

degree of pain an activity causes, are matters concluded by the passage and enforcement of the laws in question. The judiciary has no role to play other than that of applying the statutes in a fair and impartial manner.

One of my colleagues refers to this conclusion, not without sarcasm, as the "Equal Gratification Clause." The phrase is apt, and I accept it, though not the sarcasm. Equality of human gratifications, where the document does not impose a hierarchy, is an essential part of constitutional doctrine because of the necessity that judges be principled. To be perfectly clear on the subject, I repeat that the principle is not applicable to legislatures. Legislation requires value choice and cannot be principled in the sense under discussion. Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution.

It follows, of course, that broad areas of constitutional law ought to be reformulated. Most obviously, it follows that substantive due process, revived by the *Griswold* case, is and always has been an improper doctrine. Substantive due process requires the Court to say, without guidance from the Constitution, which liberties or gratifications may be infringed by majorities and which may not. This means that *Griswold's* antecedents were also wrongly decided, e.g., *Meyer v. Nebraska*,²¹ which struck down a statute forbidding the teaching of subjects in any language other than English; *Pierce v. Society of Sisters*,²² which set aside a statute compelling all Oregon school children to attend public schools; *Adkins v. Children's Hospital*,²³ which invalidated a statute of Congress authorizing a board to fix minimum wages for women and children in the District of Columbia; and *Lochner v. New York*,²⁴ which voided a statute fixing maximum hours of work for bakers. With some of these cases I am in political agreement, and perhaps *Pierce's* result could be reached on acceptable grounds, but there is no justification for the Court's methods. In *Lochner*, Justice Peckham, defending liberty from what he conceived as a mere meddlesome interference, asked, "[A]re we all * * * at the mercy of legislative majorities?"²⁵ The correct answer, where the Constitution does not speak, must be "yes."

C. THE ROLE OF THE TEXT

FREDERICK SCHAUER, EASY CASES

58 S.Cal.L.Rev. 399, 414-423, 430-31 (1985).

* * * [It is] clear that there *are* easy cases in constitutional law—lots of them. The parties concerned know, without litigating and without consulting lawyers, that Ronald Reagan cannot run for a third term; that the junior Senator from Virginia, who was elected in 1982,

21. 262 U.S. 390 (1922).

22. 268 U.S. 510 (1925).

23. 261 U.S. 525 (1923).

24. 198 U.S. 45 (1905).

25. *Id.* at 59.

does not have to run again in 1984 or 1986 even though the Representative from the First Congressional District does; that bills receiving less than a majority of votes in either the House or the Senate are not laws of the United States; that the Equal Rights Amendment, the District of Columbia Representation in the Senate Amendment, and the Balanced Budget Amendment are not now part of the Constitution; and that a twenty-nine year-old is not going to be President of the United States. I have equivalent confidence that I will not receive a notice in the mail informing me that I must house members of the armed forces in my spare bedroom; that criminal defendants in federal courts cannot be denied the right to be represented by a qualified lawyer for whom they are willing to pay; and that the next in line to succeed to the Presidency in the event of the President's death is the Vice-President, and not the Secretary of the Interior, the Congressman from Wyoming, or the quarterback for the Philadelphia Eagles.

The foregoing is only a small sample of the legal events that are "easy" constitutional cases. Once free from the lawyer's preoccupation with close cases—those in which the lawyer *qua* lawyer is a necessary actor in the play³⁹—we begin to comprehend the enormous quantity of instances in which the legal results are commonly considered obvious. But why is this? What makes the easy case easy?

In searching for the sources of easiness, it is perhaps best to look for the sources of hardness, and then define easy cases as those without any of the characteristics of hard cases. Such definition by exclusion is not the only approach, but it seems particularly appropriate because it is the exception, the hard case, that most commonly commands our attention.

Prototypically, a vague, ambiguous, or simply opaque linguistic formulation of the relevant rule generates a hard case. Such a linguistic phenomenon may be caused by questions about the result announced by a clearly applicable rule, questions about which rule, if any, is in fact relevant, or both. Regardless of the cause, the result is the same: one cannot find the answer to a question (which is not the same as a controversy) by a straightforward reading of rules.

