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Brilliance Revisited

Daniel A. Farber*

A year ago, I published a short essay entitled *The Case Against Brilliance*¹ in these pages. My thesis was that current scholarly standards place too much emphasis on “brilliance”—a word I used to describe clever but highly counterintuitive theories—at the expense of common sense. I suggested several reasons for believing that brilliant scholarship in either law or economics is unlikely to be valid.

Law review articles are normally greeted by deafening silence, so I was unprepared for the flood of correspondence I received. The response was favorable except for letters from those who either considered themselves “brilliant” or aspired to that condition. The essay reached an even broader audience when part of it was reprinted in *The New Republic*.² Another flood of correspondence resulted.

The latest response to *Brilliance* is an article by Professor Pierre Schlag in the *Stanford Law Review* attacking my thesis.³ Because my essay was deliberately written in an elliptical, humorous style, I cannot very well complain that Professor Schlag and other readers sometimes missed my point or found holes in arguments intended to be only heuristic. The important issue is not whether they misread my essay. Instead, the issue is the validity of my suggestion that current standards for evaluating legal scholarship are perverse in honoring the “brilliantly” novel and counterintuitive rather than the sensible. In the course of explaining my views on this subject, I will attempt to show why Professor Schlag’s criticisms are unfounded.

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1. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986).
2. Farber, *Too Clever by Half*, THE NEW REPUBLIC, Sept. 1, 1986, at 11.
3. Schlag, *The Brilliant, the Curious, and the Wrong*, 39 STAN. L. REV. 917 (1987).

I. THE STERILITY OF BRILLIANCE

Anyone who thumbs through a leading law review is likely to find at least one brilliant article.⁴ Several examples were given in *Brilliance*,⁵ but just to demonstrate that those weren't flukes, here are a few more:

An article in the *University of Chicago Law Review* suggests that the *Lochner* Court may have been too timid in its crusade against economic regulation.⁶

An article in the *Harvard Law Review* argues that Judge Posner's economic theory of law must be rejected because it conflicts with the views expressed in one of the author's favorite novels.⁷

Another article in the *Harvard Law Review* asserts that the only remaining traces of civic virtue and self-government in our society are found in the Supreme Court.⁸

4. One reason for this situation is discussed in another short essay, Farber, *Gresham's Law of Legal Scholarship*, 3 CONST. COMMENTARY 307 (1986).

5. Farber, *supra* note 1, at 918-23 (economic theories of Coase, Buchanan, and others); 924-25 (constitutional theories of Ely and Dworkin).

6. See Epstein, *Toward a Revitalization of the Contract Clause*, 51 U. CHI. L. REV. 703, 734 (1984):

Ironically, the real difficulty, squarely raised by *Lochner*, runs in quite the opposite direction. *Lochner* may well have given too much scope to the police power, for it can be argued that there is no reason to interfere with freedom of contract, even for reasons of health, where no third-party interests are at stake. . . . The danger [of legislative "rent-seeking"] suggests, rather, that even health or safety measures may be attacked, notwithstanding the soundness of their ends, where the means chosen sweep too broadly.

Id. (emphasis in original). An earlier passage states that the "police power limitation on the contract clause may be no more than a means for the state to protect against such private abuse" as exists "when two parties make an agreement to violate the rights of a third." *Id.* at 732.

7. West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985). The oddity here is obviously not the disagreement with Posner but the reliance on Kafka. For reflections on whether Kafka's view of the world really is inconsistent with Judge Posner's economic theory of law, see the later exchange between Posner and West: Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431 (1986); West, *Submission, Choice, and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986). I fail to see how Posner's possible inconsistency with Kafka is any more probative than Darwin's inconsistency with the Bible.

8. Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986). Admittedly, it's hard to believe that anyone as smart as Michelman would take such a position, but how else can one interpret passages like the following?

[A]s a result, the courts, and especially the Supreme Court, seem to take on as one of their ascribed functions the modeling of active self-government that citizens find practically beyond reach. Unable as a nation to practice our own self-government (in the full, positive

In giving these examples, my point is not to suggest that there is anything wrong with the authors of these articles. They are highly intelligent, learned individuals; each has done other work of great value. It is hardly surprising when mediocre scholars go astray, but these are first-class minds. Where did they go wrong?

