

# Chicago-Kent Law Review

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Volume 76  
Issue 2 *Symposium on Philosophical  
Hermeneutics and Critical Legal Theory*

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Article 5

December 2000

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### Recommended Citation

Charles W. Collier, *Law as Interpretation*, 76 Chi.-Kent L. Rev. 779 (2000).  
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## LAW AS INTERPRETATION

CHARLES W. COLLIER\*

### I. THEORY BETWEEN THE DISCIPLINES: THE HERMENEUTICS OF “LAW AND”

A recent essay on *Law, Literature, and the Problems of Interdisciplinarity* makes the following fairly uncontroversial yet suggestive claim that

[t]he less anyone discusses what “law” is for purposes of comparing law to literature, the easier it is to think of law in fairly stereotypical terms drawn from the standard story about law’s development as an independent, nonhumanistic discipline. . . . [T]hat is, if practicing law consists of the dry and technical manipulation of rules, then of what relevance is literature (or anything else) to lawyers?<sup>1</sup>

The standard account of the development of law as an independent or relatively autonomous discipline begins with the efforts of Langdell to make the common law more scientific. I shall have more to say about that standard account later, but for now Baron’s point remains a good one: if the boundaries of law—understood as the relatively routine application of technical rules—remain fixed and inevitable, then the prospects for expanding or enriching law’s horizons by means of law and literature (or “law and” anything, for that matter) would be bleak indeed.

But of course the boundaries of law are not fixed or even particularly resilient to reinterpretation. A vast temporal, cultural, and social diversity is readily apparent among the recognizable legal systems of the world. As Baron puts it,

I do not believe law has determinate boundaries that comparisons with literature (or history or philosophy or economics) neutrally discover. I believe that the definition of the field “law,” like that of any other field, will to some degree reflect or be a product of what we, as a culture, want law to be and do.<sup>2</sup>

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1. Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 YALE L.J. 1059, 1080, 1083 (1999).

2. *Id.* at 1085.

In other words, law is “socially constructed.”

The term (and the concept) “socially constructed” has come into deserved disrepute in recent years, as it has come to mean almost anything from “made up” to “invented” to “unreal.” But, strictly speaking, the claim that something is socially constructed means only that it is a contingent product of historical events, social forces, and, perhaps, ideology. Consider, for example, the so-called “Year 2000 Computer Bug,” which, whatever else it may have done, will doubtless be immortalized in lexicons of the future as “Y2K.” The Y2K problem was conventionally conceived of as a “technical defect” of our computers, which might confuse the year 2000 with 1900 (or not recognize it at all).<sup>3</sup> Yet with all the discussion of the Y2K problem, I have yet to hear a claim that our computers would do anything other than precisely that which they had been specifically designed and programmed to do (i.e., interpret our shortcut, two-digit designations of the year as falling within the twentieth century). The “problem” arises when the computers’ blind adherence to their preassigned tasks conflicts with a broad array of unanticipated social uses to which the computer-generated data would now be put.

It is a real, but no less socially constructed, problem when a computer-generated mortgage statement claims my payment is 100 years overdue. In many ways we could say of the Y2K problem what has been said of gender: that it is “a social category whose definition makes reference to a broad network of social relations, and . . . is not simply a matter of anatomical [read: technological] differences.”<sup>4</sup> The Y2K computer problem should really be understood as the late twentieth-century social procrastination bug, or perhaps the postmodern lack of imagination glitch.

Typically, a claim of social construction takes something like the following form:

*X* need not have existed, or need not be at all as it is. *X*, or *X* as it is at present, is not determined by the nature of things; it is not inevitable.<sup>5</sup>

In the case of law, we should readily recognize that its existence or character is not determined by the nature of things, that its past or

3. See Rhonda Brammer, *Life After Y2K*, BARRON'S, Aug. 16, 1999, at 24.

4. Sally Haslanger, *Ontology and Social Construction*, 23 PHIL. TOPICS 127, 130 (1995); cf. Rob Pegoraro, *Y2K, From High Anxiety to Low Comedy*, WASH. POST, Jan. 7, 2000, at E1 (“Instead of a computing problem and a technology issue, it became some sort of metaphor about what kind of people we want to be, what sort of society we live in, and—a lot of the time—how we all somehow deserved to be punished.”).

5. IAN HACKING, *THE SOCIAL CONSTRUCTION OF WHAT?* 6 (1999).

current states are not inevitable, and that it was “brought into existence or shaped by social events, forces, history, all of which could well have been different.”<sup>6</sup> We should almost certainly *not* say of law what opponents of social construction have said about fundamental physics: “If we ever discover intelligent creatures on some distant planet and translate their scientific works, we will find that we and they have discovered the same laws.”<sup>7</sup>

Ian Hacking has shed great light on the discussion of social construction by focusing on the question that forms the title of his recent book: *The Social Construction of What?*<sup>8</sup> In the realm of law, we could point to our idea or concept of law, the historical development of legal practices, their embodiment in established legal principles and institutions, our current body of knowledge about the legal world, and manifest signposts of law such as written constitutions, statutes, regulations, orders, and judicial decisions—all as deeply reflective of the specific mix of contingent social circumstances and the circuitous route by which they somehow arrived at their present incarnation. It is no objection to a traffic patrolman’s claim that I have exceeded the speed limit to point out that, without our current, contingent mix of legal practices and institutions, there would be no such thing as a speed limit at all. Our law, and our laws, are no less real and objective for being socially constructed, and even the traffic patrolman recognizes that.

I should like to focus attention on an aspect of law that is no less socially constructed but is perhaps less well recognized. I call it the “professional narrative.” The professional narrative is a socially constructed organization of legal knowledge into an authoritative interpretation of law. The professional narrative is the body of arguments and citations to authority that a successful advocate draws upon in oral argument before the Supreme Court. It is an interpretation of law that explains why, for example, the successful advocate no longer cites *Plessy v. Ferguson*<sup>9</sup> or *Lochner v. New York*<sup>10</sup> as authority.

In this Article, I shall trace out separate professional narratives in common law, constitutional law, and in legal cases turning on the distinction between community and society (Part III). But first I

6. *Id.* at 7.

7. Steven Weinberg, *Sokal's Hoax*, N.Y. REV. BOOKS, Aug. 8, 1996, at 11, 14.

8. See HACKING, *supra* note 5.

9. 163 U.S. 537 (1896).

10. 198 U.S. 45 (1905).

should like to situate these legal-professional narratives within a broader interdisciplinary framework (Part II).

## II. THE INTELLECTUAL ORIGINS OF HERMENEUTIC THEORY

The natural sciences, the humanities, and the social sciences all make use of basic paradigms or conceptual frameworks in terms of which apparently uninterpreted “results” can make sense. In none of these disciplines are simple truths or uninterpreted results the fundamental, elementary starting points of scientific or intellectual discussion. As in law, the need for something like a professional narrative pervades all intellectual disciplines.

### A. *The Book of Nature*

The natural sciences are not usually thought of as interpretive disciplines. But they make use of a powerful metaphor that can be traced through antiquity (Plato), the early Christian period (Saint Augustine), and the Renaissance: the *Book of Nature*. By the early modern period it could be said that almost every modern natural philosopher made reference to the Book of Nature.<sup>11</sup> Galileo’s description in *The Assayer* (*Il Saggiatore*) is perhaps the most famous:

Philosophy is written in this grand book, the universe, which stands continually open to our gaze. But the book cannot be understood unless one first learns to comprehend the language and read the letters in which it is composed. It is written in the language of mathematics, and its characters are triangles, circles, and other geometric figures without which it is humanly impossible to understand a single word of it; without these, one wanders about in a dark labyrinth.<sup>12</sup>

Today we would say that Galileo saw the need for an interpretive framework within which his observations could make sense. On the one hand, Galileo is arguing against what he terms “the firm belief that in philosophizing one must support oneself upon the opinion of some celebrated author,”<sup>13</sup> usually Aristotle or the Scholastic commentaries and glosses on Aristotle’s works. In this sense, Galileo’s criticism reflects one of the most widespread tendencies of the early modern period: “What was said to be overwhelmingly wrong with existing natural philosophical traditions was that they

11. STEVEN SHAPIN, *THE SCIENTIFIC REVOLUTION* 69 (1996).

12. See *Excerpts from the Assayer*, in *DISCOVERIES AND OPINIONS OF GALILEO* 229, 237-38 (Stillman Drake trans., 1957) (1623).

13. *Id.* at 237.

proceeded not from the evidence of natural reality but from human textual authority.”<sup>14</sup> One is reminded in this context of the infamous professor from Padua who refused to look through Galileo’s telescope (to see the newly discovered moons of Jupiter that contradicted Aristotelian and Roman Catholic cosmology). Here the emphasis is on studying the *Book of Nature*, as opposed to the traditionally valued books of authoritative human authors.

On the other hand, Galileo is also insisting that nature is like a *book*. It stands “open to our gaze”; but, like any book (and unlike most other things that stand open to our gaze), it “cannot be understood unless one first learns to comprehend the language and read the letters in which it is composed.”<sup>15</sup> The truths of nature are not open to direct observation. To the untutored observer, the Moon looks no bigger than a ball and the Sun appears to go around the Earth. Even with a telescope, it is unclear whether the fixed stars are very small or just very distant. “As a matter of fact both interpretations fit the optical data equally well and a man of that period had no scientific, but only philosophical, reasons for choosing between them.”<sup>16</sup> The *Book of Nature* must be deciphered if it is to make any sense.

In a later passage in *The Assayer*, Galileo suggests how that decipherment might proceed. In explaining his theory of heat, Galileo notes that many people believe heat is a real phenomenon, property, or quality that actually resides in things that feel warm to us.

Now I say that whenever I conceive any material or corporeal substance, I immediately feel the need to think of it as bounded, and as having this or that shape; as being large or small in relation to other things, and in some specific place at any given time; as being in motion or at rest; as touching or not touching some other body; and as being one in number, or few, or many. From these conditions I cannot separate such a substance by any stretch of my imagination.<sup>17</sup>

But that such a substance should be “white or red, bitter or sweet, noisy or silent, [or] of sweet or foul odor,” continues Galileo, “my mind does not feel compelled to bring in as necessary

14. SHAPIN, *supra* note 11, at 68; cf. C.S. LEWIS, *THE DISCARDED IMAGE: AN INTRODUCTION TO MEDIEVAL AND RENAISSANCE LITERATURE* 5, 11, 189 (1964).

15. *Excerpts from the Assayer*, *supra* note 12, at 238.

16. ALEXANDRE KOYRÉ, *FROM THE CLOSED WORLD TO THE INFINITE UNIVERSE* 94 (1957).

17. *Excerpts from the Assayer*, *supra* note 12, at 274.

accompaniments.”<sup>18</sup> Without our senses’ guidance, “reason or imagination unaided would probably never arrive at qualities like these.”<sup>19</sup> From this Galileo concludes that tastes, odors, colors, warmth, and the like are “no more than mere names so far as the object in which we place them is concerned, and that they reside only in the consciousness.”<sup>20</sup> If the perceiving creature were removed, all these qualities would cease to exist.