To the extent that one *can* find an answer to a question by a straightforward reading of rules, other factors may make a case hard. A case that seems linguistically easy may be hard if the result announced by the language is inconsistent with the "purpose" of the rule. In such cases the tension between the plain meaning of the words and the reason for using those words creates a hard case, in much the same way that linguistic imprecision creates a hard case.

Even if a rule seems plainly applicable, and even if that application is consistent with the purpose behind a rule, it may be that two or more rules, dictating different results, will be applicable. If one rule suggests

39. Part of the problem, of course, is that legal theory in general is undertaken largely by those who train lawyers. We will have made considerable strides when we

recognize that not only hard cases, but also all litigation and all lawyers, are in important respects epiphenomenal.

answer *A* to the question, and another suggests answer *B*, then it is as if no answer had been provided. In the calculus of rules, too many rules are no better than none at all.

Finally, and perhaps most importantly, there may be only one relevant rule, it may be quite straightforwardly applicable, and its application would be consistent with its purpose. Yet it may still be morally, socially, or politically hard, however, in the sense of *hard* to swallow. * * *

There may very well be other sources of hardness, but this sample seems sufficiently large. With these types of hard cases in mind, we can tentatively define an easy case as one having *none* of these characteristics of hardness, one in which a clearly applicable rule noncontroversially generates an answer to the question at hand, and one in which the answer so generated is consistent both with the purpose behind the rule and with the social, political, and moral climate in which the question is answered.

There is clearly more involved than merely describing an easy case. Perhaps easy cases are like unicorns, quite capable of definition and description, but not to be found in the real world. Thus, my list of seemingly easy cases purported to fill this argumentative gap, to show that easy cases not only can be imagined, but in fact exist if we only know where to look. And, as should be apparent from the particular examples offered, my thesis here is that language is a significant and often underappreciated factor in the production of easy cases. I am *not* claiming that only language can generate easy cases. Various other legal, cultural, and historical phenomena can create those shared understandings that will clarify a linguistically vague regulation, statute, or constitutional provision. And, as the foregoing taxonomy of hard cases was designed to demonstrate, language alone is insufficient to generate an easy case. Neither of these qualifications, however, is inconsistent with my central claim that language is significantly important in producing easy cases—that language can and frequently does speak with a sufficiently clear voice such that linguistically articulated norms themselves leave little doubt as to which results are consistent with that command.

One way of supporting the claim that language is important in producing easy cases is to engage in an extended and most likely incomprehensible discussion of numerous theories of meaning, attempting to demonstrate by some collage of philosophical and behavioral arguments the way in which the use of certain artificially created symbols can and does enable us to communicate with each other. In this context, however, and indeed in most others, such an excursus seems to ignore the most significant piece of evidence supporting a claim about meaning, which is that even the discussion of meaning would take place in English. The discussion itself would thus irrefutably prove the very hypothesis at issue, just as this Article is right now doing the same thing.

When Wittgenstein remarked that "[l]anguage must speak for itself,"⁴⁷ he was not claiming that language existed in a vacuum, or that meaning could be disassociated from context. Rather, he was pointing out that the ability of language to function ought to be self-evident, and that the inability to explain all or even any of the sources of this phenomenon does not detract from the conclusion that language does function. Thus, to demonstrate that language works with a typical-looking argument would be possible only because of the conclusion of that very argument. If language didn't "work," the world would be so different from the world in which we live as to be beyond both description and comprehension. Regardless of how understandable this Article may be, it is certainly more understandable to this audience than it would be if it were written in Hungarian, in Chinese, or in semaphore signals. Whether our ability to understand each other in language is biological, behavioral, sociological, or some combination of these is less important than the fact that we can do it.

This is not meant to be the end of an argument, but only the beginning of one. Because law operates with language, understanding the way in which law works requires starting with the proposition that language works. In many instances, some of which I will deal with presently, it may be important to know *why* or *how* language works. In many other instances, however, it is sufficient to do less thinking and more looking, and at least take certain observable facts about language as a possible starting point in the analysis.

