, the purpose that the Court attributed to the Clause was *Spector*'s "underlying philosophy" of "free trade," the very "philosophy" that the Court had con-

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70 Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 278 (1977).

71 *Id.*

72 *Id.* at 279 (quoting Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938)) (internal quotation marks omitted).

73 453 U.S. 609 (1981).

74 *Id.* at 618 (second alteration in original) (quoting McLeod v. J.E. Dilworth Co., 332 U.S. 327, 330 (1944)).

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structed in *Complete Auto* and then had defeated with the "just share" purpose.

The net result of the Court's reframing of its Commerce Clause analysis was the nearly complete displacement of the text of the Commerce Clause by the *Complete Auto* Test and its purposive discourse. It was the Test that stood at the center of the Court's analysis, for the Test mediated the conflict between the competing purposes that the Court attributed to the Clause. The Test states that a state tax on interstate commerce is constitutional only if it is "applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[75] The establishment of this Test and the corresponding displacement of the Commerce Clause as the focus of the Court's analysis marked the transition from *Spector*'s grammatical approach to *Complete Auto*'s purposive, hermeneutic one.

The following passage, quoted from *Goldberg v. Sweet*,[76] demonstrates the final stage in the Court's restructuring of its Commerce Clause analysis. For the Court, Justice Marshall stated:

> The wavering doctrinal lines of our pre-*Complete Auto* cases reflect the tension between two competing concepts: the view that interstate commerce enjoys a "free trade" immunity from state taxation; and the view that businesses engaged in interstate commerce may be required to pay their own way. *Complete Auto* sought to resolve this tension by specifically rejecting the view that the States cannot tax interstate commerce, while at the same time placing limits on state taxation of interstate commerce. Since the *Complete Auto* decision we have applied its four-pronged test on numerous occasions.[77]

The parameters of the Court's analysis thus came to consist of "two competing concepts" or "purposes," each put forth in the Court's own terms. The focus then fell on the "tension"-resolver: the Court's own *Complete Auto* Test. Remarkably enough, the text of the Commerce Clause has been entirely displaced from the Court's interstate commerce analysis.

(b) Effect Orientation. — The Court's persistent call to consider the practical effects of Commerce Clause doctrine facilitated the textual displacement described above. This discourse of practical effects demonstrates that the implementation of the Test Method represented the Court's rather calculated attempt to shift from a formalist to a hermeneutic interpretive method.

Justice Clark's acerbic dissent in *Spector*, followed by the majority opinions in *Complete Auto* and its progeny, launched a concerted attack on *Spector*'s purportedly literal approach to the Commerce

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[75] *Complete Auto*, 430 U.S. at 279.

[76] 488 U.S. 252 (1989).

[77] *Id.* at 259–60 (citations omitted).

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Clause. His dissent set the tone for a new interpretive approach that would focus on the economic realities and practical effects of Commerce Clause doctrine. Noting that the "Connecticut tax [met] every practical test of fairness and propriety,"[78] Justice Clark argued:

> The Court does not ask whether the State is merely asking interstate commerce to pay its way, or whether the State in fact provides protection and services for which such commerce may fairly be charged. Nor is the Court concerned whether the tax puts interstate business at a competitive disadvantage or is likely to do so. Instead, the tax is declared invalid simply because the State has verbally characterized it as a levy on the privilege of doing business within its borders. . . . [T]he standard employed to strike down Connecticut's tax is [no] more than a matter of labels.[79]

Justice Clark accused the *Spector* majority of "cloaking a purely verbal standard [(exclusively interstate commerce)] with constitutional dignity" and of striking down the Connecticut tax merely "[b]ecause of its failure to use the right tag."[80] The states, he concluded, would consequently be forced to perform the useless task of "enacting laws more felicitously drafted."[81]

The thrust of Justice Clark's criticism is quite clear. He objected to *Spector*'s focus on language, text, and writing (as is evidenced by the recurrence of such terms as "verbal," "verbally characterized," "labels," "purely verbal standard," "tag," and "felicitously drafted") and contrasted that focus with an approach that would consider practicalities and economic effects.

Complete Auto continued Justice Clark's harsh criticism of *Spector*'s interpretive approach. Justice Blackmun, writing for a unanimous Court, stated that the "rule" in *Spector* "look[ed] only to the fact that the incidence of the tax [was] 'the privilege of doing business[,]' [and that] it deem[ed] irrelevant any consideration of the practical effect of the tax."[82] As such, the rule "ha[d] no relationship to economic realities. Rather it [stood] only as a trap for the unwary draftsman."[83] To the *Complete Auto* Court, then, *Spector* represented "a triumph of formalism over substance"[84] that operated merely as "a rule of words."[85] The Court decided to adopt an approach that would "consider[] not the formal language of the . . . statute[,] but rather its prac-

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78 Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602, 612 (1951) (Clark, J., dissenting). The anticipatory linkage of "practical" with "test" is striking.

79 *Id.* at 611.

80 *Id.* at 614.

81 *Id.*

82 Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 278 (1977).

83 *Id.* at 279.

84 *Id.* at 281.

85 *Id.* at 286.

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tical effect."[86] Summarizing its decision to overturn *Spector*, the Court stated:

> There is no economic consequence that follows necessarily from the use of the particular words, "privilege of doing business," and a focus on that formalism merely obscures the question whether the tax produces a forbidden effect. Simply put, the *Spector* rule does not address the problems with which the Commerce Clause is concerned. Accordingly, we now reject the rule of *Spector* . . . .[87]

Effect orientation represents the flip side of purposive discourse (as effects are measured in terms of purposes) and operates in an identical manner. Just as the switch to purposive discourse requires the Court to describe, in its own language, the purposes that it attributes to the primary text, so does the transition to effect orientation require the judicial elaboration of "economic realities" and "practical effects." The switch marks the transition from a nonjudicial text to judicially described phenomena and thus a transition from a grammatical to a hermeneutic mode of reading.

One cannot emphasize enough the extent to which the discourse of practical effects permeates, and even dominates, the *Complete Auto* line of Commerce Clause decisions. This orientation toward effects — and the vehemently anti-formalist discourse that tends to accompany it — is so fundamental to the Test Method that the Supreme Court continues to reiterate it forcefully in every decision that applies the *Complete Auto* Test.[88]

The switch to purposive discourse and effect orientation is doubly fundamental to the Test Method. First, it functions as a device that

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[86] *Id.* at 279.

[87] *Id.* at 288–89. It is important to note that *Complete Auto* went to great pains to refer to the *Spector* holding as a "rule." *Spector* itself did no such thing. The characterization of the *Spector* holding as a "rule" served two purposes. First, it suggested that the *Spector* approach was unduly and categorically rigid — in other words, that it was formalist. Second, it operated as a discursive maneuver that served to distance *Spector*'s "literal" or grammatical interpretive approach to the Commerce Clause from the Commerce Clause itself. That is, it turned a grammatical reading of the text of the Clause into a merely formal rule. This maneuver permitted *Complete Auto* to move away from *Spector*'s grammatical reading of the Clause without overtly confronting the text of the Clause itself.

[88] Justice Marshall, for example, wrote for the Court in *Commonwealth Edison*: "We conclude that the same 'practical' analysis should apply in reviewing Commerce Clause challenges to state severance taxes. . . . [The] effect [on interstate commerce] is the proper focus of Commerce Clause inquiry." Commonwealth Edison Co. v. Montana, 453 U.S. 609, 616 (1981). Justice Stevens, writing for the Court in *American Trucking Ass'n v. Scheiner*, 483 U.S. 266 (1987), stated: "In our more recent decisions we have rejected [*Spector*'s] somewhat metaphysical approach to the Commerce Clause[, an approach] that focused primarily on the character of the privilege rather than the practical consequences of the tax." *Id.* at 294–95.

Having reached this stage, the Court has not felt the need to continue producing novel arguments for its new Commerce Clause approach. Writing for the Court in *Goldberg*, for example, Justice Marshall was content to quote from the endless "practical effect" language that the *Complete Auto* line of cases provided, *see* Goldberg v. Sweet, 488 U.S. 252, 259–60 n.11 (1989), rather than to bother contributing original material.

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clears the analytic ground of the controlling, nonjudicial, primary text (in this case, the Commerce Clause) and permits the Court to operate entirely in the realm of its own language. Second, having thus created the requisite textual space, the discursive and interpretive switch permits the establishment of the judicial Test, which takes the place of the previously controlling, primary text. The judicial Test then takes up purposive discourse and effect orientation as the very substance of its new interpretive approach. In other words, the Test establishes a hermeneutic based on these discursive techniques.

The *Complete Auto* Test represents a typical example of this new hermeneutic. According to the Test, a state tax on interstate commerce is constitutional only if it is "applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[89] The Test carries within itself the discourse and hermeneutic of purposes and effects: the state tax must not produce certain practical effects (such as discrimination against interstate commerce) that are contrary to the Commerce Clause's purposes, as defined by the Court.[90] The fact that the Court will likely apply the Test in all future Commerce Clause cases assures the continual displacement of the language of the controlling legal text and thus the continual rejection of a formalist approach to reading that text.

2. The Collateral Order Doctrine: The Cohen *Test.* — The deployment of purposive discourse represents a basic attribute of every line of Supreme Court cases that utilizes the Test Method. The line of cases that establishes and applies the "collateral order doctrine" is no exception. The doctrine defines the circumstances in which interlocutory appeals may be made from certain "nonfinal" judgments. The controlling federal statute, 28 U.S.C. § 1291, provides for appeal only "from all final decisions of the district courts."[91] *Cohen v. Beneficial Industrial Loan Corp.*[92] gave birth to the collateral order doctrine by creating an exception to the finality requirement of § 1291. *Cohen* established a set of criteria to determine when such an exception might be warranted. This set of criteria came to be known as the *Cohen* Test.

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[89] *Complete Auto*, 430 U.S. at 279.

[90] The most explicit example of the inclusion of the discourses of purposes and effects within the language of a judicial Test occurs in the *Lemon v. Kurtzman* three-prong Establishment Clause Test, which states: "First, the statute must have a secular legislative *purpose*; second, its principal or primary *effect* must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (emphasis added) (citations omitted) (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

[91] 28 U.S.C. § 1291 states, in pertinent part, that the federal courts of appeals are vested with "jurisdiction of appeals from all final decisions of the district courts." 28 U.S.C. § 1291 (1994).

[92] 337 U.S. 541 (1949).

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The *Cohen* Court opened its analysis by performing two fundamental discursive moves that attributed purposes to the federal appealability statutes. First, the Court derived a purpose from 28 U.S.C. § 1292,[93] a move that may take even the attentive reader somewhat by surprise: the statute in question in the case, after all, was § 1291, not § 1292. Writing for the Court, Justice Jackson stated: "Section 1292 allows appeals also from certain interlocutory orders, decrees and judgments, not material to this case except as they indicate the purpose to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties."[94] Second, the Court took the very purpose that it had attributed to § 1292 — to allow appeals when nonfinal judgments might have an "irreparable effect" on the parties — and proceeded to incorporate it into the purpose that the Court attributed to § 1291. Justice Jackson explained:

> The effect of [§ 1291] is to disallow appeal from any decision which is tentative, informal or incomplete .... Nor does the statute permit appeals from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that *effectively* may be reviewed and corrected if and when final judgment results.[95]

Thus, in the course of the Supreme Court's analysis, § 1291 acquired a purpose derived from § 1292.

Justice Jackson's decision in *Cohen* effectively — if somewhat surreptitiously — displaced the text of § 1291. The initial transfer to purposive discourse permitted the Court to focus on the supposed purpose of the statute rather than on its language. This standard discursive mechanism represented only the beginning of the Court's displacement of the text of § 1291. In this case, the externality of purposive hermeneutics to the grammar of the primary text (§ 1291) was further marked by the derivation of purposes from an entirely different text, that of § 1292. This double shift permitted, if not required, the Court to perform its § 1291 analysis completely independently from the text of § 1291. The result was that the Court's analysis left a gaping hole in the place that § 1291 had occupied. The Court's mode of analysis created the necessity for the Court itself to produce a controlling text.

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93. 28 U.S.C. § 1292 (1994).

94 *Cohen*, 337 U.S. at 545. 28 U.S.C. § 1292 states, in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing such order. The Court of Appeals ... may thereupon, in its discretion, permit an appeal to be taken from such order ....

28 U.S.C. § 1292 (1994).

95 *Cohen*, 337 U.S. at 546 (emphasis added).

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The Court proceeded to do so:

> This decision appears to fall in that small class [of cases] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.[96]

This new and controlling judicial text, derived from and necessitated by the Court's purposive discourse, became known as the *Cohen* exception to the finality rule, the collateral order doctrine, or the *Cohen* collateral order Test.

In later cases, the Court-defined purposes of § 1291 took on a course and power of their own. At first, § 1291's purposes proliferated and thus offered the Court an ever-expanding body of judicial — as opposed to primary, or in this case, legislative — text on which to focus its analysis. For example, Justice Stevens, writing for the Court in *Coopers & Lybrand v. Livesay*,[97] added the following purpose to § 1291: "one vital purpose of the final judgment rule [is] 'maintaining the appropriate relationship between the respective courts.'"[98] By the time the Court decided *Firestone Tire & Rubber Co. v. Risjord*,[99] the list of the statute's purposes had become truly redoubtable:

> This rule, that a party must ordinarily raise all claims of error in a single appeal following final judgment on the merits, serves a number of important purposes. It emphasizes the deference that appellate courts owe to the trial judge .... Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that [the] individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of "avoid[ing] the obstruction of just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise ...." The rule also serves the important purpose of promoting efficient judicial administration.[100]

Section 1291's initial Court-attributed purpose has expanded, then, into a veritable litany of jurisprudential concerns. The Court's purposive discourse thus represents a discursive mechanism that calls for and generates an ever greater amount of judicial text that further displaces the previously controlling legislative text.

Eventually, in *Livesay*, the Court's expanding purposive discourse even challenged the authority of the text of § 1291. The Court, per Justice Stevens, began by quoting the purpose of the finality requirement that it had first expounded in *Cohen*: "to combine in one review

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96 *Id.*

97 437 U.S. 463 (1978).

98 *Id.* at 476 (quoting Parkinson v. April Indus., 520 F.2d 650, 654 (2d Cir. 1975)).

99 449 U.S. 368 (1981).

100 *Id.* at 374 (citations omitted) (quoting Cobbledick v. United States, 309 U.S. 323, 325 (1940)). It is important to note that all of these purposes are oriented toward "practical effects." *Id.*

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all stages of the proceeding that effectively may be reviewed and corrected if and when judgment results."[101] The Court then explained that "a rigid insistence on technical finality would sometimes conflict with the purposes of the statute";[102] accordingly, the Court referred to the *Cohen* exceptions to the finality rule as encompassing "that limited category of orders which, though nonfinal, may be appealed without undermining the policies served by the general [final judgment] rule."[103] Finally, the Court described "the policy of the final judgment rule [as] embodied in 28 U.S.C. § 1291."[104] Taken together, this series of statements implies and almost overtly states that, should the Court determine that a literal reading of the text of the statute runs counter to the statute's Court-attributed purpose, the purpose will take precedence. Under these circumstances, the text of the statute loses its independent authority; it becomes but the "embodiment" of its Court-attributed purpose or policy, and it is this purpose or policy — and not the language of the text itself — that stands as the proper source of interpretive authority. In other words, the Court repudiates a grammatical approach in favor of a purposive hermeneutic.

Perhaps the most overt sign of the Court's change in interpretive approach emerged for the first time in *Cohen* itself. In the opinion, the Court immediately followed its enunciation of the Test with these words: "The Court has long given [§ 1291] this practical rather than a technical construction."[105] This sentence, which makes rather explicit the Court's choice between two modes of reading the statute, is almost invariably cited in each of the Court's ensuing § 1291 cases.[106]

3. Ineffective Assistance of Counsel Cases: The Strickland *Test.* — The Supreme Court cases dealing with "ineffective assistance of counsel" in criminal trials offer the most simple, straightforward, and overt example of the displacement of controlling primary text by judicial text.[107] The purposes and effects that the Court has attributed to the Counsel Clause of the Sixth Amendment have displaced the language of the Clause and left a judicial Test as the controlling language in Counsel Clause cases.

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101 *Livesay*, 437 U.S. at 468 (quoting *Cohen*, 337 U.S. at 546).

102 *Id.* at 471.

103 *Id.*

104 *Id.*

105 *Cohen*, 337 U.S. at 546.

106 *See* Stringfellow v. Concerned Neighbors in Action, 480 U.S. 370, 378 (1987); Richardson v. United States, 468 U.S. 317, 322 (1984); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 375 (1981); *Livesay*, 437 U.S. at 471; Abney v. United States, 431 U.S. 651, 658 (1977).

107 The Counsel Clause states that, in "all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. amend. VI. These cases address whether and under what circumstances a defendant whose counsel has been incompetent can claim to have been denied his "right to counsel."

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Strickland v. Washington[108] is the Supreme Court's landmark "ineffective assistance of counsel" decision. Writing for the Court, Justice O'Connor displaced the Counsel Clause cleanly, quickly, and completely. As soon as she finished recounting the facts and procedural history of the case, Justice O'Connor framed the issue before the Court in the following terms: "The petition presents a type of Sixth Amendment claim that this Court has not previously considered in any generality. . . . [This is] a claim of 'actual ineffectiveness' of counsel's assistance in a case going to trial."[109] Justice O'Connor's odd choice of words — that is, her statement that this type of claim had yet to be "considered in any generality" (rather than "considered in any particularity") — anticipated the analytic method that the Court was about to employ. The Court would expound, and then focus on, the general purposes of the Sixth Amendment's Counsel Clause.

Justice O'Connor shifted to purposive discourse in the very first sentence of her analysis. She stated: "this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial."[110] The key expression in this sentence is "in order to"; it implies that the Counsel Clause exists for a reason, a purpose. A single sentence accomplished the Court's transition to a purposive hermeneutic.

