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THE PERSISTENCE OF CLASSICAL STYLE

PATRICK O. GUDRIDGE†

As in music, art, and literature, there is also in law a classical style. The virtues of order, permanence, balance, and universality may preoccupy legal argument in much the same way that they fix the starting points for other forms of social expression. Karl Llewellyn, we know, in the end seized upon the idea of style, and described his "Grand Style" in strikingly classical terms, as part of a strategy for supplying the language of legal realism with positive as well as negative images.¹ Grant Gilmore began his famous Storrs lectures by marking a somewhat different classical or formal style as a recurring tendency in American law, a gravitation interrupted by only occasional flights of romanticism.² Concepts of style, however, play little part in the day-to-day combat of our legal theory.³ It is as though we are content to acknowledge Llewellyn (and now Gilmore) their Olympian status, but to let their sometimes difficult ideas rest with them. We also make no new attempts.

I think that we are making a mistake. In this essay, therefore, I propose to discuss what would happen to the way we usually conceive of law if we put in controversy the ideas of style in general and classical style in particular. The essay has two parts. The first has the aim of suggesting why the idea of style might be useful. It takes as its focus the complementary notion of a legal *medium*—the idea that we "make law" from some raw material. If we reduce questions of law to questions of choosing the relevant legal medium, contemporary legal thought becomes an unsatisfactorily inconclusive state of affairs. The second and longer part of the essay organizes itself around the idea of style per se. I briefly characterize style and classical style in the abstract. The more interesting issues, however, arise once matters of defi-

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¹ K. LLEWELLYN, *THE COMMON LAW TRADITION* (1960). See *infra* note 143.

² See G. GILMORE, *THE AGES OF AMERICAN LAW* 10-11 (1977). Gilmore associated the romantic impulse much more with English law.

³ The exception lies in recent historical writing, especially in the work of Duncan Kennedy, in which notions of a "classical" legal thought do play an important part. Much of Kennedy's relevant writing is collected at *infra* note 173.

dition acquire normative overtones: as we begin to work with ideas of style and classical style critically and in the process attempt to generate meaningful alternatives to classical style. This essay thus ultimately aims to suggest something of the quality not only of classical style but of at least one distinctively "anticlassical" style as well.

The larger argument works itself in and around a series of intensive and quite particular investigations. For example, I introduce the idea of legal media by considering two cases. *Olcott v. Supervisors*⁴ is an 1873 Supreme Court decision ruling on the enforceability of municipal bond obligations incurred as part of a program of railroad subsidy. *Lake Country Estates v. Tahoe Regional Planning Agency*,⁵ also the work of the Supreme Court, dates from 1979 and addresses the damages liability of a regional planning agency and its officials. I demonstrate the critical capacity of the idea of classical style by treating as illustrations in common Justice Peckham's opinion in *Lochner v. New York*⁶ and Professor Kennedy's analysis in *The Structure of Blackstone's Commentaries*.⁷ And finally, in order to develop one version of an anticlassical style, I discuss *Social Justice in the Liberal State*,⁸ an attempt by Bruce Ackerman to rework liberal political philosophy, and *Communication and the Evolution of Society*,⁹ a recently translated collection of essays by the German social theorist Jurgen Habermas.

The success of this essay, I think, depends upon whether I can show that style is something we can appreciate other than at a distance. We should be able to perceive it readily, and even more importantly react to it, in confronting particular works. And yet, in order to make explicit the form of the inquiry that organizes and ultimately connects the individual readings, I cannot avoid offering a series of relatively abstract characterizations of ideas like medium, style, classical style, and anticlassical style. The relationship of abstract and particular here is a risky one. I mean to limit as much as possible the dominance of a priori categorization: the reduction of the concrete to the status of mere illustration. But I also hope to avoid a kind of "inductive fallacy": the appearance of suggesting that this essay's more concrete investigations inspire and establish, in some strong sense, its general observations.

The approach I have adopted is one that treats both the particular and the general as simply different means of *description*, and that emphasizes in the idea of description a combination of contingent and

⁴ 83 U.S. (16 Wall.) 678 (1873).

⁵ 440 U.S. 391 (1979).

⁶ 198 U.S. 45 (1905).

⁷ Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979).

⁸ B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

⁹ J. HABERMAS, *COMMUNICATION AND THE EVOLUTION OF SOCIETY* (1979).

pragmatic aspects. Description is first of all reactive and, as such, it is a means of expression that, in principle, is antidogmatic. It presupposes relatively little about its subject. But description is always also a re-statement and therefore, insofar as its point is to portray its subject in a way that is accessible to a third party, description may, not surprisingly, refashion the subject as part of the process of effective representation. Description thus emphasizes rather than denies point of view.

The built-in bias of description is straightforwardly present at the outset of this essay. I claim that *Olcott* and *Lake Country Estates* suggest a historic divide between a former period, in which law appeared to draw its substance from a single medium, and the contemporary moment, when media seem to us to be ordinarily plural. This claim, unqualified, is certainly too broad. The two cases are obviously not sufficient evidence by themselves to support such a sweeping historical characterization. But the pseudo-history, while it cannot assert the status of fact, is nonetheless helpful. It provides a form within which we can emphasize, as if in caricature, certain features of contemporary legal thinking as a whole that, although often complicated in practice, are indeed really present. We are put in a position to trace the implications of the revealed tendencies—something we could not so easily do if we were initially more realistic.

The later abstract accounts of style, classical style, and anticlassical style carry a more complicated representational burden. In the aggregate, it is their task both to illuminate and to respond to what is absent, suppressed, or obscured in *Lochner* or in the writings of Kennedy, Ackerman, and Habermas. The point of this strategy is to reveal the critical capacity of the idea of classical style and at least the outlines of an anticlassical alternative. This is, of course, description at the limit. To be sure, it remains a reaction to its subject. But in reporting what is missing, description of this sort can never be noncontroversial. The subject itself, because of its own differing assertions, stands as a kind of prior critique.

This essay presents to the reader a broken surface. Its organization incorporates repeated changes in subject and abrupt transitions between the abstract and the concrete. These introductory comments are in part simply an explanation and an apology for this "disorganization." But partly, these comments are also a "foreshadowing"—a true introduction. This essay, in its substance, especially in its evocation of an anticlassical style, attempts to bring into question the idea that the only useful orienting images for legal argument are those that begin with notions of order or harmony or resolution. The image of "description," by the close of the essay, becomes central to the argument, as suggesting

the alternative starting point.

I. JURIDICAL EXPECTATIONS: A FIRST JUXTAPOSITION

Present-day legal analysis includes among its more interesting features a predisposition to treat sources of law as irreducibly multiple—not simply several but elusive of all but the most provisional hierarchy. Seemingly, this tendency sharply distinguishes our jurisprudence from at least its immediate predecessor. The former approach, it appears, only occasionally confronted problems of ordering. The various sources of law, such as constitutions, statutes, or precedent, were all ultimately derived from a single underlying legal medium.

Propositions such as these are difficult to elaborate in the absence of concrete illustration. Therefore, in order to provide a frame of reference for subsequent discussion, I will describe two opinions of the United States Supreme Court. The cases are by no means landmarks of any sort; indeed, it is the sense they give of being ordinary that gives plausibility to my larger point. Admittedly, however, I have selected these particular opinions because they illustrate especially well the distinction I want to draw. The cases are thus as much models as evidence.

A. *Olcott: Unity*

I begin with the earlier decision. *Olcott v. Supervisors*,¹⁰ decided in 1873, involved an effort by the successor in interest of a railroad, suing in federal court, to compel the Supervisors of the County of Fond du Lac, Wisconsin, to honor promissory notes that the County had issued (by way of subsidy) to the railroad in return for the railroad's promise to abide by certain rate regulations.¹¹ Following the issue of the notes, but before *Olcott* itself came to trial, the Wisconsin Supreme Court declared unconstitutional the state legislation that had authorized counties to offer subsidy obligations to railroads.¹² The court held that revenues raised by taxation could be expended only for public purposes and that aiding a private corporation pertained to no such end.¹³ The initial question in *Olcott*, therefore, concerned the effect a federal court in a diversity case should give to the state supreme court decision. The state

¹⁰ 83 U.S. (16 Wall.) 678 (1873).

¹¹ *Id.* at 678-79. Municipal railroad stock purchase and subsidy cases constituted an important and controversial part of the Supreme Court's docket during this period. See C. FAIRMAN, *RECONSTRUCTION AND REUNION*, 1864-88, at 918-1116 (1971).

¹² *Whiting v. Sheboygan & Fond du Lac R.R.*, 25 Wis. 167 (1870).

¹³ See *id.* at 181-82.

opinion relied in no way on federal constitutional law.¹⁴

The federal trial court treated the state ruling as binding on federal courts and dismissed the case, deferring to the state court's determination that the promissory notes were void.¹⁵ The Supreme Court reversed,¹⁶ indicating two reasons why a federal court could disregard the state opinion.

First, the question raised by the case did not require "a determination of any question of local law."¹⁷ Instead,

[t]he question considered by the court was not one of interpretation or construction. The meaning of no provision of the State constitution was considered or declared. . . . [T]he uses for which taxation generally, taxation by any government, might be authorized . . . is not a question of constitutional construction. It is a question of general law. . . . Its solution must be sought not in the decisions of any single State tribunal, but in general principles common to all courts. The nature of taxation, what uses are public and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no State court can conclusively determine for us.¹⁸

Respect for the security of contracts also suggested that the state court decision might be better ignored:

[I]f a contract when made was valid under the constitution and laws of a State, as they had been previously expounded by its judicial tribunals, and as they were understood at the time, no subsequent action by the legislature or judiciary will be regarded by this court as establishing its invalidity. Such a rule is based upon the highest principles of justice. Parties have a right to contract, and they do contract in view of the law as declared to them when their engagements are formed. Nothing can justify us in holding them to any other rule.¹⁹

¹⁴ See *Olcott*, 83 U.S. at 689.

¹⁵ See *Olcott v. Fond du Lac County*, 18 F. Cas. 637, 638 (C.C.E.D. Wis. 1870) (No. 10,479).

¹⁶ Justice Strong wrote for the majority. Chief Justice Chase and Justices Miller and Davis dissented without opinion. See 83 U.S. at 698.

¹⁷ *Id.* at 689.

¹⁸ *Id.* at 689-90.

¹⁹ *Id.* at 690 (footnote omitted). "[E]xpounded" and "understood" are the key terms. Prior to *Whiting v. Sheboygan & Fond du Lac R.R.*, 25 Wis. 167 (1870), the Wisconsin Supreme Court apparently had never directly faced the railroad subsidy question. *Olcott* thus did not present so clear a case of change in law as its better known predecessor, *Gelpcke v. City of Dubuque*, 68

Familiarly nineteenth century themes echo here: general common law and liberty of contract. What is interesting about *Olcott* is the jurisprudential use to which the ideas were put. Justice Strong's majority opinion sought to minimize plurality. He portrayed a legal universe in which a common element aggressively centered itself, pushing diversity out to the periphery. To be sure, the idea of general common law was a mechanism for detaching basic constitutional principles from constitutional texts. The point, though, was not simply to differentiate, but to fix a hierarchy. The model in this regard was clearly the traditional relation of common law and statute. The constitutional text, like a statute in derogation of the common law, is relevant only occasionally, when it specifically addresses the question at hand.

Liberty of contract ideas worked to the same end. Justice Strong invoked the perspective of contracting parties not because he wished to celebrate liberty of contract per se. He did not deny that the law constrained the process of contracting. Instead, by emphasizing the contracting process, he was able to introduce a temporal element. The idea of retroactive change thus entered the analysis, suggesting in turn the opposing value of preserving expectations. All of this apparatus, Strong claimed, supported the conclusion that we should give little weight to specifically Wisconsin law, which was apparently changeable at whim.

U.S. (1 Wall.) 175 (1864). In the years before *Whiting*, however, the Wisconsin court had acknowledged that the state legislature could validly delegate the power of eminent domain to privately owned railroads. Railroad takings were for a public use. See, e.g., *Robbins v. Milwaukee & Horicon R.R.*, 6 Wis. 636, 636-41 (1858). Moreover, in dictum in a harbor construction case, the court had stated that a municipality could properly incur obligations and levy taxes "to engage in works of internal improvements, such as the building of railroads, canals, harbors, and the like . . . although they are in general operated and controlled by private corporations . . ." *Hasbrouck v. City of Milwaukee*, 13 Wis. 37, 43-44 (1860). "[Such] works . . . are nevertheless . . . indispensable to the public interests and public functions." *Id.* at 44. And finally, in a case concerning bounties that a city had agreed to pay Civil War volunteers, the Wisconsin Supreme Court had treated as "the great leading case" the Pennsylvania Supreme Court decision in *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147 (1853), the best-known judicial opinion recognizing the right of a municipality to incur obligations and collect taxes as part of a program of railroad subsidy through stock purchases. See *Brodhead v. City of Milwaukee*, 19 Wis. 624, 652 (1865).

We would presumably regard cases like *Robbins*, *Hasbrouck*, and *Brodhead* as only weak authority. See *infra* note 20. But Justice Strong was not alone in treating *Whiting* as a fundamental change in Wisconsin law. Judge Paine had argued in dissent in *Whiting* that "[t]he single question presented seems to me to have been already so thoroughly determined the other way, that it ought no longer to be considered even an open one." 25 Wis. at 210 (Paine, J., dissenting). And indeed, Chief Judge Dixon, in both his original majority opinion and his opinion on rehearing in *Whiting*, plainly assumed that the relevant question was not precedent as such, but see *id.* at 188-89, but rather how the court's decision fit with preexisting principle. Thus, Dixon treated *Curtis v. Whipple*, 24 Wis. 350 (1869), as controlling, even though the case involved municipal gifts to a private educational institution and not railroad subsidies, because *Curtis* established the principle that subsidies for private corporations were without public purpose. The differing factual contexts were relevant to Dixon only as a means of demonstrating that in theory the differing facts made no difference. See *Whiting*, 25 Wis. at 181-82. Dixon also distinguished eminent domain and stock purchase cases, albeit more elaborately, in a similarly abstract fashion. See, e.g., *id.* at 185-86, 190-204, 209-10; see also *infra* note 27.

We should instead respect the needs of contracting parties for a stable legal environment and therefore treat the source of any restrictions on their agreement as legally more general.

From the contemporary perspective, this analysis is all quite question-begging. Why should the general common law be of more immediacy for contracting parties than the law of the state in which the contract was made? For that matter, why should we presume that a general constitutional law is indeed possible, or that there are principles that survive separate from particular texts and to which texts relate only interstitially or as occasional modifiers? What was natural for Justice Strong, we recognize, is alien for us.²⁰ Because Justice Strong accepted his own jurisprudence as given, we cannot expect him to have identified explicitly its underlying assumptions or defended their plausibility. But we may indirectly infer, from the substantive conclusions that Strong extracted from his general common law, what he must have believed about the theoretical structure of this common law that gave it plausibility.

This is the central passage:

If there be any purpose for which taxation would seem to be legitimate it is the making and maintenance of highways. They have always been governmental affairs, and it has ever been recognized as one of the most important duties of the State to provide and care for them. Taxation for such uses has been immemorially imposed. . . . It is said that railroads are not public highways *per se*; that they are only declared such by the decisions of the courts, and that they

²⁰ It is clear, for example, that Professor Fairman, in his discussion of *Olcott*, proceeds from a perspective strikingly different from that of Justice Strong. In his analysis, Fairman focuses on the private expectations argument:

Prior to the issue of the Fond du Lac notes, the State court had made various pronouncements about "public purpose" in taxation (in cases dealing with various particular matters such as a bounty to encourage enlistments in the Union army). . . . By projecting these expositions one constructed law to fill a gap, and by that law the Fond du Lac notes were valid. . . . (To be sure, Justice Strong did not explain so baldly as this what the Supreme Court was doing.)

C. FAIRMAN, *supra* note 11, at 1017. Fairman, however, in representing common law as "constructed" out of particular cases, and thus as ordinarily of gapped structure, adopts a perspective not simply more "bald" than Strong's but fundamentally different. Strong, in his account of Wisconsin law prior to *Whiting*, treated as the significant datum the assertions of the state courts about the "public" status of railroads, and the relevant factors generally with regard to application of the "public" classification. *Olcott*, 83 U.S. at 691-93. He did not hide the differing facts of the prior cases. *See id.* at 691-92. He did not, like Fairman, see the law as fundamentally bound up with the facts, but as primarily manifesting itself in the character of its classifications. Strong's analysis at this point links up with his assumptions about general common law. *See infra* text accompanying note 21. Moreover, in this respect at least, Strong's approach is consistent with that of the Wisconsin court in *Whiting* itself. *See supra* note 19.

have been declared public only with respect to the power of eminent domain. This is a mistake. In their very nature they are public highways. It needed no decision of courts to make them such. . . . A railroad built by a State no one claims would be anything else than a public highway, justifying taxation for its construction and maintenance, though it could be no more open to public use than is a road built and owned by a corporation. Yet it is the purpose and the uses of a work which determine its character.²¹

The question, as it is put, is first of all one of classification. The common law is a jurisprudence of names. If it is appropriate to label a railroad as a highway for public use, then taxes levied to subsidize a railroad are raised and spent for a properly public objective. The process of classifying is utterly practical: "it is the purpose and the uses of a work which determine its character."²² But the process is also definitive. Identifying a railroad as a kind of public highway is not a merely discretionary, contingent labeling. Railroads "[i]n their very nature . . . are public highways."²³ With railroads as with highways, it is as though the taxonomy were already fixed: "always," "ever . . . recognized," "immemorially."²⁴ It is as though we have access to a language of names of self-evident reference, a language that holds our use of its terms utterly in line, in a state of perfect description.²⁵ It is a language

²¹ 83 U.S. at 696.

²² *Id.*

²³ *Id.* Justice Strong's commitment to this essentialist metaphysic of classification also reveals itself elsewhere in the opinion. For example, Strong did not hesitate to separate the question of whether an act was "public" from the question of whether or not the act was performed by government institutions *per se*:

Whether the use of a railroad is a public or private one depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the State.

Id. at 695. This separation contrasts, in its confident use of the "public function" idea, with our more recent difficulties with that notion. See, e.g., *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978) (collapsing the distinction between "public" and "government" action); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974) (same).

Again, consistent with his insistence upon the reality of the "public" category, Justice Strong had no difficulty in talking about affirmative governmental duties: "[H]ighways] have always been governmental affairs, and it has ever been recognized as one of the most important duties of the State to provide and care for them." 83 U.S. at 696. This ease is also alien to us. See, e.g., Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659, 659-60 (difficulties in seeing needs of indigents as source of affirmative obligation).

²⁴ 83 U.S. at 696.

²⁵ It is not uncommon in reading nineteenth century judicial opinions to encounter variations on the idea that features of language are important in legal analysis. Chief Justice Marshall's argument for judicial review in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), emphasized the fact that the Constitution was a written instrument. See *id.* at 174, 176-77; Levinson, *Judicial Review and the Problem of the Comprehensible Constitution*, 59 TEX. L. REV. 395, 395-96

like this, Justice Strong must have believed, to which the general common law gives us entry.²⁶

The idea of recognizing a general common law, even in constitutional cases, becomes more plausible. If common law consists of a set of decisive names of ascertainable application, rooted in custom or common experience, parties to contracts are indeed likely to be more sure in their sense of the common law than they might be in their knowledge of state law per se. Local law as such is not only subject to change in detail, but also, to the extent it departs from common law, becomes (within this perspective) more arbitrary in content. It thus makes sense to emphasize retroactivity problems in dealing with state law, and to treat these problems as peculiar to state rather than general law. The more fundamental argument—that it is indeed possible to conceive of a common law of constitutional principles independent of particular constitutional texts—also gains in persuasiveness.