Galileo thus inverts the conceptual scheme established by Aristotle in *On the Soul*, according to which (1) “perception of the special objects of sense is never in error”; (2) while the perception that there is, say, white before us cannot be false, “the perception that what is white is this or that may be false”; (3) finally, with regard to the universal attributes (e.g., movement and magnitude) of objects having sensible qualities—“it is in respect of these that the greatest amount of sense-illusion is possible.”<sup>21</sup>

Galileo inverts this traditional hierarchy by devaluing the direct perceptions of things—as merely unique, subjective sensations that do not admit of measurement or quantification. What he elevates to the first rank is the scientific study of matter, as defined by universally knowable mathematical and mechanical properties such as shape, number, distance, motion, impact, etc. “When these properties are not directly observable”—as they generally will not be—“the physicist must search for them beneath the macroscopic appearances that conceal them.”<sup>22</sup>

“Appearances that conceal”—this phrase is impossible in Aristotle’s doctrinal world, where direct perception is never in error. A new role for the natural philosopher is suggested, that of *interpreting* the appearances. In Husserl’s formulation, Galileo is at once “a discovering and a concealing genius.” For if “[t]he phenomena are only in the subjects . . . [i]f the intuited world of our life is merely subjective,” Husserl continues:

then all the truths of pre- and extrascientific life which have to do with its factual being are deprived of value. They have meaning only insofar as they, while themselves false, vaguely indicate an in-

18. *Id.*

19. *Id.*

20. *Id.*

21. ARISTOTLE, DE ANIMA 428b-429a.

22. PIETRO REDONDI, GALILEO HERETIC 57 (Raymond Rosenthal trans., 1987) (1983); cf. EDMUND HUSSERL, THE CRISIS OF EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY 53 (David Carr trans., 1970) (1954) (“[N]ature . . . is in itself mathematical; it is given in formulae, and it can be interpreted only in terms of the formulae.”).

itself which lies behind this world of possible experience and is transcendent in respect to it.<sup>23</sup>

Thus it does not seem correct to say that, with Galileo's Book of Nature, "[h]ere is the root idea of modern *empiricism*, the view that proper knowledge is and ought to be derived from direct sense experience."<sup>24</sup> That idea seems more descriptive of a different, equally powerful metaphor: the mind as a Mirror of Nature. I shall not duplicate Richard Rorty's exhaustive efforts to dismantle "[t]he picture which holds traditional philosophy captive . . . that of the mind as a great mirror, containing various representations—some accurate, some not,"<sup>25</sup> which in turn suggests the view of knowledge as accuracy of representation. As Rorty notes, that original dominating metaphor depends on "having our beliefs determined by being brought face-to-face with the object of the belief (the geometrical figure which proves the theorem, for example)."<sup>26</sup>

By contrast, with the Book of Nature "[t]here were some chapters . . . to which unaided experience drew attention in qualitatively illusory and misleading ways. Their decipherment, according to Galileo, must be of a rational nature."<sup>27</sup> Interpreting the meaning of the appearances implies two elements, not one. That to which one is brought face-to-face is merely the perceptible *signans* of the Stoics; its meaning is the intelligible *signatum*. Interpretation is a discursive mental process for which the *signans* provides only the underlying physical basis *for something else*.

According to Augustine, "[a] sign is a thing that brings something else to mind, over and above the impression that the thing itself makes on the senses."<sup>28</sup> This basic position is taken over by the seventeenth-century logicians of Port-Royal and reformulated as follows. Something can be both a thing and a sign at the same time. When one regards an object solely in itself and in its own proper being, the idea that one has of it is an idea of a thing; but when one regards an object solely as representing another, the idea that one has

23. HUSSERL, *supra* note 22, at 54.

24. SHAPIN, *supra* note 11, at 69.

25. RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 12 (1979).

26. *Id.* at 163.

27. REDONDI, *supra* note 22, at 55; *cf. id.* at 53 ("We are in the seventeenth century, the century of the gold of the Cabala, of exegesis, of ultrasophisticated systems of ciphers concealing beneath irreproachable forms the most delicate diplomatic messages. Everyone interprets, deciphers, makes up anagrams, and combines. It is the *grand siècle* of the combinatorial and the linguistic.")

28. SAINT AUGUSTINE, *DE DOCTRINA CHRISTIANA* lib. II, cap. I, at 1.



of it is an idea of a sign, and this first object is termed a "sign."

Thus the sign comprises two ideas: the one of the thing that represents, the other of the thing represented; and its nature consists in prompting the second by the first. . . . [E]very sign requires a distinction between the thing representing and the thing represented.<sup>29</sup>

The relationship of the sign to its signification is not assured in the order of things themselves; what connects them is "a bond established, inside knowledge, between the idea of one thing and the idea of another."<sup>30</sup> Beginning with the seventeenth century, there is no more interest in searching for, discovering, or uncovering preexisting signs; there is no longer any such thing as an unknown sign—not because we are in possession of all possible signs, but because

though God still uses signs to speak to us through nature, he makes use of our knowledge, and the connections established between our impressions, in order to institute in our minds a relationship of signification.<sup>31</sup>

### B. *The Bible As Literature*

The Book of Nature was only one of the two books God had written; the other was of course Holy Scripture, the *Book of God*. "Holy Scripture is the word of God, which means that the Scripture itself simply must have priority over the teachings of those who interpret it."<sup>32</sup> Just as the direct reading of the Book of Nature called into question the scientific authority of Aristotle and his scholastic commentators, so the slogan "sola scriptura" undermined the established interpretive authority of the Roman Catholic Church.

Yet even as Luther challenged the interpretive authority of the Church in matters biblical, he also drew attention to the fact that *the*

29. ANTOINE ARNAULD & PIERRE NICOLE, *LA LOGIQUE OU L'ART DE PENSER* 52-53 (Édition critique par Pierre Clair et François Girbal, 2d ed. 1981).

30. MICHEL FOUCAULT, *LES MOTS ET LES CHOSSES* 78 (1966).

31. *Id.* at 73; cf. GEORGE BERKELEY, *THE PRINCIPLES OF HUMAN KNOWLEDGE*, reprinted in 35 GREAT BOOKS OF THE WESTERN WORLD 413, 425 (Robert Maynard Hutchins et al. eds., 1952) (1710) ("[T]he connexion of ideas does not imply the relation of *cause* and *effect*, but only of a *mark* or *sign* with the *thing signified*. The fire which I see is not the cause of the pain I suffer upon my approaching it, but the mark that forewarns me of it."). See generally NOAM CHOMSKY, *CARTESIAN LINGUISTICS: A CHAPTER IN THE HISTORY OF RATIONALIST THOUGHT* (1966); Charles W. Collier, *Verzweiflung an der Geschichte*, 52 *DEUTSCHE VIERTELJAHRSSCHRIFT FÜR LITERATURWISSENSCHAFT UND GEISTESGESCHICHTE* 527 (1978).

32. HANS-GEORG GADAMER, *WAHRHEIT UND METHODE* 313 (3d erweiterte Auflage 1972); cf. 2 *Timothy* 3:16 ("All Scripture is given by inspiration of God, and is profitable for instruction.").

*Bible must be interpreted* by someone. The Book of God is a *book* in an even more literal sense than the Book of Nature. The entire body of Church doctrine, the accumulated dogmatic tradition of the centuries—all this represented merely an established, entrenched, and not particularly well-supported body of interpretation. “The Romanists profess to be the only interpreters of Scripture,” wrote Luther, “even though they never learn anything in it their lives long.”<sup>33</sup>

They claim authority for themselves alone, juggle with words shamelessly before our eyes, saying that the pope cannot err as to the faith, whether he be bad or good; although they cannot quote a single letter of Scripture to support their claim. . . . Therefore it is a wicked, base invention, for which they cannot adduce a tittle of evidence in support, to aver that it is the function of the pope alone to interpret Scripture, or to confirm any particular interpretation.<sup>34</sup>

But even for one committed to recovering or rediscovering the Bible in its own terms, and not “as [it] had been mediated to the West by the Church,”<sup>35</sup> that project required interpretation, maybe even a lot of interpretation. Luther certainly did his part in translating the Bible into German and writing extensive commentaries on it (not to mention a lifetime of teaching and preaching).<sup>36</sup> The development of the printing press did the rest. For the first time it became truly possible to read the Bible for oneself.

The Bible, once free from the groaning weight of accumulated Church commentaries and glosses, begins to resemble a language in a linguistic community. Under normal conditions, where there is no authoritative interpreter or arbiter, language leads “a semiological life of its own.”<sup>37</sup> Language is the affair of everyone, hence the property of no one. To an extent unparalleled in other social institutions, everyone participates in language, and this is why it is

33. MARTIN LUTHER, *An Appeal to the Ruling Class of German Nationality As to the Amelioration of the State of Christendom*, in MARTIN LUTHER: SELECTIONS FROM HIS WRITINGS 403, 412 (John Dillenberger ed., 1961) (1520).

34. *Id.* at 412-13.

35. GABRIEL JOSIPOVICI, *THE BOOK OF GOD: A RESPONSE TO THE BIBLE*, at x (1988); cf. MARTIN LUTHER, *Preface to the Epistle of St. Paul to the Romans, 1522*, in MARTIN LUTHER: SELECTIONS FROM HIS WRITINGS, *supra* note 33, at 19, 31 (“Often the text almost disappears under the weight of the various marginal and interlinear glosses and commentaries; and one of the key motives of the Reformers was to remove these glosses and allow readers to read the Holy Book for themselves.”).

36. See DIE BIBEL, NACH DER ÜBERSETZUNG MARTIN LUTHERS (revidierte Fassung 1984) (1534).

37. FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 76 (Roy Harris trans., 1993) (1916).

constantly influenced by all. Only the collective is able to establish a linguistic system, i.e., to institute values whose sole *raison d'être* lies in common usage and consent, and even it can do so only over time.

Introducing the newly translated (and widely printed) Bible into the newly expanded "interpretive community" was like introducing an artificial language into a natural linguistic community:

Anyone who invents an artificial language retains control of it only as long as it is not in use. But as soon as it fulfils its purpose and becomes the property of the community, it is no longer under control. . . . Its transmission will follow laws which have nothing in common with those of deliberate creation, and it will then be impossible to turn the clock back.<sup>38</sup>

The comparison is instructive, because a further implication of Luther's rejection of Church authority in biblical interpretation was a corresponding broadening of the relevant religious community far beyond the boundaries of the official Church. The Church was no longer identified with the priests, bishops, and popes, or their doctrinal and sacramental practices; instead, the relevant interpretive community was simply the community of believers.<sup>39</sup> "For where two or three are gathered together in my name, I am there in the midst of them."<sup>40</sup>

So far, nothing has been said that would distinguish biblical interpretation from any other form of literary interpretation. But two main arguments have been advanced against treating the Bible as literature:

[1] The Bible's claim to truth . . . is tyrannical—it excludes all other claims. The world of the Scripture stories is not satisfied with claiming to be a historically true reality—it insists that it is the only true world. . . . Far from seeking, like Homer, merely to let us forget our own reality for a few hours, it seeks to overcome our reality; we are to fit our own life into its world, feel ourselves to be elements in its structure of universal history.<sup>41</sup>

[2(a)] [I]t is not literature because it is a collection of documents and not a whole, and about real not invented people. . . .

38. *Id.* at 76.

39. *Cf.* LUTHER, *supra* note 33, at 407 ("[A]ll Christians whatsoever really and truly belong to the religious class, and there is no difference among them except in so far as they do different work."); *id.* at 409 ("[T]here is, at bottom, really no other difference between laymen, priests, princes, bishops, or, in Romanist terminology, between religious and secular, than that of office or occupation, and not that of Christian status."); *id.* at 414 ("Think it over for yourself. You must acknowledge that there are good Christians among us who have the true faith, spirit, understanding, word, and mind of Christ. Why ever should one reject their opinion and judgment, and accept those of the pope, who has neither that faith nor that spirit?").

40. *Matthew* 18:20.

41. ERICH AUERBACH, *MIMESIS* 17-18 (5th ed. 1971).

[2(b)] . . . [I]t is not literature because it consists of laws, prophecies, wisdom sayings and many other genres that we do not normally classify as literature.<sup>42</sup>

The first argument may be termed the argument from authority. The institutional authority of Church interpretation may have been displaced by the Reformation, but this loss is more than compensated for by the inherent authority of Holy Scripture itself. For centuries the Bible has been the sacred book of Western culture; it is considered to be the directly revealed word of God and, as such, necessarily true. The first-century Jewish historian Josephus says of the Scriptures that

no one has ventured either to add, or to remove, or to alter a syllable; and it is an instinct with every Jew, from the day of his birth, to regard them as the decrees of God, to abide by them, and, if need be, cheerfully to die for them.<sup>43</sup>

But what does it mean to say that the Bible is necessarily true? That it should not or need not be interpreted, or is beyond all interpretation? Saying that the truths of the Bible are directly revealed without human mediation would be like saying the mind is a Mirror of Nature. Swift famously parodied this sort of naive fundamentalism in concluding that the Bible forbids the use of toilet paper, since it is written in *Revelation*: "he who is filthy, let him be filthy still."<sup>44</sup> But James Barr is not writing as a naive fundamentalist or denying that the Bible has to be interpreted when he says:

The recognition that the Bible is dominated by a religious concern is no obstacle to the reading of it as literature; but the idea that its religious teaching must be right and must be accepted as authoritative does constitute . . . a serious block to the enjoyment of it as literature.<sup>45</sup>

The objection is not that the Bible must be interpreted; the objection is that such interpretation seems to imply or require an acceptance of authority that would not normally be assumed.