It is thus worthwhile to note that the Constitution is, even if nothing else, a use of language. By virtue of being able to speak the English language, we can differentiate between the Constitution and a nursery rhyme, between the Constitution and a novel, and between the Constitution and the Communist Manifesto. Let us construct a simple thought experiment involving a person who is fluent in English (even the English of 1984, and not necessarily the English of 1787 or 1868), but who knows nothing of the history, politics, law, or culture of the United States. If we were to show this person a copy of the Constitution, would that person glean from that collection of marks on a piece of paper alone at least some rudimentary idea of how *this* government works and of what types of relationships exist between the central government and the states, between the different branches of government, and between individuals and government? Although the understanding would be primitive and significant mistakes would be made, it still seems apparent that the answer to the question would be, "Yes." However sketchy and distorted the understanding might be, it would still exceed the understanding produced by a document written in a language not understood by our hypothetical reader, and surpass as well the understanding gained from no information at all.

This general intelligibility of language enables us to understand immediately the mandate of numerous constitutional provisions without

47. L. Wittgenstein, *Philosophical Grammar* 40 (1974).

recourse to precedent, original intent, or any of the other standard interpretive supplements. We need not depart from the text to determine the rudiments of how a bill becomes a law, the age and other qualifications for various federal offices, the permissible and impermissible limits on the franchise, the number of terms that may be served by the President, the basic procedure for amending the Constitution, the mechanics of admitting a new state, the number of witnesses necessary in a trial for treason, and the permissibility of calling the defendant as a prosecution witness in a federal criminal case.

In some of these and other instances, some noncontroversial technical knowledge may be necessary for understanding. In order to appreciate the clarity of some of the requirements of the fourth, fifth, and sixth amendments, for example, one must understand what a trial is, how it is conducted, and so on. In order to understand some of the structural provisions, it is useful to have at least some preconstitutional understanding of what a state is. These shared background understandings, however, virtually a part of understanding *this* language, do not make the notion of a clear meaning implausible. Words themselves are nothing other than marks or noises, transformed into vehicles for communication by virtue of those rules of language that make it possible for the listener to understand the speaker in most cases. But these rules are not contained in a set of maroon volumes, the linguistic equivalent to the United States Code. These rules are made and continuously remade by the society that uses the language, and different rules may prevail in different segments of that society at different times.

Thus, language cannot be divorced from its context, because meanings become clear if and only if certain understandings are presupposed. Language cannot and does not transcend completely the culture of which it is a part. It is not something that has been delivered packaged, assembled, and ready-to-use to a previously nonlinguistic culture. Language and society are part and parcel of each other; understanding a language, even at its clearest, requires some understanding of the society that has generated it.

But what does this tell us? Certainly not that the notion of plain meaning is worthless, or that questions of interpreting language collapse completely into questions about a culture. That a rosebush springs from and cannot exist without earth, sun, and water does not mean that the notion of a rosebush is not distinguishable from the concepts earth, sun, and water. Similarly, that language requires context does not mean that language *is* context. Language operates significantly because of and as a system of rules that enable people within a shared context to understand each other. At times these rules may be vague, and thus may produce hard cases, but at other times the rules can and do operate to produce the very kinds of "easy" cases I have been describing.

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I am * * * quite willing to concede that it is impossible to have an entirely clear constitutional clause, for the same reason that it is

impossible to have an absolutely airtight legal provision of any kind, or an absolutely airtight definition in any field. This is merely a recasting of the well-known message that all terms and all laws have fringe as well as core applications.⁶⁰ That there are fringe meanings of words, or fringe applications of laws, for which one can make a reasonable argument for either inclusion or exclusion, does not mean that there are no core cases in which an argument on one side would be almost universally agreed to be compelling, and an argument on the other side would be almost universally agreed to be specious. That I am unsure whether rafts and floating motorized automobiles are "boats" does not dispel my confidence that rowboats and dories most clearly are boats, and that steam locomotives, hamburgers, and elephants equally clearly are not.