Constitutional law, on this reasoning, consists in its substance of a

(1981). This fact was actually pertinent to Marshall's argument, and not simply rhetorical window-dressing, only if the Constitution, like other legal documents, was susceptible to well-developed and determinate judicial methods of decoding. See *id.* at 396-400; Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 12-13 (1983). Only then would constitutional law seem to fit so easily within "the province and the duty of the judiciary." Marshall repeated the theme in later cases. He treated constitutional interpretation, at least on its face, as a process of defining terms: in which a specific constitutional text found its meaning in settled legal usages, see *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 407-10 (1821); in ordinary language, see *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824); or in the very notion of a constitution as a written text, see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

There is a surprising family resemblance, therefore, between prominent elements of Marshall's great opinions and the taken-for-granted taxonomies of later justices like Strong. The idea of the Constitution as a writing, and the question of the sources and characteristics of its language, remained a part of nineteenth century constitutional jurisprudence. Later in the period, however, one often used approach, whose traces we have indeed been studying in *Olcott*, nonetheless subtly altered Marshall's emphasis. It moved more quickly past the constitutional text to the underlying lexicon. The Constitution, it was said, was written in the language of the common law. See, e.g., *United States v. Wong Kim Ark*, 169 U.S. 649, 654-55 (1898); *Smith v. Alabama*, 124 U.S. 465, 478 (1888); *Moore v. United States*, 91 U.S. 270, 274 (1875). The essential jurisprudential image, we might think, was that of the dictionary. See *infra* notes 29-30.

²⁶ Justice Miller, who dissented in *Olcott*, ironically confirmed the power of Justice Strong's jurisprudence in the later and more famous case of *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655 (1875). In this case, the Supreme Court held that a tax levied for the purpose of subsidizing an iron bridge factory lacked the requisite public purpose. Justice Miller, proceeding within the context of the general common law, treated the process of analysis as one of categorizing. He distinguished between true classifications, "sanctioned by time and the acquiescence of the people," *id.* at 665, and spurious labels:

To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals to aid private enterprise and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms.

Id. at 664. Indeed, Miller if anything fills out the *Olcott* perspective, establishing clearly the link between a jurisprudence of categories and a constitutional philosophy of limited government. See *id.* at 662-63, 665.

set of classifications that define the appropriate provinces of governmental action.²⁷ Particular constitutional texts are of secondary importance. They are relevant chiefly insofar as they incorporate, obscure, or

²⁷ It is important to recognize that, although the idea of naming or classification plainly worked well as a way of conceptualizing limits on the power of government, it could also serve as an organizing device for arguments justifying aggressive government action. "Public" and "private" categories, in the constitutional analysis of the period, did not always yield the *Topeka* result. See generally *supra* note 26. In *Olcott* itself, the Supreme Court was protecting an elaborate system of government subsidy of private railroads. See generally C. FAIRMAN, *supra* note 11. *Topeka* prevented the expansion of this subsidy institution, and indeed (if only for a time) erased it, as a matter of theoretical possibility, from constitutional law. Interestingly, however, at the time of *Olcott*, opponents of railroad subsidies, while deploying *Topeka*-like arguments, treated "public" and "private" ideas as a "sword" as well as a "shield."

In *Whiting v. Sheboygan & Fond du Lac R.R.*, for example, Chief Judge Dixon, in his opinion on rehearing at one level, concerned himself with seemingly formalist questions of "clear, concise and correct general definition." 25 Wis. 167, 195 (1870). He carefully explained why the fact that legislatures may delegate to railroads the eminent domain power to take property for "public use" was not decisive of the question whether a tax levied to raise a subsidy for a railroad was a tax for a "public purpose." *Id.* at 190-204. He demonstrated that railroad property could not, because of the railroad's incorporation, be classed as "public property." *Id.* at 204-09. He distinguished cases upholding taxes to finance municipal stock purchases on the ground that the purchases changed the classification: in part, at least, the railroad now became "public property" and thus a proper subject for taxing support. *Id.* at 209-10.

In all of this, to be sure, there was evidence of what we would sometimes call "formalism"—a sense of law as possessing an objective limit. Dixon observed in his stock purchase discussion, for example, that

[i]t has been said that to discriminate between cases where stock has been subscribed for, and those where it has not but the money is to be given to the company, is "to dwarf and obscure the real nature of these works, and unduly to magnify into the place of principal, a feature which was merely casual, incidental and comparatively unimportant." Whether this appears so or not depends very much upon what our attention is given to. If we are looking to the rules and principles of law governing the subject, there would seem to be very good ground for the discrimination.

Id. at 209. Dixon, however, immediately followed this assertion of legal autonomy by noting what he thought was a "real" difference between stock purchases and gifts: purchases yielded at least some measure of control, gifts did not. See *id.* at 209-10. He concluded that the results of permitting stock subscriptions "have been most sad and disastrous" and were thus a reason, perhaps, for an arbitrary line. *Id.* at 210.

Indeed, the opinion as a whole, not simply *in addition* to its concern with classification or naming, but *through that concern*, communicated a definite political message. For Dixon, the point at every stage was *control*. Because a railroad corporation, absent public ownership, was private property, its owners were free to do as they wished. "[A]fter the people of Fond du Lac county have levied this money, there is nothing . . . to bind the company ever to run a single car . . . or prevent it from taking up the track and abandoning the use of the road entirely." *Id.* at 209. But if the railroad entered into operation, it put its property to public use and became subject to regulation—it was this retained regulatory authority that justified the legislative delegation of eminent domain power. See *id.* at 195-98. Dixon needed to build up the importance of this regulatory power in order to distinguish the eminent domain delegation from a string-free subsidy. His point, as a matter of classifying, was that mere "public benefit" was not the test. See *id.* 192-94. See generally M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 201 (1977). He could therefore take the opportunity to describe what regulation in principle involved—rate fixing, subject to constitutional limits, but rate fixing nonetheless. See *Whiting*, 25 Wis. at 200-04. And he could note, seemingly in passing, that, although the Wisconsin legislature had not yet engaged in such regulation, "[i]t is valuable, however, as a check upon the rapacity which these corporations sometimes exhibit, and the time may come when the legislature will be imperiously required to exert it." *Id.* at 202. Definition became threat: no railroad lawyer, presumably, missed the point.

alter the basic categories.²⁸ Because constitutional questions are thus most importantly matters of classification, with their resolution the result of applying a generally understood taxonomy, they are indeed appropriate subjects for general common law: to the same extent, for example, as the commercial law of *Swift v. Tyson*.²⁹ On this view, for that matter, it is always easy to see an operating unity in legal analysis. The agent of unification is the process of categorizing. This process is plausible because (or to the extent that) the relevant legal responses take the form of a well-defined set of names.³⁰ It is also easy to see,

²⁸ This is the point at which *Olcott* diverges from the perspective of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). See *supra* note 25.

²⁹ 41 U.S. 1 (1842). Questions of language recur in *Swift*. Justice Story's so-called declaratory theory of adjudication emerged from his discussion of whether, in the text of the Rules of Decision Act, 28 U.S.C. § 1652 (1976) (current codification), "the word 'laws' . . . includes within the scope of its meaning, the decisions of the local tribunals." 41 U.S. at 18. His negative conclusion followed, Story said, from "the ordinary use of language." *Id.* Only statutes, presumably relatively well-defined on their face, and "long-established local customs"—"local usages of a [similarly] fixed and permanent operation"—had "the force of laws." *Id.* at 18-19. But, for Story, "questions of general commercial law" were plainly different:

the state tribunals are called upon to perform the like functions as ourselves, that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case.

Id. at 19. This task differentiated judicial decisions from already relatively well-fixed statutes and customs. Judicial decisions "are often re-examined, reversed and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect." *Id.* at 18. Because the general common law has this stochastic aspect, Story stated that "the decisions of the courts . . . are, at most, only evidence of what the laws are, and are not, of themselves, laws." *Id.*

Even if general common law was indefinite, as compared with statutes and custom, Story nonetheless treated it as also possessing linguistic form once he reached the underlying commercial law questions in *Swift*. Story described the general proposition that a holder in due course who takes an instrument for valuable consideration is safe from challenges to prior transactions as "a doctrine so long and so well established . . . that it is laid up among the fundamentals of the law." *Id.* at 15. But see K. LLEWELLYN, *THE COMMON LAW TRADITION* 414-17 (1960) (Story misinterpreted Mansfield and tendency of New York law by emphasizing consideration more than course of trade). The next step involved determining whether surrender of a preexisting debt was indeed valuable consideration. For Story, that issue was one of classification. See *Swift*, 41 U.S. at 19. But the process of classification (and here Story was consistent with his earlier general law discussion) was not automatic. The general proposition had to be restated more precisely, and Story acknowledged that the translation was not free from question.

Assuming it to be true (which, however, may well admit of some doubt from the generality of the language), that the holder . . . is unaffected with the equities between the antecedent parties . . . only where he receives [the instrument] in the usual course of trade and business, for a valuable consideration . . . we are prepared to say, that receiving it in payment of . . . a pre-existing debt, is according to the known usual course of trade and business.

Id. He therefore referred at some length to considerations of pro-commercial policy, see *id.* at 20, and to somewhat equivocal English and American precedent, see *id.* at 20-22, as support for his translation and classification. Story, we can see, was clearly conscious that his common law analysis worked with language. The law initially consisted in the language of the first formulation; the difficulty in the case (the reason policy and precedent became relevant) lay in the too general character of the unquestioned formulation, and thus in the need for translation.

³⁰ In emphasizing language and its perceived qualities as the medium within which Justice

however, that this jurisprudence is not our own.³¹

Strong (and others) worked, I am not simply asserting that Strong was a "formalist," in the sense we frequently use this term today. In cases like *Olcott* the Supreme Court clearly regarded itself as acting to protect a preexisting legal order from degrading state court revisions. But the political and economic consequences of the cases are, and presumably were then, entirely obvious. See, e.g., *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147, 158 (1853) ("This is, beyond all comparison, the most important cause that has ever been in this Court since the formation of the Government.") See generally C. FAIRMAN, *supra* note 11; Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1753-56 (1981) (economic subsidy legislation frequent). The railroad subsidy cases are thus difficult to categorize. See generally *supra* note 27. Strong may or may not have believed that "the process of rule articulation in individual cases" is not "a means to some policy end" but rather "an elaboration of an existing body of doctrine"—one recent characterization of nineteenth century formalism. Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513, 516 (1974).

More to the point, Strong's conception of common law as a set of definite names should not by itself trigger the "formalist" conclusion. Naming figured equally prominently in the Marshall opinions, see *supra* note 25, and yet no one regards Marshall as unconcerned with the political or economic implications of his decisions, see, e.g., Nelson, *supra* at 524 (Marshall as instrumentalist). Moreover, in *Swift*, Justice Story seemed to treat definite naming as the paradigm, from which general common law unfortunately departed, but which in outline continued to organize common law analysis, and to define the setting for considerations of policy. See *supra* note 29. Indeed, it is only once we notice Story's affinities (as it were) with Justice Strong that we can see how well *Swift* fits within Story's larger jurisprudence: how Story, consistently with his other writings, see M. HORWITZ, *supra* note 27, at 245-52, framed an opinion that left room for instrumental reasoning notwithstanding its apparently formal surface, see *id.* at 245.

Language is the medium of the law. If we take this idea seriously as something like an axiom for many nineteenth century legal writers, we can see at least one reason why what looks to us like instrumentalism and formalism could sometimes merge. See M. HORWITZ, *supra* note 27, at 253-66. The process of naming left room, as in *Swift*, for considerations of policy; or naming itself, even if not represented as problematic, was itself an expression of policy. See Goetsch, *The Future of Legal Formalism*, 24 AM. J. LEGAL HIST. 221, 252-53 (1980). We can also begin to account for differences of view among legal writers whom we might otherwise group as all formalists. It would not be surprising, for example, for individuals who regarded legal names as originating in ordinary language, common sense empiricism, or consensus political principle, to disagree with scientific taxonomists. The latter would continue to accept naming as a master idea, but treat the content of classifications as open to question pending some form of rigorous inductive analysis. Compare, e.g., *Lochner v. New York*, 198 U.S. 45, 59 (1905), and Baldwin, *Teaching Law by Cases*, 14 HARV. L. REV. 258, 261 (1900), with, e.g., *People v. Lochner*, 177 N.Y. 145, 169-74, 69 N.E. 373, 382-84 (1904) (Vann, J., concurring), *rev'd*, 198 U.S. 45 (1905), and Chase, *The Birth of the Modern Law School*, 23 AM. J. LEGAL HIST. 329 (1979) (relationship of case method and nineteenth century educational theory). See generally T. HASKELL, *THE EMERGENCE OF PROFESSIONAL SOCIAL SCIENCE* (1977).

³¹ The point is more than that we no longer profess to believe in "general" law. See *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). Rather, in acting on this belief, we sometimes go to an opposite extreme, not only fragmenting what we perhaps could never unify in any event, see *infra* text accompanying notes 56-69, but purporting to fragment (apparently out of reflex) what we in fact actually unify.

Butner v. United States, 440 U.S. 48 (1979), is a good illustration of this latter phenomenon. The question in *Butner* was whether, in federal bankruptcy proceedings, the existence of a security interest in rents and profits was a matter of state law or of a federal rule of equity. See *id.* at 51-54. The Supreme Court ostensibly opted for state law as the appropriate source, see *id.* at 54-56, describing the equity alternative as "undefined considerations of equity," *id.* at 56, a disparaging reference consistent with contemporary characterizations of ideas of general common law. The arguments in favor of resort to state law were of the *Erie* variety. See *id.* at 55. The Court, however, could not end matters there. There was a risk, ironically, that the onset of federal bankruptcy proceedings would prevent creditors from being able to take the steps necessary as a matter of state law, e.g., foreclosures, to perfect their interests in rents and profits. *Id.* at 54, 56-57. The rule therefore became: "the federal bankruptcy court should take whatever steps are necessary to

B. Lake Country Estates: *Multiplicity*

The Supreme Court decided *Lake Country Estates v. Tahoe Regional Planning Agency*³² in 1979. Property owners, suing in a federal district court, had alleged that a land use plan promulgated by the Tahoe Regional Planning Agency (TRPA) amounted to an uncompensated and thus unconstitutional condemnation.³³ The complaint, requesting both monetary and equitable relief, named as defendants TRPA itself, the individual members of its governing body, and its executive officer.³⁴

Justice Stevens, writing for a majority of the Court,³⁵ treated the case as presenting three issues. The first concerned the origins of the cause of action. Plaintiffs could claim a statutory right of action under 1983³⁶ only if TRPA were properly characterizable as a state government agency. If TRPA were treated as a federal agency, plaintiffs would have to argue that the Constitution itself supported an implied cause of action.³⁷ But TRPA was not obviously either a state or federal agency. A regional planning instrumentality, TRPA was the product of an interstate compact between California and Nevada, to which Con-

ensure that the mortgagee is afforded in federal bankruptcy court the same protection he would have under state law if no bankruptcy had ensued." *Id.* at 56. "Whatever steps" could include "authorizing immediate state-law foreclosures" which would literally perfect state rights. *Id.* at 57; *see id.* at 52 n.3. Apparently the federal bankruptcy courts could also simply pretend state rights had ripened, and act on this pretense "by sequestering rents." *Id.* at 57. Bankruptcy courts retained discretion to delay either form of acting, discretion that the Supreme Court rationalized by analyzing it to an equivalent supposed discretion existing in state courts. *See id.* In sum, it is difficult to see how the bankruptcy court is any differently constrained by state law after *Butner* than it would have been previously by equity. Reference to state law is simply the proper form of expression. The evident artificiality of the reference suggests nothing so powerfully as the possibility that *Butner* is more an artifact of our particular jurisprudence than anything else.

³² 440 U.S. 391 (1979).

³³ *See id.* at 394, 396.

³⁴ The case came before the Supreme Court on the pleadings, after the district court dismissed the action against all defendants, and the court of appeals subsequently reinstated the complaint against the individual defendants, but not the agency. *See Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (9th Cir. 1978), *aff'd in part and rev'd in part sub nom. Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979).

³⁵ Justices Brennan, Marshall, and Blackmun each dissented in part. *See Lake Country Estates*, 440 U.S. at 406, 408.

³⁶ Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1976 & Supp. IV 1980).

³⁷ The court of appeals followed this course, analogizing TRPA to a federal agency, and resolving the implied cause of action issue in favor of plaintiffs in their suit against the individual defendants. *See Jacobson*, 566 F.2d at 1363-64; *cf., e.g., Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (implying cause of action under fourth amendment).

gress had given the constitutionally necessary assent.³⁸ Voting members of the agency's governing body were appointed by the two states, as well as by cities and counties in both states that fell within the jurisdiction of the agency because they bordered Lake Tahoe.³⁹ The federal government had the authority to name an additional nonvoting member.⁴⁰

Justice Stevens acknowledged TRPA's hybrid character.⁴¹ He concluded, however, that the agency "had its genesis in the actions of the compacting States," derived its form from legislation enacted in the states, drew its active membership from state, county, and local government officials, and remained in existence because the states had not exercised their compact right to withdraw.⁴² Justice Stevens held, therefore, that TRPA acted under color of state law, and thus section 1983 applied, notwithstanding the peripheral and passive federal involvement, and even though no one state's law governed TRPA exclusively.⁴³

A second issue arose: was TRPA a state government agency as such within the meaning of the eleventh amendment, and thus able to claim sovereign immunity from suit? TRPA, Justice Stevens ruled, was

³⁸ Tahoe Regional Planning Compact, Pub. L. No. 91-148, 83 Stat. 360 (1969), amended by Pub. L. No. 96-551, 94 Stat. 3233 (1980). Concerning the requirement of congressional approval, see U.S. CONST., art. I, § 10, cl. 3.

³⁹ See Tahoe Regional Planning Compact, Pub. L. No. 91-148, art. III (a), (1), (2), 83 Stat. 360, 361-62 (1969), amended by Pub. L. No. 96-551, 94 Stat. 3233 (1980).

⁴⁰ See Tahoe Regional Planning Compact, Pub. L. No. 91-148, art. VIII, § 3, 83 Stat. 360, 369 (1969), amended in Pub. L. No. 96-551, art. X, § 3, 94 Stat. 3233, 3252 (1980).

⁴¹ See *Lake Country Estates*, 440 U.S. at 399 & n.13.

⁴² *Id.* at 399. Stevens emphasized that the compact "remains part of the statutory law of both States." *Id.* He did not, however, note the long-established doctrine that "congressional consent transforms an interstate compact . . . into a law of the United States," and therefore "the construction of an interstate agreement . . . presents a federal question." *Cuyler v. Adams*, 449 U.S. 433, 438 (1981) (citing pre-1979 cases). In *Cuyler*, however, the Supreme Court also observed that the federal rule with regard to compacts is essentially supervisory. "[T]he Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority." *Id.* at 440. For purposes of his section 1983 analysis, therefore, Stevens might have been able to analogize federal question jurisdiction over compact terms to other forms of federal supervision of state law that do not therefore transform state law into federal law. See *infra* note 43; cf. 440 U.S. at 399 n.13 (notwithstanding congressionally required prior federal approval, state regulations remain state law).