This argument from authority may be criticized both from the perspective of the Bible and from that of literature. First, the intensely personal responses to the Bible favored by Kierkegaard, Barth, and Bultmann say, in effect: "On this book depends my life; it

42. JOSIPOVICI, *supra* note 35, at 298.

43. JOSEPHUS, *Against Apion: Or on the Antiquity of the Jews*, in 1 WORKS OF JOSEPHUS 162, 179-81 (H. St. John Thackeray trans., 1976) (1926).

44. *Revelation* 22:11; cf. JONATHAN SWIFT, A TALE OF A TUB 191 (A.G. Guthkelch & D. Nicoll Smith eds., 1958).

45. James Barr, *Reading the Bible As Literature*, 56 BULL. JOHN RYLANDS LIBR. 10, 15 (1973-74) (on file with author).

is too important a matter to leave to others; if I am to read it as it asks to be read I must shed not only my literary preconceptions but also every attachment I have to the world."<sup>46</sup> As Ricoeur has cautioned,

A theory of interpretation which at the outset runs straight to the moment of decision moves too fast. . . . It is the objectivity of the text, understood as content—bearer of meaning and demand for meaning—that begins the existential movement of appropriation. . . . If there is no objective meaning, then the text no longer says anything at all.<sup>47</sup>

Second, the Bible's claim to be uniquely authoritative does not do justice to the authority of great literature. To return to the comparison suggested by Auerbach above: Is it fair to say that Homer seeks "merely to let us forget our own reality for a few hours," to amuse and entertain us, and not to make us "fit our own life into its world, feel ourselves to be elements in its structure of universal history"? After all, it was precisely because of Homer's perceived authority in ancient Athens that Plato felt the need to counter his dangerous influence.<sup>48</sup> Barr objects that the Bible demands to be read "as a source of true knowledge about the objects described in [it]—about God, about the creation of the world, about his redemption of mankind, about sin and salvation, about the possibility of a future life."<sup>49</sup> But would that be any less true of Homer, Virgil, Dante, Shakespeare, Spenser, Milton, Proust, or Tolstoy? More generally, "the reader who has come to the Bible from the works of Homer or Dante will want to ask: does not every major work or writer speak with authority?"<sup>50</sup>

The second main argument against treating the Bible as literature may be termed the argument from disunity. To begin with, we have, separated by centuries, an Old Testament and a New Testament, both of which feature disparate collections of ancient documents assembled and edited by unknown committees of ancient religious leaders. By subject matter, the Bible comprises "history, romance, law, poems of praise and vituperation, aphorisms, proverbs, love-songs, visions, and much else besides."<sup>51</sup> The criterion of selection is supposed to be "divine inspiration," but what counts as

46. JOSIPOVICI, *supra* note 35, at 13.

47. PAUL RICOEUR, *ESSAYS ON BIBLICAL INTERPRETATION* 68-69 (Lewis S. Mudge ed., 1980).

48. *See generally* ERIC HAVELOCK, *PREFACE TO PLATO* (1963).

49. Barr, *supra* note 45, at 13.

50. JOSIPOVICI, *supra* note 35, at 26.

51. *Id.* at 9.

divinely inspired seems to change, sometimes as a function of arbitrary political and social considerations. "Haggai, Zechariah and Malachi are commonly regarded as the last of the prophets," for example, "since after them, it was felt, the 'divine spirit' ceased to be active in Israel."<sup>52</sup> To scholars enamored of the disunity thesis, the search for historical and archaeological information thus seems more important than the literary analysis of the Bible's distinctive mode of narration.

This argument from disunity, like the argument from authority, may be criticized both from the perspective of the Bible and from that of literature. First, the books of the Bible seem to be more closely related to each other than the works of any single author:

The books that deal with the history of the world from the Creation onwards follow each other in roughly chronological order; the prophets sometimes appear in the historical books and often mention events that are dealt with more fully there; the Psalms refer to the Creation, the crossing of the Red Sea and the Jerusalem Temple; the Gospels, Acts and the Epistles frequently refer to the earlier books and the last two of course refer constantly to the Jesus we have encountered in the Gospels; and Revelation picks up images from Daniel and elsewhere and weaves them into something new.<sup>53</sup>

More importantly, there is a grand thematic unity underlying all these references and correspondences: "It begins where time begins, with the creation of the world; it ends where time ends, with the Apocalypse, and it surveys human history in between, or the aspect of history it is interested in, under the symbolic names of Adam and Israel."<sup>54</sup>

Second, criticisms of the Bible's supposed disunity often reflect merely the norms of literary coherence derived from certain literary genres, in particular from the carefully plotted classical novels of the nineteenth century. These notions of what constitutes unity, "which are still taken for granted by the majority of those who write about the Bible, themselves have a history, but a very brief one: it is doubtful if Shakespeare, let alone Chaucer, would have made much sense of them."<sup>55</sup> Nor, one might add, would modernists such as Joyce (*Ulysses*), Eliot (*The Waste Land*), or Proust (*À la recherche du temps perdu*).

52. *Id.* at 43.

53. *Id.* at 11-12.

54. NORTHROP FRYE, *THE GREAT CODE*, at xiii (1982).

55. JOSIPOVICI, *supra* note 35, at 11.

What accounts for the enduring separation of biblical interpretation from literary interpretation? Josipovici offers an interesting explanation based on the unique role of the Bible in childhood. "Once the Bible was not a book but stories told us by our parents. When stories are read to us in childhood we accept them without question."<sup>56</sup> The Bible thus acquires what we might term a sort of unearned authority; at the very least, it retains a form of authority different from the "intellectual authority" we attribute in later life to works whose arguments and doctrines are intellectually sound and persuasive.<sup>57</sup> The child's relation to the Bible is then uniquely "perpetuated into adulthood" through public worship services, which differ from school, for example, in that family and relatives of all ages participate. Our "sense of awe in relation to the Bible" is thus reinforced through this powerful association with community values, where community is defined as a relatively small group in which shared values can be assumed.<sup>58</sup>

Up to about the time of the Reformation, this is where the story would have ended. "[T]he men, women and children who filled the medieval churches and looked up at the stained-glass windows as they listened to the preachers, were living out an elaborated version of the childhood experience." But Luther's admonition on the world stage to "[t]hink it over for yourself" corresponds, in developmental terms, with "the natural reaction of the adolescent" to the Bible's unearned authority, "his natural desire to *find out for himself*. . . . [O]nce Luther stood up and asserted the need to speak the truth as he saw it and not pay lip-service to tradition, things could never be quite the same again."<sup>59</sup>

The adult who takes up the Bible against this background remembers that its stories once seemed to have tremendous authority, though not because of their literary qualities. "Going back to them in later life we have somehow felt that there must be a reason for their authority, that we must get behind them to find out what they were really about"<sup>60</sup>—questions that would not arise in such intense form for the adult reader of ordinary literature. Thus, according to Josipovici, we misread the Bible because we ask too

56. *Id.* at 4.

57. See Charles W. Collier, *Intellectual Authority and Institutional Authority*, 35 INQUIRY 145 (1992), reprinted in 42 J. LEGAL EDUC. 151 (1992).

58. See JOSIPOVICI, *supra* note 35, at 8.

59. *Id.* at 12.

60. *Id.* at 27.

much of it; “it is our anxiety in relation to this particular book that makes us concentrate on whether we are accurately understanding the details while ignoring the challenge of responding to the whole.”<sup>61</sup>

### C. *Society As the Self*

The modern social sciences were basically invented in the nineteenth century, so it is somewhat anachronistic to speak of social science before that time. But it is possible to see the stirrings of social theory and political philosophy since at least the time of Plato. And if one understands the social sciences in general terms as the interpretation of human social behavior, that project can be traced back to an equally venerable metaphor or interpretive paradigm: Society as the Self.

In Plato’s *Republic*, Socrates considers how best to get at the nature of justice:

There is, we say, justice of one man; and there is, surely, justice of a whole city too? . . . So then, perhaps there would be more justice in the bigger and it would be easier to observe closely. If you want, first we’ll investigate what justice is like in the cities. Then, we’ll also go on to consider it in individuals, considering the likeness of the bigger in the *idea* of the littler?<sup>62</sup>

This methodology is justified by an implied parallelism between the city and man or, more precisely, between the city and the individual human soul. Later, Plato makes the parallelism explicit: “Isn’t it quite necessary for us to agree that the very same forms and dispositions as are in the city are in each of us? . . . Surely they didn’t get there from any other place.”<sup>63</sup>

In his analysis of the city, Plato determines that it is composed of three distinct classes, each of which corresponds to one of the fundamental parts of the soul. The obvious differences between people suggest a hierarchy in the city. At the top is the ruling class, composed of those who are wisest; likewise, in the soul, it is fitting that reason should govern. Just as only the wise can take disinterested account of the genuine, long-term needs of the whole city and not just themselves, so reason takes into consideration the

61. *Id.* at 34; *cf. id.* at 17 (explaining that the Torah also “must be perceived as a unity, regardless of the number and types of smaller units that form the building blocks of its composition”).

62. THE REPUBLIC OF PLATO 368e-369a (Allan Bloom trans., 1968); *cf. id.* at 434d-e (Socrates further explains the benefit of looking at justice first in the city and then in one man.).

63. *Id.* at 435e; *cf. id.* at 544d-e (arguing that human characters and dispositions make up cities).



interests of the whole soul and not just itself. In the middle, a warrior class ensures the physical safety of the city, and this class corresponds to courage or spirit in the soul. Finally, at the bottom of the city's hierarchy is the productive or money-making class, which corresponds to desire in the soul; both are concerned only with their own gratification, to the exclusion of any wider concerns.

For Plato, justice in the city consists of each class's doing just that one thing for which it is by nature best fitted. Justice is thus dependent upon the virtue of moderation, in the sense of "the control of what is by nature worse by that which is by nature better—that control through which the whole is in harmony."<sup>64</sup> Likewise, when the parts of the soul "mind their own business" and do that, and only that, for which they are naturally best suited, a balanced and unified state arises that we would term "psychic harmony" and that Plato defines as justice:

And in truth justice was, as it seems, something of this sort; however, not with respect to a man's minding his external business, but with respect to what is within, with respect to what truly concerns him and his own. He doesn't let each part in him mind other people's business or the three classes in the soul meddle with each other, but really sets his own house in good order and rules himself; he arranges himself, becomes his own friend, and harmonizes the three parts, exactly like three notes in a harmonic scale, lowest, highest and middle. And if there are some other parts in between, he binds them together and becomes entirely one from many, moderate and harmonized.<sup>65</sup>

All of which leads directly to Plato's conclusion that "the just man will not be any different from the just city with respect to the form itself of justice, but will be like it."<sup>66</sup>

Following in Plato's footsteps, Aristotle understands man as a "political animal," "one whose nature is to live with others" in society, "man's natural habitat."<sup>67</sup> The end of politics is the good for man and, according to Aristotle, "even if the end is the same for a single man and for a state, that of the state seems at all events

64. Leo Strauss, *Plato*, in *HISTORY OF POLITICAL PHILOSOPHY* 7, 46 (Leo Strauss & Joseph Cropsey eds., 3d ed. 1987); cf. *THE REPUBLIC OF PLATO*, *supra* note 62, at 430e, 431e-432a, 433a-b.