This is not to deny that determining the contents of the core, the fringe, and what is wholly outside are contextually and culturally contingent. I can imagine a world in which "elephant" is a fringe (or core) example of a boat, and I can imagine a set of circumstances in *this* world in which a floating hamburger might legitimately present us with a definitional problem vis-à-vis the class "boats." The mere possibility of such circumstances does not eliminate our ability to make sense out of the words as standardly applied, however. If it did, we would have no way of communicating with each other.

The lesson of open texture, then, is that every use of language is potentially vague * * *. The precision of language is necessarily limited by the lack of omniscience of human beings, and thus any use of language is bounded by the limitations of human foresight. The *non sequitur*, however, is the move from the proposition that language is not perfectly precise to the proposition that language is useless. * * *

Although linguistic nihilism seems scarcely comprehensible as a general statement about language, nihilistic tendencies have had a surprising vitality in legal and constitutional theory. The attractions of nihilism seem to be largely attributable, however, to a crabbed view of the legal world, a view that focuses almost exclusively on those hard cases that wind up in court. If we focus only on the marginal cases, only on the cases that a screening process selects largely because of their very closeness, it should come as no surprise that we would have a skeptical view of the power of language to draw distinctions. The cases that wind up in court are not there solely because they lie at the edge of linguistic distinctions, but this is at least a significant factor. Thus the cases that are in court are hardly a representative sample of the effects of legal language. But if we focus instead on easy as well as hard cases, and thus take into our comprehension the full legal world, we see that the cases at the margin are but a small percentage of the full domain of legal

60. See Hart, *Scandinavian Realism*, 17 Cambridge L.J. 233, 239 (1959); Williams, *Language and the Law—II*, 61 Law Q.Rev. 179 (1945); see generally M. Black, *Reasoning with Loose Concepts*, in *Margins of Pre-*

cision: Essays in Logic and Language 1 (1970); I. Scheffler, *Beyond the Letter: A Philosophical Inquiry into Ambiguity, Vagueness, and Metaphor in Language* (1979).

events; the bulk of the remaining cases are those in which we can answer questions by consulting the articulated norm. * * *

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The perspective described above views linguistically articulated rules as excluding wrong answers rather than pointing to right ones. From this perspective, there is no longer any justification to view the specific and the general clauses in the Constitution as fundamentally different in kind. Since no clause can generate a uniquely correct answer, at least in the abstract rather than in the context of a specific question, the best view of the specific clauses is that they are merely less vague than the general clauses. The language of a clause, whether seemingly general or seemingly specific, establishes a boundary, or a frame, albeit a frame with fuzzy edges. Even though the language itself does not tell us what goes within the frame, it does tell us when we have gone outside it.

It is best to view the role of language in setting the size of the frame as presumptive rather than absolute. Factors other than the language of the text, or the language of a specifically articulated rule in a case or series of cases, often influence the size and shape of the frame of permissible argument. The language of the text itself is still, however, commonly not only the starting point, but also a constant check long after leaving the starting point. When we look at an uninterpreted clause (in the sense of a series of authoritative judicial interpretations), we commonly focus quite closely on the text. Even in those cases in which an established body of precedent exists, reference to the text is never considered illegitimate.

The language of the text, therefore, remains perhaps the most significant factor in setting the size of the frame. Those clauses that look quite specific are those where the frame is quite small, and thus the range of permissible alternatives is equivalently small. Those clauses that look much more general are those with a substantially larger frame, giving a much wider range of permissible alternatives. This, however, is a continuum and not a dichotomy. Those clauses that seem specific differ from those that seem general in that the former exclude as wrong a larger number of answers than do the latter. * * *

* * * If we consider the text to be informative about boundaries, or limits, rather than about centers, or cores, then the text appears far less irrelevant than is commonly assumed. The text presumptively constrains us, or should, from overstepping what are admittedly pretheoretical and almost intuitive linguistic bounds, and thus serves as one constraint on constitutional interpretation.

We can thus view these linguistic frames as telling an interpreter, *for example* the Supreme Court, which areas are legitimately within the province of interpretation, which subjects are properly the business of the interpretation. An interpretation is legitimate (which is not the same as correct) only insofar as it purports to interpret some language of