⁴³ The language of the compact itself is consistent with this conclusion:

The appropriate courts of the respective states . . . are vested with jurisdiction over civil actions to which the agency is a party. . . . Each such action shall be brought in a court of the state . . . where the property affected by a civil action is situated, unless the action is brought in a federal court. For this purpose, the agency shall be deemed a political subdivision of both the State of California and the State of Nevada.

Tahoe Regional Planning Compact, Pub. L. No. 91-148, art. VI(b), 83 Stat. 360, 367 (1969), amended by Pub. L. No. 96-551, 94 Stat. 3233 (1980).

"an agency comparable to a county or municipality,"⁴⁴ and thus it was not "the state" in the eleventh amendment sense. A third issue also concerned immunity: the personal immunity of TRPA decisionmakers—a question that brought Justice Stevens back to section 1983. The individual defendants, asserting that they acted in a legislative capacity, claimed the absolute immunity the Supreme Court had earlier held shielded state legislators from section 1983 suits.⁴⁵ Justice Stevens agreed with this immunity argument. TRPA officials performed functions analogous to those of state legislators.⁴⁶

The organization of the analysis in *Lake Country Estates*, we can see, is obviously quite different from that of *Olcott*. The three questions Justice Stevens addresses look as though they are related. Each involves a variation on the same analogy—of TRPA and state government. The relevant dimension of the analogy differs from issue to issue.⁴⁷ We would not, however, be surprised to see Stevens attempt a unified treatment: "a state is a state is a state."⁴⁸

⁴⁴ *Lake Country Estates*, 440 U.S. at 401.

⁴⁵ See *Tenney v. Brandhove*, 341 U.S. 367 (1951).

⁴⁶ See *Lake Country Estates*, 440 U.S. at 405. Justice Stevens assumed, however, that section 1983 did not bar plaintiffs from recovering damages from TRPA itself. See *id.* at 405 n.29; see also *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981) (mayor but not city immune).

⁴⁷ With respect to the section 1983 cause of action issue, for example, the opposite classification was "federal." For eleventh amendment purposes, the contrasting analogy was to local government. See *Lake Country Estates*, 440 U.S. at 401-02. Justice Stevens regarded the relevant criteria for deciding the individual immunity issue as functional in character, going to whether the individuals needed the independence of a legislator. See *id.* at 404-05. He attempted, however, to avoid the question of the immunity of local legislators. See *id.* at 404 n.26. Arguably, to this extent, Stevens undercut his own functional analysis. See *id.* at 407-08 (Marshall, J., dissenting in part). Some of the language of the majority opinion indeed suggested that, rather than an operational approach, a state/local dichotomy, like that in the eleventh amendment discussion, qualified the analysis: "This reasoning is equally applicable to federal, state, and regional legislators." *Id.* at 405.

Some lower courts, taking Stevens at his word, have treated *Lake Country Estates* as not resolving the local legislative immunity question. See, e.g., *Flores v. Pierce*, 617 F.2d 1386, 1391 (9th Cir. 1980). More commonly, lower court decisions appear to read *Lake Country Estates* as strong support, indeed sometimes decisively so, for the proposition that county and local legislators enjoy absolute personal immunity. See, e.g., *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1192-94 (5th Cir. 1981); *Bruce v. Riddle*, 631 F.2d 272, 277-79 (4th Cir. 1980); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 612-14 (8th Cir. 1980); see also Comment, *A New Perspective on Legislative Immunity in Section 1983 Actions*, 28 UCLA L. REV. 1087, 1096-97 (1981) (noting extension of immunity). Arguably, however, the seeming refusal by the Supreme Court to treat *Lake Country Estates* as a generally relevant precedent may support a narrow reading of the case. See Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719 (1980); Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 502-04 (1982).

⁴⁸ It is easy to imagine an analysis of the case that, after emphasizing the difficulty in treating TRPA as acting under color of state law in the usual sense, refers to that difficulty as a basis for treating TRPA as so distinctive an agency as properly to be, for eleventh amendment purposes, a branch of state government per se. This approach, of course, would have justified dismissal of the action against TRPA itself. Another line of argument could explain that "color of state law" suggests nothing about the place of a given agency within the state scheme, and then proceed through the county or municipality analogy at the eleventh amendment stage. This argument

But for Justice Stevens, the case simply did not involve the status of TRPA per se. Instead, the relevant questions concerned the construction, in series, of the section 1983 cause of action, the eleventh amendment sovereign immunity privilege, and finally the section 1983 official immunity privilege. Each inquiry was independent of the others. The eleventh amendment had nothing to do with causes of action, only defenses.⁴⁹ It was therefore not necessary, in ruling on the TRPA claim to immunity under the eleventh amendment, to pay any attention to the source of plaintiffs' rights.⁵⁰ Similarly, because the eleventh amendment

would resolve the official immunity question by linking TRPA with county or municipal legislatures and then (perhaps through a reference to "home rule" ideas) assimilating all the local bodies to a state legislature.

Lake Country Estates was apparently the first Supreme Court decision to face squarely the question of the status of multistate entities under the eleventh amendment. See *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 279 (1959) (assuming eleventh amendment applies); *id.* at 283 (Black, Clark, Stewart, JJ., concurring) (emphasizing that the issue remained open). Lower federal courts, however, had confronted the matter repeatedly. These decisions reveal several (often jointly applied) approaches. One (which was clearly irrelevant in *Lake Country Estates*) treated the boundaries of sovereign immunity as at least partly determined by whether multistate entities were clearly set up as public "businesses"—proprietary institutions—rather than as government entities per se. See, e.g., *Ladue Local Lines, Inc. v. Bi-State Dev. Agency of the Mo.-Ill. Metropolitan Dist.*, 443 F.2d 131, 135 (8th Cir. 1970); see also *South Carolina Pub. Serv. Auth. v. New York Casualty Co.*, 74 F. Supp. 831, 837, 838-39 (E.D.S.C. 1947) (state public service authority). A second perspective, closest to that suggested above, took as central the role of the multistate entity in implementing state governmental policy and regarded as particularly probative evidence the extent to which state officials participated in the entity's decisionmaking. See, e.g., *Petty v. Tennessee-Missouri Bridge Comm'n*, 254 F.2d 857, 859 (8th Cir. 1958), *rev'd on other grounds*, 359 U.S. 275 (1959). Although in *Lake Country Estates*, state officials could claim no veto, see 440 U.S. at 402, four of the ten voting members of the governing board were state (as opposed to county or local) officials, see *Tahoe Regional Planning Compact*, Pub. L. No. 91-148, art. III(a), 83 Stat. 361, 362 (1969) (amended 1980), and the compact, in fixing a majority vote rule, aligned members by state, see *id.* art. III(g), 83 Stat. at 363 ("majority vote of the members present representing each state"). A third way of addressing the issue distinguished political subdivisions like cities and counties, which have never been able to claim eleventh amendment immunity, see, e.g., *Workman v. City of New York*, 179 U.S. 552 (1900); *Chicot County v. Sherwood*, 148 U.S. 529 (1893), from state agencies as such, which the amendment plainly protects. The question then became: if the mission of a given multistate agency had been purely intrastate, would it have been the function of a geographical subdivision or a line agency? See, e.g., *Howell v. Port of N.Y. Auth.*, 34 F. Supp. 797, 807 (D.N.J. 1940). In *Lake Country Estates*, Justice Stevens in part drew on this approach. See 440 U.S. at 402 ("The regulation of land use is traditionally a function performed by local governments"). The language of the Tahoe Compact, as Stevens noted, also supported a "subdivision" classification. See, e.g., Pub. L. No. 91-148, art. VI(b), 83 Stat. at 367. But Stevens mainly followed what had been in the lower courts a fourth line of attack: close scrutiny of compact language in order to gauge the degree to which the compact itself emphasized the independence of the entity from state government, especially with respect to matters of finance. Compare *Lake Country Estates*, 440 U.S. at 401-02, with, e.g., *Trotman v. Palisades Interstate Park Comm'n*, 557 F.2d 35, 38 (2d Cir. 1977), and *Byram River v. Village of Port Chester*, 394 F. Supp. 618, 628 (S.D.N.Y. 1975).

⁴⁹ Arguably, the Tahoe Compact in any event amounted to a waiver of sovereign immunity. Compare *Tahoe Regional Planning Compact*, Pub. L. No. 91-148, art. VI(b), 83 Stat. 360, 367 (1969) (amended 1980), with *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 280-82 (1959).

⁵⁰ The identity of a cause of action is irrelevant only if we are addressing the question of the applicability of the amendment on its own terms. If the pertinence of the eleventh amendment is itself a subject for controversy, for example because of apparent congressional intent (in connection

addresses only questions of state *governmental* immunity,⁵¹ it was beside the point once the question of *individual* immunity surfaced. This last matter was simply one of statutory policy,⁵² and the relevant criteria were those peculiar to section 1983 jurisprudence in isolation.

In particular parts of its analysis as well, the *Lake Country Estates* opinion reveals a repeated and emphatic tendency to differentiate sources of law; to postulate a set of autonomous jurisprudential universes. Individual arguments frequently take the form of a cross-reference. Justice Stevens repeatedly treats questions of federal law as turning on the fact that state law is well-formed, comprehensive, and consistent in its content. We have already seen how Stevens regards developed state law and practice as largely decisive of the color of law (cause of action) question under section 1983. His eleventh amendment analysis proceeds in a similar fashion. The federal constitutional provision identifies state law characterization of TRPA as the relevant question, and state law treats TRPA much as it would a local agency.⁵³ In deciding the individual immunity question, Justice Stevens did not expressly engage in an analogous *renvoi*, asserting that functional considerations were the statutory key.⁵⁴ But of course the legislative tasks that Justice Stevens took as his model are at bottom products of state law as well.⁵⁵

The impulse to conceive of sources of law as separable in this way shows up once more when we consider why Justice Stevens had to treat *both* section 1983 and the eleventh amendment as pertinent. In one sense, the question is easy to answer. Justice Rehnquist's majority

with particular legislation) to recognize monetary remedies against state governments, the constitutional source of congressional authority may then matter in determining (1) whether Congress could indeed recognize such remedies or (2) how clearly Congress must state its intent. See Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Congressional Imposition of Suit Upon the States*, 126 U. PA. L. REV. 1203, 1209-52 (1978); Note, *Reconciling Federalism and Individual Rights: The Burger Court's Treatment of the Eleventh and Fourteenth Amendments*, 68 VA. L. REV. 865, 871-81 (1982). Supreme Court cases themselves are not clear in this regard. Compare *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) and *Parden v. Terminal Railway*, 377 U.S. 184 (1964), with *Quern v. Jordan*, 440 U.S. 332 (1979) and *Employees of the Dep't of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279 (1973).

⁵¹ Compare, e.g., *Smith v. Reeves*, 178 U.S. 436, 438-39 (1900) (suit against state official would require office to disburse state money), with, e.g., *Poindexter v. Greenhow*, 114 U.S. 270, 285-97 (1885) (suit would impose only personal liability on government official). See generally *Ex Parte Young*, 209 U.S. 123, 159-60 (1908) (unconstitutional conduct by official not protected by immunity).

⁵² See *Lake Country Estates*, 440 U.S. at 404-05.

⁵³ See *id.* at 401-02.

⁵⁴ See *id.* at 405 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951)).

⁵⁵ Justice Marshall, disagreeing with regard to legislative immunity, relied initially on the appointment procedures in the compact itself. See 440 U.S. at 407 (Marshall, J., dissenting in part). Justice Blackmun challenged the functional argument chiefly on its own terms. See *id.* at 408-09 (Blackmun, J., dissenting in part).

opinion in *Quern v. Jordan*,⁵⁶ issued the same day the Supreme Court announced its decision in *Lake Country Estates*, included an elaborate dictum specifically reaffirming the decisive role of the eleventh amendment for governmental immunity questions arising in the course of section 1983 actions.⁵⁷ *Quern*, however, is not so much an answer as simply another part of the puzzle. Why did Justice Rehnquist feel so urgent a need to confirm the relevance of the eleventh amendment that he would do so (as it were) gratuitously? As we shall see, *Quern* and *Lake Country Estates* came before the Supreme Court during a period, continuing into the present, in which the Court has been trying to determine the extent to which section 1983 establishes a self-contained and comprehensively organized system of law.⁵⁸ Fixing section 1983's separate identity, it appears, is a difficult project. This difficulty ultimately explains the *Quern* dictum and thus the eleventh amendment "turn" in *Lake Country Estates*.

For at least two reasons, section 1983 is not a ready subject for ordinary methods of statutory construction. First, this particular provision is in important ways cut off from its legislative history.⁵⁹ The Ku Klux Klan Act,⁶⁰ of which section 1983 was originally a part,⁶¹ rested on an interpretation of the fourteenth amendment that the Supreme

⁵⁶ 440 U.S. 332 (1979).

⁵⁷ See *id.* at 338-45. *Quern* involved a later phase of litigation previously before the Supreme Court in *Edelman v. Jordan*, 415 U.S. 651 (1974). Plaintiffs had sued Illinois officials under section 1983, challenging state regulations implementing a joint federal-state welfare program as in violation of governing federal statutes and regulations. See *id.* at 653-56. Although in *Edelman* the Supreme Court agreed that the Illinois regulations were illegal, see *id.* at 659-60 n.8, it held that a federal court could not, under the eleventh amendment, require state officials to pay retroactively improperly withheld welfare benefits, at least in the absence of clear congressional requirements or obvious state waiver of sovereign immunity rights. Following *Edelman*, the lower courts ultimately required state officials to send notice to members of the plaintiff class advising class members that they may have been denied benefits illegally and that there were avenues of state administrative redress available. See *Jordan v. Trainor*, 563 F.2d 873 (7th Cir. 1977) (en banc). The precise question before the Supreme Court in *Quern* was whether this notice itself violated the eleventh amendment. The court held that the notice was entirely proper: "whether or not the class member will receive retroactive benefits rests entirely with the State, its agencies, courts, and legislature, not with the federal court." 440 U.S. at 348. Before resolving this question, however, Justice Rehnquist's majority opinion considered at length whether the eleventh amendment was at all relevant in a section 1983 action. See *id.* at 338-45. This issue was apparently raised for the first time in briefs filed with the Supreme Court. See *id.* at 338; *id.* at 354 (Brennan, J., concurring in the judgment). As a matter of logic, the question of the relevance of the eleventh amendment may have necessarily preceded the question of its application. See generally *id.* at 341-42 n.12. The plainly more parsimonious approach in *Quern*, however, would have been to decide only the rather easy notice question. It is on this basis that I label the section 1983 eleventh amendment discussion as dictum. Cf. *id.* at 354 (Brennan, J., concurring in the judgment).

⁵⁸ See generally *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133 (1977) (analyzing first phase of cases).

⁵⁹ For an important discussion of many of the implications of the historical break, see Eisenberg, *supra* note 47.

⁶⁰ Act of April 20, 1871, ch. 22, 17 Stat. 13.

⁶¹ *Id.* § 1.

Court soon repudiated.⁶² Section 1983, because it addressed "state ac-

⁶² See, e.g., *The Civil Rights Cases*, 109 U.S. 3 (1883); *United States v. Harris*, 106 U.S. 629 (1882). In certain aspects, the differences in constitutional theory dividing the Reconstruction Congresses and the Supreme Court, while real, were narrower than we ordinarily assume. See Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39. Nonetheless, *The Civil Rights Cases* initiated a movement in fourteenth amendment interpretation that has by now separated itself from Reconstruction motions to such an extent that those notions have become largely irrelevant.

Precisely what the Reconstruction era Congresses thought about the fourteenth amendment—and what significance we should attach to their views—are of course matters of recurring controversy. Much of the dispute has centered upon whether the fourteenth amendment was understood at the time of its adoption to establish principles more far-reaching than the immediate concerns of Reconstruction policy. See, e.g., R. BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Soifer, *Protecting Civil Rights: A Critique of Raoul Berger's History* (Book Review), 54 N.Y.U. L. REV. 651 (1979). And yet, it is sufficient merely to glance at the legislation Congress enacted concurrently with the adoption of the fourteenth amendment in order to recognize that, even at its core, the constitutional theory of the Reconstruction Congresses was significantly different from the jurisprudence the Supreme Court would later take as given in the twentieth century.

In this regard, it is useful first to note the structure of the 1866 Civil Rights Act, Act of April 9, 1866, ch. 31, 14 Stat. 27. Section 1 of the 1866 Act proclaimed, in the face of contrary state black codes, that "all persons born in the United States," as "citizens of the United States," and "without regard to any previous condition of slavery," possessed

the same right in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property . . . and [to] . . . be subject [only] to like punishment, pains, and penalties, and to none other. . . .

Id. § 1, 14 Stat. at 27. Section 2 of the Act punished as a misdemeanor the acts of "any persons who, under color of any law" deprived "any inhabitant of any State or Territory" of the rights recognized in section 1. *Id.* § 2, 14 Stat. at 27. Section 3 elaborately conferred jurisdiction on federal courts to hear "all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them" by section 1; section 3 further addressed the question of choice of law, requiring federal courts in the absence of specifically governing federal law to apply "the common law, as modified and changed by the constitution and statutes of the State." *Id.* § 3, 14 Stat. at 27. Sections 4-7 addressed various procedural questions ancillary to the administration of section 3. See *id.* §§ 4-7, 14 Stat. at 28-29. Sections 8 and 9 authorized presidential mobilization of federal legal and military resources for enforcement purposes. See *id.* §§ 8, 9, 14 Stat. at 29.

Subsequent Reconstruction legislation built on the pattern of the 1866 Act. The Civil Rights Act of 1870, Act of May 31, 1870, ch. 114, 16 Stat. 140, although largely concerned with questions of suffrage, reenacted the 1866 Act under the auspices of the fourteenth amendment, see *id.* §§ 16-18, 16 Stat. at 144, and punished as a felony conspiracies to deprive individuals of federally guaranteed civil rights, see *id.* § 6, 16 Stat. at 141. The Ku Klux Klan Act, Act of April 20, 1871, ch. 22, 17 Stat. 13, in addition to imposing civil liability on persons who "under color of any law" deprived individuals of federal rights, *id.* § 1, 17 Stat. at 13, proceeded further to address at considerable length the problem of private conspiracies to deny through various forms of violent intimidation both the exercise of basic federally guaranteed capacities and access to courts to protect those capacities, see *id.* §§ 2-6, 16 Stat. 13-15. The Civil Rights Act of 1875, Act of March 1, 1875, ch. 114, 18 Stat. 335, extended the 1866 equal rights guarantees to include common law rights of access to public accommodations, facilities, and common carriers, see *id.* § 1, 18 Stat. at 336, and provided (on the model of the 1866 Act but without the earlier requirement that state courts be unavailable) for a federal judicial remedy, see *id.* § 2, 18 Stat. at 336.