Having identified "the fundamental right to a fair trial," Justice O'Connor could then expand the amount of relevant constitutional material. She stated: "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial through the several provisions of the Sixth Amendment, including the Counsel Clause . . . ."[111] In addition to illustrating the expansion of relevant constitutional material (from the Counsel Clause to the entire Sixth Amendment and the Due Process Clauses), this sentence demonstrates the changing hierarchy in the Court's interpretive approach. Not only did the Counsel Clause become merely one relevant text among many, but each of these texts was also relevant simply because it protected "the fundamental right to a fair trial." The Court addressed the constitutional provisions because they protected "fair trials"; it did not address the issue of fair trials because of the existence of the constitutional texts. This shift in the Court's interpretive hierarchy is perhaps best illustrated by the fact that the Court referred to "fair trials" no fewer than four times in the first three sentences of its analysis.[112] Ultimately, it was the purpose that ruled, not the constitutional text.

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[108] 466 U.S. 668 (1984).
[109] *Id.* at 683.
[110] *Id.* at 684.
[111] *Id.* at 684–85.
[112] *See id.*

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Having shifted the focus of analysis from the Counsel Clause to "the fundamental right to a fair trial," the Court turned to the role of "the adversarial system" in ensuring "fair trials." Justice O'Connor stated:

> The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment .... The Sixth Amendment recognizes the right of the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.[113]

As this passage demonstrates, the text of the Counsel Clause was submerged by the grand purposes it was supposedly serving. The Court addressed a metasystem of fundamental purposes (adversarial process, fair trial, and just results) rather than focusing on the text of a single constitutional clause. In this inverted hierarchy of text and purposes, the relevance of the primary constitutional text was limited to its ability to serve as the "embodiment" of its Court-attributed purposes.[114]

The beauty of the *Strickland* opinion, for the sake of this analysis, lies in Justice O'Connor's overt explanation of the Court's interpretive method. In remarkably accurate and insightful terms, she stated:

> The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases — that is, those presenting claims of "actual ineffectiveness." In giving meaning to the requirement, however, we must take its purpose — to ensure a fair trial — as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.[115]

This passage explicitly demonstrates the convergence of several elements that are fundamental to this analysis. Most importantly, Justice O'Connor made it very clear that the Court was engaged in the process of constructing a hermeneutic: "The Court has not *elaborated on the meaning* of the constitutional requirement . . . ."[116]

Justice O'Connor appears to have been quite aware that this interpretive process involves much more than the simple application of the grammatical matrix of the text of a constitutional clause or statutory provision.[117] The process, as she stated, involves "*giving meaning* to

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[113] *Id.* at 685.

[114] This textual "embodiment" of purposes was also a feature of the Court's § 1291 cases. *See supra* p. 713.

[115] *Strickland*, 466 U.S. at 686.

[116] *Id.* (emphasis added).

[117] The term "grammatical matrix" means a textual model that generates proper applications of that model in particular instances.

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the requirement."[118] Her choice of words is quite correct. It is not the grammar of the text that generates the text's meaning; rather, that meaning must indeed be "given" to the text. The meaning of a text can only be "elaborated" by making reference to some logic external to it. As Justice O'Connor stated, "In giving meaning to the requirement . . . we must take its purpose — to ensure a fair trial — as the guide."[119] What the Court proposed, therefore, was a purposive hermeneutic, one that gave meaning to the text by reading it in terms of its Court-attributed purpose.

The externality of this "purpose" to the constitutional text is clear: neither the Sixth Amendment nor the Counsel Clause itself says anything about "fair trials." The Counsel Clause states: "In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense."[120] Even "the requirement of *effective* assistance"[121] is a construction of the Court. The concept of *effectiveness* is as external to the language of the constitutional text as is the "fair trial" *purpose*. However, the two concepts merge in the Court's new hermeneutic: counsel must be effective in order to ensure a fair trial.

In the Court's new hermeneutic of purposes and effects, the Counsel Clause has fallen entirely out of the interpretive picture. The Court "elaborates" and "gives meaning" to the "requirement of effective assistance,"[122] not to the text of the Clause. Thus, the Court attributes purposes, considers effects, and proposes norms, but the Counsel Clause is missing.

The disappearance of the Counsel Clause is of primary importance. Once Court-attributed purposes drive the text of the Counsel Clause out of view, judicial text can — and does — take its place. In *Strickland*, Justice O'Connor outlined the norms that would govern "ineffective assistance of counsel" cases:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed . . . by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the

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118 *Strickland*, 466 U.S. at 686 (emphasis added).
119 *Id.*
120 U.S. CONST. amend. VI.
121 *Strickland*, 466 U.S. at 686 (emphasis added).
122 *Id.*

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> conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.[123]

These guidelines, oriented toward the purposes ("fair trial" and "adversary process") and effects (deprivation of "reliable" results and "prejudic[ing] the defense") elaborated by the Court, came to be known as the *Strickland* Test.

The *Strickland* Test possesses two particularly interesting features. First, it appears to be secondary to the Sixth Amendment. That is, it *appears* merely to put the controlling Sixth Amendment into effect. After all, one of the components of the Test does state: "[A successful claim] requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment."[124] The analytic centrality of the Sixth Amendment text is, however, only an illusion. The constitutional text says nothing about what qualifies as "counsel." Establishing, by hermeneutic means, what "functioning as the 'counsel' guaranteed by the Sixth Amendment" means is precisely what *Strickland* was supposed to have done. The *Strickland* Test's fleeting reference to the Sixth Amendment was merely a reference to the Court's own text. In essence, then, the Test's reference to the Amendment reads as follows: "To determine whether counsel qualifies as 'counsel,' turn to the Sixth Amendment. To determine what qualifies as 'counsel' under the Sixth Amendment, turn to this opinion, which 'gives meaning' to the Amendment's 'effective assistance' requirement." The reference merely incorporated the Counsel Clause into the Test Method's purposive hermeneutics.

A second notable feature of the *Strickland* guidelines is that they constitute the first stage in the expansion of the Court's own controlling text. The Court's purposive Counsel Clause analysis yielded two fundamental guidelines or prongs, both oriented toward practical effects: the performance prong and the prejudice prong. Each prong is phrased as a "must show": the defendant "must show" "deficient performance" and "prejudice" to the defense.[125] Interestingly, these two "must show" prongs generated secondary guidelines, which are phrased as "require[d] showings."[126] The structure is as follows: "[T]he defendant must show . . . . This requires showing . . . . [T]he defendant must show . . . . This requires showing . . . ."[127] In other words, the first step was the introduction of the Court's hermeneutic of purposes and effects. In response to this new interpretive approach, the Court produced a set of guidelines — a Test. Then, in response to these new guidelines, the Court produced a set of secondary guidelines.

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123 *Id.* at 687.
124 *Id.*
125 *Id.*
126 *Id.*
127 *Id.*

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The Court's language expanded on itself, by referring to itself, until the resulting text became entirely judicial.[128] The Court's self-responsive judicial text thus drove the previously controlling primary text (in this case, the Counsel Clause), which had already been displaced by the Court's purposive discourse, ever farther away from the Court's Counsel Clause analysis.

The continued operation of the Test Method — that is, the application of the established judicial Test in later decisions — perpetuates and aggravates the displacement of the previously controlling primary text. The judicial Test takes the place of that primary text and does not relinquish its position: the Test carries with it the discourse of purposes and effects from which it first emerged and by which it originally displaced the primary text. The continued operation of the Test Method ensures that its purposive hermeneutics will produce further textual displacement.

C. The Continued Operation of the Test Method

The continued "application" of the established judicial Test, however, reveals a remarkable flip side to the Test Method's purposive hermeneutics. This section examines that flip side.

1. The Test as "Authority Figure," or "The Return of the Formalist Repressed."

(a) The Test as the New Focus of Judicial Analysis. — As any cursory reading of Supreme Court "Test Method" cases readily demonstrates, an established judicial Test always serves as the focal point of the Court's analysis. This ascendancy of the judicial Test to a position of analytic centrality necessarily involves, as section B discussed, a corresponding displacement of the previously controlling primary text.

In a Test Method case, the Court typically begins its analysis by presenting the established Test as controlling the decision. This presentation of the Test as the doctrinal "authority figure" varies in its respect for the relevant constitutional or legislative text. In a relatively tactful example, the Court opened its analysis as follows: "We agree with appellants that the Montana tax must be evaluated under *Complete Auto Transit*'s four-part test. Under that test, a state tax does not offend the Commerce Clause if it [the Court quotes the Test]."[129] Although the Court did mention the Commerce Clause in this passage, it made it clear that the *Complete Auto* Test, under which the tax "[had to] be evaluated," controlled the analysis. The fact that the Court quoted the Test, not the Commerce Clause, further demonstrates the extent to which the Test controls the Court's Commerce Clause jurisprudence.

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[128] Robert Nagel describes this pattern as "narcissistic." *See* NAGEL, *supra* note 4, at 132.

[129] Commonwealth Edison v. Montana, 453 U.S. 609, 617 (1981).

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At times, however, the Court's introduction of the judicial Test as the controlling text leaves the primary text somewhat farther out of the decisional picture. Writing for the Court in *Memoirs v. Massachusetts*,[130] Justice Brennan opened his First Amendment obscenity analysis in the following terms:

> Indeed, the final decree before us equates the finding that [the book] *Memoirs* is obscene within the meaning of the [Massachusetts obscenity] statute with the declaration that the book is not entitled to the protection of the First Amendment. Thus the *sole question* before the state courts was whether *Memoirs* satisfies the test of obscenity established in *Roth v. United States*.
>
> We defined obscenity in *Roth* in the following terms: [the Court quotes the *Roth* Test].[131]

In this example, the displacement of the primary text was nearly complete. Although the Court mentioned the First Amendment in the sentence preceding its introduction of the *Roth v. United States*[132] Test, it was the Test that the Court explicitly presented as the determinative center of the Court's analysis; the "*sole question*" was "whether *Memoirs* satisfie[d] the test of obscenity established in *Roth*." The First Amendment was all but brushed aside as mere *surplusage*: the *Roth* "obscenity" Test ruled alone.

In still other Test Method cases, the Court begins its analysis without any reference to the previously controlling primary text at all. In *Pope v. Illinois*,[133] an obscenity case discussing *Miller v. California*,[134] the very first words of Justice White's majority opinion were as follows: "In *Miller* . . . , the Court set out a tripartite test for judging whether material is obscene. The third prong of the *Miller* test requires the trier of fact to determine [the Court quotes from the *Miller* Test]."[135] The Court eventually *mentioned* the First Amendment three pages into its analysis, and even then only in a quote from *Miller*.[136] Whatever authority the First Amendment was permitted to maintain had become entirely derivative. The Court in *Pope* only cited (and did not even quote) the constitutional text because the *Miller* Court had mentioned it in passing.

Finally, in a particularly striking — though quite typical — example, Justice Powell, writing for the Court in *Darden v. Wainwright*,[137] began his Counsel Clause analysis as follows: "Petitioner contends that he was denied effective assistance of counsel at the sentencing phase of

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130 383 U.S. 413 (1966).
131 *Id.* at 418 (emphasis added) (citation omitted).
132 354 U.S. 476 (1957).
133 481 U.S. 497 (1987).
134 413 U.S. 15 (1973).
135 *Pope*, 481 U.S. at 498.
136 *See id.* at 500.
137 477 U.S. 168 (1986).

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the trial. That claim must be evaluated against the two-part test announced in *Strickland*. [The Court quotes the Test.]"[138] In this passage, the Counsel Clause is never even mentioned, never mind quoted. Remarkably enough, the Court never mentioned the Counsel Clause at *any* point in its *Darden* opinion.

The end of the Court's standard Test Method opinion is very similar to its beginning. The opinion typically concludes by stating, as the ground for the holding, whether the given Test has been satisfied. As the introductions to the Court's analyses sometimes do, the conclusions to these analyses may make a passing reference to the previously controlling primary text.[139] Quite often, however, the Court ends its decisions without any reference whatsoever to the primary text and thereby leaves the judicial Test as the only text of consequence. For example, Justice Rehnquist ended his majority opinion in *Hill v. Lockhart*[140] as follows: "Because petitioner in this case failed to allege the kind of 'prejudice' necessary to satisfy the second half of the *Strickland v. Washington* test, the District Court did not err in declining to hold a hearing on petitioner's ineffectiveness of counsel claim."[141] Clearly, it was the *Strickland* Test, not the Counsel Clause, that governed this decision.

In each of the examples just presented, the judicial Test became the textual "authority figure." When the Court identifies a segment of its own text as a Test, it accords that judicial text a certain formal status. Henceforth, when the Court sets out what will (or did) control its decision, it is the Test, not the primary text, that the Court places to the fore; it is the Test that the Court cites and quotes and that "must be satisfied."

(b) The Test as Structural Matrix. — Once the Court has identified a given judicial Test as controlling for a given decision — that is, once the Test has been established as the textual authority figure governing a given doctrinal area — the implementation of that Test profoundly modifies the formal structure of the Court's decision. In particular, the Court's opinion typically tracks the language of the Test: the opinion mirrors the Test's structure and follows it prong by prong.

Justice Marshall's majority opinion in *Goldberg v. Sweet*[142] constitutes an archetypal example of this judicial tracking of a Test's formal structure. Justice Marshall stated:

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138 *Id.* at 184.

139 *See, e.g.*, Coopers & Lybrand v. Livesay, 437 U.S. 463, 477 (1977).

140 474 U.S. 52 (1985).

141 *Id.* at 60; *see also Darden*, 477 U.S. at 187 ("Petitioner has failed to satisfy the first part of the *Strickland* test, that his trial counsel's performance fell below an objective standard of reasonableness."); Commonwealth Edison v. Montana, 453 U.S. 609, 629 (1981) ("We are satisfied that the Montana tax . . . comports with the requirements of the *Complete Auto Transit* test.").

142 488 U.S. 252 (1989).

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> As all parties agree that Illinois has a substantial nexus with the interstate telecommunications reached by the Tax Act, we begin our inquiry with apportionment, the second prong of the *Complete Auto* test. . . .
>
> . . . .
>
> We turn next to the third prong of the *Complete Auto* test . . . .
>
> . . . .
>
> Finally, we reach the fourth prong of the *Complete Auto* test . . . .[143]

In *Goldberg*, the Court did more than just establish the *Complete Auto* Test as the doctrinal authority figure that governed the Court's analysis. It also structured its opinion on the model of the Test.

The formal structure of the Court's opinions in Test Method cases signifies two things. First, it operates as a sign of the controlling *status* of the judicial Test (which controls at the expense of the primary text). Second, it operates as the sign of a particular mode of reading.

2. The Discourse of the Judicial Test. — The judicial Test's motivation of the formal structure of the judicial opinion functions in a very specific discursive context. This context is created both by the form in which the judicial Test tends to be composed and by the terms in which it tends to be discussed.

The typical judicial Test takes a rather standard — and easily recognizable — form. It is identified as a Test, is referred to by name, and tends to be composed of two to four sets of rules or criteria. The Test Method decision also employs a particular kind of discourse. This discourse consists of calling the set of criteria a "Test" and of labeling the components of that "Test" as numbered "parts" or "prongs" that are stated in the categorical fashion of a statute. It also involves identifying the Test as "ruling" or "governing" a particular doctrinal area, and thus stating that the Test must be "satisfied." In short, the Test Method case always asks the same question: "Does the particular statute satisfy the particular prong of the particular Test?"[144]

This discourse of judicial Test analysis, combined with the use of the Test as the structural matrix of the Test Method opinion, operates as a sign. What does it signify? It signifies that the Court is engaged in a *grammatical* mode of reading. This statement gives reason to pause, for this Article has gone to great pains to demonstrate that the establishment of a judicial Test — complete with the Test Method's discourse of purposes and effects — marks the transition from a

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143 *Id.* at 260–66.

144 These attributes of the judicial Test, however, are largely produced over time. Rare is the judicial Test that identifies itself as such from the moment of its first enunciation. A judicial Test acquires many, if not most, of its characteristic traits over the course of its "application" in later cases. The suggestion is that a Test becomes a full-fledged Test (with all its recognizable trappings) not only because its language is somehow "Test-like," but also because it is presented and discussed in a particular fashion. In a very important sense, it is precisely the "trappings" that make the Test.

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grammatical mode of reading to a hermeneutic one. This analysis still holds, but it should not mask the fact that the Test Method case nonetheless also adopts a form and a discourse that signify grammatical reading.

The Test Method opinion, after all, treats the "governing" judicial Test quite differently than it does the previously controlling primary text. In particular, it tracks the language and form of that Test in a way that it refuses to do with regard to the primary text. As this Article has shown, the Court tends to make an explicit reference to the Test at the very beginning and end of its opinion. The Test, the text that governs the Court's decision, is actually quoted. The language of the Test therefore occupies a position of prominence in the Court's decision, a position that is reflected by the Court's structuring of its opinion on the model of the Test. In short, the Test Method opinion offers numerous signs that it is following the requirements of the Test.

Of course, these signs operate to continue the displacement of the primary text, thereby establishing the judicial Test as the opinion's undeniable textual authority figure. However, these signs also do much more; they confer upon the Test Method opinion an extremely formal quality, one that signifies a faithful adherence to the language of the Test. Combined with the discourse of judicial Test analysis, these signs convey the message that the Court's decision is *required* by the grammar of the controlling judicial Test.

The form and discourse of the Test Method opinion thus signify textual necessity. It is no coincidence that the judicial Test is called a "Test," or that its implementation is invariably termed "application" (as opposed to "interpretation"), or that the Court always frames its fundamental inquiry in terms of whether a given statute or action "satisfies" the "requirements" of the Test. These signs all suggest that the grammar of the controlling judicial Test generates, in almost mechanical or mathematical fashion, the Court's Test Method decision.[145]

Nonetheless, on a substantive level, these seemingly formal Tests tend to be oriented overwhelmingly toward the hermeneutic of purposes and practical effects. This juxtaposition of the grammatical and the hermeneutic best defines the Test Method, for Test Method cases set forth simultaneously two interpretive ideologies, two portraits of judicial practice. First, the Test Method cases reject a formalist approach to the controlling primary text and displace that text with a judicial one (the judicial Test) oriented toward a hermeneutic of purposes and effects. Then, however, the repressed formalism returns: the cases adopt a structure and a discourse that suggest the formalist production

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[145] *Cf.* Horwitz, *supra* note 9, at 98 (referring to the technical quality of Supreme Court Test Method decisions).