There are countless ways that clever people can reach absurd conclusions. To demonstrate the sterility of brilliance, I would have to analyze each brilliant article fully to show that it is either false or devoid of significance. Not only would this be a time-consuming and tedious endeavor, but it also would in some sense take these articles too seriously and thereby help to legitimate them.⁹ Admittedly, however, my "hit and run" attacks on various scholarly works in *Brilliance* seem to have left readers such as Schlag unclear about my reasoning. As a compromise, then, I will analyze at some length a paradigm case of brilliance.

Let's take a closer look at one of the examples used in *Brilliance*:¹⁰ the argument that Justice Rehnquist's opinion in *National League of Cities v. Usery*¹¹ established a constitutional right to welfare.¹² To avoid repeatedly referring to the authors by name, which might give the impression that this is a personal attack on them, let's just use their initials and call this

sense), we—or at any rate we of the "reasoning class"—can at least identify with the judiciary's as we idealistically construct it.

Id. at 74. Or consider this passage:

[F]or citizens of the United States, national politics are not imaginably the arena of self-government in its positive, freedom-giving sense. . . . Congress is not us. The President is not us. The Air Force is not us. "We" are not "in" those bodies. Their determinations are not our self-government.

Id. at 75.

9. As Professor Kelman recently suggested, taking an absurd idea seriously (even while disputing it) may give it political and intellectual respectability when it deserves to be marginalized. Kelman, *Taking Takings Seriously: An Essay for Centrists*, 74 CALIF. L. REV. 1829, 1829-31, 1862 (1986).

10. Farber, *supra* note 1, at 926-29.

11. 426 U.S. 833 (1976) (striking down the federal minimum wage as applied to state employees).

12. See L. TRIBE, AMERICAN CONSTITUTIONAL LAW 312-13 (1978); Michelman, *States' Rights and States' Roles: Permutations of 'Sovereignty' in National League of Cities v. Usery*, 86 YALE L.J. 1165, 1181-92 (1977); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1075-76 (1977). I admit that I was seized by a moment of doubt while writing this section. Perhaps I was setting up a straw man. Could Tribe and Michelman possibly have meant to take the position identified in the text? After carefully rereading the cited passages, however, I see no other possible interpretation.

the TM thesis. As is typical of brilliant arguments, the TM thesis turns conventional understanding upside down. What purpose is served by doing so?

The most obvious possibility is that TM serves to establish the following proposition:

TM/1: The opinion in *National League of Cities* is best interpreted as support for a constitutional right to welfare.¹³

TM/1 is clearly false. It is simply untenable to interpret the Rehnquist opinion as having this meaning. I suppose this is perfectly obvious, but if any doubts remain, consider the plausibility of the following excerpt from a future biography of Rehnquist:

National League of Cities was, as a few perceptive critics of the day foresaw, the opening salvo in Rehnquist's campaign for a constitutional right to welfare. Despite the temporary setback of *Garcia*, which overruled *National League of Cities*, Rehnquist continued his struggle to protect the poor. Finally, he succeeded in garnering majority support for his position in *Smith v. Department of Agriculture*, in which he held unconstitutional a cutback in food stamp benefits. As his opinion in *Smith* pointed out, a desire to balance the federal budget cannot justify further disadvantaging the most impoverished members of society. No astute reader of *National League of Cities* should be surprised that *Smith* relies almost entirely on John Rawls's *Theory of Justice* as a basis for construing the fourteenth amendment.

Okay, but don't we know from modern literary criticism, deconstruction, and so on, that "authorial intention" has nothing to do with interpretation of texts? Rather than debating the merits of these interpretative theories, I prefer to show their irrelevance. The paragraph from the Rehnquist biography is easily rewritten to avoid any mention of Rehnquist's subjective intentions. The crucial move is to replace references to Rehnquist's actual authorship of the opinions with references to the texts themselves. One important line of the *National League of Cities* opinion reads: "Justice Rehnquist delivered the opinion of the Court." So, consider the following from a future book about the Rehnquist opinions by a prominent literary theorist:

A recurrent theme in the "Rehnquist" cycle of texts is the establishment of a constitutional right to welfare. This theme first emerged in the *National League of Cities* text and was repeated more explicitly in a line of later texts culminating in the statement in *Smith v. Department of Agriculture* that "[t]he Constitution does not permit the federal budget to be balanced on the backs of the poor."