The major Reconstruction civil rights statutes thus took as their substantive concern what Senator Trumbull had called "practical freedom." See Bickel, *supra*, at 12. The equal rights that the federal legislation guaranteed were rights to enter into the ordinary legal relationships of economic life—relationships that in their fundamental definition were previously (and still remained)

tion", nonetheless survived—but as a kind of legislative orphan, separated from its original statutory context.⁶³ Second, the Supreme Court in recent years has treated section 1983 as a remedial portmanteau, a civil action vindicating not only "pure" fourteenth amendment rights but "incorporated" fourteenth amendment rights,⁶⁴ and federal statutory rights of no particular lineage.⁶⁵ Given this jumble of protected rights, as well as the historical break, it is not surprising that a coherent basis for construing section 1983 is difficult to discover.⁶⁶

In addressing strictly remedial questions, however, the Supreme Court has nonetheless attempted to approach the statute as though it fit the model of ordinary legislation. The Court on occasion isolates segments of legislative history, carefully avoiding Reconstruction heresy, in order to answer particular questions.⁶⁷ The Court also sometimes as-

the province of common law (general or local) and state statute. The obligation the federal legislation impressed upon the states was therefore a requirement to keep their statutes and common law free in substance from racial discrimination and also to administer their legal systems to protect equal rights. As means of guaranteeing traditional civil rights in the absence of state protection, the federal statutes set up federal courts as alternative enforcers of state law and developed a body of federal criminal law prohibiting private interference with federally guaranteed rights. Congress thus assumed that the fourteenth amendment protected "private law" rights and authorized Congress to act not only in the face of inconsistent "state action" but "state inaction" as well—especially in the face of mob violence. Clearly this is not the fourteenth amendment we know today.

For discussions of Reconstruction constitutional theory indicating its differences from its successors, see Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U.L.J. 331 (1967); Eisenberg, *State Law in Federal Civil Rights Cases: The Proper Scope of Section 1983*, 128 U. PA. L. REV. 499 (1980); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131 (1950).

⁶³ Section 1983 had its origins in section 1 of the Ku Klux Klan Act. See Act of April 20, 1871, ch. 22, 17 Stat. 13. Section 2 of the Act addressed private violence obstructing the exercise of federally guaranteed rights; its prohibitions served as the foundation for the enforcement provisions making up much of the rest of the Act. See *id.* §§ 2-6, 17 Stat. 13-15. The Act as a whole, therefore, lost much of its significance once the Supreme Court struck down the criminal penalties for private violence in section 2. See *Baldwin v. Franks*, 120 U.S. 678, 692-94 (1887); *United States v. Harris*, 106 U.S. 629 (1882). But cf. *Griffin v. Breckenridge*, 403 U.S. 88 (1971) (rehabilitating civil liability provisions of section 2 under thirteenth amendment).

⁶⁴ *E.g.*, *Monroe v. Pape*, 365 U.S. 167, 171 (1961).

⁶⁵ *E.g.*, *Maine v. Thiboutot*, 448 U.S. 1, 6-8 (1980). It is one measure of the substantive emptiness of section 1983, as the Supreme Court currently understands it, that whether federal statutory rights may be privately enforced through section 1983 apparently depends chiefly on the policies implicit in the statutory scheme giving rise to the rights, and not any section 1983 concerns per se. See, *e.g.*, *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 19-21 (1981). See generally Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U. CHI. L. REV. 394 (1982).

⁶⁶ For an excellent critical discussion of contemporary section 1983 case law that largely treats the historical break as simply given, see Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980).

⁶⁷ For example, in *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), a case concerned with the question of municipal liability under section 1983, Justice Brennan's majority opinion referred to the official title of the Ku Klux Klan Act—"a bill 'to enforce the . . . fourteenth amendment . . . and for other purposes'"—and observed (wrongly but understandably in light of present-day state action law) that, although section 1 of the Act (codified as section 1983 of

sumes that Congress drafted section 1983 against a backdrop of mid-nineteenth century tort jurisprudence, thereby opening a second avenue for historical investigation.⁶⁸ These efforts to restore section 1983 to at least part of its original setting, however, have a subversive effect. They underscore the "grab-bag" character of the assortment of rights that the statute today protects and tempt the Supreme Court to restore order, to fix a hierarchy by keying section 1983's remedial law to the origins of the right that the statute is enforcing in a particular case.⁶⁹

The governmental immunity question, in the years before *Quern v. Jordan*, provoked such differentiating impulses. In *Edelman v. Jordan*,⁷⁰ a majority of the Supreme Court accepted the proposition that the eleventh amendment ruled state government immunity questions in section 1983 actions. Justice Rehnquist's opinion, however, had little to say on the subject.⁷¹ Subsequently, the Supreme Court in *Monnell v. Department of Social Services*⁷² recognized municipal damages liability, overruling *Monroe v. Pape*⁷³ on this question. In *Fitzpatrick v. Bitzer*,⁷⁴ the Court held, in the context of the 1972 amendments to Title VII,⁷⁵ that at least some fourteenth amendment legislation could

title 42) was fourteenth amendment legislation, "[s]ections 2 through 4 dealt primarily with the 'other purpose' of suppressing Ku Klux Klan violence in the Southern States." 436 U.S. at 665. *Monell* is nonetheless notable for its extended (and atypical) reproduction of congressional constitutional argument: argument clearly revealing the legislative view of the fourteenth amendment as imposing an affirmative obligation on state and local governments to maintain a nondiscriminatory legal system that would effectively provide redress for private wrongs and authorizing federal relief against private illegality in the event of state failure. See also *Patsy v. Florida Bd. of Regents*, 102 S. Ct. 2557, 2561-64 (1982). Interestingly, in cases dealing with the section 1983 "color of law" requirement, in which differences between congressional understandings and modern constitutional theory would be most apparent, the Supreme Court has ordinarily avoided any elaborate analysis of legislative history. See, e.g., *Polk County v. Dodson*, 454 U.S. 312 (1981). But see *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970). The Supreme Court, moreover, typically collapses "color of law" and the more general constitutional "state action" requirement. See, e.g., *Rendell-Baker v. Kohn*, 102 S. Ct. 2764, 2770 (1982).

⁶⁸ See, e.g., *Smith v. Wade*, 103 S. Ct. 1625, 1651-54 & n.12 (1983) (Rehnquist, J., dissenting) (citing 78 mid-nineteenth century cases); *Owen v. City of Independence*, 445 U.S. 622, 638-50 (1980). In *Carey v. Phipps*, 435 U.S. 247 (1978), the Supreme Court began its analysis of section 1983 damages rules by looking to tort principles as they existed at the time of passage of section 1983, see *id.* at 255-56 & n.9, but the Court, in framing much of its discussion, assumed a continuity between nineteenth century and present-day tort damages theory, thus permitting ready use of modern tort ideas, e.g., *id.* at 262-63 & n.17-19. Professor Whitman would apparently approach section 1983 from an entirely modern perspective. See Whitman, *supra* note 66.

⁶⁹ See, e.g., *Carey*, 435 U.S. at 259-65 (leaving open the possibility that, while an award of damages presupposes actual injury in a procedural due process case, no such proof may be necessary in race discrimination, voting rights, or fourth amendment actions under § 1983); see also *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979) (28 U.S.C. § 1343(3) (1976), the jurisdictional counterpart of section 1983, is available only in "equal rights" actions).

⁷⁰ 415 U.S. 651 (1974).

⁷¹ See *id.* at 675-77.

⁷² 436 U.S. 658 (1978).

⁷³ 365 U.S. 167, 187 (1961).

⁷⁴ 427 U.S. 445 (1976).

⁷⁵ Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified

nullify eleventh amendment recognition of state governmental immunity. *Monell* and *Fitzpatrick* led Justice Brennan to suggest, although Justice Powell disagreed, that *Edelman* was no longer controlling.⁷⁶ Section 1983, Brennan asserted, is clearly fourteenth amendment legislation and overrides the eleventh amendment to establish damages liability for state government agencies violating protected rights.

The most interesting response to the newer cases, however, was that of Justice Rehnquist, author of both *Fitzpatrick* and *Edelman*. Dissenting in *Hutto v. Finney*,⁷⁷ an attorney's fee case that implicated recent federal fees legislation⁷⁸ as well as section 1983, Rehnquist took advantage of the catch-all character of the fourteenth amendment and section 1983 as they operate today. He suggested that *Fitzpatrick* governed only in cases involving assertions of "pure" fourteenth amendment rights, like the equal protection right that Title VII enforced. *Hutto*, by contrast, was at bottom an eighth amendment case, in which only "incorporated" fourteenth amendment rights were at issue.⁷⁹ A majority of the Supreme Court, however, rejected this idea, albeit not without some ambiguity, in both *Hutto* and a succeeding case.⁸⁰

Undaunted, in *Quern v. Jordan*,⁸¹ Justice Rehnquist exploited the other characteristic feature of section 1983 jurisprudence—its only shaky grounding in legislative history—and this time, over Justice Brennan's dissent,⁸² obtained majority support. The *Quern* opinion ignored the question of the ultimate origins of the right for which section 1983 supplied a remedy in the particular case, although in *Quern*, a later phase of the *Edelman* litigation, the right was in fact purely statutory.⁸³ Instead, Justice Rehnquist read *Fitzpatrick* as requiring even fourteenth amendment legislation to embody nullifications of eleventh amendment principles in a "clear statement."⁸⁴ Section 1983, not sur-

in scattered sections of 42 U.S.C. (1976)).

⁷⁶ See *Alabama v. Pugh*, 438 U.S. 781, 783 n.* (1978) (Stevens, J., dissenting). Compare *Hutto v. Finney*, 437 U.S. 678, 700-04 (1978) (Brennan, J., concurring), with *id.* at 708-10 (Powell, J., concurring in part and dissenting in part).

⁷⁷ 437 U.S. 678 (1978).

⁷⁸ Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (codified at 42 U.S.C. § 1988 (1976)).

⁷⁹ 437 U.S. at 717-18 (Rehnquist, J., dissenting).

⁸⁰ See *id.* at 693-94; *Maier v. Gagne*, 448 U.S. 122, 133 n.16 (1980). Concerning the ambiguities, see Comment, *Civil Rights Attorneys' Fees in Cases Resolved on State Pendent and Federal Statutory Grounds*, 130 U. PA. L. REV. 488, 501-03 (1981).

⁸¹ 440 U.S. 332 (1979).

⁸² Although Justice Brennan concurred in the judgment, he devoted the bulk of his opinion to a criticism of Justice Rehnquist's eleventh amendment analysis. See *id.* at 349, 350-66 (Brennan, J., concurring in the judgment).

⁸³ See *supra* note 57. But cf. *Maier v. Gagne*, 448 U.S. 122, 130-31 (1980) (leaving open the question of relationship of purely statutory rights and eleventh amendment immunity).

⁸⁴ See *Quern*, 440 U.S. at 340, 344-45.

prisingly, disclosed no such explicit aim of overriding sovereign immunity.⁸⁵

Section 1983's language, in its broad reference to "persons," is the language of a background provision—as section 1983 indeed was, in its original context.⁸⁶ Legislative history, given section 1983's initially secondary role, is straightforward and thin,⁸⁷ and thus fails as an alternative source of clear purpose. Justice Rehnquist, in resorting to the "clear statement" idea, treated section 1983 as though it were an ordinary statute—self-contained, assertive, programmatic. But given its traumatic history, an ordinary statute is precisely what section 1983 is not.

We can now return to the question of the relationship between *Quern* and *Lake Country Estates*. *Quern*, we see, does not just explain the eleventh amendment interlude in *Lake Country Estates*. *Quern* and its context, rather, reveal as well the irony implicit in the assumptions that *Lake Country Estates* must make. In *Lake Country Estates* Justice Stevens takes it for granted that federal statutes, constitutional provisions, and state law are each distinctively developed, each a separate legal universe with its own set of characterizations and program of results. Section 1983, however, not only fails to resolve on its own terms governmental immunity matters, leaving those questions open for the eleventh amendment, but also fails to define the very rights for which it supplies redress. Section 1983, it thus turns out, does not fit the model that in *Lake Country Estates* guides the statute's construction.⁸⁸ This dissonance (or rather the Supreme Court's apparent willingness to tolerate it) suggests, I think, how committed we are today to the assumption that sources of law tend to be differentiable. This is plainly not the assumption of *Olcott*. There is no longer a single background vocabu-

⁸⁵ But see Eisenberg, *supra* note 47, at 516-17 (since general language of section 1983 and its historical context support holding states liable, burden of proof in statutory construction in *Quern* should have been reversed).

⁸⁶ Only section 1 of the Ku Klux Klan Act—the origin of section 1983—deals with acts under color of law; the remaining provisions address private violence blocking exercise of federal rights. Compare Act of April 20, 1871, ch. 22 § 1, 17 Stat. 13, 13 with *id.* §§ 2-6, 17 Stat. at 13-15. Indeed, section 1 in substance supplemented section 2 of the 1866 Act, which had fixed criminal penalties for acts under color of law in contravention of federal rights. See Act of April 9, 1866, ch. 31, § 2, 14 Stat. 27, 27. Section 1 of the Klan Act is thus at one level additional evidence concerning the central role of the 1866 Act in the thinking of Reconstruction Congresses. See *supra* note 62. But section 1 also fits within the larger scheme of the 1871 legislation if we reverse our usual modern expectations by treating state actors as aiders and abettors and private actors as the principal legislative targets. This is an accurate picture if Congress was indeed responding to private violence facilitated by official tolerance, passivity, or subtle encouragement. See generally Act of April 20, 1871, ch. 22, § 6, 17 Stat. 13, 15.

⁸⁷ See *Monell v. Department of Social Servs.*, 436 U.S. 658, 665 (1978).

⁸⁸ "Section 1983 by itself does not protect anyone against anything." *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979).

lary or set of ideas: no single legal medium.

II. THE PROLIFERATION OF LEGAL MEDIA

Suppose we were to generalize the differences in approach in *Olcott v. Supervisors*⁸⁹ and *Lake Country Estates v. Tahoe Regional Planning Authority*⁹⁰ by positing the existence of two systems of legal thought. We would see in the past a period in which courts or other legal writers took for granted the possibility of unity and stability, in which law organized itself for the most part in a single medium: the common law jurisprudence of names. We would see at present a period of formal turmoil, in which our sense of the multiplicity of legal media, and of the absence of a systematic hierarchy with which to order these media, finds expression in a characteristic legal analysis. Careful differentiation of legal sources and attention to the particular features of the sources once differentiated becomes a dominant and often strikingly successful mode of legal analysis. Claims of a systematic perspective, however, either disappear or sound only hollowly.

To what extent is this exercise in projection plausible? Of course, there is much in postbellum nineteenth century or early twentieth century legal thought that seems to illustrate strikingly well the single medium hypothesis. But any close, genuinely historical account of the jurisprudence of the period would also note complicating phenomena.⁹¹ This picture of the past, we might conclude, is not so much realistic as a kind of "pastoral" image.⁹² It provides us with a way of indirectly emphasizing certain features of contemporary legal thought by "discovering" antithetical elements in past thought. On this view, the accuracy of the portrayal of the "past" is not the main point. Our real concern is with the present. In any event, I intend in this part of the essay to put aside further exploration of the "earlier" perspective. Instead I will examine the plausibility of my description of the present state of affairs. Is it really the case that legal thought, as it now stands, is frequently caught up in efforts to distinguish and choose among multiple legal media?

In fact, much may be said about the present state of legal theory by way of illustrating and elaborating the notion that legal media are irreducibly multiple, exhibiting no consistent, effective hierarchy. We might begin with the "decline" of the common law.⁹³ Statutes, adminis-

⁸⁹ 83 U.S. (16 Wall.) 678 (1873).

⁹⁰ 440 U.S. 391 (1979).

⁹¹ See, e.g., *infra* text accompanying notes 209-38.

⁹² See generally R. WILLIAMS, *THE COUNTRY AND THE CITY* (1973).

⁹³ Strictly speaking, of course, common law was never controlling in the face of a conflicting

trative regulations, ostensibly procedural rulemakings, and constitutional interpretations, we sense, are often or more often the subjects of legal inquiry than common law precedent.⁹⁴ This phenomenon would be notable, simply because of its magnitude, even if these other sources of law merely supplemented common law or addressed subjects on which common law was silent. In fact, however, alternative sources of law have frequently displaced common law from its traditional domain. This substitution may take two forms. Sometimes another legal resource, such as a statute or system of administrative regulations, explicitly replaces common law as the governing source of law.⁹⁵ In other instances displacement is more subtle. Common law adjudication appears to remain the means of lawmaking but, rather than looking to its own traditional concepts or approaches, the common law process now borrows its ideas from, for example, constitutional law or statutory policy.⁹⁶

We are all familiar with the apparent "contraction" of contract law.⁹⁷ Employment contracts, for example, are often no longer restricted in form or content by judicially articulated common law rules.⁹⁸

statute or constitutional provision. Its claim to supremacy derived from the tendency of courts, legislatures, and litigants (or potential litigants) to regard themselves as working first of all in a common law milieu. Within this perspective, statutory or constitutional options became relevant only *after* (in reaction to) common law. See, e.g., Parker, *President's Annual Address*, 19 THE GREEN BAG 581, 582, 592 (1907) (ABA presidential address); see also Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908) (criticizing idea of priority of common law). It at least seemed, therefore, as though most of the law had its origin in common law sources. Equally significant, even in contexts in which statutory or constitutional texts nominally controlled, their interpreters, and probably their authors, treated these texts as though they were written (but for exceptional cases) in common law language. See *supra* note 25.

⁹⁴ See, e.g., G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1, 183-84 n.1 (1982).

In the discussion that follows, I will repeatedly contrast statutory and constitutional law with common law. I will, however, only occasionally refer to the fact of our federal governmental structure, even though the statute or constitutional law I cite will often be federal law and the common law will usually be state law. The impact of the federal system upon the content of American law frequently reveals itself in the substance of federal constitutional prescriptions or legislation as such, or in judicial constitutional or statutory readings. To this extent, federalism is already incorporated (if sub silentio) in my simplified contrasts. Alternatively, if the implications of institutional complexity do indeed sometimes play a separate and explicit role in our legal analysis, by replacing rather than merely informing substantive law as narrowly defined, my basic point about jurisprudential pluralism is simply reinforced.

⁹⁵ The substitution of state-administered workers compensation schemes for common law tort litigation was an early manifestation of the phenomenon. For a contemporary reaction illustrating the shock of the transition, see Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235 (1914). See generally Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967).

⁹⁶ See, e.g., Phillips, *A Haystack in a Hurricane: Divergent Case Law on the Right of Publicity and the Copyright Act of 1976*, 63 J. PAT. OFF. SOC'Y 296 (1981) (surveying both constitutional and statutory influences).

⁹⁷ See, e.g., L. FRIEDMAN, CONTRACT LAW IN AMERICA 20-24 (1965).

⁹⁸ Concerning the former system, see C. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANTS (2d ed. 1913).

An elaborate system of statutory and administrative promulgations organizes the main part of the legal environment in which bargaining, performance, modification, breach, and remedy take place.⁹⁹ To the extent that common law rules continue to operate, statutory policies increasingly shape or constrain their content.¹⁰⁰ Moreover, even in contexts in which statutes are inapplicable, the principal source of innovation in common law adjudication is frequently extrinsic. Recent fair hearing¹⁰¹ and wrongful dismissal decisions,¹⁰² for example, reveal

⁹⁹ See generally R. GORMAN, *BASIC TEXT ON LABOR LAW* (1976).