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of judicial decisions on the basis of the grammatical matrix of the judicial Test.

3. The Problem of Perpetual Slippage. — The Test Method opinion therefore reveals itself to be remarkably supple and complex. Its form and structure suggest textual stability. The opinion maintains the status of the controlling Test, its recurring structure reproduces that of the Test, and even its discourse suggests that the Test is generating required outcomes by a process of mechanical application. At the same time, the judicial Test is substantively oriented toward purposes and effects. The Test Method opinion therefore operates simultaneously on two fronts. It presents itself as engaged in two modes of reading, the grammatical/formalist and the purposive/hermeneutic. The result is fabulously rich: the Test Method opinion offers the prospect of interpretive stability without the perceived dangers of formalism.[146]

(a) Grammatical Instability. — The interpretive stability that the Test Method offers, however, reveals itself to be, in large measure, an illusion. The first little signs of instability surface on the grammatical level. Needless to say, fidelity to the literal text (that is, to the text to be applied) represents the first requirement of grammatical reading. The reader who sees fit to change the language of the text he is reading can hardly be considered to be engaged in the grammatical application of that text. However, when the Court is engaged in Test Method analysis, it constantly changes the language of the controlling judicial Test.

Unlike the language of the previously controlling primary texts, the language of judicial Tests is not immutable. The Court can change the language of its own Tests in a way that it cannot when dealing with the language of a constitutional clause or federal statute. Most of the time, the Court makes such changes quietly, without pointing them out or explaining why it has made them. The following are two unexceptional examples among many.

In *Goldberg*, Justice Marshall stated for the Court: "Finally, we reach the fourth prong of the *Complete Auto* test, namely, whether the . . . tax is fairly related to the presence and activities of the taxpayer within the State."[147] Actually, the fourth prong of the *Complete Auto* Test, as originally articulated, queries whether the tax "is fairly related *to the services provided by the State.*"[148] The Court's collateral order cases supply a subtler example. The *Cohen* Test states that, in order to

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146 *See* NAGEL, *supra* note 4, at 130.

147 *Goldberg*, 488 U.S. at 266.

148 Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977) (emphasis added). Although it is dangerous to venture a guess regarding the motivation for the *Goldberg* Court's modification of the Test's language, it is worth noting that the tax in question was challenged on the ground that it was excessive in light of the services actually provided by the state to the interstate companies. *See Goldberg*, 488 U.S. at 267. The Court, as one might expect given its modification of the Test's language, upheld the tax. *See id.*

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fall under its exception to the § 1291 finality requirement, the judgment to be reviewed must involve a right "separable from . . . rights asserted in the action."[149] In *Coopers & Lybrand v. Livesay*,[150] which held that orders denying class certification do *not* fall under the *Cohen* exception,[151] the Court stated that the order must involve an "issue *completely* separate from the merits of the action."[152] Similarly, when the Court held that orders denying a motion to disqualify counsel do *not* fall under the *Cohen* exception, the Court quoted the *Livesay* "completely separate" version of the *Cohen* Test.[153] However, when the Court held that orders denying claims of qualified immunity *do* fall under the *Cohen* exception, the Court reverted to the *Cohen* version of the *Cohen* Test (in other words, it dropped the adverb "completely").[154] The strategic and unexplained appearance (or disappearance) of qualifiers is commonplace in the Court's "application" of its judicial Tests.

These mundane examples demonstrate that the Court takes liberties with the very language of the Tests it claims to be applying. Granted, the modifications are minor, but are the results really so negligible? Furthermore, the above are only modest examples of the Court's willingness to tamper with the grammar of its own Tests. The analysis that follows turns to more sizable quarry.

(b) Purposive Instability. — Any and all changes in the language of a judicial Test represent, by definition, a change in the grammar of that Test. This analysis nonetheless offers the distinction between grammatical and purposive instability in order to demonstrate the strong link between certain grammatical changes and the Test Method opinions' pervasive discourse of purposive hermeneutics.

The following example, drawn from the collateral order cases, illustrates the simultaneous operation of the Test Method's formal grammar and its purposive hermeneutics. Section B demonstrated how *Cohen* first displaced the text of § 1291 by shifting to purposive discourse, how the Court attributed the purpose of "effective review" to § 1291, and how this notion of "effective review" was transferred to § 1291 from a purpose that the Court had attributed to § 1292.[155] The Court did not, however, formally include this purpose of "effective review" in the *Cohen* Test.[156] Twenty-nine years later, in *Livesay*, the Court rewrote the *Cohen* criteria. This time, the Court explicitly in-

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149 Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

150 437 U.S. 463 (1977).

151 *See id.* at 469.

152 *Id.* at 468 (emphasis added). The Court also made the switch from "right" to "issue."

153 *E.g.*, Firestone Tire & Rubber Co. v. Risjond, 449 U.S. 368, 375 (1981) (quoting language from *Livesay* in its statement of the Test).

154 *See* Mitchell v. Forsyth, 472 U.S. 511, 527 (1985).

155 *See supra* pp. 710–12.

156 *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949).

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cluded the purpose in the text of the judicial Test. Justice Stevens, writing for the Court, stated: "To come within the 'small class' of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from final judgment."[157] The Court's purposive discourse thus finally broke overtly into the formally controlling Test.

The *Livesay* rewriting of the *Cohen* Test demonstrates the fundamental importance of purposive hermeneutics to the continued operation of the Test Method. The Court "applied" the *Cohen* Test for almost thirty years, and during that time the Court never discarded the purposive discourse that first permitted the establishment of the Test. To the contrary, that discourse was so essential to the operation of the *Cohen* Test that the Court finally promoted it to a position of textual centrality by eventually including it within the very text of the formally controlling Test. The operation of the Test Method involves the transmission of the Court's purposive hermeneutics from case to case.

However, the transmission of purposive hermeneutics also implies the transmission of one of its characteristic traits: the displacement of the controlling text. For instance, the purposive discourse of "effective review," which had first displaced the text of § 1291, came to displace portions of the *Cohen* Test itself. The Test Method's purposive hermeneutics does not discriminate between controlling texts. It represents a mode of reading any given text in terms of something else — the text's purposes. As such, it displaces *judicial* text as effectively as it displaces constitutional or legislative text.

There tends to be, however, one particularly important difference between the Test Method's displacement of the controlling "primary" text and its displacement of the text of the controlling judicial Test. This difference surfaces clearly in the Court's collateral order cases. The *Livesay* criteria, as noted above, have become the controlling text in the Court's collateral order decisions. Yet *none* of the Court's opinions *ever* refers to the "*Livesay* Test." Instead, the Supreme Court opinions refer to the "three-part test of the *Cohen* case,"[158] to "the *Cohen* test,"[159] to the "*Cohen* exception,"[160] to the "collateral order doc-

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[157] *Livesay*, 437 U.S. at 468 (quoting *Cohen*, 337 U.S. at 546). This new version of the Test offered several changes from the original, which stated:

> This decision appears to fall in that small class [of cases] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.

Cohen, 337 U.S. at 546.

[158] Richardson v. United States, 468 U.S. 317, 321 (1986).

[159] *Mitchell*, 472 U.S. at 529.

[160] Lauro Lines s.r.l. v. Chasser, 490 U.S. 495, 498 (1989).

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trine enunciated . . . in *Cohen*,"[161] and to the "collateral order test."[162] The Court then routinely proceeds to quote the language of the *Livesay* rewriting of the *Cohen* Test, but the Court never uses the words "the *Livesay* Test."[163] In short, the Test Method's purposive hermeneutics displaces the controlling text, even if that text is judicial, but resists displacing a judicial Test from its formal status as the controlling text. This resistance demonstrates the Test Method's pretension to grammatical stability. The *Cohen* Test continues to be presented as the matrix of the Court's collateral order decisions, even though what passes as the *Cohen* Test is really the language of *Livesay*.

(c) The Obscenity Tests: An Exception? — The Test Method's tendency to displace controlling text therefore continues to operate even after the establishment of a judicial Test, and the Method's purposive hermeneutics constitutes the primary factor in this perpetual displacement. Furthermore, Test Method opinions tend to deemphasize the resulting displacement of the established Test's own text. The Supreme Court's line of obscenity cases, however, superficially appears to undermine my conclusions. Although this line of Test Method cases follows the stated pattern of displacing constitutional language — in this instance, the First Amendment[164] — from the center of its analysis by turning to purposive hermeneutics, it does *not* maintain the formal status of its established judicial Test. Instead, it overrules it.

Justice Brennan's majority opinion in *Roth v. United States*[165] established the basic structure of the Court's obscenity analysis. First, the Court held that obscenity is not speech protected by the First Amendment,[166] and then it produced a Test that defined obscenity. Justice Brennan surveyed the history of the First Amendment and reached the following conclusion:

> In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press.[167]

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161 *Richardson*, 468 U.S. at 319.

162 Firestone Tire & Rubber Co. v. Risjold, 499 U.S. 368, 375 (1981) (internal quotation marks omitted).

163 *See, e.g., id.*

164 The First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

165 354 U.S. 476 (1957).

166 *See id.* at 484–85.

167 *Id.* at 483 (citation omitted).

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The Court, in this passage, employed an "original intent" argument. In this instance, however, the argument was not *grammatical* in nature. It did not involve an inquiry into *what* a given word (or series of words) meant during a given historical period. Rather, the argument constituted a form of *purposive hermeneutics*: the inquiry involved *why* the words were originally written. That is, the question concerned the purpose of the constitutional protection. The nature of the inquiry became evident in the Court's next paragraph:

> The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . . All ideas having even the slightest redeeming social importance — unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion — have the full protection of the guaranties . . . .[168]

The word "to," used in the phrase "was fashioned to assure," stood for "*in order* to" and identifies this passage as purposive in nature. The purpose of protecting those "ideas" that possess some "social importance" came to control the Court's analysis.[169] *Roth* thus placed obscenity outside the protective sphere of the First Amendment on the ground that it is "utterly without redeeming social importance."[170]

Only once the Court had placed obscenity outside the purview of the First Amendment did it go about defining what constitutes "obscenity." The Test asks "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[171] From this point forward, it was the obscenity Test and the purposive hermeneutic of "ideas" of some "social importance" that dominated the Supreme Court's obscenity analysis. The structure of the Court's *Roth* opinion is quite remarkable in this respect, and this structure best illustrates the displacement of the First Amendment from the Court's obscenity analysis. The structure of the opinion was such that the Court first placed outside the sphere of the First Amendment an entire class of speech that the Court had yet to define. The net result was that the First Amendment would have little or nothing to do with the definition of obscenity. In fact, the First Amendment has become quite irrelevant; "obscenity" has already been assumed, by definition, to be constitutionally unprotected.

Nine years after the establishment of the *Roth* Test (and the corresponding displacement of the First Amendment), the text of the Test

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168 *Id.* at 484.

169 The shift to purposive hermeneutics left clear traces in the Court's opinion. In the sentences quoted here, the Court first attributed to the First Amendment the purpose of protecting "ideas" and then proceeded to underline its point by using the term "ideas" no fewer than five times.

170 *Roth*, 354 U.S. at 484.

171 *Id.* at 489.

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experienced a certain displacement of its own. This displacement, which occurred in *Memoirs*, was quite similar to the one in *Livesay*:[172] the Court's purposive discourse broke into the text of the formally established Test. Justice Brennan's plurality opinion stated:

> Thus the sole question before the state courts was whether *Memoirs* satisfies the test of obscenity established in *Roth v. United States*.
>
> We defined obscenity in *Roth* in the following terms: [Justice Brennan accurately quotes the *Roth* Test]. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.[173]

Prong (c) represented the transposition of the *Roth*'s purposive discourse into the body of the Court's controlling text.

Remarkably, some seven years later, the Court took advantage of this close link between purposive hermeneutics and judicial Tests in order to rewrite its obscenity Test once again. Chief Justice Burger, writing for the Court in *Miller*, put a different twist on the purposive discourse of ideas and of social importance and value that had been central to the Court's analysis since *Roth*. He stated:

> [T]o equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. . . . The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, or scientific value. . . . But the public portrayal of hard-core sexual conduct for its own sake, and for the ensuing commercial gain, is a different matter.[174]

By shifting the discussion to "high purposes" (and thus to his version of the intention of the Framers), Chief Justice Burger restricted the amount of material that the First Amendment was intended to protect.[175] This change in the Court's purposive discourse produced a corresponding change in the text of the obscenity Test. The third prong of the Test now requires that "the work, taken as a whole, lack[] serious literary, artistic, political, or scientific value";[176] *Memoirs* simply required that "the material [be] utterly without redeeming social

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[172] *See supra* pp. 724–25.

[173] Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966) (citations omitted).

The Court did not provide any citations for its assertion that the *Roth* Test had been "elaborated in subsequent cases."

Prong (b) is a rewriting of *Roth*'s "applying contemporary community standards" language. *Roth*, 354 U.S. at 489.

[174] Miller v. California, 413 U.S. 15, 34–35 (1973).

[175] *Id.* at 34.

[176] *Id.* at 24.

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value."[177] In essence, the obscenity Test has been changed to include the new "high purposes" that the Court attributed to the First Amendment.

So far, this analysis has demonstrated only that the Court's obscenity Test opinions are characteristic of the Test Method genre. The *Miller* opinion does, however, present the following problem: it openly rejects the *Memoirs* version of the obscenity Test.[178] Although the Court often changes entire sections of established Tests, it is unusual for the Court to emphasize such changes. To call attention to the changes detracts from the status of the Test as textual "authority figure" and thus damages the image of grammatical stability that the very form of the Test Method opinion conveys. Chief Justice Burger nonetheless chose to stress — and criticize — the *Memoirs* rewriting of the *Roth* Test. He stated:

> Nine years [after *Roth*], in *Memoirs* . . . , the Court veered sharply away from the *Roth* concept and, with only three Justices in the plurality opinion, articulated a new test of obscenity. [Chief Justice Burger quotes the plurality's restatement of *Memoirs*' holding]. The sharpness of the break with *Roth* [was] represented by the third element of the *Memoirs* test . . . .
>
> While *Roth* presumed "obscenity" to be "utterly without redeeming social importance," *Memoirs* required that to prove obscenity it must be affirmatively established that the material is "*utterly* without redeeming social value." Thus, even as they repeated the words of *Roth*, the *Memoirs* plurality produced a drastically altered test . . . .[179]

In this accurate and insightful passage, Chief Justice Burger broke from the traditional etiquette of the Test Method opinion by overtly labeling the modification "the *Memoirs* test." This process of naming the modification — that is, of identifying it as a new and different Test — is a clear sign that something has gone wrong. As this Article has shown, a judicial Test almost always goes by the name of the decision that first established it, regardless of how much the Test has actually been changed over the course of subsequent decisions.[180]

What, then, has gone wrong? Chief Justice Burger stated: "But now the *Memoirs* test has been abandoned as unworkable by its author [Justice Brennan], and no Member of the Court today supports the *Memoirs* formulation."[181] The problem, as Chief Justice Burger pointed out, is that the *Memoirs* Test does not "work." The Test apparently does not function as it should; it does not generate solutions

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177 *Memoirs*, 383 U.S. at 418.

178 *See Miller*, 413 U.S. at 23.

179 *Id.* at 21–22 (quoting *Memoirs*, 383 U.S. at 418; Roth v. United States, 354 U.S. 476, 484 (1957)).

180 One need only refer, for example, to the *Livesay* Court's rewriting of the *Cohen* Test, which continues to be called "the *Cohen* Test." *See supra* pp. 725–26.

181 *Miller*, 413 U.S. at 23.

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with the expected mechanical precision. This objection reveals the neo-formalist aspiration of judicial Tests: these Tests are supposed to provide grammatical stability, and the *Memoirs* Test has apparently failed to do so.

One can imagine at least two possible responses to the breakdown. The first would be a categorical rejection of the Test Method as an interpretive approach. The *Miller* Court declined to pursue this option. It turned instead to the second possibility: placing the blame on the *Memoirs* Test itself. According to *Miller*, given that the *Memoirs* Test is a lousy, "unworkable" machine,[182] the solution is to replace it with another — the *Miller* Test.

The *Miller* opinion, then, which appeared at first to pose a significant threat to the traditional operation of the Test Method, turned out to embrace it. The *Miller* Court's objection to *Memoirs* was that it was unfaithful to the Court's original obscenity "authority figure," the *Roth* Test.[183] The *Miller* opinion presents itself, in large measure, as a rehabilitation of the *Roth* Test. Chief Justice Burger went so far as to quote his predecessor, Chief Justice Warren, for the following proposition: "For all the sound and fury that the *Roth* test has generated, it has not been proved unsound . . . ."[184] Most importantly, the basic structure of the Court's Test Method analysis has not changed at all, even in the obscenity context. A judicial Test continues to operate as the controlling text. The Test defines "obscenity," which is still assumed to be outside the purview of the First Amendment. This Test is still composed of three parts, the last of which still consists of a transposition of the Court's purposive discourse. Finally, the language of the Test is still recognizably derived from *Roth*, the Court's initial displacing opinion, whose authoritative status is expressly reaffirmed.

4. Tests and More Tests: The Proliferation of Secondary Tests. — The *Memoirs* and *Miller* obscenity opinions displayed one final characteristic that is of particular interest to this study of the Test Method — the tendency to generate what I call "secondary Tests." This phenomenon, which this Article first mentioned in its analysis of *Strickland v. Washington*,[185] demonstrates what could be termed both the "success" and the "problem" of the Test Method as a mode of judicial analysis.

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182 *See id.*

183 *See supra* p. 729.