65. *THE REPUBLIC OF PLATO*, *supra* note 62, at 443d-e.

66. *Id.* at 435b.

67. ARISTOTLE, *POLITICS* 1253a2 (Benjamin Jowett trans., 1943); ARISTOTLE, *NICOMACHEAN ETHICS* 1169b18 (David Ross trans., revised by J.L. Ackrill & J.O. Urmsion, 1992); JONATHAN LEAR, *ARISTOTLE: THE DESIRE TO UNDERSTAND* 311 (1988).

something greater and more complete both to attain and to preserve.”<sup>68</sup>

In his *Ethics*, Aristotle inquires into man’s distinctive nature and function. The life of nutrition and growth is not peculiar to man, nor is that of perception. Aristotle thus focuses on man’s unique “rational soul,” of which one element possesses reason and thinks; however, there is “also another natural element beside the [reason], which fights against and resists that principle,”<sup>69</sup> but ultimately obeys it (at least in the well balanced man). “[T]he appetitive and in general the desiring element in a sense shares in [reason], in so far as it listens to and obeys it; this is the sense in which we speak of [paying heed to] one’s father or one’s friends.”<sup>70</sup>

Notice that Aristotle’s categories of the soul are all drawn from social functions: listening and obeying, father and friends. He leaves little doubt that this hierarchy derived from social functions also defines the truly human function in the individual soul:

[J]ust as a city or any other systematic whole is most properly identified with the most authoritative element in it, so is a man . . . . [A] man is said to have or not to have self-control according as his [intellect] has or has not the control, on the assumption that this is the man himself.<sup>71</sup>

The natural subordination to reason in the soul is reflected in a properly conceived and planned social order. When the naturally governing element controls the soul, it is in good order; when the proper political and legal choices have been made, the conventional order reflects the natural order.

The metaphor of Society as the Self remains an interpretive commonplace throughout the middle ages and well into the eighteenth century. For Aquinas, deeply steeped in Aristotelian thought, a city without a governing political regime is like a body without a soul. In *Julius Caesar*, Brutus says:

Between the acting of a dreadful thing  
And the first motion, all the interim is  
Like a phantasma, or a hideous dream:  
The genius and the mortal instruments  
Are then in council; and the state of man,  
Like to a little kingdom, suffers then

68. ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 67, at 1094b7-9.

69. *Id.* at 1102b17.

70. *Id.* at 1102b30-32.

71. *Id.* at 1168b31-35.

The nature of an insurrection.<sup>72</sup>

And even when Hume, in direct opposition to the classical tradition, declares that reason is and ought to be the slave of the passions, he still uses the traditional social hierarchy of master and slave (albeit in inverted form) to shed new light on the self.

More often, the self is used to interpret society. For Luther, to say that secular authorities have no jurisdiction over religious office-holders "is as much as to say that the hand ought to do nothing to help when the eye suffers severely."<sup>73</sup> One of the most common justifications for social distinctions was the seemingly corresponding stratification of the human organism:

Whereupon as it would be a thing monstrous and incommodious to see a human body wholly compounded of heads arms legs or of other members uniform in themselves, so would it be altogether as disproportionable and a thing of itself insufficient if all men in a city were artificers, husbandmen, soldiers, judges, or of one self condition and quality.<sup>74</sup>

Likewise, different functions in the body politic are justified on the analogy to the different functions of the human body.

[T]he soul's parted, though in substance one,  
Into understanding, will, and memory. . . .

The heads are those above-recited three,  
The under-rulers thoughts and fancies are,  
The citizens the outward senses be,  
The rurals be the bodies rare  
(Which often make the soul most poor and bare);  
For when these riff-raffs in commotion rise,  
And all will have their will, or nought will spare,  
The soul, poor soul, they then in rage surprize,  
And rob her of her wealth and blind her of her eyes.<sup>75</sup>

But when these elements are properly reconciled, the virtuous state has "good order and policy by good laws established and set, and by heads and rulers put in effect, by the which the whole body, as by reason, is governed and ruled . . . one loving one another as members and parts of one body."<sup>76</sup>

Interpreting society in terms of the self follows the normal order of beginning with what seems most natural and proceeding to that

72. WILLIAM SHAKESPEARE, *JULIUS CAESAR* act 2, sc. 1.

73. LUTHER, *supra* note 33, at 410.

74. ANNIBALE ROMEO, *THE COURTIER'S ACADEMIE* 248 (John Kepers trans., 1968) (1598).

75. DAVIES OF HEREFORD, *MIRUM IN MODUM* (1602).

76. Thomas Starkey, *Dialogue between Cardinal Pole and Thomas Lupset* 45 ff. (Early English Text Society ed. 1878).

which can be planned and arranged in conformity with the natural order. The natural subordinations in the self have to be observed if we are to be well-adjusted, virtuous, and happy. To the extent that society resembles a human organism, it seems that the state's functions and institutions should be conceived and planned to reflect these important human qualities and conditions.

Nonetheless, the durability of the "Society as the Self" paradigm is also shown by other uses that can be made of it. Stuart Hampshire, for example, suggests that, "reversing the tradition," we start at the other end of the analogy and proceed in the opposite direction:

The procedures necessary to any decent social order are to be seen as natural, and the analogous processes in the mind are to be thought of as constructed and distinguished by convention: it is by linguistic convention that mental processes in the minds of individuals are to be seen as the shadows of publicly identifiable procedures that are pervasive across different cultures.<sup>77</sup>

Hampshire has in mind such processes of public reasoning as deliberating, judging, adjudicating, reviewing, and examining. When these processes of reasoning are "cut loose from any supposedly identifiable psychological faculty called 'reason,'" the traditional mental hierarchy and even the notion of "parts of the soul" are called very much into question.<sup>78</sup>

In like manner, Theodor Adorno's theory of the "authoritarian" and "democratic" personalities draws on preexisting social categories in an interpretation and critical reexamination of the inner self.<sup>79</sup> This theme of "the Self as Social" may also be seen in Freud's theory of the conscious and unconscious and in his later theory of the ego, superego, and id. Against the classical Greek conception of the finely balanced, harmonized, unified soul, Freud paints a picture of inevitable inner conflict, of civil war in the psyche. When we dream, says Freud,

the top slides off the caldron, and we see another self, far less beholden to convention and to moral niceties than the waking I. At night, we discover that nothing human is foreign to us: incest, murder, bizarre cruelties, sexual urges of all sorts arise directly, or in distorted form, within the dreaming theater of the mind. . . . At night, we discover what our precivilized self is and what it wants.<sup>80</sup>

77. Stuart Hampshire, *Justice Is Strife*, 65 PROC. ADDRESSES AM. PHIL. ASS'N 19, 19-20 (Nov. 1991).

78. *Id.* at 20, 23; cf. STUART HAMPSHIRE, *INNOCENCE AND EXPERIENCE* (1989).

79. See generally T.W. ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* (1950).

80. Mark Edmundson, *Save Sigmund Freud*, N.Y. TIMES MAG., July 13, 1997, at 34.

Civilization requires prohibition, and along with custom, law, and morality, an inner agency of authority also seems to function within us as a counterforce to precivilized drives. Freud's superego is patterned on those other forms of social order and serves, within the individual, as society's garrison against the onrush of desire. In a grand elaboration of "the Self as Social" metaphor, Freud suggests that the broadest known social conflicts may be defused, or at least stabilized, in the psyche.

### III. LAW AS INTERPRETATION

Like the other intellectual disciplines discussed above, law makes use of interpretive paradigms or metaphors, and in general there is a strong interpretive basis for legal decision making. In what follows I shall consider what I term law's "common law narrative," its "constitutional narrative," and its use of the community-society paradigm.

Three distinct senses of a professional narrative may be distinguished: (1) A "simplifying interpretation" that helps make sense of law as a precondition for legal practice; (2) an "interpretive practice" that gives legal materials something like the narrative unity of a book; and (3) the use of an "interpretive paradigm" or metaphor in law.

#### A. *The Common Law Narrative*

##### 1. Blackstone and the Origins of Legal Authority

The common law is based on and derived from what might be termed "legalized customs." These *leges non scriptae* "receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom." More specifically, according to Blackstone, "in our law the goodness of a custom depends upon its having been used time out of mind . . . . This it is that gives it its weight and authority."<sup>81</sup>

Unfortunately, it is of course the oldest customs that are the most difficult to establish, "nothing being more difficult than to ascertain the precise beginning and first spring of an ancient and long established custom," especially when it is one that, by definition, is

81. 1 WILLIAM BLACKSTONE, COMMENTARIES \*64. See generally Albert W. Alschuler, *Rediscovering Blackstone*, 145 U. PA. L. REV. 1 (1996).

“of higher antiquity than memory or history can reach.” Blackstone offers an equally paradoxical alternative explanation for the authority of the common law—that it “rests entirely upon general reception and usage.” But again, “the only method of proving, that this or that maxim is a rule of the common law, is by shewing that it hath been always the custom to observe it.”<sup>82</sup>

At this point, says Blackstone, a “very natural, and very material” question arises: “how are these customs or maxims to be known, and by whom is their validity to be determined?” Without the slightest hesitation or deliberation, Blackstone answers his own question in his very next sentence: “The answer is, by the judges in the several courts of justice.” They are “the depositary of the laws; the living oracles,” whose knowledge of the law of the land is derived from experience, study, “and from being long personally accustomed to the judicial decisions of their predecessors.”<sup>83</sup>

In other words, it seems obvious to Blackstone that, at least in terms of professional competence, the most authoritative interpreters of the common law are the judges, past and present. And indeed their judicial decisions are “the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law.” Blackstone makes clear that the judges are expected not merely to make decisions and render judgments that, along with all the proceedings, “are carefully registered and preserved, under the name of *records*.” The judges are also expected to explain their judgments, to offer an interpretation of the law and the facts that justifies the decision. “[T]he numerous volumes of *reports* which furnish the lawyer’s library” prominently include “the reasons the court gave for their judgment . . . . And these serve as indexes to, and also to explain, the records.” In rendering judgment in an individual case, then, the common law judge is simultaneously applying the law and declaring what the law is.

[T]he first ground and chief corner stone of the laws of England . . . is, general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice; which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law.<sup>84</sup>

82. 1 BLACKSTONE, *supra* note 81, at \*67-68.

83. *Id.* at \*69.

84. *Id.* at \*69, \*71, \*73.

## 2. Langdell and the Texts of the Law

The most influential expositor of the common law in America was Christopher Columbus Langdell.<sup>85</sup> The “standard account” of Langdell’s teaching emphasizes his formalist, conceptualist, almost deductive “science” of rule-governed decision making; but in introducing the case law system at Harvard, Langdell also guaranteed that law study would focus on the interpretation of legal “texts.” Like Luther before him, Langdell introduced his students to the original sources of their subject in “strange new pamphlets, reports bereft of their only useful part, the head-notes!”<sup>86</sup> If law was to be worthy of university study, reasoned Langdell, “it was indispensable to establish at least two things: first, that law is a science; secondly, that all the available materials of that science are contained in printed books.” As a corollary to the second point, “if printed books are the ultimate sources of all legal knowledge,” then “every student who would obtain any mastery of law as a science must resort to these ultimate sources.”<sup>87</sup>

In considering the reported cases the “original sources” of law,<sup>88</sup> Langdell is proceeding very much in the tradition of Blackstone (for whom, it will be recalled, judicial decisions were “the principal and most authoritative evidence” of the common law). As one of Langdell’s followers put it,

the student should not only be encouraged to investigate the law in its original sources, but should be distinctly discouraged from regarding as law, what is, in fact, simply the conclusions of writers whose opinions are based upon the material to which the student can be given access. . . . [T]he opinion of the court giving the

85. See generally Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

86. 2 CHARLES WARREN, *HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA* 372 (1908); cf. GERALD L. BRUNS, *HERMENEUTICS ANCIENT AND MODERN* 139-40 (1992):

The Bible studied in the medieval schools was, we know, a glossed text, the *Glossa Ordinaria*, in which each verse is surrounded by notes and commentaries handed down from the Church Fathers. . . . [W]hen Martin Luther began preparing his first lectures as professor of theology at the University of Wittenberg[, he] produced for his students something like a modern, as opposed to medieval, text of the Bible—its modernity consisting precisely in the white space around the text.