¹⁰⁰ See, e.g., *Operating Engineers Local 926 v. Jones*, 103 S. Ct. 1453 (1983); *Amalgamated Ass'n of Street Employees v. Lockridge*, 403 U.S. 274 (1971). Statutory restrictions on common law rules, of course, extend beyond the specific concerns of common law contract, also addressing the survival of common law tort rules. See, e.g., *Farmer v. United Bhd. of Carpenters*, 430 U.S. 290, 304-05, 306-07 (1977) (restricting the range of union behavior a court may consider in an emotional distress claim); *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 199-207 (1978) (apparently tying company right to enjoin trespass to whether or not union had filed NLRB unfair labor practice charge).

The labor law preemption decisions of the Supreme Court are chronically confused. Notably, however, both of the two most prominent lines of thinking about preemption illustrate the decline in the intellectual priority of the common law and the persuasive character of assumptions about the irreducible multiplicity of legal resources. Supreme Court opinions characteristically treat contemporary labor law preemption doctrine as beginning (although not necessarily ending) with *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). *Garmon* established the proposition that the limits of the federal "occupation of the field" with respect to matters susceptible to both federal statutory regulation and, e.g., state common law control, are to be fixed by an analysis that works primarily within the vocabulary and values of the federal statute. The key is whether a given activity is arguably protected or prohibited by the National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (as amended) (codified at various sections of 29 U.S.C. (1976)). See *Garmon*, 359 U.S. at 245; see also, e.g., *Operating Engineers*, 103 S. Ct. at 1458-59; *Lockridge*, 403 U.S. at 286-91. But cf. *New York Tel. Co. v. New York State Dep't of Labor*, 440 U.S. 519, 530-34 (1979) (discussing possibility of preemption regardless of NLRA coverage).

The chief competing perspective is largely the work of Archibald Cox. Professor Cox would have a court undertake a more complex two-dimensional inquiry, seeking to determine whether "the areas of discourse" of federal and state law are truly distinct. Cox, *Recent Developments in Federal Labor Law Preemption*, 41 OHIO ST. L.J. 277, 297 (1980). On this view, state law (typically but not necessarily common law) should survive, at least in the absence of clearly contrary congressional requirements, if state law is not "based upon an accommodation of the special interests" of concern to federal labor law and policy but rather defines its crucial variables "without regard to whether the individual is an employer, union, or employee concerned with unionization or a labor dispute." Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1355-56 (1972); see Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954). Recent Supreme Court decisions have treated Cox's analysis equivocally. See *Sears, Roebuck & Co.*, 436 U.S. at 193-98 (use of Cox-like analysis prior to final emphasis on absence of NLRB filing). Compare, e.g., *Lodge 76 v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 156 (1976) (Powell, J., concurring) (endorsing Cox view), with, e.g., *Farmer*, 430 U.S. at 300 (Powell, J.) (apparently rejecting Cox approach).

Professor Cox's approach is particularly interesting insofar as he appears to regard state (largely common law) rights and obligations as defining the "larger context" within which Congress acted, see Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. at 1337, 1355, but nonetheless frames his inquiry in a way that attaches no priority to (but only treats as deserving of equal respect) common law policies. His method is thus sharply distinct from that of some pre-*Garmon* Supreme Court cases, which at least seemed to make use of traditional assumptions about the dominance of common law except in the face of clear legislative statement. See, e.g., *United Automobile Workers v. Russell*, 356 U.S. 634, 641-46 (1958).

¹⁰¹ See, e.g., *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 526 P.2d 253, 116 Cal. Rptr. 245 (1974).

¹⁰² See generally Note, *Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

important borrowings from constitutional law.¹⁰³

It is possible, of course, to overemphasize the phenomenon of substitution. The statutory or administrative character of a particular body of law may sometimes be a matter of a only nominal significance. Some statutes, like the Uniform Partnership Act, by their terms purport to do little more than codify common law principles.¹⁰⁴ The working assumptions behind the common law may also influence the construction of even apparently more aggressive statutes. There is, for example, an important question in labor law jurisprudence whether the notions that inform common law ideas of contract are or should be of relevance in fixing the legal attributes of the collective bargaining agreement.¹⁰⁵

For purposes of this account, nothing turns upon whether substi-

¹⁰³ It is easy to see the borrowing from constitutional procedural due process decisions in the common law fair hearing cases. See, e.g., *Dietz v. American Dental Ass'n*, 479 F. Supp. 554, 557-58, 560 (E.D. Mich. 1979); *Ezekial v. Winkley*, 20 Cal. 3d 267, 276-77, 572 P.2d 32, 38, 142 Cal. Rptr. 418, 423-25 (1977); cf. *Parker v. City of Fountain Valley*, 127 Cal. App. 3d 99, 114-17, 179 Cal. Rptr. 351, 360-61 (1981) (treating fair hearing and due process cases as interchangeable in constitutional analysis). In the wrongful dismissal actions, the analogy is less explicit, manifested chiefly in the use of an "unconstitutional conditions" approach as a basis for imposing tort liability upon employers who dismiss employees for exercising various public rights. Compare, e.g., *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1979) (cause of action for retaliatory discharge triggered by exercise of statutory right) with, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963) (denial of unemployment benefits cannot be triggered by exercise of constitutional right). See, generally Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974) (analogy to due process entitlement analysis). The wrongful dismissal cases that defend tort liability as protecting employee exercise of public rights are especially noteworthy because they undermine traditional common law doctrine respecting employer rights to dismiss at will (absent contrary contractual language) without requiring courts to confront common law on its own terms. Instead, courts purport neither to reject nor to endorse common law rules in general but rather frame their analysis as simply giving priority to a policy of protecting the exercise of a particular "public right"—although the list of public rights continually expands. See Note, *Defining Public Policy Torts in At-Will Dismissals*, 34 STAN. L. REV. 153, 155-61 (1981).

I do not mean to suggest that either the fair hearing or wrongful dismissal cases could not also be defended in more traditional common law terms. See, e.g., *Pinsker v. Pacific Coast Soc'y of Orthodontists*, 12 Cal. 3d 541, 550-52, 526 P.2d 253, 260-61, 116 Cal. Rptr. 245, 252-53 (1974); Note, *supra* note 102, at 1828-44.

¹⁰⁴ The question whether to carry over the underlying assumptions of common law partnership was apparently a matter of considerable controversy during the drafting of the Uniform Partnership Act. Adherents of the common law claimed ultimate victory. See, e.g., Lewis, *The Uniform Partnership Act*, 24 YALE L.J. 617, 638-40 (1915).

¹⁰⁵ There is a large body of distinguished writing. For two of the later articles, referring to the larger literature, see Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-41*, 62 MINN. L. REV. 265, 293-310 (1978).

As workers compensation statutes, see *supra* note 95, underwent the process of constitutional confirmation, they acquired as a gloss a quid pro quo characterization of their origins, see, e.g., *Jensen v. Southern Pac. Co.*, 215 N.Y. 514, 521-28, 109 N.E. 600, 602-04 (1915), that was not much different from the contractual picture that lay behind the common law fellow servant rule, see, e.g., *Farwell v. Boston & Worcester R.R.*, 45 Mass. (4 Met.) 49, 56-57 (1842), and that continues to organize important features of statutory construction, see, e.g., *Carlson v. Smogard*, 298 Minn. 362, 367-69, 215 N.W.2d 615, 619 (1974).

tution of other legal sources for the common law is more often a matter of substance, form, or some mixed case. Indeed, the obvious decline in priority of the common law in the contemporary legal world is interesting precisely because no single "replacement" medium comes to dominate. Thus, along with subordination of the common law, we discern instances of retrogressive development. Statutory, administrative, or constitutional provisions as initially understood supplant common law, but then, reinterpreted, retreat in their claims to coverage or substantively incorporate, in the end, the hitherto abandoned common law norms.¹⁰⁶

Moreover, common law and other systems of law do not relate to each other solely as alternatives. Statutes or constitutional provisions may provide courts ostensibly formulating common law with sources of inspiration analogous to common law precedent itself.¹⁰⁷ More frequently the interaction of statute and common law takes place in an ostensibly statutory context. Courts often read a particular statute as presupposing but not formulating certain legal principles or remedies and, therefore, treat the statute as authorizing a kind of peripheral (but still statute-reinforcing) common law development.¹⁰⁸

¹⁰⁶ For example, after the Supreme Court's decision in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), constitutional considerations of free speech largely replaced traditional (and only partly overlapping) common law notions as the chief organizing force within defamation law. See, e.g., Christie, *Defamatory Opinions and the Restatement* (Second) of Torts, 75 MICH. L. REV. 1621 (1977). *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), however, fixed boundaries for the constitutional impulse through use of the "public figure" category, restored at least partially the common law fact/opinion distinction, see Note, *Fact and Opinion After Gertz v. Robert Welch, Inc.: The Evolution of a Privilege*, 34 RUTGERS L. REV. 81 (1981), and set up "private" media defamation suits along common law principles (albeit negligence rather than traditional strict liability). See generally Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 TEX. L. REV. 199 (1976).

A less well-known but more complete retreat took place after the Supreme Court held in *NLRB v. Hearst Publications*, 322 U.S. 111 (1944), that statutory concerns rather than common law agency doctrine would determine the identity of "independent contractors" for purposes of federal collective bargaining law. Congress shortly thereafter amended the National Labor Relations Act definition of "employee" in order to make explicit the legislative commitment to the common law standard. See Labor Management Relations (Taft-Hartley) Act of 1947, ch. 120, tit. I, § 101, 61 Stat. 136, 137-38, codified at 29 U.S.C. § 152(3) (1976)). See generally *Allied Chemical Workers Local No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 165-68 (1971).

¹⁰⁷ See, e.g., *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970); *Diamond v. Oreamuno*, 24 N.Y.2d 494, 248 N.E.2d 910, 301 N.Y.S.2d 78 (1969). This is the possibility to which James Landis drew attention in his well-known essay. Landis, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213 (1934); see also *supra* note 103.

¹⁰⁸ Traditional citations include *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), and *Friendly, In Praise of Erie—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964). But see *Stewart & Sunstein, Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1223 (1982) (noting recent tendency to reject statutory common law idea).

One notably elaborate body of federal common law starts from policies implicit in federal collective bargaining statutes in order to address questions about the enforceability of collective bargaining agreements and the fiduciary duties of bargaining representatives. On enforceability law, its common law status, and its relationship to statutory law, see, e.g., *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Textile Workers Union v. Lincoln Mills*,

Three well-known court decisions involving the securities-fraud prohibition rule 10b-5¹⁰⁹ illustrate several of the forms that relationships among legal sources may take.

In *SEC v. Texas Gulf Sulphur Co.*,¹¹⁰ the court of appeals held that insider trading, absent disclosure, violated rule 10b-5. The court ignored the absence of any general prohibition of insider trading in traditional common law,¹¹¹ and the failure of either the rule itself, or section 10(b) of the Exchange Act,¹¹² the statutory authority for the rule, to bar the practice explicitly.¹¹³ The court appeared to conceive of rule 10b-5 as an instrument for enforcing rules, tantamount to "statutory common law," that the securities marketing system, as reorganized by federal legislation,¹¹⁴ presupposed but did not elaborate. Judging the

353 U.S. 448 (1957). Recent controversy has centered on enforcement of no-strike clauses. *E.g.*, *Buffalo Forge Co. v. United Steelworkers*, 428 U.S. 397 (1976); *Boys Mkts. Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235 (1970). On fiduciary duties of bargaining representatives, see, *e.g.*, *Vaca v. Sipes*, 386 U.S. 171 (1967); *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944).

In employment discrimination law, the discriminatory impact principle, see *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), finds only minimal support in statutory language per se, but plainly acquires justification from overall statutory objectives to alter significantly prestatutory employment patterns, and thus may be seen as at least analogous to a statutory common law development.

¹⁰⁹ 17 C.F.R. § 240.10b-5 (1981).

¹¹⁰ 401 F.2d 833 (2d Cir. 1968) (en banc), cert. denied, 394 U.S. 976 (1969).

¹¹¹ See, *e.g.*, *Goodwin v. Agassiz*, 283 Mass. 358, 186 N.E. 659 (1933); *Carpenter v. Danforth*, 52 Barb. 581, 584-86 (N.Y. App. Div. 1868). The common law did not so much license insider trading as reject the proposition that the director/shareholder relationship alone, at least against the backdrop of an established market for shares, imposed a fiduciary duty of disclosure upon the director. Whatever fiduciary duty the director held was owed to the corporation, not the shareholder, and the shares transaction by itself fell outside the scope of this management duty. See *id.* "Special facts," in addition to the director/shareholder relationship, could provide a basis for a disclosure obligation. See, *e.g.*, *Strong v. Repide*, 213 U.S. 419, 431 (1909). Such special facts, however, seemed to include clearly established and real informational asymmetries. See *id.* at 432. Moreover, courts finding no reason for imposing a duty emphasized the existence of apparent equal access to information, see, *e.g.*, *Danforth*, 52 Barb. at 589-91, and assimilated insider trading in shares to a more general contract law of disclosure in which at least the opportunity for equal access to information apparently played an important part. See *id.* at 588. Compare *Laidlaw v. Organ*, 15 U.S. (2 Wheat.) 178, 195 (1817), with *Etting v. United States Bank*, 24 U.S. (11 Wheat.) 57, 67-68 (1826) (argument of counsel) (reading *Laidlaw* in equality terms), and *Kronman, Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 9-18 (1978) (reading *Laidlaw* along more individualist lines). Common law "insider trading" jurisprudence was thus not entirely stable. Compare, *e.g.*, *Berle, Publicity of Accounts and Directors' Purchases of Stock*, 25 MICH. L. REV. 827 (1927) (arguing for general disclosure rule), with, *e.g.*, *Walker, The Duty of Disclosure by a Director Purchasing Stock From His Stockholders*, 32 YALE L.J. 637 (1923) (defending traditional rule). By 1960, at least one commentator was criticizing "[t]he trend in the common law of a growing minority of states" to impose fiduciary duties on insider trading. Conant, *Duties of Disclosure of Corporate Insiders Who Purchase Shares*, 46 CORNELL L.Q. 53, 53 (1960); see also *Langevoort, Insider Trading and the Fiduciary Principle: A Post - Chiarella Restatement*, 70 CALIF. L. REV. 1, 4-7 (1982).

¹¹² Section 10(b) of the Securities Exchange Act of 1934 is codified at 15 U.S.C. § 78j(b) (1976).

¹¹³ See *Dooley, Enforcement of Insider Trading Restrictions*, 66 VA. L. REV. 1, 56-59 (1980).

¹¹⁴ The principal statutes include the Securities Act of 1933, 15 U.S.C. §§ 77a-77ddd (1976 & Supp. IV 1980), and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a-78kk (1976 &

principal of equal access to information to be an important element of a "fair" market for securities market participants,¹¹⁵ the court regarded the insider trading ban as an appropriate system-reinforcing rule.

The Supreme Court in *Santa Fe Industries, Inc. v. Green*¹¹⁶ held that rule 10b-5 requires a showing of manipulation or deception, and not merely unfairness, in order to establish a violation.¹¹⁷ The Court emphasized statutory and regulatory language, but also noted that state law addressed the questions of fairness or business justification that plaintiffs believed rule 10b-5 should consider.¹¹⁸ The existence of established state law, given constitutional policies of federalism, suggested to the Court the desirability of a strict reading of rule 10b-5.¹¹⁹ In contrast with *Texas Gulf Sulphur*, in which the court relied ultimately on its understanding of statutory policies, in *Santa Fe* there was no single emphasis in the analysis. The case, for the reader, as easily turns on

Supp. IV 1980).

¹¹⁵ See 401 F.2d at 848. The idea is developed to a somewhat greater extent in the commentary cited by the court. See Cary, *Insider Trading in Stocks*, 21 BUS. LAW. 1009, 1010 (1966); Fleischer, *Securities Trading and Corporate Information Practices: The Implications of the Texas Gulf Sulphur Proceeding*, 51 VA. L. REV. 1271, 1274-76 (1965). The rule 10b-5 prohibition of undisclosed insider trading was of course not the creation of the *Texas Gulf Sulphur* court, but was in the first instance the product of the SEC. See, e.g., *In re Cady, Roberts & Co.*, 40 S.E.C. 907 (1961). As a matter of administrative law, the important emphasis on investor confidence revealed in the legislative history of federal securities laws, see generally FitzGibbon, *What Is a Security?—A Redefinition Based on Eligibility to Participate in the Financial Markets*, 64 MINN. L. REV. 893, 912-18 (1980), coupled with the chronically controversial status of insider trading at common law, see *supra* note 111, probably supplied a sufficient basis for the SEC interpretation of rule 10b-5, cf. Abernathy, *Title VI and the Constitution: A Regulatory Model for Defining "Discrimination"*, 70 GEO. L.J. 1 (1982) (administrative discretion as justification for Title VI "effects" test). But cf. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 212-14 (1976) (SEC rule 10b-5 may not go beyond language of authorizing statutory provision in order to relax scienter rule). Current debate on insider trading, however, typically concentrates not so much on the question of authorization as on the merits of the rule itself. In that context, notions of investor confidence and of the importance of the appearance of fairness frequently strike critics as difficult to define or verify. See, e.g., Dooley, *supra* note 113, at 37-47. Discussion instead often focuses on efforts to identify some more direct and personal injury to investors that insider trading might cause. See, e.g., Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 323-38 (includes partial survey of the voluminous literature).

¹¹⁶ 430 U.S. 462 (1977).

¹¹⁷ See *id.* at 473-74.

¹¹⁸ See *id.* at 478-79 & n.16. The case on its facts concerned a Delaware short-form merger, to which minority shareholders objected because: (1) pursuant to the Delaware statute, the merger was effected without prior notice to, or the vote of, the minority shareholders; (2) the merger was without valid business purpose; and (3) the compensation the shareholders received was allegedly inadequate. *Id.* at 465-68. Although the Supreme Court treated state law in this context as chiefly statutory, in fact it has been the equitable endorsement or effective canceling of statutory merger policy which has often functioned as the truly organizing impulse in state merger law. Indeed, *Santa Fe* immediately preceded the most recent active phase in state judicial lawmaking—in which Delaware courts in particular dramatically expanded equitable remedies against "unfair" mergers. See, e.g., *Roland Int'l Corp. v. Najjar*, 407 A.2d 1032 (Del. 1979) (short-form merger); *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977).

¹¹⁹ See 430 U.S. at 478-80.

statutory construction, constitutional policy, or substantive preference for state law approaches.¹²⁰

*Ernst & Ernst v. Hochfelder*¹²¹ prompted a Supreme Court opinion treating the language of rule 10b-5 as subordinate to the wording of section 10(b),¹²² and carefully comparing section 10(b) with other provisions of the 1933 and 1934 securities acts.¹²³ This emphasis on statutory construction, however, yielded the conclusion that section 10(b) did not authorize the rule 10b-5 cause of action, at least with regard to matters of scienter, to depart from the approach of traditional common law.¹²⁴ *Hochfelder* and *Texas Gulf Sulphur* thus appear to be method-

¹²⁰ This multiple emphasis derives, for example, from the inclusion in the *Santa Fe* majority opinion of the federalism/state law discussion as a separate section of the opinion, see *id.* at 477-80, even though the addition of this part prompted Justices Blackmun and Stevens to write separate opinions indicating their view that the further discussion (beyond statutory construction *per se*) was unnecessary, see *id.* at 480 (Blackmun, J., concurring in part); *id.* at 480-81 (Stevens, J., concurring in part). Given its willingness to tolerate these departures, we may fairly assume that the majority attributed to its federalism/state law analysis some measure of independent significance.