13. All the best philosophers these days abbreviate and number the propositions they discuss.

As a description of future Rehnquist opinions, this is no more plausible than the fragment from the hypothetical Rehnquist biography.

Furthermore, it does not help in establishing the TM thesis to say, as Professor Schlag suggests, that simply because Rehnquist didn't think "with or pursuant to those theories," he might still "think in accordance with these ideas."¹⁴ If Rehnquist thinks in "accordance with" the TM thesis, then we would expect his future conduct to conform with that thesis, as he continues to think in accordance with (but not pursuant to) TM. If so, we would expect him to take a favorable view of constitutional welfare rights. Of course, we don't actually expect this at all.

Professor Schlag would say, presumably, that all I have shown thus far is that the TM thesis lacks "representational accuracy."¹⁵ According to Schlag, "our sense that a theory offers an interpretation or an explanation, not merely a recapitulation of what has already transpired, depends upon a critical distancing between the theory and the conventional practice of its subject matter."¹⁶ "The virtue of brilliance," he maintains, "is that it achieves at once a great distance from the conventional understanding and yet returns to shed a stronger light on the subject matter."¹⁷ From Professor Schlag's perspective, then, the counterfactual nature of the TM thesis is an asset. But if the TM thesis is not intended to be "representationally accurate" (i.e., true), just what light can it shed on its subject matter?

If the TM thesis is untenable as an interpretation of the Rehnquist opinion, perhaps the thesis can be salvaged in some other way. For example, the creators of TM could use *National League of Cities* as a premise on which to base a logical inference. Rather than making claims about what the opinion means, they might be arguing about what the opinion logically

14. Schlag, *supra* note 3, at 923 n.17 (emphasis omitted).

15. *See id.* at 922.

16. *Id.* at 921. In a sense this is quite correct. A linguist's account of a language's grammar doesn't have to be comprehensible to the ordinary speaker of the language; in fact, a good theory probably won't be. But the theory can't contradict the actual usage of ordinary speakers. Similarly, a successful semantic theory could not posit that the word "apple" really refers to oranges, although it could offer an explanation for the connection between the word "apple" and the actual piece of fruit that most people would not understand. The TM thesis doesn't successfully explain Rehnquist's meaning because it contradicts what it seeks to explain.

17. *Id.* at 921 n.9.

entails. These alternatives are not at all equivalent because we may intend a meaning without knowing of or being willing to agree with its logical consequences. So let's try this form of the TM thesis:

TM/2: Proposition *P* ("*National League of Cities* was correctly decided.") implies proposition *Q* ("There is a constitutional right to welfare.").

Unlike TM/1, TM/2 is surprising but not crazy.

Although TM/2 conceivably could be true,¹⁸ its significance is unclear. What would one accomplish by establishing the truth of TM/2? It certainly would be an amusing irony (well worth a humorous fifteen-page essay) if Rehnquist's opinion implied the existence of a constitutional right to welfare. But most legal writing, almost certainly including the TM articles, is intended to do more than amuse. Presumably, the TM idea was to use the authority of *National League of Cities* to establish the *validity* of a constitutional right to welfare.

Obviously, this use of the opinion simply *passés* by those of us who don't agree with *National League of Cities*.¹⁹ It follows, therefore, that the argument must be addressed to readers like Justice Rehnquist who do believe in the validity of *National League of Cities*. Imagine poor Rehnquist, forced by inescapable logic to support a constitutional right to welfare!

Luckily for the current Chief Justice, even if TM/2 were valid, he could easily escape the trap so cleverly laid for him. The easiest escapes would be simply to ignore the problem (Rehnquist doesn't like to cite law review articles anyway) or to revise the rationale for *National League of Cities* in a way that avoids TM/2. These escape routes would be so easy, however, that using them seems almost unfair.

More sporting responses are available. Rehnquist could simply renounce *National League of Cities*. If TM could accomplish such a result, it might have some value after all, even though that result is not one intended by TM's creators. Alternatively, Rehnquist could renounce strict adherence to logic.

18. In fact, as a matter of technical logic, I believe that TM/2 is true. In my opinion *P* is false because *National League of Cities* was not correctly decided. According to logicians, if *P* is false, "*P* implies *Q*" is true for any proposition *Q*. See W. QUINE, *METHODS OF LOGIC* 13-16, 24 (rev. ed. 1959). So in a trivial sense TM/2 is true.