87. Christopher C. Langdell, *Address to Harvard Law School Association, in A RECORD OF THE COMMEMORATION . . . OF THE FOUNDING OF HARVARD COLLEGE* 84, 85, 86 (Univ. Press 1887); cf. *id.* at 86-87 (“From what I have already said it easily follows. . . that a good academic training, especially in the study of language, is a necessary qualification for the successful study of law.”).

88. See C.C. LANGDELL, *A SELECTION OF CASES ON THE LAW OF CONTRACTS*, at vii (1871).

reasons for the conclusion reached, is really the only authoritative treatise which we have in our law.<sup>89</sup>

And in insisting that the study of law must be scientific, Langdell is employing the broader, nineteenth-century understanding of "science," in the sense of *Wissenschaft*.<sup>90</sup> The science he has in mind is certainly not an empirical science, any more than Galileo's was; according to Langdell, "the cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless and worse than useless for any purpose of systematic study."<sup>91</sup> Langdell also maintains that the law library is to him and his students "all that the museum of natural history is to the zoölogists, all that the botanical garden is to the botanists,"<sup>92</sup> but it is hard to imagine zoologists or botanists declaring the "vast majority" of their specimens "useless and worse than useless."

In reality, Langdell's science of case law serves as a "simplifying interpretation" that helps make sense of law as a precondition for legal practice. Already in the nineteenth century, complained Langdell, "the great and rapidly increasing number of reported cases in every department of law" was beginning to make legal generalizations difficult.<sup>93</sup>

The volume of cases was so large that there was no way in which a lawyer could study them all. . . . In the nineteenth century a new solution to the problem became fashionable. This claimed that the right way to acquire a mastery of legal principles was not to read large numbers of cases, but rather to concentrate attention upon the limited number of "leading" cases which provided the best illustrations of their application, or those in which a principle was first clearly expounded.<sup>94</sup>

Earlier writers had published collections of "leading cases" and commended them metaphorically to their students as "so many nuclei of future legal acquisitions," "so many landmarks upon the trackless wilds of the law," "the great 'lighthouses of the law,' which never fail,

89. William A. Keener, *Methods of Legal Education*, 1 YALE L.J. 143, 144-45 (1892).

90. See GERHARD WAHRIG, *DEUTSCHES WÖRTERBUCH* 4166 (1975) (defining *Wissenschaft* as an "ordered, logically structured, coherent field of knowledge").

91. LANGDELL, *supra* note 88, at vi.

92. Langdell, *supra* note 87, at 87.

93. LANGDELL, *supra* note 88, at vi; see also M. DAWES, *EPITOME OF THE LAW OF LANDED PROPERTY* (1818) ("[T]he first principles of the science are obscured by their bulk . . . and the law, like a river which never runs back to its source, expands and deepens in its current, and grows more and more arduous to fathom.").

94. A. W. BRIAN SIMPSON, *LEADING CASES IN THE COMMON LAW* 3-4 (1995) ("In much the same way one might master a language by concentrating upon its best writers.").



are never dimmed, and are most visible in those times when the need for guide is mostly felt.”<sup>95</sup> Langdell’s contribution was to provide a theory for this interpretive practice:

[T]he number of fundamental legal doctrines is much less than is commonly supposed . . . [A]nd much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied. . . . It seemed to me, therefore, to be possible to take such a branch of the law as Contracts, for example, and, without exceeding comparatively moderate limits, to *select, classify, and arrange all the cases* which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines.<sup>96</sup>

The compiler of a casebook is essentially an editor of the tradition. In “selecting, classifying, and arranging all the cases” of contracts, Langdell is offering an interpretation that simultaneously simplifies and makes sense of this field of law. Unlike traditional commentators and textbook writers, he operates wholly within the confines of the original sources in which the doctrines are “embodied,” making his enterprise seem more modest by comparison. But an interpretation it remains. It is as if Langdell were a paleontologist at an excavation who first discards most of the fossils as “useless and worse than useless,” then proceeds to arrange the rest in what appears to him the truest and most revealing order of their evolution.<sup>97</sup>

### 3. Legal Innovation in the Common Law

An early German observer of the case method in American law schools noted that “it really teaches the pupil to think in the way that any practical lawyer—whether dealing with written or with unwritten law—ought to and has to think.”<sup>98</sup> In other words, the study of case law is not essentially different from the practice of the case lawyer.<sup>99</sup> This can be shown by examining how *legal innovation* is interpreted in the common law tradition.

The first and predominant method is to interpret legal

95. *Id.* at 5-6.

96. LANGDELL, *supra* note 88, at vi-vii (emphasis added).

97. See generally STEPHEN JAY GOULD, *WONDERFUL LIFE: THE BURGESS SHALE AND THE NATURE OF HISTORY* (1989).

98. JOSEF REDLICH, *Essential Reason for the Success of the Case Method, in THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS* 35, 39 (1914).

99. See J.C. Gray, *Methods of Legal Education Part IV*, 1 *YALE L.J.* 159, 160 (1892) (“To extract law from facts is *the* thing that a lawyer has to do all his life; . . . a student cannot begin it too early.”).

innovation in terms of existing judicial precedents and legal doctrines. A classic example is Samuel Warren and Louis Brandeis's 1890 article on *The Right to Privacy*.<sup>100</sup> In their opening sentence the authors state that the individual's right to full protection in person and property is "a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection."<sup>101</sup> In the face of social, political, economic, and technological change, "the common law, in its eternal youth, grows to meet the demands of society."<sup>102</sup>

Warren and Brandeis trace the evolution of a legal right of privacy to the general refinement of sensibilities attendant upon the advance of civilization. In very early times, the law gave a remedy only for physical interference with life and property; then the protection against actual bodily injury was extended to cover the psychic harm occasioned by the mere attempt to do such injury. Much later the law of nuisance was developed. Regard for human emotions soon extended the sphere of immunity beyond the body of the individual, as reflected in actions for slander, libel, and alienation of affection. A similar development can be seen in the law of property, where the protections for corporeal property have been extended to intangible property, to the products and processes of the mind.

"This development of the law was inevitable," write Warren and Brandeis.<sup>103</sup> "Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law enabled the judges to afford the requisite protection, without the interposition of the legislature."<sup>104</sup> A similar interpretive procedure can be seen in Warren and Brandeis's approach to "the next step": "It is our purpose to consider whether *the existing law* affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is."<sup>105</sup> Making use of legal analogies already developed in the law, Warren and Brandeis find such a principle in the common law right to determine whether, and to what extent,

100. 4 HARV. L. REV. 193, 193 (1890); see also PRIVACY LAW: CASES AND MATERIALS 22-51 (Richard C. Turkington et al.eds., 1999).

101. Warren & Brandeis, *supra* note 100, at 193.

102. *Id.*

103. *Id.* at 195.

104. *Id.*

105. *Id.* at 197 (emphasis added).

personal thoughts, sentiments, and emotions will be communicated to others. This right, in turn, is interpreted as part of the more general right to the immunity of the person—the right to one’s personality. But even while advocating what amounts to the recognition of a new legal right, Warren and Brandeis remain firmly in the role of interpreters of the tradition:

If we are correct in this conclusion, *the existing law* affords a principle which may be invoked to protect the privacy of the individual . . . . If then, the decisions indicate a general right to privacy for thoughts, emotions, and sensations, these should receive the same protection, whether expressed in writing, or in conduct, in conversation, in attitudes, or in facial expression.<sup>106</sup>

Borrowing a term from constitutional law, we may describe the traditional common law approach to innovation as “interpretivist.”<sup>107</sup> It sees itself as interpreting the tradition—in a new way, perhaps, but nevertheless as bound by and remaining within “the four corners” of the tradition. The classic common law approach to innovation is accordingly: (1) state the problem; (2) propose a solution; and (3) show how the common law, properly reinterpreted, already affords the proposed solution.<sup>108</sup>

Corresponding to the distinction in constitutional law, there is also a not-insignificant “noninterpretivist” tradition in the common law approach to innovation. A classic example is Lord Coleridge’s opinion in the famous case of *Regina v. Dudley & Stephens*.<sup>109</sup> Lord Coleridge consults various definitions of murder in “books of authority” and finds no support for the proposition that one may lawfully take away the life of another in order to save one’s own life. But “[d]ecided cases there are none.” There was an American case in which “it was decided, correctly indeed, that sailors had no right to throw passengers overboard to save themselves”; but since that case was decided on “the somewhat strange ground” that the selection of those to be sacrificed should be by drawing lots, the American case “can hardly . . . be an authority satisfactory to a court in this country.”<sup>110</sup>

106. *Id.* at 206 (emphasis added).

107. See CONSTITUTIONAL LAW 541-42 (Gerald Gunther & Kathleen M. Sullivan eds., 13th ed. 1997).

108. See Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 41 DUKE L.J. 191, 200 (1991).

109. 14 Q.B.D. 273 (1884); see also A.W. BRIAN SIMPSON, CANNIBALISM AND THE COMMON LAW (1984); Glanville Williams, *A Commentary on R. v. Dudley and Stephens*, 8 CAMBRIAN L. REV. 94 (1977).

110. *Dudley & Stephens*, 14 Q.B.D. at 284-85.

Instead, Lord Coleridge bases his conclusions on the principle that “the absolute divorce of law from morality would be of fatal consequence,” and on the “moral necessity” of self-sacrifice instead of self-preservation. “[I]t is enough in a Christian country to remind ourselves of the Great Example whom we profess to follow.”<sup>111</sup> In the course of this noninterpretivist review of religion and morality, Lord Coleridge concedes that the defendants were subjected to suffering most awful; nevertheless, they would be comforted to learn that “[w]e are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy.”<sup>112</sup>

The closest American counterpart to *Dudley & Stephens* is probably the equally celebrated case of *Riggs v. Palmer*, in which a statute of wills was read against a background standard of common law principles and maxims.<sup>113</sup> As Professor Dworkin notes, “the court cited the principle that no man may profit from his own wrong as a background standard against which to read the statute of wills and in this way justified a new interpretation of that statute.”<sup>114</sup> As authority for its interpretation the court cited numerous “learned authors,” including Aristotle, Blackstone, Bacon, Puffendorf, and Rutherford, as well as the Code Napoleon, the Civil Code of Lower Canada, and the Decalogue. “[G]eneral, fundamental maxims of the common law,” writes the court, “are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.”<sup>115</sup>

The only case cited approvingly by the court involved a murder to recover under a life insurance policy (whereas in *Riggs* the devisee murdered the testator to acquire his property under the will). “It would be a reproach to the jurisprudence of the country,” wrote Justice Field for the U.S. Supreme Court, if the insurance scheme should succeed; likewise, the New York court reasoned that it “would be a reproach to the jurisprudence of our state” if the murderous grandson should recover under the will.<sup>116</sup> Of an adverse decision proffered by the dissent, “as a case quite like this,” Judge Earl,

111. *Id.* at 287.

112. *Id.* at 288.

113. 115 N.Y. 506 (1889); see also Kenneth S. Abraham, *Statutory Interpretation and Literary Theory*, in INTERPRETING LAW AND LITERATURE 115, 118-24 (Sanford Levinson & Steven Mailloux eds., 1988).

114. RONALD DWORKIN, *The Model of Rules I*, in TAKING RIGHTS SERIOUSLY 14, 28-29 (1977).

115. *Riggs*, 115 N.Y. at 511-12.