In its repercussions, *Santa Fe* also illustrates the more general point I have been making about the ease with which we treat legal resources as multiple. The Supreme Court in *Santa Fe* indicated that failure to disclose the short-form merger in advance was not in and of itself a rule 10b-5 violation because under Delaware law minority shareholders could have done nothing to stop the merger even if they had in fact known of it. See *id.* at 474 n.14. The implication, of course, was that, if state law had indeed provided a possible premerger remedy, nondisclosure might have been actionable. Several of the federal circuit courts have subsequently elaborated on this idea, and taking advantage of recent state judicial development of injunctive remedies against unfair mergers (or other one-sided transactions), see *supra* note 118, have held that, while federal law of itself does not define the fiduciary duties of dominant actors in corporate politics, federal law nonetheless does impose an obligation on such actors to make sufficient prior disclosure so that possible state law duties might be enforced, see, e.g., *Goldberg v. Meridor*, 567 F.2d 209 (2d Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978). The 10b-5 inquiry thus now works with two bodies of law simultaneously. "Only if the relevant state law recognizes the viability of the plaintiff's claim will a federal claim be possible." Ferrara & Steinberg, *A Reappraisal of Santa Fe: Rule 10b-5 and the New Federalism*, 129 U. PA. L. REV. 263, 292-93 (1980). For collections of post-*Goldberg* cases, detailed discussion of the new action, and criticism of the federal/state hybrid as inconsistent with *Santa Fe*'s overall thrust, see, e.g., Lashbrooke, *The Alternative-Action Requirement: The Derailment of Santa Fe*, 1981 DUKE L.J. 963; Comment, *Santa Fe Industries v. Green Revisited: A Critique of Circuit Court Application of Rule 10b-5 to Breaches of Fiduciary Duty to Minority Shareholders*, 28 U.C.L.A. L. REV. 564 (1981).

¹²¹ 425 U.S. 185 (1976).

¹²² See *id.* at 212-14.

¹²³ See *id.* at 197-211.

¹²⁴ Plaintiffs must prove that misrepresentations were "knowing"—intentional or perhaps reckless. *Id.* at 193. The Supreme Court did not itself determine whether "recklessness" would constitute "a mental state" legally equivalent to "intent to deceive, manipulate, or defraud." *Id.* at 193 n.12. Lower federal courts, however, have generally recognized "recklessness" as a form of "scienter," although the cases differ in their descriptions of what "recklessness" involves. See Kaler, *Scienter After Hochfelder: Recklessness as a Standard in Rule 10b-5 Private Damage Actions*, 6 J. CORP. L. 337, 344-51 (1981).

In *Hochfelder*, the common law origins of the "scienter" idea were not so much acknowledged as taken for granted. See 425 U.S. at 193 n.12. Courts and commentators, however, have had no difficulty in recognizing the common law model underlying the Supreme Court's analysis. See, e.g., *Rolf v. Blyth, Eastman Dillon & Co., Inc.*, 570 F.2d 38, 44-46 (2d Cir.), *cert. denied*, 439 U.S. 1039 (1978); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 257-59 (1976).

ological opposites. In *Texas Gulf Sulphur*, the court did not linger over statutory language, acted as though it were engaged in common law adjudication, and yet framed a rule in terms of its understanding of statutory policies. But in *Hochfelder*, the Supreme Court read relevant statutory provisions closely, and treated legislative detail as revealing, only to discover in this detail the organizing presence of extrinsic common law ideas. Thus, in the end, the Court relied little on ideas of statutory policy as such.¹²⁵

These relationships—substitution, incorporation, retrogression, analogy, system-reinforcement—are easy to see and important to see only to the extent that we assume, at least provisionally, that there exists no master source of law. Only given this assumption will legal analysis often seem to involve, at least as a first step, an effort to fix the form in which multiple sources of law interact. Contemporary legal thought, however, indeed tends to suppose that legal resources are importantly differentiated and thus often adopts a “choice of law” mentality as a typical analytical mode. I suspect and hope that the examples I have offered struck most readers as utterly banal; many more equally unimaginative illustrations readily come to mind. The proliferation of legal media is an utterly commonplace feature of the contemporary legal environment.¹²⁶

¹²⁵ In *Chiarella v. United States*, 445 U.S. 222 (1980), the Supreme Court concluded that failure to disclose material information before trading is actionable under rule 10b-5 only if the holder of the information bears a duty to disclose because of a preexisting fiduciary relationship or some similar reason. See *id.* at 227-31. Justice Powell explicitly linked rule 10b-5 with common law doctrine. See *id.* at 227-30. Indeed, the *Chiarella* approach to inside information mirrors almost exactly the older common law formulations. See *supra* note 111. As a result, although Justice Powell was careful to cite *Texas Gulf Sulphur* approvingly, see 445 U.S. at 230, *Chiarella*, even more than *Hochfelder*, seems to be inconsistent with the earlier emphasis on the integrity of securities markets as entities rather than on the precise character of particular transactions. See, e.g., Wang, *Trading on Material Nonpublic Information on Impersonal Stock Markets: Who Is Harmed, and Who Can Sue Whom Under SEC Rule 10b-5?*, 54 S. CAL. L. REV. 1217, 1269-71, 1282-94 (1981). But cf. *Herman & MacLean v. Huddleston*, 103 S. Ct. 683, 687-90 (1983) (noting, *inter alia*, “broad remedial purposes” in holding that rule 10b-5 may overlap with another securities law right of action).

¹²⁶ The tendency toward multiplicity surfaces even within constitutional law, notwithstanding the supremacy, unity, and self-containment this legal regime sometimes seems to claim for itself. This is not the place for a detailed account. Even a quick survey, however, might note: (1) the Supreme Court’s recognition (not without hesitation) of the power of Congress to ground legislation on a reading of constitutional language that differs from the Court’s own interpretation, see, e.g., *Katzenbach v. Morgan*, 384 U.S. 641 (1966); (2) the doubts expressed by commentators about the Court’s denial to state lawmakers of a similar interpretive freedom, see, e.g., L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-4 (1978); Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978); and (3) the Court’s willingness to regard self-conscious and summary state borrowing of federal constitutional law (so long as it is done explicitly) as an appropriate form of “state” law, see, e.g., *Crawford v. Board of Educ.*, 102 S. Ct. 3211 (1982). On a less metaphysical plane, the Supreme Court or at least some of its members have on occasion: (1) treated state law or federal statutory law as decisive of the question whether procedural due process rights are relevant, see, e.g., *Bishop v. Wood*, 426 U.S. 341 (1976); *Arnett v. Kennedy*, 416 U.S. 134 (1974) (plurality opinion); (2) referred to features of, or

This conclusion, however, is subject to the following objection: The sources of law, the legal media that I have described as coexisting in an unresolved state of multiplicity, may not be "true" sources of law after all. Their differentiation may be a mere surface effect, obscuring but not denying an underlying unity in the content of law, a content cutting across the fractured forms. Notably, even as we have become aware of the absence of any clear hierarchy among the most obvious or immediate sources of law, we also have relaxed our idea of what we mean by legal analysis. Or at least, we have come to believe that there is a legitimate question whether we should do so. Straightforward exercises in reading court decisions or statutes no longer strike us as always satisfactory ways of reaching or defending legal conclusions. These texts, we suspect, often refer to or reflect more fundamental sources of law. Not surprisingly, therefore, no small part of the on-going legal argument of our time concerns whether, in particular contexts, traditional forms of analysis should give way to alternatives rooted in some more solid ground.¹²⁷

And yet, even at this second level, unity does not in fact appear. The multiplication process simply repeats itself in our efforts to identify a foundation. Sometimes, the attempt to move beneath the surface of legal doctrine is identified simply as an inquiry into "policy." This may involve nothing more than a reference to common sense practical or moral considerations.¹²⁸ The idea of policy, however, provides only an empty unity. Everything depends upon the particular context.¹²⁹ In

ideas behind, federal civil procedure as though they settled article III justiciability questions, see, e.g., *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980); *Sosna v. Iowa*, 419 U.S. 393 (1975); and (3) invoked notions of unjust enrichment as fixing a bias within which constitutional analysis develops, see, e.g., *Reeves, Inc. v. Stake*, 447 U.S. 429 (1980) (the efforts of opposing party justify rejecting constitutional claim); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (same).

¹²⁷ The recurring debate about the foundations of constitutional law provides one familiar example. The catalyst of the most recent version of this debate was J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). Representative responses include, e.g., Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486 (1982); *Symposium: Judicial Review versus Democracy*, 42 OHIO ST. L.J. 1 (1981). For one summary of earlier debate, see Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169 (1968). See also P. BOBBITT, *CONSTITUTIONAL FATE* (1982) (constitutional law as consisting of mix of various types of arguments). The (perhaps) momentarily settled dispute about the "stuff" of antitrust law is another obvious illustration. See Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979) (victory claim).

¹²⁸ See, e.g., Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521, 571-77 (1982).

¹²⁹ The tendency toward "particularity" is especially prominent (although perhaps not inevitable) when, as is frequently the case, attention to "policy" takes an interest-balancing form. See, e.g., Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962); Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755 (1963).

our systematic moments, we claim to be able to describe with some precision or derive authoritatively the images to which legal instruments refer for content or the influences to which that content responds. Our efforts to articulate this more elaborate version of policy, though, result in a further embarrassment of riches.

For example, some legal writers treat central notions of neoclassical microeconomics theory either as the basis of a logic that organizes legal behavior¹³⁰ or, more commonly, as a rich mine of ideas that explains persuasively a wide variety of legal rules¹³¹ or provides a basis for criticizing particular rules.¹³² Other theorists adopt a Marxist perspective and emphasize the masking, legitimating, or revealing features of legal surfaces and relate these characteristics (although not always straightforwardly) to underlying class conflict or domination.¹³³ Still another school borrows from Anglo-American philosophy. Close analysis of settled uses of language becomes a starting point for attributing meaning to (or building theory on the basis of) legal terms.¹³⁴ States of nature or original positions, or assumptions about the priority of the individual, also move from philosophical argument to legal discourse.¹³⁵

The questions of how ideas of policy should figure in legal analysis and whether such policy is analyzable in general terms have been the subject of considerable recent jurisprudential debate. See, e.g., R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991 (1977); Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 CORNELL L. REV. 707 (1978). Professor Summers has also attempted to put these questions in historical perspective. See Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861 (1981).

¹³⁰ See, e.g., Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Rubin, *Why Is The Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977). For a critical reappraisal, see Cooter & Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139 (1980).

¹³¹ See, e.g., Landes & Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978).

¹³² See, e.g., McCoid, *Bankruptcy, Preferences, and Efficiency: An Expression of Doubt*, 67 VA. L. REV. 249 (1981).

¹³³ See, e.g., Davis, *Critical Jurisprudence: An Essay on the Legal Theory of Robert Burt's Taking Care of Strangers*, 1981 WIS. L. REV. 419; Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1347-58 (1979).

¹³⁴ We can see the impact of so-called "ordinary language" analysis, for example, in the "rights thesis," see generally R. DWORKIN, *supra* note 129, especially insofar as that idea has entered constitutional theory, see, e.g., Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U.L.Q. 659, 659-60; Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV.; 1065, 1077-78 (1977); see also, e.g., Note, *The Speech and Press Clause of The First Amendment as Ordinary Language*, 87 HARV. L. REV. 374 (1973). Philosophical approaches to understanding the idea of "cause" have somewhat similarly contributed to the theory of tort law. See, e.g., H.L.A. HART & A. HONORE, *CAUSATION IN THE LAW* (1959); Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973).

¹³⁵ E.g., Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). Ideas associated with various

Custom has its adherents as well. Anthropology (at least by analogy) is thus yet another source of law.¹³⁶ I could add other examples.¹³⁷ The point, I think, is clear: proliferation is once more a characteristic phenomenon.

Isn't this all simply cliché? Legal resources take many forms. In law, as in other aspects of life, "[t]he springs of conduct are subtle and varied."¹³⁸

It is indeed part of my point that the preceding discussion simply summarizes something obvious. But once we start thinking about legal media, and bring the obvious (for a change) into focus, the very ease with which the exercise elaborates is unsettling. Insofar as legal analysis involves an attempt to identify the underlying legal medium, our jurisprudence paradoxically loses definition. It is in fact our modern habit, I believe, to treat sources of law as ordinarily plural.¹³⁹ If we need only to describe the relationship in a particular context of several sources of law, we usually face no special difficulty. Indeed, our ability to work through a particular question is often greatly enhanced precisely because we find it easy to represent the matter as mosaic, requiring not so much an act of choice as a sense of fit.¹⁴⁰ We cannot, how-

versions of natural rights philosophy frequently figure in arguments ostensibly preoccupied with other matters. See, e.g., Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. REV. 689, 733 (1976). Professor Grey has asserted that a focus on individual autonomy is both commonplace and misleading as a description of Supreme Court analysis. See Grey, *Eros, Civilization and the Burger Court*, LAW & CONTEMP. PROBS., Summer 1980, at 83, 84-86, 98-100 (1980).

¹³⁶ See, e.g., Clark, *The Morphogenesis of Subchapter C: An Essay on Statutory Evolution and Reform*, 87 YALE L.J. 90 (1977) (anthropological notions of "culture"). It is not uncommon to treat article 2 of the Uniform Commercial Code as an obvious and significant illustration of an anthropology-based analysis that treats custom as decisive of legal conclusions. See, e.g., Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 625 & n.15 (1975). However accurate this characterization, it is nonetheless also interesting to note that Karl Llewellyn, Chief Reporter of the UCC, in his best known anthropological work emphasized the "legal tact" or special facility of the Cheyenne Indians for formulating legal mechanisms or symbols that affirmatively resolved or at least pushed into the background underlying social conflicts. See K. LLEWELLYN & E. HOEBEL, *THE CHEYENNE WAY* (1941).

¹³⁷ See, e.g., Clark, *The Interdisciplinary Study of Legal Evolution*, 90 YALE L.J. 1238 (1981).

¹³⁸ *DeCicco v. Schweitzer*, 221 N.Y. 431, 438, 117 N.E. 807, 810 (Ct. App. 1917).

¹³⁹ The fact of multiplicity is one commentators frequently assume in the background of their arguments, see, e.g., Epstein, *The Social Consequences of Common Law Rules*, 95 HARV. L. REV. 1717, 1718-19 (1982); Stewart & Sunstein, *supra* note 108, or take for granted while disagreeing about the identity of the most pertinent manner in which multiplicity is expressed, compare, e.g., Ball, *Don't Die Don Quixote: A Response and Alternative to Tushnet, Bobbitt, and The Revised Texas Version of Constitutional Law*, 59 TEX. L. REV. 787, 792 (1981), with, e.g., Bobbitt, *A Reply to Professor Ball*, 59 TEX. L. REV. 829, 829-30 (1981). Sometimes multiplicity is indeed directly addressed. See, e.g., G. GILMORE, *supra* note 2, at 86-90, 107-08. As far as I can tell, however, only rarely if ever do we attempt to represent the fact of multiplicity as itself problematic, as within the field of controversy, rather than as simply a given phenomenon to be accepted or mourned.

¹⁴⁰ See, e.g., Brilmayer, *Legitimate Interests in Multistate Problems: As Between State and Federal Law*, 79 MICH. L. REV. 1315 (1981); Currie, *Misunderstanding Standing*, 1981 SUP. CT.

ever, proceed further, and approach the problem of ordering systematically. We have no alternative, in the absence of accepted hierarchical principles, but to limit our field of vision; to concentrate on microcosmic order while ignoring the larger jumble.

We find ourselves in a difficult position. Much present thought seems concerned with identifying and working out the characteristics of the various legal media. This effort, we can see, ends in an unresolved multiplicity. We might therefore abandon, now that we are aware of it, our emphasis on legal media, and attempt to restore, by changing subject, some unifying perspective to our analysis. But this obviously involves an important reorientation of the center of gravity of legal thought. We might alternatively deemphasize the idea of unity. This approach, though, seems equally radical. It would not bring the notion of media back to the center. We would require access to a set of ideas making it possible to account for the differentiating features of legal theories. The image of unresolved multiplicity, the chief by-product of the emphasis on legal media, does not so much help organize this project as deny its possibility.

III. STYLE AND CLASSICAL STYLE

We need to shift emphasis. One way of accomplishing this reorientation would be to increase the extent to which we regard legal analysis as imposing upon legal media their decisive characteristics, rather than as reflecting or otherwise responding to the immanent contours of the media themselves. We could then adopt a more or less agnostic stance with regard to the question whether legal materials are truly diverse or in some underlying sense unitary. Controversy would instead revolve around questions concerning the means through which legal analysis expresses and organizes itself. These questions, we will see, permit a range of answers; we may escape, therefore, the Parmenidean choice between unity and unanalyzable multiplicity that the emphasis on legal media leaves us.

The specific agent of transition, I believe, is the idea of style. Style is difficult to define precisely.¹⁴¹ I will treat it as bringing together two

REV. 41; Oxman, *The Third United Nation's Conference on the Law of the Sea: The 1977 New York Session*, 72 AM. J. INT'L L. 57, 67-74 (1978).

¹⁴¹ Style is regarded by most of its analysts as a contested concept. See, e.g., N. GOODMAN, *WAYS OF WORLDMAKING* 23-40 (1978). This characteristic of the term is very important for my argument. I do not want to appear to be proposing simply another "foundation" for law—a kind of "law and aesthetics." Questions of style, it seems to me, cut across questions of media; that is the reason (given the proliferation of legal media) for examining the prospects of a stylistic emphasis. My discussion of style, therefore, starts from the proposition that "style" does not refer to some worked out system of thought from which law should borrow, but rather is a kind of "common

other sets of ideas: notions of form and substance and temper or sensibility. I also regard the concept of style as differing in important ways from the usual ideas of structure or consciousness. None of these additional terms, obviously, is any more self-specifying than style itself. They suggest, however, a series of observations. These comments will not amount to a systematic account of the idea of style, but they will, I think, supply some working definitions.

The analysis of style for my purposes begins with the question of the relationship of form and substance in a given legal work—for example, a statute, judicial opinion, or critical essay. I assume that form has a content of its own. Form not only fixes substance, but in the process of fixing, expresses a judgment about substance. It manifests and enforces within the given work a particular conception of what is expressively correct. Form, that is, reveals a work's own sense of what its success presupposes: of the way that an idea should be put in order to assert its reality (or validity).

Form thus does not function as a kind of neutral technology. Indeed, we may at times regard our means of expression as establishing rigid categories, and as therefore radically limiting the range of what is communicable. I do not mean to suggest, however, that form necessarily censors substance to this degree or in this fashion. We can just as easily regard form as "free," as widely variable, as reinvented in each work. Importantly, though, formal freedom (and thus substantive leeway) is only an aggregate phenomenon. Even if form varies widely from work to work, each particular work possesses some form. In each work, its form registers and expresses a sense of the well-put.