184 *Miller*, 413 U.S. at 23 n.5 (quoting Jacobellis v. Ohio, 378 U.S. 184, 200 (1964) (Warren, C.J., dissenting)). Again, the objection to the *Memoirs* Test was that it was "unsound" or "unworkable" — in other words, it did not generate required judicial outcomes with appropriate precision.

185 *See supra* pp. 717–18. The structure of the relevant passage in *Strickland* is as follows: "[T]he defendant must show .... This requires showing .... [T]he defendant must show .... This requires showing ...." Strickland v. Washington, 466 U.S. 668, 687 (1984).

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The *Memoirs* plurality opinion offers a good example of the phenomenon and its consequences. That opinion[186] structured its statement of the obscenity Test as follows: "We defined obscenity in *Roth* in the following terms: [Justice Brennan quotes the *Roth* Test]. Under this definition, . . . three elements must coalesce: [Justice Brennan sets out the three prongs, identified by letters, of what came to be known as the *Memoirs* Test]."[187] The structure of this statement makes it quite difficult to identify what actually constitutes the controlling language of the obscenity Test. From a purely formal perspective, the *Roth* Test governs. The tripartite *Memoirs* Test, which followed the statement of the *Roth* Test, was presented as merely the subsidiary elaboration of the *Roth* Test's controlling language: "Under this definition . . . ."[188] At the same time, the three "subsidiary" prongs were themselves clearly presented as a formal Test: who could fail to recognize the characteristic imperative statement of three norms, each identified by letter, that "must be established"?[189] Chief Justice Burger certainly did not, given that he explicitly identified the three prongs as the "*Memoirs* test."[190] *Memoirs* therefore offered two judicial Tests: first the *Roth* Test and then its own, "secondary" Test.

Miller, of course, treated the *Memoirs* Test as the controlling, if "unworkable," text. The passage in which the *Miller* Court set out its own obscenity Test reads as follows:

> As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.[191]

This passage thus appeared to set out the *Miller* Test. But did it? Immediately after this passage, the Court stated:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[192]

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186 *See supra* p. 728.

187 Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).

188 *Id.*

189 *Id.*

190 *See supra* p. 729.

191 Miller v. California, 413 U.S. 15, 24 (1973) (footnote omitted).

192 *Id.* (citation omitted) (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972) (quoting Roth v. United States, 354 U.S. 476, 489 (1957))).

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Was the second paragraph a mere subsidiary elaboration of the language that preceded it, or was it the formal statement of the Court's new obscenity Test? The Court itself long ago answered the question: it is the second paragraph that has come to be known as the *Miller* obscenity Test. Although the particular question is resolved, the phenomenon nonetheless deserves attention.

The interstate commerce cases also demonstrate the Court's tendency to offer multiple Tests in Test Method opinions. For instance, the second prong of the Court's *Complete Auto* Test requires state taxes on interstate commerce to be "fairly apportioned."[193] When Justice Marshall, writing for the Court in *Goldberg*, reached the second prong of his analysis, he switched to purposive discourse. He stated: "In analyzing these [second prong] contentions, we are mindful that the central purpose behind the apportionment requirement is to ensure that each State taxes only its fair share of an interstate transaction."[194] As may be expected, this transition to purposive discourse marked the impending displacement of the controlling text. Because the Court's own *Complete Auto* Test was the controlling text, Justice Marshall announced new, secondary Tests. He stated that "[the Court] determine[s] whether a tax is fairly apportioned by examining whether it is internally and externally consistent."[195] Justice Marshall then explained that the focus of this internal consistency Test is whether the tax is "structured so that[,] if every State were to impose an identical tax, no multiple taxation would result."[196] He went on to state that "[t]he external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed."[197]

After switching to purposive discourse and establishing secondary Tests, the only step that remains to complete the textbook deployment of the Test Method is to orient the analysis toward practical effects. Justice Marshall dutifully completed this final step with the following explanation: "We thus examine the in-state business activity which triggers the taxable event and the practical or economic effect of the tax on that interstate activity."[198] Justice Marshall continued: "It should not be overlooked, moreover, that the external consistency test is essentially a practical inquiry."[199]

The phenomenon of the secondary Test is a product of the continued operation of the Test Method. The phenomenon represents the

193 Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

194 Goldberg v. Sweet, 488 U.S. 252, 260–61 (1989) (citing Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983)).

195 *Id.* at 261.

196 *Id.*

197 *Id.* at 262.

198 *Id.*

199 *Id.* at 264.

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tremendous "success" of the Test Method's mode of analysis: it is self-perpetuating. A judicial Test tends to carry with it the purposive hermeneutics and "practical effect" orientation, which almost always come to be incorporated into one or several of its prongs. The judicial Test thus calls for the reproduction, in later decisions, of the Test Method's hermeneutic of purposes and effects. This reproduction is assured by the formal status of the established Test, for it is this formal status that ensures that the Test is always transported, however unfaithfully, into the next judicial decision.

The Test Method therefore represents far more than the mere establishment of a stagnant set of judicially created norms. The Test Method represents a mode of analysis that remains alive and operative over time, as evidenced by the fact that even controlling judicial Tests can and do get displaced by secondary Tests.

However, this self-displacing tendency of the judicial Test does not imply that the Test Method is simply self-defeating. To the contrary, with every displacement of judicial text comes another layer of judicial text; the emergence of every secondary Test only pushes the originally controlling primary text farther away from the Court's analysis. *Goldberg*'s establishment of the "internal" and "external" consistency Tests, for example, hardly rendered the text of the Commerce Clause any more relevant to the Court's interstate commerce analysis. In fact, now two layers of judicial text exist between the Clause and the Court's decision: the *Complete Auto* Test *and* the *Goldberg* secondary Tests.

The Court's collateral order cases offer another excellent example of how the Test Method's continual textual displacement drives the previously controlling text farther out of the analytic picture. As described in section B, the text of 28 U.S.C. § 1291 was displaced by the *Cohen* Court's use of the Test Method.[200] Some thirty years later, in *Abney v. United States*,[201] the Court modified the *Cohen* Test.[202] By the time the Court rendered its decision in *Richardson v. United States*,[203] therefore, § 1291 had already been displaced by two layers of judicial text.

Richardson held that a trial judge's denial of a particular double jeopardy claim was appealable under the collateral order doctrine.[204] What is interesting is how the Court phrased its decision. Justice Rehnquist, writing for the majority, stated: "[W]e think that the collateral-order doctrine applied in *Abney* should not be read so narrowly as

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200 *See supra* pp. 710–12.

201 431 U.S. 651 (1977).

202 *See id.* at 658–59. The *Abney* Court held that pretrial orders denying motions to dismiss, although lacking the finality "traditionally considered indispensible to appellate review," are not bound by the final judgment rule. *Id.* at 659.

203 468 U.S. 317 (1984).

204 *See id.* at 321–22.

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to bar from interlocutory review the type of double jeopardy claim asserted here."[205] Justice Rehnquist cited *Abney* as the basis of the Court's decision; it was *Abney*'s collateral order doctrine — not § 1291's or even *Cohen*'s — that "should not be read so narrowly."[206]

Richardson thus demoted § 1291 to the third rank of authority: first comes *Abney*, then *Cohen*, and only then § 1291. This hierarchy, produced by the successive layers of displacement, is very important in that it allowed the Court to reject the government's "purposes" argument: "The Government understandably expresses concern that interlocutory appeals of this nature may disrupt the administration of criminal justice. But allowing appeals such as this is completely consistent with the Court's admonition in *Cohen* that the words 'final decision' in § 1291 should have a 'practical rather than a technical construction.'"[207] The Court thus rejected the government's "administration of justice" purpose — a purpose that the Court had itself attributed to § 1291 in the *Cohen* line of decisions.[208]

In short, Justice Rehnquist based his decision in *Richardson* on the trumping of the Court-attributed "administration of justice" purpose by the Court's "practicality" orientation. The Court's analysis was completely submerged in the Test Method's hermeneutic of purposes and effects. The displacement of the primary text was so severe that the government was apparently driven to defend § 1291 on the basis of the statute's Court-attributed purpose, rather than on the basis of the statutory language. The Court's analysis was therefore centered on the struggle between different layers of judicial text.[209] The closest the *Richardson* Court's analysis ever came to the primary legislative text was its reference to *Cohen*'s initial displacement of § 1291 by the Court's effect orientation.

The Test Method therefore reveals itself to be eminently successful in displacing primary text while perpetuating its particular mode of hermeneutic reading. Characteristic of the Test Method, however, is the fact that all of this active, productive, and constantly changing judicial analysis takes place under the formal guise of a stable, quasi-mechanical "application" of established norms. Despite the perpetual flux that the operation of the Test Method produces, the formal struc-

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205 *Id.*

206 *Id.* at 321.

207 *Id.* at 322 (quoting Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949)).

208 This purpose drew its roots from *Cohen*'s "one review" purpose and was explicitly established as a purpose of § 1291 in *Eisen v. Carlisle & Jacquelin* twenty-five years later. *See* Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170–71 (1974).

209 *Richardson* stands for the proposition that *Abney*'s collateral order doctrine "should not be read so narrowly," *Richardson*, 468 U.S. at 321, that it permits the "administration of justice" purpose, developed in *Cohen* and *Eisen*, to override the Court's effect orientation developed in *Cohen*.

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ture of Test Method opinions continues to suggest that judicial decisions are being produced with test-like precision.[210]

D. Conclusion

The Test Method's "problems" represent, to a large extent, the flip side of its "successes."[211] Although the Test Method, as this Part has shown, successfully installs a particular mode of reading that combines the logic of purposes and practical effects with the formal indicia of grammatical application, this admixture has hardly produced much interpretive stability. It is, of course, true that the Test Method assures the perpetuation of its particular mode of reading and that it thus ensures that the Court's Test Method opinions will stress purposes and effects and will replicate certain formal or structural characteristics. However, this does not mean that the use of the Test Method requires particular judicial decisions or outcomes.[212]

It is not necessary to dwell very long on the Test Method's interpretive instability. As this Article has shown, Test Method opinions do not even offer stable judicial Tests. The notion that there exists *a Cohen* collateral order Test or *a Complete Auto* interstate commerce Test is nothing short of a fallacy, for there are almost as many *Cohen* and *Complete Auto* Tests as there are cases that "apply" them.

The recurring phenomenon of the "secondary" Test most clearly demonstrates the Test Method's unresolved interpretive difficulties. The Court finds itself in an endlessly recurring predicament: the Test Method can be used to interpret the primary text, but it can also be used to interpret the Court's own Test. Hence secondary Tests proliferate.

What, then, is going on? The Court has rejected the particular mode of grammatical reading (currently labeled "formalism" by legal academics) illustrated by *Spector*'s "literalist" approach to the Commerce Clause.[213] The Court therefore gives meaning to the Clause by turning to its purposes and effects. Because these purposes and effects are necessarily external to the grammar of the Clause, the Court must attribute them in its own words — hence the production of the first layer of judicial text, which is marked by the establishment of the judicial Test and the corresponding displacement of the previously controlling primary text. Having adopted this prototypically hermeneutic

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[210] *See* NAGEL, *supra* note 4, at 139, 141–43.

[211] The term "problems" is offered in response to the Test Method's formal and rhetorical claims to unproblematic "application."

[212] *See* NAGEL, *supra* note 4, at 147. It should be emphasized that this last proposition is phenomenological rather than ontological in nature. That is, the proposition is premised on an analysis of the way in which the Test Method has actually functioned in the Supreme Court context. I am by no means prepared to claim that a combination of grammatical and hermeneutic reading is not *capable*, under any circumstances, of producing required judicial decisions.

[213] *See supra* p. 705.

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approach to the controlling primary text, the Court can hardly turn around and adopt the discredited grammatical or formalist approach when interpreting the established judicial Test. The Court therefore "applies" the hermeneutics of purposes and effects once again and generates a second layer of judicial text, which is marked by the establishment of secondary Tests and the corresponding displacement of the nominally controlling judicial Test. The net result is the production of ever greater amounts of judicial text oriented toward the policy logic of purposes and effects.

The problem, of course, is that there is no end in sight for this interpretive process. By renouncing a formalist faith in the capacity of grammar to generate required judicial outcomes mechanically, the Test Method appears to pave the way for never-ending interpretation. At this point, the formalist attributes of the Test Method come into play. By adopting the formal structure of the judicial Test, a Test Method opinion appears to shut down the interpretive road as much as possible. The key lies in the formal status of the judicial Test. The Test acquires the status of textual authority figure, a status that entitles its grammar to a certain degree of respect. Of course, the extent of that respect is rather limited, as evidenced by the Court's remarkable willingness to play with the language of its established Tests. Nonetheless, some respect comes with the mere quotation, however inaccurate, of the relevant Test, and with the explicit structuring of the Court's opinion on the matrix of that Test.

This respect for the grammar of the controlling Test is extremely important to the Test Method. It represents the Method's way out of the bind produced by its apparent capacity to continue to generate ever greater amounts of judicial text. The rather subtle solution it provides works as follows. The status accorded the judicial Test, which is exemplified by the structuring of the Test Method opinion on the grammatical matrix of the Test, operates as a *sign* of a specific mode of reading — in particular, of grammatical/formalist reading. This sign, this gesture toward formalism, is central to the operation of the Test Method, because it recalls and makes use of the comforting notion of interpretive stability that grammatical/formalist reading offers.

Test Method opinions thus present themselves as the product of a conglomerate interpretive method, a method that is itself produced by welding together formalist grammar and purposive hermeneutics. The Test Method opinion presents itself as simultaneously engaged in two modes of reading, the grammatical/formalist and the purposive/hermeneutic. The Test Method opinion seeks to signify interpretive stability without the perceived dangers of formalism.

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IV. "LIT. THEORY" IN LEGAL ACTION

This Article's analysis of French and American judicial practice has paid particular attention to the discourses of judging that permeate and constitute French and American judicial decisions. This focus on judicial discourse constitutes the first step in the construction and deployment of a "literary" analysis in the comparative legal context. It is, however, a loaded first step, and it is worth pausing to consider its ramifications.

The point of the foregoing analysis is not to demonstrate that French and American judges sometimes apply legal texts in a rigidly formalist fashion and sometimes engage in policy analysis. The point, rather, is that sometimes the judicial decisions deploy one kind of *discourse* and that at other times they deploy another. Furthermore, the deployment of one type of discourse portrays the judge as engaged in a particular mode of reading, and the use of a different discourse portrays the judge as engaged in a different mode of reading.

At this point, the skeptic might ask: "Why bother with this literary analysis, with 'modes of discourse,' 'modes of reading,' and 'judicial self-portraits'? Why not simply ask whether the French and American judges are formalists or realists — that is, whether they are rigidly applying legal texts or whether they are pragmatically engaging in policy analysis?"

The answer is that this typically post-Llewellyn line of questioning is reductionist — it limits the analysis of judicial decisions and practice. Such a line of questioning assumes that the judge is engaged in *either* formal application *or* policy analysis and that the language of the judicial decision clearly and cleanly reflects how the judge is deciding cases. These traditional assumptions simply disregard, or at best gloss over, the complex relation between what a judicial decision says it is doing and what it might actually be doing. The assumptions also obfuscate the fact that what the judicial decision says it is doing and how the decision's language transmits this information are, in and of themselves, significant facets of the decision.

The construction and deployment of a literary methodology is designed to parse out and analyze the complex relationship between modes of judicial discourse, modes of judicial interpretation, and modes of relating judicial decisions to "governing law." This Part demonstrates that "formalist application" and "policy analysis" are not unbiased terms that adequately reflect what judges do. Rather, they are charged conceptual constructions that surface in judicial discourse. The deployment of a literary analysis demonstrates, however, that these conceptual constructions are forged not only by particular judicial discourses, but also by the linkage of these discourses to particular modes of judicial reading and to particular modes of relating judicial decisions to governing law. An analysis that focuses on only the dis-

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course thus overlooks the conclusions that a more complete literary analysis might offer, and remains trapped in the rigid analytic framework that the formalism/policy dichotomy suggests.

The ensuing literary analysis demonstrates that French and American judicial decisions associate the discourses of formalism and policy with grammatical and hermeneutic reading, respectively. These modes of reading are themselves associated with particular modes of relating judicial decisions to governing law. One such mode of relation claims that the judicial decision is inherently similar to the governing legal norm and is therefore no more than the manifestation of the legal norm in the particular instance; the other mode of relation claims that the decision is meaningfully related — though not identical — to the legal norm and is therefore produced by contextualizing that norm. The literary analysis thus describes French and American judicial decisions as functioning simultaneously on three interrelated fronts (the discursive, the interpretive, and the relational), and deploys specific literary terms in order to avoid the loaded terms "formalism" and "policy." French and American judicial decisions link the three fronts in specific and meaningful ways that not only construct the formalism/policy distinction, but also promote the justificatory notion that French and American adjudication serve particular inherent, natural, and eternal values.

This Article has demonstrated that the French and American judicial systems each maintain two modes of discourse, each of which is associated with a distinct mode of reading. This demonstration required gathering four items for comparison: the official and unofficial portraits of the French civil judge and the two images of judging that emerge from American judicial discourse.

The French judicial system's method of maintaining two modes of discourse and reading consists of bifurcating its discourse into distinct and segregated discursive spheres. At the macro or institutional level, the French judicial system permits the simultaneous maintenance of the two modes of discourse and of reading. The discourse of formal, grammatical application of codified law operates in the official sphere of judicial decisions. The discourse of hermeneutic construction and policy logic operates in the unofficial sphere of the *conclusions* and *rapports*. Furthermore, both modes of discourse and reading operate simultaneously at the micro level of the *magistrat*'s discourse *within* each discursive sphere. The traces of hermeneutics surface in the body of the official judicial decision's discourse of formalist grammar, and the unofficial sphere's discourse of hermeneutics leads to the establishment and application of formal judicial norms.

Unlike the French judicial system, the American judicial system combines the two discourses in one place: the American judicial opinion. As Part III demonstrated, this American discursive combination is particularly visible in the Test Method decisions. On the one hand,

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the form of the judicial Test leads to the discourse of grammatical application of judicial norms; on the other, the "prongs" of the Test are oriented toward the discourse of purpose and effect hermeneutics.