19. I suppose the alliance between welfare rights and *National League of Cities* may also serve to discredit the idea of a constitutional right to welfare. Perhaps one reason why *National League of Cities* is a bad opinion is that it logically entails untenable consequences.

As in the past when logic seemed to have him backed into a corner, he could walk calmly away from the trap while reciting Holmes's adage that the life of the law is not logic but experience.²⁰ I'm not sure which of these approaches Rehnquist would take, but I would bet heavily on any of them as against his surrender to TM and constitutional welfare rights.

Lawyers are more impressed by experience than by logic in part because they know perfectly well that any chain of argument has a weak link. Thus, Rehnquist could simply find a flaw somewhere in the TM argument. The basic problem with TM/2 is the idea that the sheer force of a complicated logical argument will (and should) persuade people to adopt conclusions they regard as ridiculous. Efforts to overwhelm readers with sheer logic are found not just in law but in other fields such as philosophy. As Robert Nozick has pointed out:

A philosophical argument is an attempt to get someone to believe something, whether he wants to believe it or not. A successful philosophical argument, a strong argument, *forces* someone to a belief.

Though philosophy is carried on as a coercive activity, the penalty philosophers wield is, after all, rather weak. If the other person is willing to bear the label of "irrational" or "having the worse arguments", he can skip away happily maintaining his previous belief. He will be trailed, of course, by the philosopher furiously hurling philosophical imprecations²¹

Because we evaluate abstract theories largely by examining their concrete implications, there is little reason to abandon strongly held concrete beliefs simply because they conflict with theory.²² No matter how clever the argument for TM/2 may be, it isn't actually going to convince anyone who didn't buy the

20. See *Kaiser Aetna v. United States*, 444 U.S. 164, 177 (1979) (Rehnquist, J.). Rehnquist adopted the Holmes approach:

There is no denying that the strict logic of the more recent cases limiting the Government's liability to pay damages for riparian access, if carried to its ultimate conclusion, might completely swallow up any private claim for "just compensation" under the Fifth Amendment even in a situation as different from the riparian condemnation cases as this one. But, as Mr. Justice Holmes observed in a very different context, the life of the law has not been logic, it has been experience.

Id. at 177.

21. R. NOZICK, *PHILOSOPHICAL EXPLANATIONS* 4 (1981) (emphasis in original).

22. See D. HERZOG, *WITHOUT FOUNDATIONS* 223 (1985). This view about the limits of legal theory is developed at greater length in Farber & Frickey, *Practical Reason and the First Amendment*, 34 *UCLA L. REV.* (1987) (forthcoming). See also Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 *YALE L.J.* 1567 (1985) (describing an evolutionary reconciliation of principles and practices).

conclusion to begin with.²³

The flaw in TM/2 is not just that it won't persuade Rehnquist, but that it shouldn't. He has many reasons to believe that no constitutional right to welfare exists; this belief is tightly connected with his entire system of thought. Even if he cannot immediately see a flaw in the TM argument, he can rationally decide that the probability that such a flaw will later be found exceeds the likelihood that welfare rights exist. Even the best logical argument will not persuade him that the sun rises in the west, because his belief to the contrary is strongly rooted in his experience.²⁴

A Dworkinian interpretation of the type Schlag defends,²⁵ by the way, is no more helpful in establishing the TM thesis. Professor Ronald Dworkin contended that although the framers of the eighth amendment believed in the death penalty—it was not part of their “conception” of cruel and unusual punishment—they also had a “concept” of cruelty that may include

23. The reader will notice that I haven't criticized any of the actual reasoning used to support TM. I am quite willing to assume that every individual step of the argument is rational and defensible. The creators of TM are extremely bright people. No doubt they could come up with equally cogent lines of argument for any number of other crazy propositions if for some reason they wanted to, including the following:

Dred Scott established that women have a constitutional right to vote.

Lochner established that Communists are protected by the first amendment.

Miranda established the constitutional right to an abortion.

Each of the preceding cases established a constitutional right to welfare.

Actually, the reader might enjoy trying one or two of these just for fun; it's not really that hard. That someone can make a clever argument for an absurd position is more a tribute to the writer's creativity than to the validity of the position.