The idea of style places relationships of form and substance in comparative perspective. It therefore enables us to describe these relationships in more concrete terms. Form, I have just suggested, reveals itself as a kind of metaphysics; as expressions within a given work of what it is that organizes and limits the substance of legal argument. In the process of expressing some conclusion, a particular legal work will display a series of attributions. The organization of its argument, or the images to which it refers, for example, will identify somehow what the work treats as "importantly real," "truly present," "of particular value," or otherwise "foundational." What these attributions have in common, or perhaps fail to have in common, is the substance of style. We discover the temper or sensibility of the given legal work: the basis (on stylistic grounds) for grouping or not grouping the given work with

property" relevant to thinking and writing about many subjects. At the close of the discussion, I will briefly sketch other treatments of the idea of style—partly paralleling and partly differing from my own analysis. See *infra* note 143.

others.

Temper or sensibility carry three particular associations that further specify the distinctive characteristics of any analysis of legal style. They help make the idea of style itself more concrete. There is first an idea of an organizing predisposition. Law, as we find it in legal works, must be something we cannot fully describe simply by listing its usual subject matters, doctrinal propositions, or patterns of results. Choices of subject, the content or form of doctrine, or the distribution of results, cannot strike us as arbitrary or otherwise impervious to analysis. We must see (or be prepared to look for) a common element or organizing pattern. Temper or sensibility, however, also varies. No organizing predisposition may appear to us as necessary or inevitable. Law must possess a contingent coherence. Finally, temper or sensibility are not imposed characteristics. A description of style does not treat what it identifies as the important aspects of legal materials as borrowed or reflected, but as original in the materials themselves. Such a description would not look outside the law (as it were) for its model, but would find in legal materials themselves, in their modes of organization, tone, topics, or imagery, its first subject for study.

Style as temper or sensibility obviously resembles notions of structure or consciousness but it also carries with it some importantly different connotations. Discussions of structure or consciousness tend to emphasize what we (perhaps inevitably) bring to the process of articulating a legal argument. Structure or consciousness, we might say, refer to the cultural or personal psychology of the "author" of a legal work. Style, however, assigns privileged status to the legal work itself. It treats the given work as though it were distinct or independent, not merely a product.¹⁴² The author—or her, his, or its "psychology"—remains in the background. Arguably, style and structure simply refer to different starting points. The characteristics of a work usually tell much about the frame of mind of the author. The important features of an author's consciousness suggest corollary elements within the author's work. The choice of starting point, however, can carry with it a kind of political bias.

If we begin by stressing what we bring to legal argument, by describing the impact of some overarching consciousness, regardless of how we precisely conceive of it, we may find it easier to treat legal work as, in the main, both predestined and relatively fixed—a result or expression of something else rather than itself a choice. This bias is

¹⁴² I thus discuss "style" rather than "aesthetics" because the latter term carries with it a structural emphasis, calling attention first to a surrounding milieu rather than the work itself.

certainly resistable. The best structuralist writing, indeed, may derive its persuasive force from its depiction of *both* the difficulty and the possibility of moving outside established categories of thought. The idea of style, however, reverses the bias altogether. If we discover that a certain family of attributions predominate within a given work, we do not, simply by reason of that discovery, learn anything about the inevitability of the display. The analysis of style, although it ends up as an exercise in comparison and grouping, tends to represent its generalizations as ordinarily tentative. Style carries with it a bias toward contingency—stable order is its exceptional case.¹⁴³

¹⁴³ As I indicated earlier, the idea of style is not easily pinned down. See *supra* note 141. Not surprisingly, therefore, my efforts to describe it depart from the views of some notable writers who have drawn on the term but parallel the usages of others.

In some works, style is largely restricted in its reference to matters of form or manner; choices of subject, or the recovery of meaning or content, become topics for a separate inquiry. See, e.g., E. PANOFSKY, *STUDIES IN ICONOLOGY* 14-15 (1967). At first glance, this association of style with manner seems to figure in Llewellyn's writing about legal style, especially insofar as he meant to link his analysis of style with his conception of legal realism as a kind of "technology." Compare K. LLEWELLYN, *supra* note 1, at 36, with *id.* at 510-12. See, generally G. WETTER, *THE STYLES OF APPELLATE JUDICIAL OPINIONS* 43-45 (1960); Llewellyn's efforts to distinguish Grand Style and Formal Style, as well as a modern Style of Reason increasingly resembling Grand Style, nonetheless led him to what seem to be questions of substance—in both a general sense and in terms of judgments about results in particular cases. Thus, (to oversimplify) he linked Grand Style and the Style of Reason with a view of law as consisting of principles or policies, see, e.g., K. LLEWELLYN, *supra* note 1, at 36, brought into focus, tested, and ultimately symbolized by the worked out facts in the particular case, see, e.g., *id.* at 121-26. And he criticized Justice Story's decision in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), largely through an attack on the Formal Style preference for regarding law as rules rigorously conceived, insofar as that preference was expressed in *Swift* through an emphasis on consideration or value rather than course of trade. See K. LLEWELLYN, *supra* note 1, at 414-17; see also *supra* note 29. This difficulty in separating style and substance arguably calls into question the idea of linking style and form. See N. GOODMAN, *supra* note 141, at 27. Another response (the one I adopt) proceeds by restating the idea of form and substance not as a dichotomy but as a relationship. For two well-known efforts of this sort, see C. ALEXANDER, *NOTES ON THE SYNTHESIS OF FORM* 15-27 (1964); K. BURKE, *THE PHILOSOPHY OF LITERARY FORM* 1-137 (1973). Once form is recast, its role as a starting concept in thinking about style regains plausibility. See Schapiro, *Style*, in *ANTHROPOLOGY TODAY* 287, 290-92 (1953).

The idea of style and form as registering a kind of metaphysics within the work is a crude version of what I take to be an important organizing premise of Auerbach's well-known analysis of mimesis. See, e.g., E. AUERBACH, *MIMESIS: THE REPRESENTATION OF REALITY IN WESTERN LITERATURE* 359-94 (1953). A similar notion is succinctly developed in A. SCHOENBERG, *New Music, Outmoded Music, Style and Idea*, in *STYLE AND IDEA* 121 (L. Stein ed. 1975), and in White, *The Problem of Style in Realistic Representation*, in *THE CONCEPT OF STYLE* 213-29 (B. Lang ed. 1979).

Although my connection of style with temper or sensibility has analogies in other discussions, see, e.g., Schapiro, *supra*, at 292-95, it touches on a difficult question: whether style is a property of the work, or rather an attribute of the work's creator. See generally Lang, *Style as Instrument, Style as Person*, 4 *CRITICAL INQUIRY* 715 (1978). I treat the work as the primary subject, but read the work as an expression of a set of conclusions or suppositions held by its producer—a kind of compromise of the two positions. See Walton, *Style and the Products and Processes of Art*, in *THE CONCEPT OF STYLE*, *supra*, at 45, 45-46, 51-56.

In emphasizing a contingent, "chosen" element in style, I follow what is today a standard line of thinking. See, e.g., Meyer, *Toward A Theory of Style*, in *id.* at 3, 3-8. The idea of choice nonetheless remains controversial. In all likelihood, much of what we treat as stylistic choice was not consciously "put there" (through a decision about alternatives) by the producer. See N. GOOD-

There is, we can see, plainly a sense in which style is infinitely variable, unique to each work. But we may also usefully refer to common styles if we keep in mind their contingency. Certain organizing tendencies recur, even as they also vary, in many legal works. Within contemporary legal writings, one common style dominates. I will call that style the classical style. Ironically, in its substance, classical style purports to deny one central assumption underlying the idea of style—the very notion of contingency that I have repeatedly emphasized, that supplies the idea of style with its special implications.

A classical mode of presentation or representation exhibits in its choices of organizing principles decided preferences for clarity, order or balance, and the appearance of universality.¹⁴⁴ These preferences may reveal themselves critically: as expectations about what we ought to be able to apprehend and portray about the subjects of our thought. Clarity or other classical values, from this perspective, become features of a subject that we *should* grasp or render. The absence of these elements, in our depictions, thus possesses normative significance. It is evidence of mistake or failure.¹⁴⁵

Use of classical assumptions as a standard of criticism or judgment is commonplace in legal writing. *Griswold v. Connecticut*¹⁴⁶ supplies a familiar example. Justice Douglas, in explaining why the state law

MAN, *supra* note 141, at 23, 36. That is, the producer is something of an artifact in discussions of style. The choices (even if we think of them as expressions of producer suppositions) comprise our identification of pertinent aspects of the work, *see, e.g.*, K. LLEWELLYN, *supra* note 1, at 519 n.16; and through the work we construct our image of the producer, *see Ackerman, A Theory of Style*, 20 J. AESTHETICS & ART CRITICISM 227, 227 (1962).

"Choice" figures in my account both as a background idea for my discussion of the work as registering or expressing a metaphysics and as a component part of the notion of contingency that provides the basis for my distinction between style and structure. This latter separation would have been more difficult earlier in the century, in the heyday of notions of period styles and generalized historical analysis—notions which, from the perspective of the particular work, set style up more as part of a constraining environment. *See, e.g.*, H. WOLFFLIN, *THE PRINCIPLES OF ART HISTORY* 9-16 (1950); *see also* E. GOMBRICH, *ART AND ILLUSION* 375-81 (1960). *See generally* Schapiro, *supra*, at 296-303. Notably, Llewellyn's approach to style started with the period style idea. *See* K. LLEWELLYN, *supra* note 1, at 36. The tendency today, however, runs away from the idea of period style, treating the individual work as the more relevant unit—at least as a starting point. *See, e.g.*, Ackerman, *supra* at 236-37; Alpers, *Style Is What You Make It: The Visual Arts Once Again*, in *THE CONCEPT OF STYLE*, *supra*, at 95, 95-98, 117. At the extreme, style is drastically deemphasized, through an association with the idea of signature, becoming in the work only the identifying trace of the producer, *see, e.g.*, N. FRYE, *ANATOMY OF CRITICISM* 268 (1957); alternatively, we link style with figural intensification or exaggeration, *see, e.g.*, P. DEMAN, *ALLEGORIES OF READING* 40 (1979). Other terms take up the larger task of metaphysical decoding that I assign to style. From this perspective, my attempt to work with style as a major term would appear old-fashioned. On the idea of a group style as more an aggregate, analyzed first in terms of individual works, and less an imposed structure, *see* C. ROSEN, *THE CLASSICAL STYLE* 19-23 (1972).

¹⁴⁴ *See generally* J.F. KERMODE, *THE CLASSIC* (1975).

¹⁴⁵ *See generally* PRINCETON ENCYCLOPEDIA OF POETRY AND POETICS 138-40 (A. Preminger ed. 1974).

¹⁴⁶ 381 U.S. 479 (1965).

prohibiting use of contraceptives was unconstitutional, portrayed the Bill of Rights as surrounded by a set of "peripheral rights" or "penumbras" or "emanations."¹⁴⁷ The choice of words is perhaps distracting. Douglas, however, was in essence advancing the rather straightforward proposition that we cannot claim to take seriously the specific rights mentioned in the Bill of Rights unless we are also willing to recognize certain other rights. Enforcement of these latter rights has its origin in the same concerns that explain the inclusion of the particular rights listed in the Bill of Rights, and thus acquires an obligatory force. It is "necessary in making the express guarantees fully meaningful."¹⁴⁸ The *Griswold* majority opinion, we can see, depicted its own persuasiveness as following from the sense of completeness it creates—or a sense of the incompleteness we would perceive in our constitutional scheme if the opposite result were reached.¹⁴⁹ The appeal to classical biases is obvious.

Of course, we can also readily note why in classical terms *Griswold* is nonetheless controversial. Even as it claimed completeness as its norm, the Douglas opinion also asserted that the constitutional text is no more than a partial description of the rights that constitutional law protects.¹⁵⁰ Because the idea of a "written constitution" is such a prominent feature of constitutional rhetoric, *Griswold* opened itself up to classical criticism through the very way it invoked classical norms.¹⁵¹ Justice Goldberg's concurring opinion attempted to minimize the departure from the image of a complete constitutional text by emphasizing that the Bill of Rights, in the ninth amendment, acknowledges its own incompleteness.¹⁵² Not surprisingly, if we hold classical biases, this effort cannot be entirely persuasive.¹⁵³

¹⁴⁷ See *id.* at 483, 484.

¹⁴⁸ *Id.* at 483.

¹⁴⁹ See Black, *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 32 (1970).

¹⁵⁰ See, e.g., *Griswold*, 381 U.S. at 482.

¹⁵¹ Critics of the Douglas opinion in *Griswold* argue that there is nothing in the emphasis on "peripheral" or "penumbral" rights that stops analysis short of ignoring the constitutional text altogether, in effect sanctioning recognition of whatever rights judges regard as "fundamental." See, e.g., Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235, 252-54 (1965). Professor Black, in defending *Griswold*, reasserts the textual connection in revised and amplified form. See Black, *supra* note 149, at 39-41. On the importance of the idea of the "written" constitution in constitutional law generally, see Levinson, *supra* note 25.

¹⁵² See *Griswold*, 381 U.S. at 489-93 (Goldberg, J., concurring).

¹⁵³ It is possible to read the ninth amendment as entirely consistent with the idea of a "closed" constitutional text. "The historical evidence . . . suggests that the ninth amendment is not a cornucopia of undefined federal rights, but rather that it is limited to a specific function, well-understood at the time of its adoption: the maintenance of rights guaranteed by the laws of the states." Caplan, *The History and Meaning of the Ninth Amendment*, 69 VA. L. REV. 223, 227 (1983). Mr. Caplan collects the extensive post-*Griswold* ninth amendment commentary.

Classical predispositions also suggest a distinctive positive expression. The appropriate values concentrate themselves, as it were, in the concept of the classic: an entity that may only rarely present itself fully developed in practice, but that nonetheless remains plausible—possibly realizable—because, or to the extent that, we accept classical norms. A classic is a complete (in this sense universal and permanent) account. It is a presentation or representation that so obviously succeeds in demonstrating the correspondence of what it emphasizes in its subject and the characteristics of its medium that it thereby justifies not only its choice of subject and medium, but the priority of the emphasis it asserts. Because it admits of no alternative, a classic both describes and constitutes a universe. It fuses signifier and signified. In Eliot's famous phrase, the classic "exhausts the language."¹⁵⁴

Henry Hart's *Dialogue*¹⁵⁵—famous within the law of federal jurisdiction—provides one illustration of how legal analysis sometimes lays claim to the form of the classic. Congressional control over the jurisdiction of federal courts raises at least two unsettling questions. How is it possible for courts to regard themselves as operating independently of legislative political processes if their jurisdiction is open to congressional manipulation?¹⁵⁶ Perhaps constitutional review of such

I do not mean to suggest that we should judge the *Griswold* decision solely on the basis of how well the Douglas or Goldberg arguments square with classical assumptions. My point, rather, is that it is these assumptions that Justices Douglas and Goldberg invoke or address. Nor do I mean to claim that the appeal to classical values is the only element in the argument of the Douglas opinion. Justice Douglas at one point asks, "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives?" *Griswold*, 381 U.S. at 479. The question, while rhetorically charged, in one sense begs its conclusion. See Tribe, *The Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 17 n.83 (1973). It also suggests, however, notions of rights of "privacy" as resting either in a specific sense of the inevitable conflict of police and citizen, see W. DOUGLAS, POINTS OF REBELLION 5-6 (1970), or a more general reaction against "the forces and pressures of homogenization," L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-2, at 890 (1978). It is by no means clear that these alternative formulations frame their appeal in classical terms.

¹⁵⁴ T.S. ELIOT, WHAT IS A CLASSIC? 24 (1944). In modern writing, the idea of the classic often plays a greater role than the notion of classical style per se. This recent emphasis, it seems to me, is of a piece with the larger tendency to work with style primarily at the level of the particular work. See *supra* note 143. Starting with the particular work (the classic) seems to permit a wider range of constructions to be treated as "classical." It is important to note, however, that classical impulses as such do not disappear, but take the form of implicit hermeneutic rules—most notably, a requirement that the starting text not be disfigured, that it remain, and be celebrated as remaining, a "whole" and thus as fixing boundaries (even if we experience them as a kind of revelation or liberation) on what we may discern from the text. See, e.g., D. TRACY, THE ANALOGICAL IMAGINATION 99-229 (1981). For a particularly dramatic encounter with the limits a classic fixes on its reading, see F. JAMESON, THE POLITICAL UNCONSCIOUS 17-102 (1981) (attempting to fit modernism within Marxist literary theory).

¹⁵⁵ Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953).

¹⁵⁶ Writing more recently than Hart, Professor Black has argued that the risk of congressional manipulation is in fact of benefit to the judiciary. The failure of Congress to limit jurisdiction is an implicit sanction of constitutional review by the courts, and the courts thus obtain at

legislative rearrangement in principle limits congressional discretion enough to insure the stability of judicial independence. But how is such review itself possible in the crucial cases, in which the very jurisdiction to review is subject to manipulation? In the face of legislative withdrawal of its power to adjudicate, a court is—of necessity, it would seem—powerless to respond.¹⁵⁷ The *Dialogue's* underlying objective, I believe, was to demonstrate that both of these questions could be reassuringly answered if they were treated not as matters outside the ordinary concern of legal argument—questions of political or conceptual deep structure—but as issues no different in kind from the usual run of judicial business.

Hart on occasion simply asserted that important aspects of federal jurisdiction were secure under the Constitution from abusive congressional tampering.¹⁵⁸ The principal strategy of the *Dialogue*, however, was to avoid directly confronting the question of jurisdictional control. Sometimes, Hart noted, apparent congressional regulation of jurisdiction was really only a limitation of remedy, and thus presented no unusual issues.¹⁵⁹ Genuine jurisdictional issues, Hart emphasized, arose in many contexts, in most of which, because of the overlap of jurisdictional statutes¹⁶⁰ or for straightforward reasons of statutory construction,¹⁶¹ there was no barrier to constitutional review. Crucially, the substance of this delineation invoked component elements of the idea of adjudication itself—distinctions between the government as plaintiff or

least an indirect equivalent of support ultimately originating in the electorate. See, e.g., C. BLACK, *DECISION ACCORDING TO LAW* 17-19, 37-39 (1981). Other analysts, however, disagree. See, e.g., Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 38-42 (1981); Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129, 131-32 (1981).

¹⁵⁷ Language in *Ex Parte McCordle*, 74 U.S. (7 Wall.) 506 (1868), seems to support the conclusion that jurisdictional withdrawals deprive courts of their usual capacities (presumably including constitutional review): "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Id.* at 514. Professor Hart quotes this passage as "the most spectacular" example "of what may be thought to be injudiciously unqualified statements of the power of Congress . . ." Hart, *supra* note 155, at 1362. In *McCordle* itself, however, the Supreme Court plainly engaged in constitutional review—albeit briefly. See *McCordle*, 74 U.S. at 513-14; Van Alstyne, *A Critical Guide to Ex Parte McCordle*, 15 ARIZ. L. REV. 229, 258-60 (1973). Commentators writing after Hart have advanced a variety of reasons why jurisdictional withdrawals are subject to constitutional review. See, e.g., Sager, *supra* note 156, at 23-25 (Constitution itself confers appellate jurisdiction on Supreme Court); Tribe, *supra* note 156 at 133-34 (withdrawal statute not properly before court until after constitutional review).