This analytic framework illuminates the hermeneutic similarities between French and American judicial discourse. Test Method decisions and the "unofficial" arguments of French *magistrats* share certain basic discursive traits. Both displace, largely by means of practical effect orientation, the formally controlling legal texts. Focusing primarily on "realities" and "effects," their legal analyses virtually ignore the literal wording of the apparently controlling *loi*, legislative provision, or constitutional clause.

Instead, the French *rapport* or *conclusions* and the American Test Method decision engage in protracted policy discussion. In this discursive mode, the French or American judge bases her legal analysis, inter alia, on social and economic policy considerations, on purposes and effects, and on institutional competence arguments. The interpretive method consists of producing a socially meaningful judicial solution on the basis of something external to the grammar of the formally controlling legal text — typically, on the basis of policy. In this hermeneutic framework, the French or American judge deliberately establishes iterable and prospective judicial norms, in the form of "rules of *jurisprudence*" or "judicial Tests."

Similarities also exist between French and American judges' deployment of the discourse of formalist grammar. In this context, the proper comparison is between the formalist discourses that surface in American Test Method decisions and in official French judicial decisions. In this discursive mode, the judge merely "applies" the relevant numbered provision of the Civil Code or the relevant numbered prong of the appropriate Test. This formalist mode portrays the judge as passively, mechanically, and almost mathematically applying the generative matrix of the controlling legal text. That text apparently exercises such control that it generates not only the required judicial result but also the very structure of the judge's discourse. The official French judicial decision always takes the form of a syllogism; the Test Method decision always tracks the prongs of the appropriate Test.

Previous comparative analyses notwithstanding, contemporary French and American judicial discourses therefore reveal themselves to be historically and culturally contingent variations on the same basic combination of formalist and hermeneutic reading. This is not to say that significant differences do not exist between French and American judges' discursive and interpretive practices. The differences, however, are not quite what one might expect or what other comparatists have previously described.[214] In particular, the official

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[214] *See, e.g.*, DAWSON, *supra* note 13; MERRYMAN, *supra* note 13.

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French portrait's greater emphasis on formal grammar — which exceeds that in American judicial discourse — sometimes results "in an increased sensitivity to [grammar's] perceived failures."[215] This sensitivity manifests itself in the unofficial French discursive sphere, in which the French judge is remarkably candid about the perceived gaps, conflicts, and ambiguities in the Code.[216] Once the French judge enters this unofficial discursive sphere, she finds herself in an explicitly embattled hermeneutic field. She must take sides, must adopt and defend a position as a subjective individual whose interpretive status is by no means superior to that of the other judicial and professorial voices in the field. As I have demonstrated elsewhere, she ultimately becomes, in certain respects, far more personalized than her American counterpart.[217] She argues as an insecure "I," and she is not only particularly sensitive to the perceived limitations of grammatical reading, but also less confident than her American counterpart in the ability of hermeneutics (especially policy hermeneutics) to generate required interpretive solutions.[218]

Despite the fact that the French and American judicial systems put both formalist and hermeneutic modes of reading into play, each system stresses one mode over the other in its dominant discourse. The official discourse of the French judicial system stresses and valorizes formalist reading based on grammatical application and banishes its hermeneutics, insofar as is possible, to the hidden, unofficial discursive sphere. In contrast, American judicial discourse explicitly disparages formalist reading.[219] Test Method decisions, as this Article has shown, consistently attack such formalist or literal readings, and emphasize instead hermeneutic readings based on policy logic.

A. The Judicial Decision as Paradigmatic or Syntagmatic Discourse

1. The Jakobsonian Perspective. — The key nexus in this Article's analysis is the relation between judicial text and the statutory or constitutional provision that the judicial text is supposed to apply and/or interpret. The work of the structural linguist Roman Jakobson provides a methodology that permits a more precise analysis of the nature and significance of this relation.

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215 Lasser, *supra* note 5, at 1403.

216 *See id.* at 1373–76, 1403.

217 *See id.* at 1388–89.

218 *See id.* at 1389–92, 1404.

219 *Cf.* Horwitz, *supra* note 9, at 98 ("Perhaps Roscoe Pound's characterization of the *Lochner* Court comes closest to capturing the present moment — this is a court trapped in the grips of mechanical jurisprudence." (citation omitted)). There exists, of course, another body of American scholarship that describes American adjudication as predominantly formalist. Commentators who subscribe to this view characterize formalist adjudication as either laudable, *see* Schauer, *supra* note 4, at 1456, or undesirable, *see* Llewellyn, *supra* note 1, at 1253.

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Jakobson identifies and distinguishes between "the two basic modes of arrangement used in verbal behavior, *selection* and *combination*."[220] Jakobson contends that "[s]peech implies a selection of certain linguistic entities and their combination into linguistic units of a higher degree of complexity."[221] This twofold character of linguistic arrangement is "readily apparent" in the construction of sentences, in which "the speaker selects words and combines them into sentences [by using syntax]."[222] For example, a fly-fisher whose imitation insect has just been eaten by a trout may utter the sentence, "The trout took my fly." In order to construct this sentence, the speaker must engage in two operations: she must select each of the words and combine them in the sentence.

The "selection" of the constituent parts of the message involves choosing among similar linguistic units. "A selection between alternatives implies the possibility of substituting one for the other, equivalent in one respect and different in another. Actually, selection and substitution are two faces of the same operation."[223] The selection of the constituent parts of a message is therefore a *paradigmatic* operation: it involves selecting among similar linguistic units and substituting the selected unit into the message.[224] To return to the fly-fishing example, the speaker must select among similar and dissimilar terms for trout ("cutthroat,"[225] "fish," "salmon," "cordless telephone," etc.) and fly ("emerger,"[226] "lure," "bait," "portable computer," etc.) and substitute the selected words into her sentence.

The "combination" of the constituent parts of the message involves constructing a context with and for the parts. Jakobson states:

> Any sign is made up of constituent signs and/or occurs only in combination with other signs. This means that any linguistic unit at one and the same time serves as a context for simpler units and/or finds its own context in a more complex linguistic unit. Hence any actual grouping of linguistic units binds them into a superior unit: combination and contexture are two faces of the same operation.[227]

The combination of the message's constituent parts is therefore a *syntagmatic* operation: it involves the construction of a context by placing the selected linguistic units in a sequence with other, contiguous lin-

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220 Roman Jakobson, *Linguistics and Poetics*, *in* LANGUAGE IN LITERATURE 62, 71 (Kristina Pomorska & Stephen Rudy eds., 1987).

221 Roman Jakobson, *Two Aspects of Language and Two Types of Aphasic Disturbances*, *in* LANGUAGE IN LITERATURE, *supra* note 220, at 95, 97.

222 *Id.*

223 *Id.* at 99.

224 The term "paradigmatic" is borrowed from de Man. *See* DE MAN, ALLEGORIES OF READING, *supra* note 17, at 15.

225 A "cutthroat" is a type of trout with red markings on its throat.

226 An "emerger" is a type of fly that imitates an aquatic insect emerging to the surface of the water in order to hatch as a flying insect.

227 Jakobson, *supra* note 221, at 98–99.

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guistic units.[228] In the fly-fishing example, the speaker must place the selected words ("trout," "fly," etc.) next to each other to produce a more complex linguistic unit (the sentence), in which each word contextualizes and is contextualized by every other.

The distinction between paradigmatic and syntagmatic relation therefore distinguishes between the two basic ways in which linguistic units are related to each other. The selection of a term is a *paradigmatic* operation in that it posits that a relation of *similarity* (or dissimilarity) exists between the term selected and the other terms in the lexical code. In the fly-fishing example, the speaker must refer to the lexical code that is provided by her (English) language (and that consists of every word that exists in that language), and engage in a paradigmatic operation: she must decide which of the more or less similar terms she is going to use ("trout," "fish," etc.), and substitute them in her sentence.[229]

The speaker constructing the linguistic message must also engage in a second, *syntagmatic* operation: she must use syntax to combine the selected linguistic units in a sequence that forms a sentence. The syntagmatic relation between the units in a given message is not based on similarity; rather, it is based on *contiguity*. For example, each of the words in a sentence is not necessarily similar to the others but is simply placed next to them. The syntagmatic relation between words in a sentence does not exist in the lexical code but is constructed in the message itself through the act of placing certain words next to others.[230] Thus, in the fly-fishing example, the speaker does not use the words "trout," "took," and "fly" on the ground that they have similar dictionary definitions. Rather, she relates the words to each other by placing them next to each other in her sentence.

The process of constructing a message therefore consists of two operations that relate linguistic units in different ways. Jakobson states that paradigmatic selection "connects terms *in absentia*," whereas syntagmatic combination connects terms "*in presentia*."[231] In other words, the selected terms are related to the analogous terms for which they substitute, but this relation is not apparent in the message itself (the lexical code remains in the background and is not present in the message). In contrast, the relation between combined terms does appear in the sequential context of the message itself. Thus, the word "trout" may well be paradigmatically related to other words in the lexical code ("fish"), but that relation is not apparent in the fly-fisher's message (her sentence). The syntagmatic relation between the words

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228 The term "syntagmatic" is borrowed from de Man. *See* DE MAN, ALLEGORIES OF READING, *supra* note 17, at 15.

229 *See* Jakobson, *supra* note 221, at 99.

230 *See id.*

231 *Id.*

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"trout" and "fly," however, is apparent in the message: each of the words is next to and contextualizes the other words in the sentence.

A given linguistic sign (a linguistic unit, such as a word) in a given message is therefore related to two sets of other signs: similar signs that exist in the code of available signs (but that have not been selected for use in the given message), and the other signs that appear in the sequence of the given message. Jakobson states:

> There are two references which serve to interpret the sign — one to the code and the other to the context, whether coded or free [—] and in each of these ways the sign is related to another set of linguistic signs . . . . A given significative unit may be replaced by other, more explicit signs of the same code, whereby its general meaning is revealed, while its contextual meaning is determined by its connection with other signs within the same sequence.
>
> The constituents of any message are necessarily linked with the code of available signs by an *internal relation* and with the message by an *external relation.* Language in its various aspects deals with both modes of relation.[232]

Thus, the words "trout," "cutthroat," and "fish" are linked *within* the English language's lexical code and are *internally* related to each other, whereas the words "trout" and "fly" are linked *outside* the lexical code (in the message/sentence) and are *externally* related to each other.

In the normal operation of language, therefore, both modes of relation (the paradigmatic selection/substitution of similar linguistic units and the syntagmatic combination/contexture of contiguous linguistic units) work simultaneously to provide the linguistic sign with two sources of relational meaning (the lexical code and the actual message). All speakers must engage in both modes of relation when constructing messages.

Although both modes of relation are normally employed in any given linguistic system, any speaker (or group of speakers) tends to prioritize one mode over the other. Jakobson states:

> In normal verbal behavior both processes are continually operative, but careful observation will reveal that under the influence of a cultural pattern, personality, and verbal style, preference is given to one of the two processes over the other.
>
> . . . .
>
> A competition between both devices . . . is manifest in any symbolic process, be it intrapersonal or social.[233]

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[232] *Id.* at 99–100 (emphasis added).

[233] *Id.* at 110, 113. Jakobson claims that "[t]he alternative predominance of one or the other of these two processes is by no means confined to verbal art." *Id.* at 111. He notes that "[t]he same oscillation occurs in sign systems other than language," including, for example, pictorial representation. *Id.*

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In a more "poetic" linguistic mode, for example, the fly-fisher might say: "The rainbow rose to my pale morning dun."[234] In this case, the poetic fly-fisher may well be prioritizing the similarity, within the lexical code, between the words she has used in her sentence. She has substituted the words "rainbow," "rose," and "pale morning dun" for the words "fish," "took," and "fly," in order to stress the similarity, within her lexical code, between the color-related and atmosphere-related terms that she has selected for her message (all the colors in the rainbow, the color "rose," pale colors, and the pale morning light). However, even in this poetic example, external, syntagmatic relations of contiguity are operative. The sentence places the terms next to one another and thereby relates each in the context of every other and of the sentence itself.[235]

Jakobson's analysis of "[t]he bipolar structure of language (or other semiotic systems)"[236] includes a study of those language disturbances that demonstrate an impairment of either the paradigmatic or syntagmatic mode of linguistic relation. Jakobson's description of these disturbances, which are collectively known as aphasia, informs this Article's analysis not as a scientific description of medical pathologies, but as a suggestive description of linguistic systems that strongly privilege either paradigmatic or syntagmatic relations.

Jakobson breaks down these aphasic language disturbances into two types: similarity disorder and contiguity disorder. According to Jakobson, the distinction between the two types of disorders depends on "whether the major deficiency lies in selection and substitution, with relative stability of combination and contexture[,] or conversely, in combination and contexture, with relative retention of normal selection and substitution."[237]

Aphasics who suffer from similarity disorder (also known as "selection deficiency") have trouble beginning conversations, utterances, or sentences.[238] They have difficulty making the initial selection among similar linguistic units, and therefore cannot select a subject for a sentence. For such aphasics, "beginning is the patient's main difficulty,"[239] and "context is the indispensable and decisive factor" in his

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234 A "rainbow" is a type of trout; a trout "rises" when it moves to the surface of the water in order to swallow an insect; a "pale morning dun" is an artificial imitation of a specific type of insect.

235 In fact, one might well argue that it is the syntagmatic relation between the terms in the sentence that permits the paradigmatic relation of the terms in the code to come to light. It is the juxtaposition and sequencing of the terms that calls attention to their similarity. Part V provides further discussion of this extremely important point.

236 Jakobson, *supra* note 221, at 111. A semiotic system is any system that utilizes signs to convey meaning.

237 *Id.* at 100.

238 *Id.*

239 *Id.* at 101.

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speech;[240] isolated words mean nothing, for "the word out of context has no meaning."[241] As "it is the external relation of contiguity which unites the constituents of a context, and the internal relation of similarity which underlies the substitution set,"[242] such aphasics have difficulty making the initial, internal relation to the code, and their speech resorts overwhelmingly to external context. For them, linguistic "operations involving similarity yield to those based on contiguity."[243] They have trouble with naming, except insofar as the habitual context of a linguistic unit provides adequate guidance. They can readily complete sentences already begun, but they cannot make the initial move to the "substitution set [provided by] the lexical code."[244]

Aphasics with contiguity disorder exhibit the opposite problem. They can readily begin a sentence (for their access to the lexical code is intact), but they cannot effectively construct the rest of the utterance. They can select a subject for the sentence but have trouble building a predicate. What is lost is the ability to establish a contiguous relation between the words in a sentence. Such aphasics have difficulty "organizing words into higher units,"[245] a difficulty that "diminishes the extent and variety of sentences."[246] Context is lost, and signification is seriously impaired. These aphasics can identify, distinguish, and reproduce linguistic units, but because they cannot relate the units they select to other linguistic units — that is, because they cannot place linguistic units in context — the linguistic units "may be grasped as known but not understood."[247]

2. French and American Judicial Discourse from a Jakobsonian Perspective. — Jakobson's methodology of the bipolar structure of linguistic relations can be transposed into a legal context to produce suggestive interpretations of French and American judicial discourse. Specifically, Jakobson provides the tools with which to approach this Article's larger topic, the relation between the judicial decision and the law on which that decision is to be based. In their dominant modes, French and American judicial discourses each stress different relations between the judicial decision and the law that the decision is supposed to apply or interpret.

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240 *Id.* at 100. Such aphasics, for example, might "never utter[] the word *knife* alone but, according to its use and surroundings, alternately call[] the knife *pencil-sharpener*, *apple-pearer*, *bread-knife*, [and] *knife-and-fork*." *Id.* at 102.

241 *Id.* at 102.

242 *Id.* at 104.

243 *Id.* at 105.

244 *Id.* at 102.

245 *Id.* at 106.

246 *Id.* Such aphasics might be able to utter the word *knife* alone but would not be able to construct a sentence around that word.

247 *Id.* at 109 (quoting KURT GOLDSTEIN, LANGUAGE AND DISTURBANCES 90 (1948)) (internal quotation marks omitted).

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The official French judicial decision presents itself as paradigmatically related to the *loi* that governs the case at hand. This paradigmatic relation manifests itself in the very form and structure of the official French judicial decision. The official Cour de cassation decision, as we have seen, is always structured as follows:

The Court

(a) Given Articles 5 and 1342 of the Civil Code . . .;

Whereas Plaintiff did *X* . . .;

Whereas Defendant did *Y* . . .;

Whereas the Appellate Court ruled *Z* . . .;

(b) Quashes.[248]

The judicial decision is merely the direct substitute for the *loi*. It does no more than demonstrate the selection of the applicable *loi* from the repository provided by the Civil Code, and voice the *loi*'s command. In other words, the Cour speaks as a single voice in the name of the *loi*, which is merely transposed and applied without intervening or mediating factors.

The relation of the French judicial decision to the Code's *loi* is one of internal and inherent necessity. Absolutely no explanation is given, or apparently required, for the relation between the decision and the *loi*. The decision therefore demonstrates, by its very form and structure, that no external force (most notably a judge) has constructed the relation. The relation simply exists. It is, to use the Saussurian term employed by Jakobson, *in absentia*, and doubly so.[249] Nothing in the body of the judicial decision explains the decision's link to the *loi*, and the decision never quotes the text of the *loi* (Code provisions are merely cited by number).

The official French judicial decision's almost complete disregard for any kind of context further emphasizes its paradigmatic nature. American legal comparatists have long called attention to the extremely terse exposition of facts that characterizes the French decision.[250] This factual terseness is certainly significant, but only insofar as it reflects a veritable silence of another kind. The French judicial decision says nothing about its relation to the *loi*. The automatic application of the *loi* in French judicial decisions is in no way dependent on, or related to, such external factors as social, economic, or institutional policy considerations. Even those few facts that find their way into an official French judicial decision do not affect the relation between the decision and the codified *loi*; they merely provide the in-

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[248] *See* Lasser, *supra* note 5, at 1340; pp. 695–96.