24. Some readers may find an analogy to Bayesian analysis helpful. (Others will find the analogy utterly obscure.) Bayesian analysis is a method of combining a prior estimate of a conclusion's probability with a new piece of evidence to calculate a new estimate of the conclusion's likelihood given the new evidence. (For more than you ever wanted to know about Bayesian analysis, see *Symposium: Probability and Inference in the Law of Evidence*, 66 B.U.L. REV. 377 (1987).) No matter how good a piece of evidence may be (short of *certain* proof), a Bayesian will reject a conclusion if the prior estimate of likelihood is low enough. For similar reasons Chief Justice Rehnquist can rationally reject a conclusion which seems absurd even if he cannot immediately disprove TM/2.

25. Schlag, *supra* note 3, at 919-20, 923 n.17.

the death penalty.²⁶ So perhaps Rehnquist's concept of state sovereignty mandates a constitutional right to welfare even though his conception of sovereignty excludes it. It is something of a mystery, however, how anyone could say either that Rehnquist has such a concept or that a conception embodies a concept that contradicts it. The only sense I can make of the Dworkinian formulation is that Rehnquist's reasoning in *National League of Cities* somehow leads to the TM thesis. This is either just TM/2 all over again, or at best a sort of hybrid of TM/1 and TM/2. Perhaps the Dworkinian formulation would be illuminating to some eccentric who deeply admired Rehnquist's jurisprudence but thought Rehnquist had a blind spot about constitutional welfare rights.

After further reflection, then, and despite the arguments made by such critics as Schlag, I remain unable to see why apparently absurd theses such as TM ought to be respected and honored, as they so often seem to be.²⁷ Still remaining, however, is the other half of the attack on *Brilliance*: the argument that common sense is somehow anti-intellectual and an impediment to progress.

II. THE CASE FOR COMMON SENSE

Common sense may seem a rather obvious virtue, but it is under heavy attack today as an enemy of both intellectual and social progress. Neither of these attacks is well-founded.

The most frequent argument against common sense runs something like this: If there is one thing we can be sure of, it is that most of what we now find obvious will turn out to be false.

26. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 134-36 (1977). Dworkin says, for example:

It would be a mistake for the Court to be much influenced by the fact that when the clause was adopted capital punishment was standard and unquestioned. That would be decisive if the framers of the clause had meant to lay down a particular conception of cruelty, because it would show that the conception did not extend so far. But it is not decisive of the different question the Court now faces, which is this: Can the Court, responding to the framers' appeal to the concept of cruelty, now defend a conception that does not make death cruel?

Id. at 135-36.

27. Some responses to *Brilliance* took me to task for making fun of serious scholars who were only doing their best to find the truth. Frankly, I do not see much sign of disinterested curiosity at work here; at least, it is a marvelous coincidence that each scholar's thesis was so congenial to his or her pre-existing political views. I am not suggesting that there is anything in the slightest improper about having an ideological motivation, but to defend political advocacy as if it were disinterested scholarship is disingenuous.

The history of modern thought is largely about the defeat of common sense and its replacement by brilliant, counterintuitive theories. It is common sense that space and time are the same everywhere, but Einstein taught us that both are relative. To argue for common sense is to be an intellectual reactionary.

For present purposes I am willing to accept the initial premise that most of our "obvious truths" will someday turn out to be false. Most of our current beliefs may well be replaced by brilliant, counterintuitive new ideas. Nevertheless, it is a mistake to believe that this should encourage an eagerness to abandon our current beliefs in favor of counterintuitive alternatives. Although the odds may be against the conventional wisdom, it may still be the best available bet if all other candidates are real long shots.

Just for fun, here is a quantitative version of that argument. Suppose, for example, that two-thirds of our core beliefs will turn out to be false. For any given core belief, there are any number of counterintuitive alternatives—let's pick four as a reasonably conservative guess. Now, what are the odds that any one of those alternatives is correct? Two-thirds of the time, one of them will be correct; all four are equally likely; so any one alternative will be correct one-sixth (two-thirds times one-fourth) of the time. Hence, the odds are two to one that our conventional belief is false, but five to one that any particular alternative is false. Logically, we should have a strong presumption in favor of retaining our conventional beliefs. Even if we think they are probably going to turn out to be false, any given alternative is much more likely to be false. In other words, even if it isn't a very strong candidate, the conventional wisdom is still the best candidate for truth.