116. *Id.* at 512-13.

writing for the court, states simply that "I am unwilling to assent to the doctrine of that case."<sup>117</sup>

The theory of noninterpretive common law reasoning has been ably articulated by Benjamin Cardozo, both in his judicial and extrajudicial writings. Most notably, in *Hynes v. New York Central Railroad Co.*, Judge Cardozo allowed a "lad of sixteen" to recover damages for injuries on defendant's land, even though he was technically a trespasser (and thus an "outlaw," as Cardozo more rhetorically put it).<sup>118</sup> As in *Riggs*, Cardozo's decision seems to turn on background principles and maxims.

This case is a striking instance of the dangers of "a jurisprudence of conceptions" . . . In such circumstances, there is little help in pursuing general maxims to ultimate conclusions. They have been framed *alio intuitu*. They must be reformulated and readapted to meet exceptional conditions.<sup>119</sup>

Citing unspecified "considerations of analogy, of convenience, of policy, and of justice" (but conspicuously *not* the existing law of torts or property), Cardozo concluded that the railroad is liable.<sup>120</sup>

For one of the preeminent jurists of our time, this means that "[n]o reason is given for the conclusion. . . . In his soaring peroration Cardozo has given no reason why the plaintiff should win."<sup>121</sup> In *The Nature of the Judicial Process*, published in the same year as the *Hynes* case, Cardozo elaborates on his noninterpretivist judicial philosophy. In a section entitled, significantly, "The Judge As Legislator," Cardozo shows just how closely related these two legal roles are for him:

[The] power of interpretation must be lodged somewhere, and the custom of the constitution has lodged it in the judges. . . . Innovate, however, to some extent, he must, for with new conditions there must be new rules. . . . [The judge, like the legislator] is legislating within the limits of his competence. No doubt the limits for the judge are narrower. He legislates only between gaps. He fills the open spaces in the law.<sup>122</sup>

Perhaps Judge Posner may be forgiven for complaining that "[p]assages like these . . . leav[e] unresolved the basic question of how

117. *Id.* at 514.

118. 231 N.Y. 229, 229, 231 (1921); see also RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 48-55 (1990).

119. *Hynes*, 231 N.Y. at 235-36 (citation omitted).

120. *Id.* at 236.

121. POSNER, *supra* note 118, at 53.

122. BENJAMIN N. CARDOZO, *Lecture III. The Method of Sociology. The Judge As a Legislator*, in *THE NATURE OF THE JUDICIAL PROCESS* 98, 135, 137, 113 (1921).

the judge is to decide cases that fall in the open area (and indeed how to demarcate that area)."<sup>123</sup>

## B. *The Constitutional Narrative*

### 1. Interpreting the Constitution

American constitutional law begins with a grand interpretive gesture. Chief Justice John Marshall's opinion for the Court in *Marbury v. Madison*<sup>124</sup> effectively establishes the power of judicial review, though this power is nowhere mentioned in the Constitution. Marshall's argument rests on two main bases: (1) general structural considerations, reinforced through the supremacy of the law of the Constitution over ordinary legislation; (2) general considerations of the judicial role in interpreting law.

By its own terms, the Constitution of the United States is "the supreme Law of the Land."<sup>125</sup> Emphasizing the "supremacy," Marshall distinguishes ordinary legislation from the original, fundamental act of establishing a constitutional system:

The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And . . . the authority from which they proceed is supreme.<sup>126</sup>

Emphasizing the "law," Marshall declares that the Constitution is a species of law: "a superior paramount law, unchangeable by ordinary means . . . . Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation."<sup>127</sup>

Marshall then turns to general considerations of judicial competence to interpret and enforce the law. If the Constitution is a species of "law," then one need look no farther than to Blackstone for authority in support of Marshall's next, seemingly innocuous proposition: "It is emphatically the province and duty of the judicial department to say what the law is," both with respect to ordinary laws and to the fundamental law of the Constitution.<sup>128</sup> This answers the question, "Who decides?"

123. POSNER, *supra* note 118, at 30.

124. 5 U.S. (1 Cranch) 137 (1803).

125. U.S. CONST. art. VI.

126. *Marbury*, 5 U.S. at 176.

127. *Id.* at 177; *cf. id.* at 178 ("[T]he constitution is to be considered, in court, as a paramount law.").

128. *Id.* at 177.

As for “how” to decide, Marshall simply applies ordinary, traditional presumptions as to the judicial role.

Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. . . . This is of the very essence of judicial duty.<sup>129</sup>

Moreover, the Constitution itself vests “[t]he judicial Power of the United States” in the federal courts, and “extend[s]” this judicial power to “all cases . . . arising under the constitution.”<sup>130</sup> Could it have been the intention of those who granted this power “to say that in using it the constitution should not be looked into?”<sup>131</sup> Or that a case arising under the Constitution should be decided “without examining the instrument under which it arises?”<sup>132</sup> “This is,” says Marshall, “too extravagant to be maintained.”<sup>133</sup>

Beyond instituting the power of judicial review, Marshall also establishes in *McCulloch v. Maryland*<sup>134</sup> a powerful interpretive role for the federal judiciary in constitutional adjudication. Part of this argument proceeds by showing the absurd consequences of denying such an interpretive role, by using “easy cases” reminiscent of Swift’s parody of biblical literalism and fundamentalism. Marshall is concerned with establishing a relatively broad and liberal interpretation of the “necessary and proper” clause, enabling Congress to make laws in the exercise of its enumerated powers.<sup>135</sup> One of those powers is “[t]o establish post offices and post-roads.”<sup>136</sup> Shall we deny that this power extends to carrying the mail along the post road, or from one post office to another? And what about the right to punish those who steal letters from a post office, or rob the mail? That power is not explicitly provided for either.

All of which brings us to Marshall’s insistence on “a fair construction of the whole instrument” and his famous admonition that “we must never forget, that it is *a constitution* we are expounding.”<sup>137</sup> A constitution that contained “an accurate detail of all the subdivisions” of its great powers, and of all the means, “in all

129. *Id.* at 177-78.

130. *Id.* at 178; U.S. CONST. art. III, § 2, cl. 1.

131. *Marbury*, 5 U.S. at 179.

132. *Id.*

133. *Id.*

134. 17 U.S. (4 Wheat.) 316 (1819).

135. U.S. CONST. art. I, § 8, cl. 4.

136. *McCulloch*, 17 U.S. at 417.

137. *Id.* at 406-07.

future time,” by which government should execute its powers, would “partake of the prolixity of a legal code” (perhaps a tax code).<sup>138</sup> The essential nature of a constitution, then,

requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. . . . We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion . . . which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people.<sup>139</sup>

By refusing to conceive constitutional interpretation narrowly, Marshall ensured for the young republic broad national powers of government commensurate with its ambitious and rapidly unfolding destiny.

## 2. Interpreting Standards of Review

The passage last quoted above from *McCulloch* is followed by a key sentence frequently cited by the Supreme Court throughout its history:

Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.<sup>140</sup>

Here the theory of broad, liberal constitutional interpretation is concretized in an operative formula. It is what we would today call the standard of deferential review, and it functions as a basic interpretive paradigm or model for analysis.

This interpretive paradigm of deferential review reflects the prevailing political theory of the Constitution, and in particular the fundamental separation of judicial and legislative powers. As Marshall shortly clarifies: “[W]here the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its

138. *Id.* at 406.

139. *Id.* at 407, 421.

140. *Id.* at 421; see also Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 186 (1985):

Almost nothing in *McCulloch* presaged the complexity and ambiguity of this passage. The thrust of all the arguments had been that the necessary and proper clause enlarged Congress’ power and permitted the use of any means *it* thought useful. The pronouncement, however, suggested that courts should decide whether the means chosen are “appropriate” and whether they are “plainly adapted” to their ends.



necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."<sup>141</sup> To the legislatures are entrusted the weighing and balancing of public policy concerns; the courts merely police the outer boundaries of constitutionality.

The standard of deferential review was further clarified in an influential 1893 article by James B. Thayer entitled *The Origin and Scope of the American Doctrine of Constitutional Law*.<sup>142</sup> Thayer points out that legislatures have been entrusted by their constitutions with the preliminary and, in many if not most cases, the final determination of the constitutionality of legislation. Only as some individual may find it in his private interest to litigate the matter does the occasion even arise for the courts to intervene. Otherwise, "it is the legislature to whom this power is given,—this power, not merely of enacting laws, but of putting an interpretation on the constitution."<sup>143</sup> Thus Thayer considers that the "primary authority to interpret" is given to the legislatures; and where a power so momentous is given, "the actual determinations of the body to whom it is intrusted are entitled to a corresponding respect."<sup>144</sup> Or to put it the other way: Where the opportunity of judges to check and correct unconstitutional acts is, *as was foreseen*, so limited and episodic, "the extent of their control, when they do have the opportunity, should also be narrow."<sup>145</sup>

Three stages in the development of the standard of deferential review may be traced. In 1793, Judge Roan of the General Court of Virginia, in finding a law unconstitutional, nevertheless cautioned that: "the violation must be *plain and clear*," or there might be danger of the judiciary preventing the operation of laws which might be productive of much public good.<sup>146</sup>

By 1811 the principle had evolved as follows:

[F]or weighty reasons, it has been assumed as a principle in construing constitutions by the Supreme Court of the United States, by this Court, and every other court of reputation in the United States, that an Act of the legislature is not to be declared void unless the violation of the constitution is *so manifest as to leave no room for reasonable doubt*.<sup>147</sup>

141. *McCulloch*, 17 U.S. at 423.

142. 7 HARV. L. REV. 129 (1893).

143. *Id.* at 136.

144. *Id.*

145. *Id.* at 136-37.

146. *Kemper v. Hawkins*, 1 Va. (1 Wash.) 20, 61 (1793) (emphasis added).

147. *Commonwealth v. Smith*, 4 Binn. 117, 123 (1811) (emphasis added).

The standard of reasonable doubt is imposed on juries in criminal cases because of the great gravity of an incorrect determination. The same standard is self-imposed on courts in reviewing civil jury verdicts because they are revising the work of another department primarily charged with making such determinations. *Both* rationales support the use of the standard in the judicial review of legislation.

Thayer explains the third stage in the development of a deferential review standard as follows. Focusing on the “naked judicial question” can have the perverse effect of leading one to disregard legislative considerations altogether. But the court’s work is not done when it has found legislation unconstitutional.

Having ascertained all this, yet there remains a question—the really momentous question—whether, after all, the court can disregard the Act. It cannot do this as a mere matter of course,—merely because it is concluded that upon a just and true construction the law is unconstitutional. . . . It can only disregard the Act when those who have the right to make laws have not merely made a mistake, but have made a very clear one,—so clear that it is *not open to rational question*.<sup>148</sup>

This rule recognizes that a constitution may admit of different interpretations, that what seems unconstitutional to one person may reasonably not seem so to another, that within the range of legislative choice and judgment the constitution does not impose any particular option on the legislature, but that “whatever choice is rational is constitutional.”<sup>149</sup>

Thus a rule that starts out emphasizing certainty ends up seeming to place someone’s sanity in question. In any event, “rationality review” has proved to be a particularly durable interpretive formula, one that even dictates results when it can plausibly be invoked. Justice Holmes momentarily found himself on the losing side in *Lochner v. New York*, but constitutional history has vindicated his dissenting view that “a constitution . . . is made for people of fundamentally differing views” and that legislation must be upheld “unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law.”<sup>150</sup>

The power of the formula is shown by its successful invocation in

148. Thayer, *supra* note 142, at 144 (emphasis added).

149. *Id.* As Thayer puts it later, upholding a statute as “constitutional” should really be expressed as: “[N]ot unconstitutional beyond a reasonable doubt.” *Id.* at 151.