[249] *See* Jakobson, *supra* note 221, at 99.

[250] *See, e.g.*, DAWSON, *supra* note 13, at 411.

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stance that provokes the necessary substitution of the decision for the selected *loi* in whose name the decision speaks.

The syllogistic structure of the French judicial decision also demonstrates the extent of the paradigmatic relation between the *loi* and the decision. The internal and inherent similarity or analogy between the *loi* and the decision manifests itself as a mathematical syllogism; the *loi* necessarily leads to the decision. Furthermore, as the French judicial decision simply embodies the selected law in a particular instance, the decision possesses no normative force. This trait helps to explain why French judicial decisions do not and may not cite precedent as binding legal authority. To allow judicial precedent to exert normative force would be to threaten the necessary, internal, and paradigmatic link between the *loi* and the judicial decision.

The American judicial decision, in contrast, presents itself as contiguously related to the law that governs the case at hand. It does not present itself as the locus of the mere transposition of a legal norm that is selected simply because it is applicable to the facts of a particular case. Rather, it presents itself as the combination of the legal norm with issues related, but not analogous, to that norm. It is the syntagmatic construction of a link between the law and policy considerations in the context of a legal case. The juxtaposition, in the text of the decision itself, of legal norms and, for example, social, economic, and institutional policy issues, produces the American judicial decision. In short, the relations in American judicial decisions are syntagmatic relations of contiguity, not paradigmatic relations of analogy.

The introduction of "external" policy issues in American judicial decisions results in a syntagmatic link between legal norms and those policy issues. This syntagmatic link is *in presentia*: in the American judicial decision, the legal norms are overtly placed in the context of various policy considerations. The legal norm must combine with the policy issues in order to produce the judicial decision. The decision itself appears as the legal norm *and* something else — namely, context. This context is not reducible to the mere "facts" of the particular case that trigger the paradigmatic selection and reproduction of the given legal norm. The facts are part of a greater policy context that must be brought explicitly into relation with the legal norm.

Because the American judicial decision does not present itself as the paradigmatic substitute for the *loi*, it tends to be longer and more complex than its French counterpart. The American decision must provide sequences that juxtapose the legal norms and the policy issues. Insofar as this juxtaposition produces the decision, the norm — as well as the decision — is no longer unrelated to, or unaffected by, context. The decision's characteristic feature is therefore its combination of legal norms with related, though external, policy concerns, a combination that is exemplified by the Test Method decision's consideration of purposes and practical effects.

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The American judicial decision, then, contextualizes legal norms with policy in a way that differentiates it from the French decision. This contextualization within the sequence of the American judicial decision renders the decision susceptible to contextualization by later decisions. It becomes part of the context for the sequence of these later decisions and thus acquires normative status. The syntagmatic combination of legal norms and policy considerations within American judicial discourse thrusts each decision into the syntax of past and future judicial decisions.

In their dominant discursive modes, French and American judicial decisions therefore present themselves, respectively, as paradigmatically or syntagmatically related to the law that they apply or interpret. If their respective self-representations were taken at face value, French and American judicial decisions would almost appear to suffer from opposite forms of aphasia.[251] The French judicial system would resemble an aphasic suffering from contiguity disorder, a speaker in whom the process of syntagmatic relation was impaired and in whom the paradigmatic relation was predominant. Jakobson elaborates on the nature of the disorder in the following terms:

> The type of aphasia affecting contexture tends to give rise to infantile one-sentence utterances and one-word sentences. Only a few longer, stereotyped, ready-made sentences manage to survive . . . . While contexture disintegrates, the selective [paradigmatic] operation goes on . . . . The patient confined to the substitution set [(the lexical code)] (once contexture is deficient) deals with similarities . . . .
>
> . . . .
>
> . . . As long as the sense of derivation is still alive, so that this process is still used for creating innovations in the code, one can observe a tendency toward oversimplification and automatism . . . .[252]

This description of the effects of contiguity disorder appears to apply readily to French judicial discourse. The official Cour de cassation decision, for example, is an utterance limited to a single, "stereotyped, ready-made sentence[]"[253] devoid of context. It engages in only one, "selective" operation: choosing the appropriate legal provision from the "substitution set" (Civil Code) to which it is "confined."[254] The French judicial decision deals only with "similarities"; it matches fact scenarios

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[251] I cannot emphasize enough that I do *not* offer here a straight-faced, "scientific" diagnosis of French and American judicial discourse as actually suffering from aphasia, which is a medical condition the actual existence, contours, and attributes of which are utterly irrelevant to the ensuing analysis. I simply adopt Jakobson's description as a suggestive heuristic device. Furthermore, Jakobson's description of the two forms of aphasia depends on acceptance of the paradigmatic/syntagmatic distinction, a distinction the "essential" nature of which is criticized in Part V of this Article.

[252] Jakobson, *supra* note 221, at 107–08.

[253] *Id.* at 107.

[254] *Id.*

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to Code provisions. To the extent that novel fact scenarios force the Cour to create, by derivation, "innovations in the code, one can observe a tendency toward oversimplification and automatism":[255] the decision always takes the reductive and automatic form of the judicial syllogism, regardless of how complex a novel legal issue may be.

In contrast, the American judicial system would resemble an aphasic suffering from similarity disorder, a speaker in whom the process of paradigmatic relation was impaired and in whom the syntagmatic relation was predominant. Jakobson states:

> For aphasics of [this] type (selection deficiency), the context is the indispensable and decisive factor. . . . It is particularly hard for [them] to perform, or even to understand, such a closed discourse as the monologue. The more [their] utterances are dependent on the context, the better [they] cope[] with [their] verbal task. [They] feel[] unable to utter a sentence which responds neither to the cue of their interlocutor nor to the actual situation. . . .
>
> . . . .
>
> . . . In this type of language disturbance, sentences are conceived as elliptical sequels to be supplied from antecedent sentences uttered, if not imagined, by the aphasic himself or received by him from the other partner in the colloquy, actual if not imaginary . . . .
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> . . . .
>
> . . . In the pathological cases under discussion, an isolated word means actually nothing but "blab." . . . Thus [one] patient never uttered the word *knife* alone but, according to its use and surroundings, alternately called the knife *pencil-sharpener*, *apple-parer*, *bread-knife*, *knife-and-fork*; so the word *knife* was changed from a free form, capable of occurring alone, into a bound form.[256]

This description of the manifestations of similarity disorder appears to be readily transposable to American judicial discourse. The American judicial decision incorporates and relies on context. That context is supplied not only by a detailed analysis of facts, but also by the economic, social, and institutional policy issues that those facts put into play. To the American judicial decision, an isolated legal rule "means actually nothing but 'blab.'"[257] To acquire meaning, a legal rule must always be placed in a factual and policy context. It is never a "free form, capable of occurring alone" in the judicial decision, but is always related "to its use and surroundings";[258] it varies according to the effects it is supposed to produce and according to the policies it is supposed to promote.

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255 *Id.* at 108.
256 *Id.* at 100–102.
257 *Id.* at 102.
258 *Id.*

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The same holds true for the American judicial decision itself. Unlike the French judicial decision, it is not a monologue produced by the acontextual selection and reproduction of a legal norm. To adopt Jakobson's terminology, American decisions are "conceived as elliptical sequels to be supplied from antecedent sentences [(previous decisions)] uttered, if not imagined, by the aphasic himself [(the Court)] or received by him from the other partner in the colloquy [(other courts)], actual if not imaginary."[259] In other words, American judicial decisions are placed in syntagmatic relation with previous decisions, which are made to supply and construct the necessary context for new judicial utterances. The American judicial decision presents itself as the predicate of a sentence already begun by previous decisions, as the next link in a chain.[260]

I do not mean to suggest, however, that the French and American judicial systems actually suffer from either similarity or contiguity disorder. Such a conclusion would run directly counter to this Article's detailed analysis of French and American judicial discourse and practice, an analysis that demonstrated that each of the two judicial systems, in its historically and culturally contingent way, puts into play two modes of discourse and two modes of reading. That analysis remains pertinent in the Jakobsonian context. French judicial discourse, in the unofficial sphere of the *conclusions* and the *rapports*, clearly emphasizes the syntagmatic relations among the *loi*, policy considerations (including the existence and relevance of prior judicial decisions), and the judicial decision in the case at hand. Similarly, American judicial discourse in Test Method decisions clearly stresses the paradigmatic selection and substitution, from one decision to the next, of the applicable judicial Test.

When French and American judicial discourses are observed and analyzed in their totality — that is, when the syntagmatic tendencies of unofficial French discourse and the paradigmatic tendencies of American Test Method decisions are taken into account — the discourse of each system emerges, in Jakobson's terms, as "normal verbal behavior."[261] In French and American judicial discourses, "both processes [(paradigmatic selection/substitution and syntagmatic combination/contexture)] are continually operative, but careful observation [reveals] that[,] under the influence of a cultural pattern, personality, and verbal style," one process is given priority over the other.[262] In the context of judicial discourse, at least, this assertion requires one caveat.

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259 *Id.* at 101.

260 *Cf.* Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 542 (1982) (arguing that a judge deciding a case works as part of a "complex chain enterprise" in which previous judges' decisions are the links).

261 Jakobson, *supra* note 221, at 110.

262 *Id.*

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The judicial discourse in each system only *appears* to give priority to one process over the other, because each system unquestionably resorts to and depends on the simultaneous operation of the other (deprioritized) process.

Although the French and American judicial systems employ both paradigmatic and syntagmatic processes, each system's attempt to privilege one of the processes reveals the legitimating power it ascribes to that process. Within the French and American systems, these linguistic processes have been invested with particular values, so that to employ one of the processes is to invoke the value it represents. Each time a judicial decision uses its apparently privileged process, then, it reinforces a particular normative vision of French or American adjudication.

In order to explain more concretely the way in which a linguistic function as seemingly abstract as the paradigmatic or syntagmatic process can be an avenue of self-justification for judicial decisions, the next section turns to another theoretical construct. Parts II and III demonstrated the ways in which French and American judicial decisions link the discourse of norm application to a grammatical or formalist mode of reading and the discourse of policy to a hermeneutic mode of reading. The next section draws on Roland Barthes's notion of contemporary myth in order to demonstrate how these two paired modes of discourse and modes of reading are themselves linked to two different understandings of the values served by adjudication.

B. The Judicial Decision as Myth

1. The Barthesian Perspective. — According to Barthes's *Mythologies*, myth is a system of communication definable not "by the object of its message, but by the way in which it utters this message."[263] Barthes works toward his definition and analysis of myth by recalling that all signifying systems are composed of three elements: the signifier, the signified, and the sign. Using the classic example of a bouquet of roses offered as a token of affection, Barthes explains that the roses constitute the signifier, affection constitutes the signified, and the joining or association of the two (i.e., the offering of affection-laden roses) constitutes the sign.[264]

Myth, states Barthes, follows the same tripartite scheme of signifier, signified, and sign. What distinguishes it from other signifying systems, however, is its two-tiered structure: the mythic system is constructed upon a prior semiological system. Barthes explains:

> [M]yth is a peculiar system, in that it is constructed from a semiological chain which existed before it: it *is a second-order semiological system.*

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263 ROLAND BARTHES, MYTHOLOGIES 109 (Annette Lavers trans., Farrar, Straus & Giroux 1972) (1957).

264 *See id.* at 113.

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> That which is a sign (namely the associative total of [the signifier and the signified]) in the first system, becomes a mere signifier in the second. . . . Whether it deals with alphabetical or pictorial writing, myth wants to see in [this sign] only . . . the final term of a first semiological chain. And it is precisely this final term which will become the first term of the greater system which it builds and of which it is only a part.[265]

Myth is therefore constructed by taking one semiological system (signifier, signified, and sign) and building a second semiological system on top of it. This construction is accomplished by appropriating the final term of the first system (the sign) and turning it into the first term (the signifier) of a second, mythic semiological system.

Barthes offers the following famous example. The cover of an edition of *Paris-Match* magazine published during the wars of colonial independence consisted of a photograph depicting an African in French military uniform who is saluting, with eyes uplifted, what is apparently the French flag. On the one hand, this photograph (the sign) functions in its own right as a simple pictorial semiological system: the particular image (the signifier) depicts an African saluting (the signified). On the other hand, the photograph simultaneously signifies something else: "that France is a great Empire, that all her sons, without any colour discrimination, faithfully serve under her flag, and that there is no better answer to the detractors of an alleged colonialism than the zeal shown by this Negro in serving his so-called oppressors."[266] This second, mythic signification is produced by appropriating the final term (the sign) of the first, pictorial system (the image of an African saluting) and using it as the vehicle (the signifier) for the transmission of a second signification (French military colonialism).[267]

Barthes represents the structure of myth in the following diagram, to which the parenthetical terms and bracketed explanations have been added:[268]

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[265] *Id.* at 114–15.

[266] *Id.* at 116.

[267] *See id.* at 118–19.

[268] *See id.* at 115. The parenthetical terms are explained in the text following the chart.

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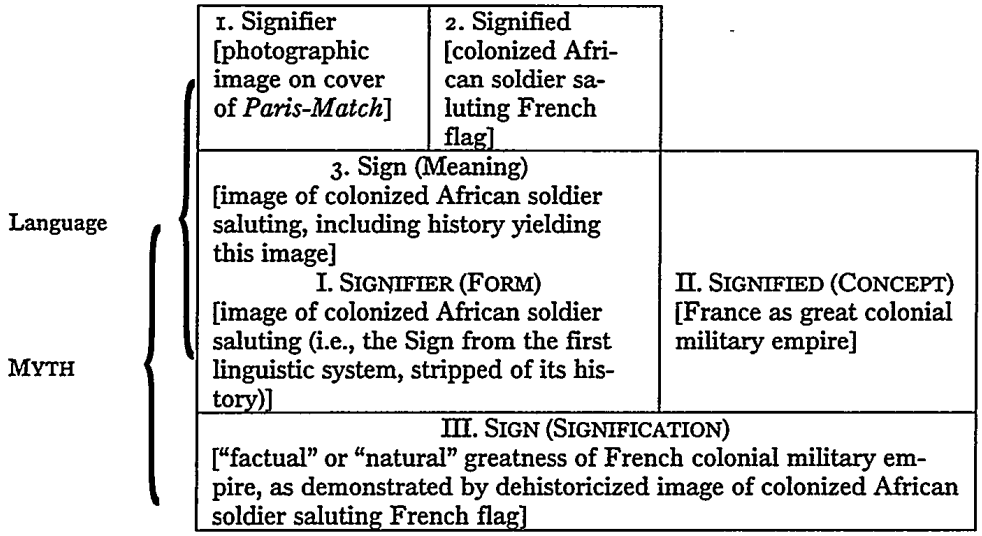

As this schematic shows, myth is composed of two overlapping semiological systems. The first is the language system (pictorial, linguistic, or otherwise), and the second is the myth itself, which appropriates the final term of the language system (the sign) in order to use it as the first term of the mythic system.

As the *Paris-Match* example demonstrates, the key is the myth's signifier, which can be read in two ways. On the one hand, it is the "rich" and "self-sufficient" final term (the sign) of the first, linguistic system. In the example above, it is a pictorial image (the African soldier saluting) full of history (the history of France, of its colonial adventures, of its current colonial difficulties, etc.; the history of the African soldier, of his upbringing and education in a French colonial territory, of his satisfaction of French military service requirements, etc.; the history of *Paris-Match*, of its position and role in the French media, etc.; the history of *Paris-Match*'s readership, of the socioeconomic, educational, and political conditions that produced it, etc.).[269] As the final term of the linguistic system, Barthes calls this pictorial image (the sign) "meaning." On the other hand, this image merely serves as the myth's signifier, which Barthes, in order to distinguish it from the rich final term of the linguistic system, calls "form."[270]

In the image's transition from the final term (sign/meaning) in the first system to the first term (signifier/form) in the second, the image is gutted of its richness, of its history. That is, in order for the myth to appropriate the image, it must empty the image of its fullness and history in order to fill it with a new, global, mythic signification. The history of the soldier, for example, must be largely emptied — or at least

[269] *See id.* at 118–19.
[270] *See id.* at 118.

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bracketed — in order to prepare the entire image to receive a new signified on the mythic level (French colonialism).[271]

The ambivalent nature of the mythic signifier characterizes myth in general. As "form," it does not remove the "meaning" but only weakens and distances it; it holds it at its own disposal and prepares it to receive the mythic signified, the "concept."[272] The "meaning" retains a certain presence, in which the concept takes root, but it is reduced, deformed, "tamed," and alienated:

> [T]he meaning loses its value, but keeps its life, from which the form of the myth will draw its nourishment. . . . [T]he form must constantly be able to be rooted again in the meaning . . . ; above all, it must be able to hide there. It is this constant game of hide-and-seek between the meaning and the form which defines myth.[273]

Myth is a mode of speech that is defined by its intentional concept (French colonialism) far more than by its literal sense (African soldier); yet the intentional concept is "somehow frozen, purified, eternalized, *made absent* by this literal sense (*The French Empire? It's just a fact: look at this good Negro who salutes like one of our own boys*)."[274]

The myth's signified (the concept) therefore implants itself and its own history in the form (the weakened version of the linguistic sign), but the existence (if not the history) of the form nonetheless remains sufficiently present for it to appear to be *naturally* related to the concept.[275] Mythic signification is precisely this process of naturalizing the mythic concept by passing it off as essentially or causally related to the meaning, when it is actually related to the form (the meaning's emptied and motivated double).[276] As Barthes states, "We reach here the very principle of myth: it transforms history into nature."[277] Myth appears to do nothing more than note the natural and factual relation between the meaning and the concept, but in actuality it empties the meaning of its history in order to press it into the service of the concept. Barthes states:

> But for the myth-reader, . . . everything happens as if the [meaning/form] *naturally* conjured up the concept, as if the signifier *gave a foundation* to the signified: . . . myth is speech justified *in excess.*
>
> . . . [T]he myth-reader is led to rationalize the signified by means of the signifier.
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> . . . .