Thus, an eagerness to jettison the status quo cannot be defended simply on the basis of the knowledge that better candidates may come along. But, one might ask, isn't it important to be open-minded and constantly ready to seek out better alternatives?

Maybe not. Thomas Kuhn—the famous inventor of the "paradigm shift"—was once asked to speak about the role of creativity in science.²⁸ Given his reputation, the audience must have expected a talk about the importance of creativity in allowing scientific revolutions to transcend the day-to-day scien-

28. See T. KUHN, *THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC TRADITION AND CHANGE* 225 (1977).

tific work that Kuhn calls normal science.²⁹

Actually, Kuhn said just the opposite. He suggested that a dogged commitment to existing theory is a crucial scientific virtue, without which science could not progress.³⁰ Open-minded, overly creative scientists would give up on existing theories too easily whenever a difficulty is encountered, rather than dedicating themselves to working out problems within the confines of existing thought. Hence, valid theories that may be workable would be too quickly abandoned in favor of unconventional alternatives. Instead of steady progress, science would undergo the periodic succession of fads that is typical of modern art. Truly great breakthroughs, like Einstein's, would be lost in the constant flux of novel theories. Indeed, it is the ability of a highly novel theory like relativity to overcome the heavy presumption against it that gives us confidence in the theory's validity.

This is perhaps a startling conclusion, but it is quite consistent with the views of other philosophers. For example, Quine has explained that conservatism is one of the prime virtues of a theory:

Virtue I is *conservatism*. In order to explain the happenings that we are inventing it to explain, the hypothesis may have to conflict with some of our previous beliefs; but the fewer the better. Acceptance of a hypothesis is of course like acceptance of any belief in that it demands rejection of whatever conflicts with it. The less rejection of prior beliefs required, the more plausible the hypothesis—other things being equal.

....

Conservatism is rather effortless on the whole, having inertia in its favor. But it is sound strategy too, since at each step it sacrifices as little as possible of the evidential support, whatever that may have been, that our overall system of beliefs has hitherto been enjoying. The truth may indeed be radically remote from our present system of beliefs, so that we may need a long series of conservative steps to attain what might have been attained in one rash leap. The longer the leap, however, the more serious an angular error in the direction. For a leap in the dark the likelihood of a happy landing is severely limited. Conservatism holds out the advantages of limited liability and a maximum of live options for each next move.³¹

The knowledge that we have so often been wrong in the past cures dogmatism, but our past errors are no reason to embrace

29. This is the common reading (misreading, in my opinion) of his most famous work, T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

30. See KUHN, *supra* note 28, at 234-36.

31. W. QUINE & J. ULLIAM, *THE WEB OF BELIEF* 66-68 (2d ed. 1978).

intellectual change for its own sake. New ideas, in short, have to pay their dues.

Even beyond the general presumption in favor of conventional wisdom supported by Kuhn and Quine, conventional legal wisdom merits deference as the collective understanding of the members of our tribe about our own tribal customs.³² To some extent, this conventional understanding constitutes law. What Rehnquist and his readers *thought* he meant in *National League of Cities* can't be different from the true meaning of the opinion because the meaning of an utterance is defined by the users of the language. Moreover, the conventional understanding is also persuasive empirical evidence of how law works because it reflects the common experiences of numerous

32. To get away from our own society for the moment, imagine a legal anthropologist (call him Bill Brilliant) studying an Amazon tribe called the Rebraf. The Rebraf, though quite untechnological, have a highly developed legal system. Bill returns home and, after many months of research into legal theory, writes a major article for the *Harvard Law Review* pointing out that the Rebraf don't understand their own legal system.

For example, Bill explains, the orders given by a Rebraf judge are always carried out instantly and with no dispute as to their meaning, whereas deconstructive analysis shows that their content is quite indeterminate. Also, in one case, a judge allied closely with the tribal chief awarded the chief possession of a banana tree. Analysis of the judge's explanation revealed that he had actually established a tribal right to free mangos. Yet when Bill questioned his informants, they all laughed at this analysis. The judge also relied on a tribal myth about the creation of bananas, which Bill found wholly irrelevant to the case, although the members of the tribe all found the explanation quite satisfying. Indeed, Bill concluded on the basis of his jurisprudential readings that the Rebraf were mistaken about nearly all of their legal system. Inspired by the success of this investigation, Bill returned to his notes and found that the Rebraf don't even have their own language right. For example, they gave "zpin" as the plural of "zpan" (the word for banana), whereas the real plural is "zpat."