150. 198 U.S. 45, 75-76 (1905).

another decision that has not stood the test of time. In *Gitlow v. New York*, the Supreme Court conceded for the first time that the First Amendment applied to the states. Nevertheless, the *Gitlow* Court went on to uphold a “criminal anarchy” statute that today would be considered an unconstitutional content-based regulation of speech, on the theory that “[e]very presumption is to be indulged in favor of the validity of the statute” (citing a case about the sale of alcoholic beverages). “[T]he State is primarily the judge of regulations required in the interest of public safety and welfare;’ and . . . its police ‘statutes may only be declared unconstitutional where they are arbitrary or unreasonable’” (citing a decision requiring a railroad company to construct a sidewalk).<sup>151</sup>

“Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”<sup>152</sup> What was missing from the *Gitlow* Court’s judicial vocabulary was finally supplied in the *Carolene Products* footnote of 1938: a rationale for reining in what has become a “presumption” (and a virtually irrefutable one) of constitutionality. In fact, *Carolene Products* supplied three such rationales: for legislation (1) “within a specific prohibition of the Constitution,” (2) restricting the “political processes,” and (3) directed at “discrete and insular minorities.”<sup>153</sup> All three rationales have been fleshed out in an elaborate scheme of “strict” or “heightened” scrutiny.<sup>154</sup> But, of course, a two-level standard of review was not to be the final word either. To round out the architectonic, intermediate scrutiny should perhaps be mentioned as well.<sup>155</sup>

The modern levels of scrutiny doctrine has become a basic interpretive tool—arguably *the* basic interpretive tool—in contemporary constitutional analysis. It diverts attention away from the development of substantive constitutional doctrine and toward a rule of administration and its corresponding (usually complicated) formula.

Throughout modern constitutional law . . . much of the Justices’ intellectual energy is not directed at the actual resolution of cases at hand. It is directed at the difficult, complex, but preliminary issue

151. *Gitlow v. New York*, 268 U.S. 652, 668-69 (1925).

152. *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 62 (N.Y. 1926) (Cardozo, J.).

153. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938).

154. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 75-77 (1980).

155. See *Craig v. Boren*, 429 U.S. 190 (1976) (discussing gender discrimination and the intermediate level of scrutiny).

of determining the proper test to be applied in a defined class of cases.<sup>156</sup>

Constitutional interpretation in the modern formulaic style thus “affects the content that the Court finds in the Constitution” and ultimately itself becomes “a doctrine, a legally effective text rather than an imperfect description of something else.”<sup>157</sup>

### 3. Periodizations of the Constitutional Past

Another basic interpretive schema in constitutional law is what might be termed the periodization of constitutional history. The facts of history cannot make sense until they are related to each other and brought together in some kind of coherent pattern or unity. To make sense of our constitutional past, we construct a meaningful narrative out of its main periods, which have been specially selected for their significance to the overall story.

The simplest and most basic periodization is the division between present and past, or the modern and the traditional. In terms of constitutional history, “we might understand ‘modernity’ as the moment in which the period of the Founding becomes so distant that it begins to seem foreign to us.”<sup>158</sup> Using a somewhat different criterion, that of “lived experience,” Bruce Ackerman places the dividing line of modernity at the point where “living Americans walked the political stage.”

As I write these words in 1988, darkness is beginning to set over the interwar period. . . . The constitutional meaning of the New Deal, like that of the Civil War or the Founding itself, will soon enough

156. Nagel, *supra* note 140, at 203-04.

157. *Id.* at 169, 187. And unfortunately there are indications that “the formulaic Constitution” may be self-perpetuating:

[M]ost constitutional law casebooks are forced by coverage pressure to print only a small part of most opinions. The Court’s formulas always survive the editing process. Supreme Court clerks mastered those formulas and were rewarded with high grades; the formulas may be the only way they know of doing constitutional law.

Douglas Laycock, *Notes on the Role of Judicial Review, the Expansion of Federal Power, and the Structure of Constitutional Rights*, 99 YALE L.J. 1711, 1742-43 (1990) (book review).

158. PAUL BREST ET AL., *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* 401 n.1 (4th ed. 2000). Similar considerations are involved in the editing of a casebook, as these particular editors freely acknowledge:

Every casebook involves the construction of a canon—a set of materials and approaches that the editors believe that every student who wishes to master the subject should know. The present casebook is no exception. Indeed, the authors have been particularly conscious of the existing canons of constitutional thought and the kinds of choices that are involved both in the materials presented and in their editing, order, and arrangement.

*Id.* at xxix.

be determined exclusively by Americans whose first acquaintance with the facts was gained indirectly.<sup>159</sup>

Beyond the basic distinction between what counts as present and past, the periodization of constitutional history has received a number of different interpretations. Brest, Levinson, Balkin, and Amar focus on the degree to which the Supreme Court's role and its relationship to democracy become problematic. Up to the Civil War, the Supreme Court's assertions of judicial power were modest, with federal statutes being struck down only in *Marbury* and *Dred Scott*. Between the Civil War and the New Deal, both federal and state legislation began to be struck down with increasing frequency and on a number of grounds. "Partly as a result, the Supreme Court increasingly becomes understood as an actor in the political system, and the relatively rigid boundaries between law and politics that preserved the Court's legitimacy in earlier times are loosened." Brest, Levinson, Balkin, and Amar refer to "academic critiques" of the Court by progressives and later by legal realists who emphasized the Court's political role and the political character of its doctrinal analysis and questioned "the Court's legitimacy as an anti-democratic and anti-majoritarian institution." Particularly in the period after 1937, "the Supreme Court itself begins to problematize its role, and the rhetoric of judicial restraint and the need to avoid unnecessary constitutional decisions become ubiquitous in judicial opinions."<sup>160</sup>

This periodization of constitutional history clearly reflects the modernist anxiety about the practice of judicial review and its relationship to democracy. As the authors note, this particular form of anxiety is most prevalent among academic critics of the Supreme Court and the Court itself. Lawyers and ordinary judges presumably share this anxiety only by proxy, as they take it into account in fashioning arguments that will succeed and writing opinions that will be upheld.

An alternative periodization of constitutional history has been reconstructed and redescribed by Ackerman as "the ongoing constitutional narrative constructed by lawyers and judges."<sup>161</sup> This existing "professional narrative" is also oriented around the familiar turning points of the Founding, Reconstruction, and New Deal, but with a different emphasis (and without the anxiety). The existing

159. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 38 (1991) [hereinafter ACKERMAN, *FOUNDATIONS*].

160. BREST, *supra* note 158, at 401 n.1.

161. ACKERMAN, *FOUNDATIONS*, *supra* note 159, at 38.

narrative emphasizes creation, origination, and the departure from tradition. Of the three periods, the Founding is viewed as the most radical and decisive break with the past; after all, the ratification procedures for amending the Articles of Confederation were not followed, so that the new Constitution was, strictly speaking, illegal. But this illegality under the preexisting Articles only enhances the pedigree of the Constitution of 1787. "If this were not the case, the *real* Founders of our Republic were the folks who wrote and ratified the Articles of Confederation."<sup>162</sup>

Things are different with the constitutional amendments enacted after the Civil War. "Substantively, everybody recognizes that these three amendments profoundly transformed preexisting constitutional principles."<sup>163</sup> But if we turn to the *process* by which the Reconstruction amendments became part of our higher law, "a remarkable silence descends on the legal community."<sup>164</sup> According to the received professional narrative, the Civil War amendments are just like any other amendments ratified in accordance with Article Five of the Constitution; so in that sense they are presumed to be "procedurally unoriginal."<sup>165</sup>

Finally, when modern lawyers and judges turn to the New Deal, "they tell themselves a story which denies that anything deeply creative was going on."<sup>166</sup> Substantively, the New Deal's triumph of activist national government is viewed as merely a rediscovery and resurrection of Chief Justice Marshall's original vision of broad national lawmaking authority. "The period between Reconstruction and the New Deal can then be viewed as a (complex) story about the fall from grace—wherein most of the Justices strayed from the path of righteousness and imposed their *laissez-faire* philosophy on the nation through the pretext of constitutional interpretation."<sup>167</sup> Procedurally, nothing of constitutional moment was supposed to have happened at all.

Apparently, We the People have never again engaged in the sweeping kind of critique and creation attempted by the Founding Federalists. . . . [T]his schema suggests a subtle but unmistakable

162. *Id.* at 42.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 42-43.

decline in the constitutionally generative capacities of the American people.<sup>168</sup>

So much for the prevailing interpretive schema. “The story line simply presents itself as an unassailable part of the conventional legal wisdom, presupposed in countless legal arguments by all sides of the endless constitutional debate about other, seemingly more controversial matters.”<sup>169</sup> And yet, asserts Ackerman, “despite its familiarity,” the existing constitutional narrative is built on sand, in the sense that it “cannot withstand an encounter with the facts of American history.” Nevertheless, it is instructive to note that this in no way suggests to Ackerman that the project of constructing a constitutional narrative should be abandoned. Instead, he proposes his own “revisionary narrative.”<sup>170</sup>

This is not the place for a detailed examination of Ackerman’s competing constitutional narrative. Suffice it to say that, in broad outline, Ackerman’s version restores both substantive originality and procedural creativity to the Reconstruction and New Deal achievements, which reflect an ongoing American engagement with higher lawmaking. In the Reconstruction period, the focus is on the “questionable legality” of the procedures by which the Civil War amendments were adopted.<sup>171</sup> In the New Deal, the emphasis is on a mobilized electorate, a president with a mandate for sweeping change, and a series of “transformative appointments” to the Supreme Court—all of which had in substance, if not in form, the effect of amending the Constitution.<sup>172</sup> On this reading the “jurisgenerative” capacities of the later periods rival that of the Founding and suggest a remarkably adaptive constitutional practice that has never ceased to embrace unconventional means of fundamental change.

In effect, then, three substantively different schemas for interpreting the constitutional past have been considered. For present purposes, the main point is not so much to decide among them or others that might be proposed. Rather, the point is that *some* such schema, as evidenced by the prevalence and persistence of this particular interpretive practice, seems necessary if we are to make

168. *Id.*

169. *Id.* at 39.

170. *Id.* at 44.

171. For a more detailed discussion, see 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 99-119 (1998).

172. For a more detailed discussion, see *id.* at 268-382.

sense of our constitutional past and put it into meaningful perspective for the present and the future.

### C. *The Community-Society Paradigm*

In this final Section I introduce a basic interpretive paradigm that makes sense of judicial decisions in many areas of the law and provides a basis for reasoned criticism of others. This paradigm, which has yet to be explicitly recognized in either adjudication or academic commentary, is based on the distinction between community and society. A brief review of cases illustrating the paradigm will provide a fitting summary and example of “law as interpretation.”

First of all, background for the current legal discussion is found in Sir Henry Maine’s *Ancient Law*. For Maine, the transition from the patriarchal institutions of remote antiquity to the rules and institutions of modern western European societies could be viewed as a salutary progression: “[W]e may say that the movement of the progressive societies has hitherto been a movement *from Status to Contract*.”<sup>173</sup> But in late nineteenth-century Germany, the displacement of the organic solidarity of inherently valuable relationships based on likeness and shared life-experience (*Gemeinschaft*) by contractual relationships based on monetary value (*Gesellschaft*) seemed to epitomize the alienation of mass society. The controlling book is Ferdinand Tönnies, *Community and Society*.<sup>174</sup> It influenced later thinkers such as Durkheim, Simmel, and Weber and, after World War I, became a kind of Bible for a new generation longing for the Golden Age of *Gemeinschaft*.

By community I understand a relatively small group in which shared values may be assumed; communities in this sense range in size from the family to the boy scout troop to the synagogue. By society I understand a relatively large group in which shared values cannot be assumed. The imposition of presumptively shared values that might be appropriate in a community would not normally be acceptable in society at large. Conversely, the requirement of a stance of neutrality among presumptively unshared values that might

173. SIR HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 174 (1930) (1861); see also HANNAH ARENDT, *THE HUMAN CONDITION* 22-78 (1958) (analyzing the public and the private realm).

174. FERDINAND TÖNNIES, *COMMUNITY & SOCIETY (GEMEINSCHAFT UND GESELLSCHAFT)* (Charles P. Loomis trans., 1957) (1887).



be appropriate in society would not normally be acceptable in a smaller community. These principles are operative in a variety of legal contexts.