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271 *See id.* at 118–19.
272 *See id.* at 117.
273 *Id.* at 118.
274 *Id.* at 124.
275 *See id.* at 117–19.
276 *See id.* at 125–26.
277 *Id.* at 129.

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> . . . In the second (mythical) system, causality is artificial, false; but it creeps, so to speak, through the back door of Nature. This is why myth is experienced as innocent speech: not because its intentions [the concept] are hidden . . . but because they are naturalized.
>
> In fact, what allows the reader to consume myth innocently is that he does not see it as a semiological system but as an inductive one. Where there is only an equivalence, he sees a kind of causal process: the signifier and the signified have, in his eyes, a natural relationship. This confusion can be expressed otherwise: any semiological system is a system of values; [but] the myth-consumer takes the signification for a system of facts: myth is read as a factual system, whereas it is but a semiological system.[278]

Myth is therefore a mode of speech that appropriates an initial linguistic system and presents it as factually, naturally, and causally related to a concept that is really a system of values. In the functioning of this mythic process, the initial linguistic system is dehistoricized, and the constructed and historically contingent values of the mythic concept are passed off as natural, essential, and eternal. As Barthes states, "[s]emiology has taught us that myth has the task of giving an historical intention a natural justification, and making contingency appear eternal."[279]

2. French and American Judicial Discourse from a Barthesian Perspective. — Barthes's study of contemporary myth provides a heuristic tool for understanding the way that French and American judicial decisions infuse linguistic processes with cultural values. Judicial discourse functions as myth. In each judicial system, a first, linguistic relation is established between modes of discourse and modes of reading; then a second, mythic relation is constructed between judicial decisions and the values associated with modes of relating those decisions to the law.

Within the linguistic system, the modes of judicial discourse are the signifiers, and the modes of reading are the signifieds. In both systems, the discourse of the judicial application of the law signifies grammatical/formalist reading. In the French system, for example, the official judicial decision presents itself as the straightforward application of pre-established legal norms (the *lois* contained in the Code). The dominant mode of French judicial discourse is the syllogism, which signifies a formalist mode of reading. The Civil Code is presented as the generative matrix for every judicial decision: it not only applies itself without intervening factors (such as policy), but its application also structures the very form of the judicial decision. The result in the particular case is merely the playing-out of the requirements of the Code, and the discourse of this playing-out is the judicial syllogism. The association of a discourse of application with a formalist

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278 *Id.* at 129–31.

279 *Id.* at 142.

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mode of reading also holds true in American judicial decisions, as the Test Method decisions demonstrate. These decisions recurrently deploy a discourse of application, which entails applying the appropriate prong of the appropriate Test. As in the French system, this discourse is associated with a grammatical/formalist mode of reading. The Test is presented not only as the generative matrix for the decision, but also as the structure for the decision's very form: the decision invariably tracks the prongs of the Test. The result reached in the judicial decision appears to be no more than the playing-out of the requirements of the Test.

Similarly, in both the French and American judicial systems, the discourses of equity, of purposes and practical effects, or of economic, social, or institutional policy signify hermeneutic reading. In both systems, these discourses are associated with the hermeneutic production of meaningful judicial interpretations of the law. This mode of reading, as opposed to the grammatical/formalist mode associated with the discourse of application, calls for interpreting the law in terms of factors external to the letter of the law. Policy discourse's explicit opposition to formalism reinforces its association with hermeneutic reading. In American Test Method decisions, as this Article has shown, the discourse of purposes and practical effects contains an explicit and virulent critique of formalist or literal reading.[280] In the French judicial system, the discourse of policy and the hermeneutic mode of reading are removed from the official discursive sphere of French judicial decisions and surface explicitly only in the unofficial *rapports* and *conclusions*.

The first semiological system in the French and American judiciaries therefore creates a linguistic relation in the judicial decisions between particular modes of discourse (signifiers) and particular modes of reading (signifieds). The judicial decisions themselves function as the signs of this linguistic system; that is, they are the concrete manifestation of the correlation between the modes of discourse and the modes of reading.

This linguistic system, however, represents only the first of two semiological systems established in and by French and American judicial decisions. The decisions construct a second system upon the first, one that establishes a relation between the judicial decisions and the law on which those decisions are supposed to be based. The final term of the linguistic system (the judicial decision) becomes the first term in a second semiological system. In this second system, judicial decisions are reduced to mere signifiers that signify particular modes of relating judicial decisions to the law. That is, the decisions signify their paradigmatic or syntagmatic relation to the law.

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[280] *See supra* pp. 708–09.

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In this second semiological system, the valorized attributes of paradigmatic relation are assigned to grammatical/formalist judicial decisions, and the valorized attributes of syntagmatic relation are assigned to hermeneutic ones. Official French judicial decisions, as section A demonstrated, present themselves as paradigmatically related to the *loi*.[281] The decisions, quite simply, *are* the *loi*. American judicial decisions, though they do not present themselves as entirely paradigmatic, do possess a strong paradigmatic component, as the Test Method decisions demonstrate. In these decisions, the judicial Tests operate as the law that is selected and manifested in the decisions. The particular decision is merely the substitute for the law in the particular instance.

Unlike French judicial decisions, however, American decisions explicitly present themselves as syntagmatically related to the law. In this mode, American decisions appear as a chain that combines with the law to produce judicial outcomes. The law, in this syntagmatic American context, is itself constituted by combining the chain of judicial decisions with, for example, legislative or constitutional norms. In its unofficial discursive sphere, the French judicial system offers the same image of judicial outcomes constituted by combining, sequencing, and contextualizing the *loi*. In short, the French and American judicial systems both present their decisions, which are signs in their own right (composed of modes of judicial discourse and modes of reading), as paradigmatically and/or syntagmatically related to the law.

It is important to question, however, just what "paradigmatic" or "syntagmatic" signifies in this second semiological system. The official French judicial decision, for example, substitutes paradigmatically for the *loi* it applies because it is inherently similar or identical to that *loi*. The link between the decision and the *loi* is one of necessary, internal relation. The link is inherently stable; thus the decision can substitute cleanly and automatically for the *loi*. The syntagmatic American judicial decision, however, combines with the law because it links the law to other, contiguously related elements. That is, it links the law to previous judicial decisions and to other factors that are external, yet somehow pertinent and related to the law (i.e., policy). The relation is not internal or inherently necessary, but external and contextually relevant.

Stated as such, it becomes evident that the paradigmatic or syntagmatic qualities of French and American judicial decisions represent ontological claims about the nature of the relation between the judicial decision and the law on which it is apparently based. A decision is paradigmatic or syntagmatic because it is, respectively, either internally, inherently, and necessarily similar to the law, or externally, contiguously, and contextually relevant to it.

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[281] *See supra* pp. 746–47.

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These ontological claims of the second semiological system are important because they are associated with the first semiological system's modes of judicial discourse and modes of reading. The discourse of application that is characteristic of Test Method decisions provides a good example. In these decisions, the legal question is always framed in terms of the application or satisfaction of the controlling judicial Test.[282] The discourse of application combines with the paradigmatic quality of judicial Tests to signify the inherent stability and textual necessity of adjudication. This signification is even more explicit in the official French judicial decision, the very prototype of the paradigmatic relation between the law and the judicial decision. The paradigmatic selection and substitution of the *loi* in the French decision, combined with the discourse of the syllogism, leaves no room for doubt: adjudication is nothing more or less than the stable production of the *loi*'s necessary legal solutions.

In the second semiological system, the syntagmatic construction of judicial decisions signifies something quite different. In the American context, the ontological claims regarding the syntagmatic relation between judicial decisions and the law are associated with the discourse of purposes and effects. This Article has shown, for example, that Test Method decisions always explicitly describe how legal norms should be read in terms of their purposes and how they should be measured in terms of their practical effects. This discourse is incorporated into the very prongs of the judicial Tests. The Test Method is an elaborate way of ensuring that, through the establishment of an iterable Test composed of distilled purposive and effect-oriented discourse, legal norms will be syntagmatically (contextually) combined with external but contiguously related policy issues to produce judicial decisions. In the unofficial French sphere of the *rapports* and *conclusions*, the syntagmatic relation between judicial decisions and the *loi* is associated with the discourse of equity and legal adaptation. The *magistrat*'s proposed judicial solution combines legal norms with external but contiguous elements that are considered contextually relevant.

In both the American and French judicial systems, therefore, the syntagmatic relation that is constructed between the judicial decision

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[282] In the *Memoirs* obscenity case, for example, Justice Brennan stated that the "sole question" was "whether *Memoirs* satisfie[d] the test of obscenity established in *Roth v. United States*." Memoirs v. Massachusetts, 383 U.S. 413, 413 (1966). In *Darden*, Justice Powell stated: "Petitioner contends that he was denied effective assistance of counsel .... That claim must be evaluated against the two-part test announced in *Strickland*." Darden v. Wainwright, 477 U.S. 168, 184 (1986) (citation omitted). The discourse of application is further bolstered by the decisions' structure, which frequently tracks the various prongs of the Test. In *Goldberg*, Justice Marshall began each of three consecutive sections by referring to a particular prong of the Test that governed his analysis: "[W]e begin our inquiry with apportionment, the second prong of the *Complete Auto* test.... We turn next to the third prong of the *Complete Auto* test .... Finally, we reach the fourth prong of the *Complete Auto* test...." Goldberg v. Sweet, 488 U.S. 252, 260, 265–66 (1989).

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and the law is associated with modes of discourse that gesture toward the universe outside of the letter of the law. The discourses of purposes, effects, equity, and adaptation, which place adjudication in the realm of the social, combine with the syntagmatic quality of American judicial decisions and of the unofficial arguments of French *magistrats* to signify the social responsiveness of adjudication. The explicitly anti-formalist discourse of Test Method decisions[283] and of the *rapports* and *conclusions*[284] further underlines this signification of socially responsive adjudication. If the judicial decision is produced paradigmatically and not syntagmatically — that is, if it does not contextualize legal norms by combining them with the concerns of the "real world" — the results can be "absurd."[285]

In both the French and American judicial systems, therefore, the definitional characteristics of paradigmatic and syntagmatic relation (internal vs. external, similarity vs. contiguity, etc.) come to signify valorized attributes of adjudication. The distinction between the paradigmatic and the syntagmatic relation of the judicial decision to the law signifies the distinction between inherently stable and socially responsive adjudication.

French and American judicial decisions thus reveal themselves to be complex semiological systems that construct similar chains of signifying links. The links progress from modes of judicial discourse, to modes of reading, to judicial decisions, to the relations between the judicial decisions and the law, to valorized attributes of adjudication. These chains of signifying links result in the following bipolar association of terms, which, although operative in both judicial systems, is not "inherent" in judicial decisionmaking, but rather is historically contingent and constructed by the texts of the judicial systems themselves:

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283 *See supra* pp. 708–09.

284 Unofficial French equity arguments make the case most overtly. For example, one advocate general stated:

> Should the law stray too far from reality, it would lose one of the essential conditions of its legitimacy: that of being perceived as acceptable by [those to whom it applies]. Rules that are too rigorous, too unshakable in their logical purity, and that lead to socially absurd situations are a menace to the credibility of the entire legal system to which they belong.

Conclusions of Advocate General Joinet, Judgment of Feb. 2, 1990, Cass. ass. plén., 1990 Bull. Civ. II, No. 2, at 2, *in* 1990 RAPPORT DE LA COUR DE CASSATION 147, 147 (1991); *see also Conclusions* of Advocate General Lindon, Judgment of Mar. 8, 1966, Cass. 1e civ., J.C.P. 1966, II, 14664 ("[T]he strict operation of this rule leads to results that, from the point of view of humanity, from the point of view of equity, are extremely shocking.").

285 *See* Lasser, *supra* note 5, at 1384–85 (discussing French *magistrats*' unofficial equity discourse).

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DISCOURSE OF APPLICATION	VS.	DISCOURSE OF PURPOSES/EFFECTS/ETC.
grammar		(policy) logic
formalism		hermeneutics
generative matrix		constructed meaning
direct/unmediated		referential/mediated
paradigmatic		syntagmatic
internal relation		external relation
in absentia		*in presentia*
selection/substitution		combination/contextualization
similarity/analogy		contiguity/relevance
inherent stability		social responsiveness

This association of terms functions on the basis of a two-tiered semiological system that relates three basic variables: particular modes of discourse, particular modes of reading, and particular modes of relating judicial decisions to the law. Both the French and the American judicial systems offer two similar chains of signifying links that associate these three variables. In the first chain, the discourse of grammatical application is associated with the formalist mode of reading, which is in turn associated with the paradigmatic relation of the judicial decision to the law; this process yields a supposedly natural association between formalist/paradigmatic relation and inherently stable adjudication. In the second chain, the discourse of purposes/effects/policy/equity is associated with the hermeneutic mode of reading, which is in turn associated with the syntagmatic relation of the judicial decision to the law; this process yields a supposedly natural association between policy/hermeneutic relation and socially responsive adjudication. *These two signifying chains are historically contingent.* They do not simply exist in the abstract or in the nature of things; rather, just like the image of French colonialism offered by the *Paris-Match* cover, they have been constructed in particular historical and cultural contexts.[286] Functioning as Barthesian myths, however, they deny this contingency. The myth consists of making the two chains signify particular, timeless *values* of adjudication: inherent stability on the one hand, and social responsiveness on the other. The myth, which functions in both the French and American judicial systems, is structured as follows:[287]

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[286] The contingency of the links produced by each signifying chain is clear. Could grammar not be associated with the syntagmatic? Grammar includes the rules of syntax, which govern the construction of sentences. Could hermeneutics not be associated with the paradigmatic? Hermeneutic reading (for example, biblical or Marxist reading) involves the clean, paradigmatic replacement of one text by an Ur-Text (such as the New Testament or *Kapital*). For example, a (crude) Marxist reading of socioeconomic relations yields nothing more than a crude reiteration of *Kapital*. The social text is simply replaced by Marx's text.

[287] This structure is based on Barthes's diagram, to which the parenthetical material and bracketed explanations have been added. *See* BARTHES, *supra* note 263, at 115.

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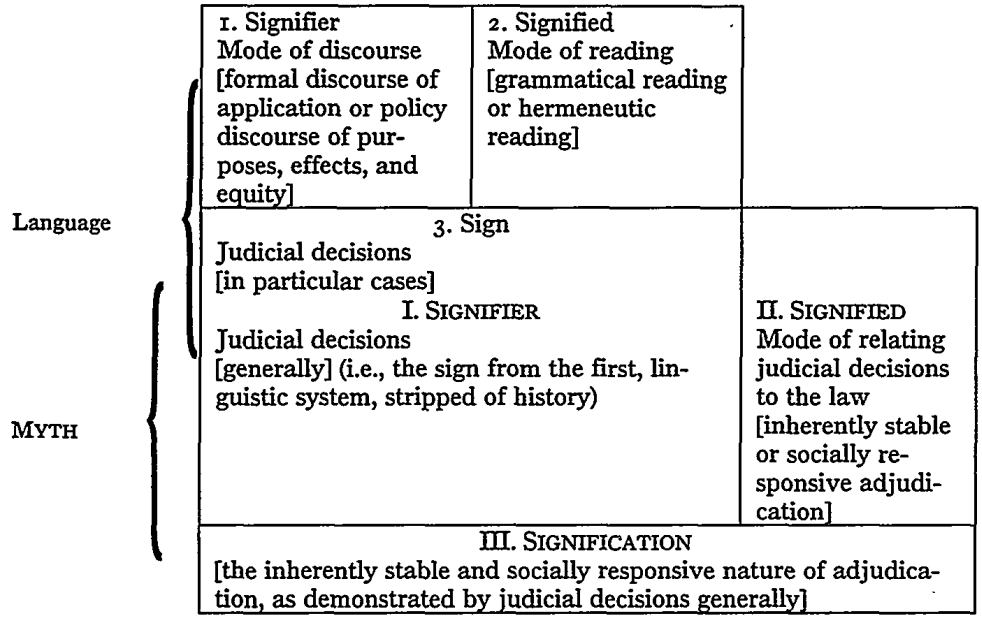

Thus, just as the image of the African soldier is used to demonstrate the natural and eternal value of French colonialism, the paradigmatic form of the French judicial decision, with its grammatical discourse of formalist reading, is made to appear naturally, eternally, and inherently stable. In contrast, the syntagmatic form of the American judicial decision, with its policy discourse of hermeneutic reading, is made to appear naturally, eternally, and inherently socially responsive.

V. CONCLUSION: THE JUDICIAL DECISION AS TROPE

The foregoing analysis suggests a final way of describing the relation between the judicial decision and the law on which that decision is apparently based. This description focuses on the fact that, in every case, the judicial decision substitutes, in one way or another, for the law. What I am suggesting is that judicial decisions function as tropes[288] for the law and should therefore be analyzed as rhetorical structures.

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[288] A trope is a rhetorical figure of speech that substitutes one linguistic term for another. Tropes are traditionally divided into two broad categories: metaphors and metonymies. In a metaphor, one term is substituted for another on the basis of the supposed similarity between the two terms. Referring to Achilles as a lion is the typical example. Achilles and the lion share some attribute (for example, courage) that permits the speaker to substitute the term "lion" for the term "Achilles."

A metonymy, on the other hand, substitutes one linguistic term for another on the basis of a mere association between the two terms. A typical example is the expression, "The theater rose to its feet in applause." Clearly this example functions as a trope, as a figure of speech: it is not the theater that rose on its foundations, but the people in the theater who rose to their feet in ap-

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The judge, according to the etymology of the word "judge," is he who speaks the law ("jus"-"dicus")[289]; hence Montesquieu's famous dictum that the judge is "only the mouth that pronounces the words of the [*loi*]."[290] However, even in the French judicial system, the judge does *not* pronounce the words of the *loi*. The official French judicial decision merely cites the number of the applicable Code provision. The decision certainly goes to great lengths to demonstrate that it is merely the mechanical application of the *loi*, but no one would ever confuse the judicial decision with the *loi* itself. The two are distinct textual entities, and it is important to recognize that the advent of one text (the decision) corresponds to the disappearance of the other (the *loi*): the judicial decision, complete with its mathematical incantation of Code numbers, replaces "the words of the *loi*."