Something is obviously badly wrong with Bill's analysis. The way the Rebraf speak their own language *can't* be wrong; by definition, the Rebraf language is whatever the Rebraf speak. But Bill's legal analysis has similar problems. Bill's interpretive theory is that Rebraf legal orders are indeterminate. But how can the meaning of something be indeterminate when in fact speakers and listeners all agree on a single meaning? If all the speakers of a language agree on how to use a word, Bill can't very well say that they are all making a mistake about its meaning—like the grammar of the language, its semantics is defined by their practice. The Rebraf can't be mistaken about the contents of their own culture any more than they can about their language. (Imagine Bill trying to straighten them out: "I know you all think it is the Rebraf custom to award banana trees to the chief, but you're wrong. I'm telling you that the Rebraf custom is to give the trees to the medicine man, and you'd better do it that way if you want to be right.") Bill can of course argue that tribal customs and beliefs ought to be changed; what he can't reasonably do is argue that everyone but him is wrong about their present content.

members of the tribe. We should not reject it without powerful reasons.

But isn't common sense itself inevitably politically reactionary? To have genuine social change, don't we need to transcend the commonplace view of reality, which is part of our oppressive social structure?

It is at least questionable whether we need to get beyond common sense to see what is wrong with our society. Do we really need to understand words like *poverty*, *bigotry*, and *violence* in exotic new ways to find fault with our society? Is the status quo really beyond criticism on its *own* terms, so that we need to find some radical new post-structuralist vantage point before a critique is possible?

If our society is to be criticized, I think, it is on the basis of quite ordinary reality—infant mortality rates, unemployment, violence, and homelessness.³³ Does it really take a deep understanding of literary criticism to understand the need to change such things? To talk about the indeterminacy of language is only to conceal the all too determinate realities. Those who seek social change but concede that common sense is against them have made a serious mistake.

Much of what I have written so far, in a sense, begs the question Schlag raises. I have suggested reasons for doubting the truth of brilliant arguments, but this of course assumes that truth is the main goal of scholarship.

If I read Professor Schlag correctly, this is the basic source of our disagreement. While I believe that truth is the key to good scholarship, he seems to view truth as only one of a number of equally valid goals. Schlag criticizes me for ascribing "an overly narrow role to theory" and thereby making "overly stringent demands" on it.³⁴ Space does not permit me to discuss why I think truth is so important, but at least I should clarify what I mean when I say truth should be the main test of good scholarship.

The truth of a work of scholarship can't be determined without knowing exactly what the work claims. For example, Coase can't be criticized for ignoring transaction costs—which

33. Radical scholars may consider these to be trivial social defects, hardly worth mentioning compared to our "real" social problems.

34. Schlag, *supra* note 3, at 921-22. When he considers my views, however, he doesn't seem to care whether they have any of the "aesthetic" virtues he discusses; he just wants to prove that I'm wrong. This seems inconsistent with his own intellectual standards.

Schlag seems to think I am arguing³⁵—because he explicitly assumed them away. But Coase did purport to tell us what would happen without transaction costs. He concluded that any legal rule would be equally compatible with economic efficiency:

In earlier sections, when dealing with the problem of the rearrangement of legal rights through the market, it was argued that such a rearrangement would be made through the market whenever this would lead to an increase in the value of production. But this assumed costless market transactions. Once the costs of carrying out market transactions are taken into account it is clear that such a rearrangement of rights will only be undertaken when the increase in the value of production consequent upon the rearrangement is greater than the costs which would be involved in bringing it about. When it is less, the granting of an injunction (or the knowledge that it would be granted) or the liability to pay damages may result in an activity being discontinued (or may prevent its being started) which would be undertaken if market transactions were costless. In these conditions the initial delimitation of legal rights does have an effect on the efficiency with which the economic system operates.³⁶

Essentially, Coase's thesis is that in the absence of transaction costs, people would achieve a unique, economically efficient allocation of resources. If this thesis is false, then he can no longer evaluate legal rules by using this hypothetical allocation as a benchmark, and his entire argument collapses.