*Papachristou v. City of Jacksonville* is usually thought of as the case in which the Supreme Court's void-for-vagueness doctrine was definitively established, and indeed many provisions of the Jacksonville vagrancy ordinance at issue are laughably vague:

Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.<sup>175</sup>

Within the vagueness, however, there is a sort of subtheme, a certain slant on the vagueness that Justice Douglas thought he detected in the selective enforcement of the ordinance. The police officers picked up racially mixed couples, arrested lower-class workers walking to and fro on city streets, charged others with loitering because they were bar-hopping, and another with being a "common thief" because "he was reputed to be a thief." By contrast, "unemployed pillars of the community who have married rich wives" might come within the terms of the ordinance but were not investigated. Nor were "members of golf clubs and city clubs," even though they might well be "habitually spending their time by frequenting . . . places where alcoholic beverages are sold or served."<sup>176</sup>

Justice Douglas encapsulates what was really being criminalized in the word "lifestyle," a popular term in the 1970s. What "[t]hose generally implicated by the imprecise terms of the ordinance—poor people, nonconformists, dissenters, idlers" have really run afoul of is "the lifestyle deemed appropriate by the Jacksonville police and the courts."<sup>177</sup> In other words, a standard that might be appropriate at the

175. 405 U.S. 156, 156-57 n.1 (1972).

176. *Id.* at 163-64.

177. *Id.* at 170; cf. Anthony G. Amsterdam, *Federal Constitutional Restrictions on the*

community level (something like “Thou shalt not be a low-life”) is inappropriately generalized at the societal level.

*City of Chicago v. Wilson* is a factually dissimilar but structurally related case from the 1970s in which the term “lifestyle” is also prominently employed. Defendants, male transvestites, were arrested pursuant to the following ordinance:

Any person who shall appear in a public place . . . in a dress not belonging to his or her sex, with intent to conceal his or her sex . . . shall be fined not less than twenty dollars nor more than five hundred dollars for each offense.<sup>178</sup>

The city asserted four reasons for its ban on cross-dressing, only one of which had any plausibility: “to prevent inherently antisocial conduct which is contrary to the accepted norms of our society.”<sup>179</sup>

The Illinois Supreme Court noted that it had “long recognized restrictions on the State’s power to regulate matters pertinent to one’s choice of a life-style which has not been demonstrated to be harmful to society’s health, safety or welfare.”<sup>180</sup> As for the city’s implied concern about public morals, the court translated this into a mere aesthetic preference: “[T]he city has not articulated the manner in which the ordinance is designed to protect the public morals. It is presumably believed that cross-dressing in public is offensive to the general public’s aesthetic preference.”<sup>181</sup> While a ban by their parents on defendants’ cross-dressing as minors would presumably be legally unassailable, the city’s error was to elevate and inappropriately generalize that unassailable communal norm to the societal level.

The *Skokie* cases present the agonized efforts of an actual “community” to free itself of offensive speech.<sup>182</sup> The village of Skokie had a population of about 70,000 persons, of whom approximately 40,000 persons were of “Jewish religion or Jewish ancestry,” including 5,000 to 7,000 survivors of German concentration camps. The National Socialist Party of America wanted to demonstrate in front of the village hall wearing storm trooper

*Punishment of Crimes of Status, Crimes of Displeasing Police Officers and the Like*, 3 CRIM. L. BULL. 205, 226 (1967) (“[I]f some carefree type of fellow is satisfied to work just so much, and no more, as will pay for one square meal, some wine, and a flophouse daily, but a court thinks this kind of living subhuman, the fellow can be forced to raise his sights or go to jail as a vagrant.”).

178. 389 N.E.2d 522, 523 (Ill. 1978).

179. *Id.* at 524.

180. *Id.*

181. *Id.* at 525.

182. See LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 23-35 (1986).

uniforms of the German Nazi Party embellished with the Nazi swastika.

The state court conceded that “the sight of [the swastika] is abhorrent to the Jewish citizens of Skokie, and that the survivors of the Nazi persecutions, tormented by their recollections, may have strong feelings regarding its display.”<sup>183</sup> Likewise, the federal court acknowledged that “the proposed demonstration would seriously disturb, emotionally and mentally, at least some, and probably many of the Village’s residents.”<sup>184</sup> Nevertheless, neither court accepted the village’s arguments; and both courts quoted the following language from *Cohen v. California*:

“[W]e are often ‘captives’ outside the sanctuary of the home and subject to objectionable speech.” The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is, in other words, dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections.<sup>185</sup>

Personal predilections are a perfectly fine basis for banning offensive speech in the home (as the “captive audience” doctrine holds) or more generally in the “community,” as I have defined that term. But *Cohen* stands for the proposition that a courthouse corridor is not a community in this sense. And the *Skokie* cases stand for the proposition that a village is not a community either. As the federal court put it, the village was “attempt[ing], by fiat, to declare the entire Village, at all times, a privacy zone that may be sanitized from the offensiveness of Nazi ideology and symbols.”<sup>186</sup> Instead, the village should be viewed as open to the larger world, as a window on society, where a standard of tolerance is enforced as a matter of law.

*Cohen v. California* is perhaps best known for Justice Harlan’s famous statement that “one man’s vulgarity is another’s lyric,” which Robert Bork has seen as “the basis for the decision” and the *cri de coeur* of “moral relativism or the privatization of morality.”<sup>187</sup> But no less stolid a jurist as Chief Justice Rehnquist has weighed in with similar sentiments in the case of *Hustler Magazine Inc. v. Falwell*: “‘Outrageousness’ in the area of political and social discourse has an

183. *Village of Skokie v. Nat’l Socialist Party*, 373 N.E.2d 21, 24 (Ill. 1978).

184. *Collin v. Smith*, 578 F.2d 1197, 1206 (7th Cir. 1978).

185. 403 U.S. 15, 21 (1971) (citations omitted).

186. 578 F.2d at 1207.

187. ROBERT H. BORK, *THE TEMPTING OF AMERICA* 246-49 (1990).

inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of the dislike of a particular expression."<sup>188</sup>

A different objection is made by Professor Robert Post, to whom the *Hustler* Court's reasoning seems "deeply misplaced in the context of a tort that appeals to *intersubjective*, rather than to private, standards of judgment."<sup>189</sup> The tort of intentional infliction of emotional distress involves behavior that violates "*community* values, rather than merely personal or idiosyncratic preferences."<sup>190</sup> Thus, what is really at issue in *Hustler* is not the "subjectiveness" of the outrageousness standard, "but rather that it is constitutionally inappropriate as a standard for the legal regulation of public discourse."<sup>191</sup> To allow any particular community to enforce its commonly accepted norms would be to privilege one community over others; in other words, it would make the communal norm enforceable in society generally. As Professor Post usefully suggests, we should conceive the neutrality required of societal standards not "only at the level of ideas, [but] at the more general level of the structures that establish communal life." We might then say that "the concept of public discourse requires the state to remain neutral in the 'marketplace of communities.'"<sup>192</sup>

In obscenity law, whether expression is "prurient" or "patently offensive" is determined by applying "contemporary community standards," so that the privileging of one community over another might seem to be avoided.<sup>193</sup> However, the Supreme Court has also made clear that for purposes of determining "contemporary community standards" the entire State of California can serve as the relevant "community," which of course defeats the purpose altogether. It is no protection at all for the many communities within the State of California to say that the standard of "their" state is being used, instead of, say, Florida's. So the claim that the standard is somehow individualized to one's community is meaningless.

In *Paris Adult Theatre I v. Slaton*, the Court declared that "[t]he States have the power to make a *morally neutral judgment* that public

188. 485 U.S. 46, 55 (1988).

189. Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 625 (1990).

190. *Id.*

191. *Id.* at 625-26.

192. *Id.* at 632.

193. See *Miller v. California*, 413 U.S. 15, 24 (1973).

exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize . . . the States' 'right . . . to maintain a decent society.'"<sup>194</sup> But consider what can be taken into account in making that "morally neutral" judgment:

It concerns the tone of the society, the mode, or to use terms that have perhaps greater currency, the style and quality of life . . . [I]f [a man] demands a right to obtain the books and pictures he wants in the market, and to foregather in public places—discreet, if you will, but accessible to all—with others who share his tastes, *then to grant him his right is to affect the world about the rest of us, and to impinge on other privacies*. Even supposing that each of us can, if he wishes, effectively avert the eye and stop the ear (which, in truth, we cannot), what is commonly read and seen and heard and done intrudes upon us all, want it or not.<sup>195</sup>

In *Cohen v. California* we were supposed to avert our eyes to avoid further bombardment of our sensibilities. But even that would be unnecessary in the *Paris Adult Theatre* case, which involved a theater open only to adults and emblazoned with elaborate warnings as to the "adult" material inside. Apparently, we need to be protected from the mere *knowledge* that someone, somewhere, is watching an obscene film. So *Paris* is not really a case about anything taking place in the market or in public places. But even if it were such a case, of course, the societal judgment should not turn on a particular community's preferred style and quality of life or on whether one shares its tastes.

Religion cases offer a rich field for studying the community-society paradigm and can only be briefly summarized here. The basic conflict is perhaps best presented in *Wisconsin v. Yoder*.<sup>196</sup> The Amish community argued that their children's attendance at high school, public or private, was "contrary to the Amish religion and way of life," which requires "life in a church community separate and apart from the world and worldly influence." The state argued with equal plausibility for the power to impose "reasonable regulations for the control and duration of basic education." In this case an exception was simply made for the Amish, in view of their sharply defined and apparently exemplary "community" values. Even so, Justice Douglas worried in dissent about foreclosing important

194. 413 U.S. 49, 69 (1973) (emphasis added).

195. *Id.* at 59 (quoting Alexander Bickel, *On Pornography: Dissenting and Concurring Opinion*, 22 PUB. INT. 25-26 (Winter 1971) (emphasis added by the Court)).

196. 406 U.S. 205 (1972).

options in life from the Amish children. The community can exercise coercive power over its members too, as it demands that they conform to its ways.

These issues are raised in a family context in *Walker v. Superior Court*, which held that community values must yield to the state's interest in protecting minor children's life and health.<sup>197</sup> Mrs. Walker, a Christian Scientist, had treated her seriously ill, four-year-old daughter with prayer rather than medical care, in accordance with her religious beliefs.<sup>198</sup> After seventeen days the child died of meningitis. The California Supreme Court was unmoved by the argument that not all children treated in this way die, and that not all children given medical treatment survive. "The expression of legislative intent is clear," ruled the court; "when a child's health is seriously jeopardized, the right of a parent to rely exclusively on prayer must yield."<sup>199</sup> As to Walker's constitutional defense, the court was even less moved by the community claim: "[P]arents have *no* right to free exercise of religion at the price of a child's life."<sup>200</sup> The court thus found no bar to the prosecution of Mrs. Walker for involuntary manslaughter and felony child endangerment.

Numerous other cases could be cited in which the theme of community vs. society is presented.<sup>201</sup> The common conflict is the community's claim of freedom and individuality, balanced against society's competing demand for coercion and uniformity. This interpretive problem can be seen as an instance of the more general problem of demarcating the proper boundary between tolerance and conformity in a legal system applied to large numbers of smaller communities. Use of the community-society paradigm does not dictate the outcome in such cases, but it does provide a conceptual vocabulary in terms of which applicable legal doctrines may be consistently developed and employed. Thus, the distinction between community and society merits explicit recognition as a fundamental interpretive framework in a system of law that develops largely through interpretive practices and the use of basic interpretive paradigms.

197. 763 P.2d 852 (Cal. 1988).

198. See CHRISTIAN SCIENCE: A SOURCEBOOK OF CONTEMPORARY MATERIALS (1990).

199. *Walker*, 763 P.2d at 867.

200. *Id.* at 870.

201. See, e.g., *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 527 (1993); *Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990); *Randall v. Orange County Council, Boy Scouts of Am.*, 952 P.2d 261 (Cal. 1998).