French and American judicial decisions, in their respective fashions, replace, or stand in for, the law in the particular instance. They do so by forging links with the law that are based on different sorts of relations. That is, the replacement is justified through the judicial decision's either paradigmatic or syntagmatic relation to the law. The predominantly paradigmatic form of the French judicial decision asserts an ontological claim: the decision is inherently similar and internally related to the law on which it is based. Formalism thus represents the mode of reading appropriate to this straightforward substitution. The predominantly syntagmatic form of the American decision, however, asserts a different ontological claim: the decision is the contextualization of the law, the law as related to external, but relevant considerations. Hermeneutics thus represents the mode of reading appropriate to this displacement. In the French and American judicial systems, the definitional characteristics of paradigmatic or syntagmatic relation represent an ontological justification for replacing the law with judicial decisions.

As this Article demonstrates, however, the French and American judicial systems both deploy both modes of tropological replacement. The French judicial system, for example, has long recognized that the paradigmatic substitution of the judicial decision for the Code must be justified. However, the assertion that the judicial decision is paradigmatically related to the *loi* amounts to an unsubstantiated ontological claim. The question is precisely whether the relation between the *loi*

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plause. The metonymic substitution of "theater" for the people in the theater is not based on some similarity between the theater and the theatergoers, but on a merely contiguous relation between them: the audience is associated with the theater.

This Part characterizes French and American judicial decisions as tropes (metaphors and metonymies) that substitute for the law in given instances.

289 8 OXFORD ENGLISH DICTIONARY 292 (2d ed. 1989).

290 BARON CHARLES DE SECONDAT MONTESQUIEU, THE SPIRIT OF THE LAWS 163 (Anne M. Cohler, Basia Carolyn Miller & Harold Samuel Stone eds. & trans., Cambridge Univ. Press 1989) (1748).

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and the particular decision is sufficiently "inherent" or "necessary" to be considered paradigmatic, and this question is one that the official French judicial decision never overtly addresses. In other words, the official decision asserts its own paradigmatic relation to the *loi* but never justifies this assertion.

The problem for the French judicial system is that the "inherentness" of the internal relation between the judicial decision and the *loi* can only be determined and demonstrated by external means. The justification for the judicial decision, the demonstration of *why* the relation between the *loi* and the decision should be considered sufficiently "inherent" or "necessary" to be considered paradigmatic, can only be produced through the construction of a justificatory sentence (or sequence of sentences) that would make evident the external criteria (external to the letter of the *loi*) used to determine the nature of the relation. The form of the judicial decision may categorically assert that *A* (*loi*) = *A'* (decision), but the process that established that equation and the equation's validity can only be determined, explained, and justified by making references external to the *loi*. Not the least of these references would have to explain what "=" means — that is, what counts as "inherently or necessarily similar," and why. This destabilization of the decisional equation threatens the collapse of the paradigmatic relation between the *loi* and the decision and leads to ever more dangerous questions. For example, a given *loi* (*A*) and a given decision (*A'*) are not simply mathematical constants, are they? Then on what basis were *A* and *A'* "selected" in the first place?

The paradigmatic substitution of the decision for the *loi* is thus justified by the inherent similarity of the decision to the *loi*, but the "inherentness" of the similarity must be justified by external, syntagmatic means. The French judicial system has apparently been sensitive to this paradox. Add to the paradox the formal requirements of the official French judicial decision, and the French solution emerges: French judicial discourse bifurcates. This bifurcation allows the official decision to maintain its paradigmatic form (and its implicit ontological claim about its inherent similarity to the *loi*), while the syntagmatic determination, explanation, and justification of the decision occur elsewhere — namely, in the unofficial discursive sphere of the *conclusions* and *rapports*.

The paradox can also be stated in terms of modes of reading. The French judicial system has apparently concluded that the official judicial decisions' formalist application of legislative norms must be determined and justified by hermeneutic means. In a recent case involving the application of a statute that defines "medication" as "any substance . . . capable of being administered to a human . . . in order

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to . . . restore . . . [his] organic functions,"[291] the *ministère public* objected to reading the statute in the formalist manner of the nineteenth century School of Exegesis. His unpublished *conclusions* stated:

> 'Restoration . . . of one's organic functions,' what is that if not *everything*, if one sticks to exegesis . . . [?] But exegesis is not a one-way street!
>
> If we remain attached to the almost byzantine analysis of this phrase, we risk sliding toward the absurd.
>
> For *water* itself is of a nature to restore the organic functions of an unfortunate child, who is victim of the whims of history, or of a harsh climate. . . .
>
> . . . .
>
> This concept, when taken word for word, is rendered utterly banal, leading one totally astray (the most ridiculous examples could be enumerated at will . . .).
>
> Without being a hypochondriac, one could, to be witty, cite Molière . . . .
>
> I submit for your reflection the phrase of CHAMFORT: "Life is an illness . . . ."[292]

The *ministère public* objected to the formalist, "word for word" reading of the *loi*, a reading that leads one "totally astray," "toward the absurd."[293] Reading must not be a "one-way street" of literal or grammatical application, but rather a two-way street involving the meaningful interaction of the text with external policy considerations. The process of judicial interpretation must involve some type of hermeneutics. The formalist substitution of the official judicial decision for the *loi*, the *ministère public* suggested, must be grounded in and informed by hermeneutic decisions.

The paradox can finally be described in rhetorical terms. The French judicial decision functions as a metaphor for the *loi*; it substitutes for the *loi* on the basis of the decision's and the *loi*'s inherently similar characteristics. The French judicial system has apparently found, however, that its metaphors (that is, its judicial decisions) are metonymic. That is, the relation between its judicial decisions and the *loi* is not one based on their inherent similarity, but on associations constructed between them.

De Man makes a similar point in a different context when he suggests that "[t]here ought to be another ['complementary'] perspective . . . in which metaphor, for example, would not be defined as a substi-

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291 C. SANTÉ PUBLIQUE art. L.511 (1993).

292 *Conclusions* of Premier Advocate General Dontenwille, Judgment of Feb. 28, 1992 (unpublished *conclusions*) (on file with author).

293 The similarity in tone and rhetoric between the *ministère*'s *conclusions* and the unofficial judicial equity arguments is striking. *See supra* note 284.

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tution but as a particular type of [syntagmatic] combination,"[294] and when he states that "a metaphor is always . . . metonymic, though motivated by a constitutive tendency to pretend the opposite."[295] All metaphors may be described as metonyms. They replace one term with another on the basis of some association between the two terms. The association (or "combination") that metaphor makes between the two terms is simply one of "inherent similarity." This metaphoric association of similarity, however, does not simply exist "in the essence or nature of things." It is a metonymic construction, albeit a particular one, that the author formulates in order to advance the substantive claim that the two terms are sufficiently closely related for one of them to substitute for the other.

In the French legal context, the judicial decision is contiguously related to the *loi* through a series of policy associations deemed relevant in the particular instance. The assertion of the similarity between two terms (the *loi* and the decision) consists of a metonymic association deemed sufficiently close to be considered inherent or metaphoric. This assertion is an ontological claim that the official French judicial decision maintains but that unofficial French discourse subverts. Although the official decision claims, to the point of obviating discussion, that the similarity between the *loi* and the decision is inherent, the *conclusions* and the *rapports* consist of precisely such a discussion about which of the policy considerations that are contiguously relevant to the *loi* should determine the decision's substitution for the *loi*.

In the unofficial discursive sphere, the tropological replacement of the *loi* by the decision is articulated differently, this time as a metonymy. The unofficial *rapports* or *conclusions* abandon the "word for word" mode of reading to which the *ministère public* objected, but they also once again remove the letter of the law. The *loi* is nonetheless displaced, albeit on other — metonymic — grounds. It is displaced by the *conclusions'* focus on elements presented not as inherently similar to the *loi*, but as contiguously relevant to it: inter alia, purposes, effects, policy considerations, and equity concerns.

This metonymic displacement also characterizes the American judicial decision, which justifies its replacement of the law on the basis that the decision is contiguously and contextually related to the law — that is, on the basis of the decision's syntagmatic relation to the law. Test Method lines of decisions often begin with a virulent critique of the formalist reading of legal texts and then engage in a hermeneutic mode of reading based on an analysis of purposes and effects. This process results in a continual and ever increasing displacement of the previously controlling legal text.[296]

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[294] DE MAN, ALLEGORIES OF READING, *supra* note 17, at 6.

[295] *Id.* at 71.

[296] *See supra* section III.D.

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The problem, as United States Supreme Court Justices have apparently found, is that the construction of the syntagmatic line of Test Method decisions requires an initial term on which to construct the ensuing line of decisions. That is, given the fact that the Test Method's hermeneutics of purposes and effects continually displaces the previously controlling legal text, where is the syntagmatic line of decisions to begin? The line of Test Method decisions requires the selection of a starting point, a subject on which the ensuing syntagmatic predicate will be constructed and to which this predicate will relate. Because the previously controlling, primary legal text (legislative statute or constitutional clause) is displaced at the very genesis of the Test Method decision, something else must serve as the stable and recurring starting point. Stated as such, the American solution emerges. The American Test Method decisions establish an "authority figure" that serves as this stable and recurring starting point: the formally controlling judicial Test.

This process may be stated in terms of modes of reading. American Test Method decisions have apparently concluded that hermeneutic reading requires a formally applicable code as its premise. In other words, the hermeneutic relation between the law and the judicial decision must first be grounded in formal law — hence the establishment of the formally controlling judicial Test. The Test then becomes the starting point of the hermeneutic reading. Furthermore, the opinion must formally codify and apply the particular hermeneutic if later judicial decisions are to reproduce it. The judicial Test consists of precisely such a formal codification.

The result, in Test Method lines of cases, is the double formalization of hermeneutics. First, the Test Method requires the formal establishment of a stable starting point on which to construct its hermeneutic analysis. Given the displacement of the previously controlling legal text, that starting point is the formal judicial Test. Second, the particular hermeneutic must itself be codified in order to be reproduced in later cases. This codification also occurs in the formal judicial Test, and the Test's replacement of the original text as the textual authority figure ensures that the formal strictures of the Test will be read according to the Test's own hermeneutic. This double formalization of the Test Method's hermeneutics explains the continual tendency of the Test Method to displace the controlling legal text, even when that text is the judicial Test itself; the displacing tendency of the hermeneutics of purposes and effects, formally codified in the judicial Test, is reproduced from case to case and leads to the establishment of secondary Tests. This formalization also explains the tenacity with which lines of Test Method decisions hold on to the controlling Test as the "authority figure," even when its language is actually changed or displaced by the secondary Tests, for the Test Method's hermeneutics requires a stable, formally controlling text from which to begin.

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Jakobson's terms are particularly useful in explaining the functioning of the American Test Method. Quite simply, a syntagm requires a paradigm. That is, a linguistic sentence or sequence that combines and contextualizes linguistic units needs an initial term or subject on which to construct the sentence.[297] The paradigmatic selection of a subject may later be justified, within the sentence itself, by syntagmatic means — that is, by associating that paradigmatic subject with the syntagmatic predicate — but at some initial point, the subject must simply be selected as the subject because that is what the subject *is*. That is the significance of Jakobson's analysis of the twofold character of linguistic arrangement. In American Test Method decisions, the controlling judicial Test, as "authority figure," serves as this initial paradigm; it functions as the law that governs the case. For all of their displacing tendencies and syntagmatic characteristics, the lines of Test Method decisions require the existence of that initial paradigm, for they have already displaced the paradigm provided by the previously controlling legislative or constitutional text. However, the paradigmatic nature of the judicial Test does not end there; the Test also determines the very structure of the decision's ensuing syntagmatic analysis. In other words, the judicial Test serves as the paradigm for the syntagmatic analysis of the Test Method decisions.

This process can finally be described in rhetorical terms. The American judicial system has apparently determined that its metonyms (that is, its judicial decisions) are metaphoric. The relation between its Test Method decisions and the law is not only based on the policy associations constructed between them, but also on their inherent similarity. The judicial Test, as "authority figure," comes to replace the previously controlling legal text. It is simply selected and applied in ensuing judicial decisions as if it were the law. This process of metaphoric replacement is readily demonstrated by the tendency of Test Method decisions to open their analyses by referring only to the judicial Tests and to leave the previously controlling legal texts completely out of the analytic picture. The Court's opinion in *Darden v. Wainwright*[298] offers a good example: "Petitioner contends that he was denied effective assistance of counsel at the sentencing phase of trial. That claim must be evaluated against the two-part test announced in *Strickland v. Washington*. [The Court quotes the Test.]"[299] The Counsel Clause of the Sixth Amendment has simply been replaced by the *Strickland* Test. Insofar as the *Darden* Court was concerned, the *Strickland* Test *is* the Counsel Clause: the Clause itself is never mentioned at any point in the Court's opinion. Despite the Test's me-

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[297] An aphasic suffering from similarity disorder is unable to begin sentences because of this difficulty with the paradigmatic function of language. *See supra* pp. 744–45.

[298] 477 U.S. 168 (1986).

[299] *Id.* at 184 (citation omitted).

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tonymic semblance of contiguous and contextual relation to the law, the established Test, as "authority figure," operates as a straightforward metaphor for the law.

French and American judicial decisions, in short, function as rhetorical structures that replace the law. If taken at their word, these decisions assert the superiority of either metaphoric or metonymic tropes. That is, they prioritize one or the other in order to justify their replacement of the law on either paradigmatic grounds of inherent similarity (France) or syntagmatic grounds of contiguous relevance (the United States).

In the practice of both judicial systems, however, each mode of tropological replacement actually relies on and resorts to the other. French and American judicial decisions are rhetorical structures that fluctuate incessantly between paradigmatic/metaphoric and syntagmatic/metonymic substitution. The effect is best described by de Man: "if we then ask the obvious and simple next question, whether the rhetorical mode of the text in question is that of metaphor or metonymy, it is impossible to give an answer."[300] In the rhetorical practice of both judicial systems, the two modes of tropological replacement are functionally inseparable.

The result is that French and American judicial decisions are tropes that simultaneously signify two very different things. De Man's description of the tripartite structure of tropes is quite useful in describing this signifying process. De Man states:

> When Homer calls Achilles a lion, the literal meaning of the figure signifies an animal of a yellowish brown color, living in Africa, having a mane, etc. The figural meaning signifies Achilles and the proper meaning the attribute of courage or strength that Achilles and the lion have in common and can therefore exchange.[301]

Thus, a trope consists of three parts: the literal meaning, the figural meaning, and the proper meaning. In French and American adjudication, the judicial decision is the literal meaning, and the law (whether the Code provision, the legislative statute, or the constitutional clause) is the figural meaning. *However, the proper meaning varies depending on which mode of tropological substitution is apparently valorized.* When the valorized mode of substitution is the paradigmatic/metaphoric, the proper meaning is inherently stable adjudication, but when the valorized mode is the syntagmatic/metonymic, the proper meaning is socially responsive adjudication. Because both modes of tropological substitution operate simultaneously in each judicial system, albeit in historically and culturally contingent ways (bifurcated French judicial discourse versus integrated American judicial

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[300] DE MAN, ALLEGORIES OF READING, *supra* note 17, at 18.

[301] *Id.* at 65 n.10.

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discourse), both proper meanings are signified simultaneously in each system.

The French and American judicial systems, therefore, have each found ways to signify that their adjudication is both inherently stable and socially responsive. The process by which they have done so, as this Article has shown, is infinitely more subtle and complex than the formalism/policy distinction would lead one to believe. French and American judicial decisions function as tropes. The question is, what kind of tropes do they present themselves to be and therefore what proper meaning do they promote? Stated in more traditionally legal terms, the question is: on what basis do judicial decisions justify their replacement of governing law? In order to answer this question, this Article has offered interlocking interpretations of Jakobson, Barthes, and de Man. On the one hand, the decisions present themselves as metaphors and metonymies and therefore justify their replacement of governing law on the apparently descriptive ground that the decisions are paradigmatically or syntagmatically related to that governing law. On the other hand, this justification, apparently descriptive in nature, is loaded: it is a Barthesian myth. French and American judicial decisions are not simply paradigmatic or syntagmatic, metaphoric or metonymic, inherently similar or externally related to governing law, for these distinctions are at all points collapsible; the decisions merely *present* themselves as such. This self-presentation turns out to be an extremely intricate and delicate process for the construction and transmission of fundamental ontological claims about the nature of French and American adjudication. The result of this process is the mythic claim — propounded in both the French and American judicial systems — that adjudication is simultaneously inherently stable and socially responsive.

French and American judicial decisions operate as tropes whose proper meanings depend on, are constructed by, and disseminate Barthesian myths. The decisions construct and signify these proper meanings, or mythic significations, by associating and aligning particular modes of discourse with particular modes of reading and with particular modes of relating the judicial decisions to the law. This process of alignment and association — which rests on the construction of judicial self-portraits — allows the *definitional characteristics* of these particular modes of discourse, reading, and relating to be transformed into a binary set of *values* (inherent stability and social responsiveness).[302] The process represents the means by which French

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[302] *Cf.* BARTHES, *supra* note 263, at 131 ("[A]ny semiological system is a system of values; [however,] the myth-consumer takes the signification for a system of facts: myth is read as a factual system, whereas it is but a semiological system."). John Guillory accuses de Manian theory of engaging in a similar mythologizing process. *See* JOHN GUILLORY, CULTURAL CAPITAL 207–30 (1993).

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and American judicial decisions project the definitional characteristics of these modes of discourse, reading, and relating onto the "outside world" of adjudication.

French and American judicial decisions emerge as complex semiological systems that forge similar and supposedly "natural" links between linguistic arrangements and the "real world" operation of their legal and judicial systems. The formalism/policy distinction, operative in both the French and American judicial systems, is the result. The distinction, however, is loaded. It represents a historically contingent value system, one that is constructed by and disseminated through judicial self-portraits.

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