Thus, the thesis of an article need not be a direct claim that a given proposition *P* about the legal system is true. Instead, the thesis might be "*P* is an interesting alternative perspective," "*P* reveals something ironic or amusing about the system," "*P* is a useful but rough approximation," or "*P* isn't true of our current practice, so we should change our practice."³⁷ But whatever claim the article does make about *P*, that claim should be assessed on the basis of its truthfulness.

In short, I am not arguing for dry factual accuracy as opposed to imagination, wit, and passion. Instead, to my mind, the

35. See *id.* at 922-32.

36. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15-16 (1960). Perhaps as Schlag suggests, Coase may have changed his mind about whether the statement quoted above is true. See Schlag, *supra* note 3, at 922-23. This does not, however, alter the meaning of what he said in 1960. (In fairness to Coase, I should probably add that although the article is famous for this "Coase Theorem," it also had a more sensible point that policy analysts should not base decisions on a comparison of real-world market activities with an ideal and hence unrealistic model of governmental regulation. See Coase, *supra*, at 43. But it would hardly have taken a 43 page article to make that point.)

37. *The Case Against Brilliance* is a little bit of all of these, which is one reason Professor Schlag's intense scrutiny of a few passages of the article strikes me as largely beside the point.

real question is whether a work exhibits what my colleague Irving Younger calls the “play of intelligence”:

Good legal writing comes from the head. You must see through and around your subject, measuring it by more than one measuring stick, turning it over, testing it, arriving at a just and clear-headed assessment of its position in the hierarchy of things.

The word that best expresses this requisite distance is “detachment,” understood as a certain amusement with the enterprise upon which you are engaged, a sense of humor about yourself and your works. If a lawyer has it, the lawyer’s writing will unfailingly communicate the play of intelligence (“play” here being as important as “intelligence”). It is the play of intelligence that brings legal writing to life, holding a reader’s attention and eliciting his assent.³⁸

Whatever the other virtues of brilliant articles, and despite the high I.Q.’s of their authors, it is precisely this play of intelligence that is missing from this genre of contemporary legal scholarship.

Arthur Leff once said that scholars live “for those occasional moments when they say, in some concise and illuminating way, something that appears to be true.”³⁹ It doesn’t embarrass me, any more than it seems to have embarrassed Leff, that I can’t define *truth*.⁴⁰ Like Leff, I believe that truth, rather than novelty, is the “first virtue”⁴¹ of scholarship.⁴²

38. Younger, *Let’s Get Serious*, 73 A.B.A. J. 110, 110 (1987).

39. Leff, *Afterword*, 90 YALE L.J. 1296, 1296 (1981). As he went on to say, “[T]o have crafted, on occasion, something true and truly put—whatever the devil else legal scholarship is, is from, or is for, it’s the joy of that too.” *Id.*; see also Cramton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1, 3-7 (1986) (describing scholarship’s pursuit of truth); Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 YALE L.J. 955, 966-68 (1981) (characterizing scholarship by its preoccupation with the discovery of truth).

40. Fortunately, a theory of truth isn’t needed to apply the word correctly. (I say “fortunately” because we would probably be unable to speak at all if we were required to have adequate theoretical underpinnings for our use of language.) Indeed, I doubt very much that a useful theory of truth is possible. See A. FINE, *THE SHAKY GAME: EINSTEIN, REALISM, AND THE QUANTUM THEORY* 9, 127-35, 148-49 (1986); R. RORTY, *THE CONSEQUENCES OF PRAGMATISM* xv, xxv, 162-66 (1982).

41. As John Rawls wrote:

Justice is the first virtue of social institutions, as truth is of systems of thought. A theory however elegant and economical must be rejected or revised if it is untrue; likewise laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust.

J. RAWLS, *A THEORY OF JUSTICE* 3 (1971).

42. Professor Schlag suggests that under my standards, much of “legal realism, law and economics, CLS, feminist jurisprudence, law and society, and grand theory would have to be dismissed from the intellectual panorama of the legal academic.” Schlag, *supra* note 3, at 920. Undoubtedly, some of the work in each of these genres, like much mainstream work, fails to meet my

standards, but I see no reason to assume that any of these forms of scholarship is inherently incompatible with the play of intelligence.