¹⁵⁸ See Hart, *supra* note 155, at 1365; see also Sager, *supra* note 156, at 42-60.

¹⁵⁹ See Hart, *supra* note 155, at 1366-70.

¹⁶⁰ See, e.g., *id.* at 1387-88.

¹⁶¹ See, e.g., *id.* at 1373-74, 1384; see also *id.* at 1398-99.

defendant;¹⁶² inferences from arrangements of rights and duties.¹⁶³ The form of the analysis, moreover, also gave prominence to the adjudicative process. The overall argument sought confirmation through analyses of particular cases;¹⁶⁴ the organizing device of dialogue was itself illustrative of the standard form of judicial method.

The very detail of its arguments, therefore, proclaimed the larger, complementary (and reassuring) themes of the *Dialogue*. Use of courts is an integral part of the enforcement mechanism of much legislation. Frequently, therefore, Congress cannot attempt jurisdictional withdrawals that are arguably unreviewable without also paying a high price; avoiding review (at least of questions of law) presupposes no use of courts for enforcement purposes.¹⁶⁵ Because courts are so useful for legislatures, overlapping jurisdictional statutes and usual maxims of statutory construction provide more than enough basis for courts skilled in standard techniques of legal reasoning to sidestep reviewability questions. Awareness of precedent in these matters, as elsewhere, also provides courts with a basis for criticizing as aberrant particular decisions that seem to counsel jurisdictional surrender.¹⁶⁶

The strength of the judicial process—its usefulness as well as the abundance of its intellectual resources—is the true protection of its independence. The *Dialogue* did not offer this proposition as a contestable argument; Hart sought to demonstrate it as *already true* given both legislative and judicial use of legal process. The *Dialogue* is simultaneously argument and illustration; hypothesis and confirmation. It asserts the status of classic.¹⁶⁷

¹⁶² See *id.* at 1372.

¹⁶³ See, e.g., *id.* at 1379.

¹⁶⁴ See, e.g., *id.* at 1375-79.

¹⁶⁵ See, e.g., *id.* at 1378-79, 1397.

¹⁶⁶ See, e.g., *id.* at 1389-96.

¹⁶⁷ If the *Dialogue* does not in fact achieve the status of classic, its failure lies in the absence within its narrative of any confirmation of the assumption from which it starts: that what we should value in the federal judiciary is a form of independence expressed both methodologically and functionally in terms of a distinction between law and politics. Professor Black, for one, sees value in relaxing the distinction, and thus his conclusions with regard to jurisdictional withdrawal diverge from Hart's. See C. BLACK, *supra* note 156. Hart is able to draw from narrative reenactment of judicial method a sense of effort and care to which he can attach normative dimension in criticizing the Supreme Court:

But the judges who sit for the time being on the court have no authority to remake by fiat alone the fabric of principle by which future cases are decided. They are only the custodians of the law and not the owners of it. The law belongs to the people of the country, and to the hundreds and thousands of lawyers and judges who through the years have struggled, in their behalf, to make it coherent and intelligible and responsive to the people's sense of justice.

Hart, *supra* note 155, at 1396. He does not, however, attempt to establish a normative basis for criticizing congressional attempts at jurisdictional withdrawal in the first place. Indeed, his view of legislation is surprisingly benign and without suggestion (in contrast with the treatment of the judiciary) of any possibility of betrayal or usurpation. See, e.g., *id.* at 1399. The reason for assert-

We cannot appreciate the "reality" of classical style or work out the characteristics of alternative legal styles without examining in detail additional legal works that exhibit versions of classical style. These exercises in close reading begin in the next section, and occupy much of the rest of this essay. To conclude this introductory discussion, though, I would like to make some further observations about the relationship between the ideas of legal media and style.

Emphasizing media makes critical the step prior to legal analysis *per se*: the identification of the relevant legal materials. As one result, legal analysis tends to condition its persuasiveness upon the existence of either a single relevant medium or a way of choosing among media. This is the destabilizing consequence we have already noted. Given this focus on media, moreover, it is also easy (although not logically necessary) to portray subsequent legal analysis as both substantively and chronologically secondary—largely determined by the characteristics of the media themselves. The derivative status of law in the "law and economics" paradigm is an obvious illustration here, but it is important to note that the same phenomenon may surface even if the relevant legal materials are utterly traditional. In *Lake Country Estates v. Tahoe Regional Planning Agency*,¹⁶⁸ for example, to the extent that Justice Stevens treated state law as decisive, he largely accepted state law as it represented itself. Section 1983 and the eleventh amendment did not, in his view, supply criteria for independent judgments about the nature of state governments—for example, about what was or was not "local" or "legislative."¹⁶⁹

By contrast, emphasizing style makes critical the predispositions legal analysis brings to its treatment of subject materials. A given style may work as a way of organizing various media. In any event, it is first of all an understanding of the style (and its alternatives), and only then a sense of the given medium, that is important. Media may indeed possess characteristics of their own. Putting style first, however, tends to increase our awareness of the actual ambiguity of many legal materials. We may thus discover, within a legal theory that assigns a working part to ideas of style, that forms of analysis we now believe must be accepted or rejected as wholes are instead arenas of conflict. We might see law and economics, for example, as more of an expression of divided perspectives, and less of an assertion of a welcome or suspect

ing judicial autonomy seemingly ends up as simply a variation on art for art's sake—without motivation except in a reaction to courts unwilling to fulfill their own obligations.

¹⁶⁸ 440 U.S. 391 (1979).

¹⁶⁹ See *supra* text accompanying notes 42-44.

orthodoxy than we regard it at present.¹⁷⁰ Sensitivity to legal style, in any event, should suggest such possibilities.

IV. CLASSICAL STYLE AS CONFESSION

It is not enough, of course, that the idea of style appears to be useful in the abstract, or that the notion of classical style, generally described, is relatively clear. We must be able to work with the concept of style in the particular instance. Important aspects of a given subject should be describable in stylistic terms. We must also be able, within the discussion of style, to proceed normatively. The limitations of particular styles of legal thought should be somehow demonstrable. We must possess the capacity not only to distinguish styles but to choose among them.

The classical style is our point of departure. In its manifestations, we must see not only confirmation of the style itself but sometimes evidence of its inaptness. Classical presentations do not openly acknowledge their own contingency. Nonetheless, it should sometimes be possible to note that classical predilections work themselves out only with effort: achieve their effects through suppression or displacement as well as revelation.

¹⁷⁰ Economics, as we typically represent it for purposes of legal analysis, takes a form that is not difficult to describe as classical. We treat markets as universal phenomena (whether explicit, implicit, or suppressed). Moreover, with respect to their workings, we regard markets as capable of exhaustive analytic description, and as ordinarily yielding determinate outcomes (equilibria) that within the logic of the market at least, are normatively significant (efficient).

This tendency to think of markets in classical terms is evident, for example, in recent work in securities law. The so-called "efficient markets hypothesis" suggests that securities markets register the effects of new information on market prices with sufficient rapidity, even without explicit or initially widespread disclosure of the information, that much traditional securities regulation becomes an unnecessary burden. See, e.g., H. KRIPKE, *THE SEC AND CORPORATE DISCLOSURE* 118-25 (1979); Note, *The Efficient Capital Market Hypothesis, Economic Theory and the Regulation of the Securities Industry*, 29 STAN. L. REV. 1031 (1977). The SEC has moved in the direction of accepting the efficient markets hypothesis in its recent disclosure reforms. See Friedman, *Integrated Disclosure Today*, 15 REV. SEC. REG. 936, 937 (1982).

Notwithstanding the persuasiveness of the efficient markets hypothesis, usual economic analyses of securities law may be notably vulnerable to the rethinking sensitivity to style should induce. Although lawyers have begun to implement a jurisprudence based on the efficient markets hypothesis, the recent work of a number of economists, taken together, appears to cast doubt (at the level of theory) on the meaningfulness of the idea of an informationally efficient market. See Stiglitz, *The Allocation Role of the Stock Market: Pareto Optimality and Competition*, 36 J. FIN. 235 (1981) (summarizing literature). The image that emerges in this economic writing is decidedly not classical: market paradoxes and imperfections are the starting point. I do not mean to argue that this new work is unassailable. See, e.g., Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1166 n.14 (1981). Nor does it necessarily suggest that recent securities law reforms are wrong. The question, rather, is one of agenda. Were we to take account of this work, we might attach less importance to the idea of markets in securities law (and thus the idea of market reform) and notice more often what the idea of markets tends to obscure: for example, the institutional politics of creditor-debtor relationships.

In this section I will examine two examples of classical style under pressure: Justice Peckham's majority opinion in *Lochner v. New York*¹⁷¹ and Professor Kennedy's discussion in *The Structure of Blackstone's Commentaries*.¹⁷² This juxtaposition is not a natural one. The variations on a common classical style nonetheless connect these two legal works in important ways, notwithstanding their striking differences in form, historical period, and originating political impulse.¹⁷³ Moreover, in the efforts of both Peckham and Kennedy, we can see the classical style realize itself only with effort. A classical style becomes a source of difficulty as well as a principle of organization.

A. *Lochner: Liberty of Contract as Subversive*

Lochner v. New York is too familiar for us. The Supreme Court ruled unconstitutional state legislation limiting to ten the maximum daily working hours of bakers. The result as such, however, is not really the point. "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."¹⁷⁴ Justice Holmes, in his famous dissent in *Lochner*, linked the majority opinion with the idea of "judicial legislation," with judges reaching results by arbitrarily setting aside legislative conclusions in favor of their own personal political preferences.¹⁷⁵ Specifically, Holmes, through his reference to Spencer, connected *Lochner* with ideas of liberty of contract, represented not as legal principle but as controversial social theory. These associations remain. *Lochner* is a "liberty of contract" case¹⁷⁶ and, more fundamentally, an important

¹⁷¹ 198 U.S. 45 (1905).

¹⁷² Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979).

¹⁷³ The surprise (if any) lies only in the assertion that there is an important similarity in the perspectives of Peckham and Kennedy. Duncan Kennedy is of course well-known for his writings on late nineteenth and early twentieth century American legal thought, even though some of his most influential writing remains formally unpublished. See, e.g., D. Kennedy, *The Rise and Fall of Classical Legal Thought, 1850-1940* (Oct., 1975) (unpublished manuscript). Kennedy's analysis of *Lochner*, however, is in print. See Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RESEARCH IN L. & SOC. 3, 9-14 (1980) [hereinafter cited as Kennedy, *Classical Legal Thought*]; see also Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) [hereinafter cited as Kennedy, *Form and Substance*]. Kennedy's interpretation of *Lochner*, it will become clear, differs from mine in important ways. See *infra* note 191. In a sense, therefore, all of this section, and not just its latter part, constitutes a reaction to Kennedy's ideas.

¹⁷⁴ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

¹⁷⁵ "This case is decided upon an economic theory which a large part of the country does not entertain." *Id.* This idea was also put forward by prominent early critics of the *Lochner* decision. See, e.g., Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 29 HARV. L. REV. 353, 363 (1916); Freund, *Limitation of Hours of Labor and the Federal Supreme Court*, 17 THE GREEN BAG 411, 416 (1905); see also *infra* note 234.

¹⁷⁶ See, e.g., *University of California Regents v. Bakke*, 438 U.S. 265, 291 (1978) (Powell, J.); G. GILMORE, *supra* note 2, at 131 n.36; Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1512 (1981). Professor Tribe's discussion of *Lochner*, while sensitive to the danger of confusing the case with its image, also works within the "liberty of contract" per-

retorical citation. It is a kind of "anti-icon," an infernal image of all that we must avoid in constitutional adjudication.¹⁷⁷

Yet when we read Justice Peckham's majority opinion in *Lochner*, we do not find precisely what we expect. Laissez faire images are not obvious;¹⁷⁸ certainly, there is no citation to Spencer as such. References to liberty of contract in any form are only occasional and do not figure prominently in the central arguments of the opinion.¹⁷⁹ This reticence is particularly striking when we note the more elaborate and important references to liberty of contract in both earlier and later cases.¹⁸⁰ What we do discover in Peckham's opinion is a clear concern for the integrity of constitutional law as a legal system of particular structure. For Peckham, the case is about jurisprudence; in particular, jurisprudence under siege. Did Holmes (and all of the rest of us) miss the point? We need to reconcile Peckham's opinion with its image; account for why

spective. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 8-2 to 8-6, (1978). Professor Ely's reading of *Lochner* emphasizes legislative justifications, but it is "liberty of contract" that he too sees as at least fixing the context. See Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 937-43 (1973).

¹⁷⁷ "For critics and proponents alike, *Lochner v. New York* symbolizes the dark side of fundamental rights adjudication." Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1085 (1981). Other recent references to *Lochner* illustrating our tendency to treat the case as an "opposite" model include, e.g., *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 522 (1965) (Black, J., dissenting); Oakes, "Property Rights" in *Constitutional Analysis Today*, 56 WASH. L. REV. 583, 591-94 (1981); Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278, 312-14 (1981). References to *Lochner* in this fashion are remarkably frequent—as we have become well aware. See L. TRIBE, *supra* note 176, at 435; Kennedy, *Classical Legal Thought*, *supra* note 173, at 10.

¹⁷⁸ See, e.g., 198 U.S. at 53-54. But see *id.* at 57.

¹⁷⁹ See, e.g., *id.* at 56, 57-58, 59, 64 (brief or conclusory references).

¹⁸⁰ There is no passage in Justice Peckham's opinion in *Lochner* even remotely comparable to the following statement, by the West Virginia Supreme Court, in *State v. Goodwill*, 33 W. Va. 179, 10 S.E. 285 (1889), a case cited by counsel for plaintiff in error in *Lochner* itself, 198 U.S. at 50:

The property which every man has in his labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property. It is equally an encroachment both upon the just liberty and rights of the workmen and his employer, or those who might be disposed to employ him, for the legislature to interfere with the freedom of contract between them. . . . A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit. And, as incident to this, is the right to labor or employ labor, make contracts in respect thereto upon such terms as may be agreed upon the parties, to enforce all lawful contracts. . . . The enjoyment [sic] or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery; between liberty and oppression.

Goodwill, 33 W. Va. at 183, 10 S.E. at 287. *Coppage v. Kansas*, 236 U.S. 1 (1915), resembles *Goodwill* much more than *Lochner*. The idea of liberty of contract, its presuppositions, and its consequences, are truly at the center of Justice Pitney's well-known opinion. See 236 U.S. at 12-13, 14, 17, 19-21.

Holmes apparently disregarded the actual argument of the majority opinion, and explain why Peckham did not emphasize freedom of contract.¹⁸¹

1. The Jurisprudential Crisis

Justice Peckham believed that constitutional law depends for its success upon the characteristics of constitutional language. The Constitution sets up a taxonomy. It establishes order, separating and fixing spheres of power, through a process of naming. Naming (or classifying or categorizing) works as an ordering device only if names are well-defined. They must be mutually exclusive and clear in their reference, and in the aggregate exhaustive of their domain. Peckham did not state any of these propositions straightforwardly. They are what he assumed or took for granted. It is nonetheless clear that he held to them. The plausibility of regarding constitutional names as well-defined, and the importance of protecting names, once well-defined, from ambiguous and thus corrupting reinterpretation, are indeed recurring themes in Peckham's *Lochner* opinion.¹⁸²

In *Lochner*, the statute at issue "interfer[ed] with . . . independence of judgment and of action"¹⁸³ by restricting freedom of contract, and thus limiting liberty. The relevant constitutional provision for judging the statute was the fourteenth amendment due process clause: "No State shall deprive any person of . . . liberty . . . without due process of law"¹⁸⁴ The language of the constitutional text, for Peckham, took the form of an elaborate hierarchy of names. The due process clause immediately identified as categorically distinct two types of state restrictions on individual liberty. One class of restrictions repre-

¹⁸¹ It could be argued that Peckham referred to liberty of contract only occasionally because the idea was so well-accepted: it was simply not in controversy. See Kennedy, *Classical Legal Thought*, *supra* note 173, at 12. Certainly, contemporary critics of *Lochner* regarded it as a liberty of contract case. See, e.g., Pound, *Liberty of Contract*, 18 YALE L.J. 454, 479-81 (1909). I believe, however, that upon close examination the *Lochner* opinion shows that, although Peckham may have endorsed liberty of contract ideas, he nonetheless also treated those ideas as unstable (vulnerable to challenge or transformation) and thus kept those ideas at the margin of his working analysis. See *infra* text accompanying notes 232-37. I also think that critics of *Lochner* emphasized the idea of liberty of contract to call attention to what they believed was the majority opinion's crucial defect—its anti-empiricism. See *infra* note 234.

¹⁸² As I describe *Lochner*, there are obvious similarities in the approach of Justice Peckham and that of Justice Strong in the earlier *Olcott* case. See *supra* text accompanying notes 10-31. There is, however, an important difference. Justice Strong, it seems to me, by and large took the process of naming for granted, as a natural way of framing analysis. Justice Peckham, we shall see, was operating in a context in which naming (as a constitutional method) was under challenge; Peckham's jurisprudence thus acquired a heightened intensity. See *infra* text accompanying notes 191-207.

¹⁸³ 198 U.S. at 57.

¹⁸⁴ U.S. CONST. amend. XIV.

sented the "due process of law," the proper response of government; the second class constituted the residual: restrictions that were not "due process." The distinguishing term "due process of law" itself suggested a process of naming, implying that we could identify the usual or traditional subjects of legislation—the ordinary course of legislative business or "due process" of law. Legislation constituted "due process of law," and therefore properly restricted individual liberty, if we could label it as "police" legislation. Such legislation addressed matters of public health, safety, or morality.¹⁸⁵

In *Lochner*, Peckham treated only the last level of naming as actually at issue. "Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty . . . ?"¹⁸⁶ He portrayed his conclusions as following from a negative argument. To describe the New York statute as an exercise of the police power would reduce the due process taxonomy to meaninglessness; one category would become all-encompassing and thus render the distinction irrelevant.¹⁸⁷

Justice Peckham at this stage was quite explicit. First, he established the importance of the idea of bounded categories:

It must, of course, be conceded that there is a limit to the valid exercise of the police power by the State. There is no dispute concerning this general proposition. Otherwise, the Fourteenth Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become an-

¹⁸⁵ Justice Peckham described the usual types of adverse consequences which individual exercises of liberty might create for the general public:

There are, however, certain powers, existing in the sovereignty of each State in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. Those powers, broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the State in the exercise of those powers, and with such conditions the Fourteenth Amendment was not designed to interfere.

198 U.S. at 53.

¹⁸⁶ *Id.* at 56.

¹⁸⁷ See *id.* at 53. By putting his argument in this negative form, Peckham could insist upon the need for clear categories without having to confront his own acknowledgement of the "vagueness" of the police power. See *supra* note 185.

other and *delusive name* for the supreme sovereignty of the State to be exercised free from constitutional restraint.¹⁸⁸

Second, Peckham demonstrated repeatedly that, however stated, the argument for classifying the maximum hour law as public health legislation ended up referring to aspects of the work of bakers that simply were not clearly distinguishable, in commonly accepted ways, from features of other occupations. Such a classification would thus fail to satisfy the necessary boundary conditions.¹⁸⁹

It is not difficult, I think, to describe Peckham's style of approach in *Lochner* as classical. Order as demarcation, the consequent importance of clarity, and the presupposed possibility of an exhaustive or universal account: these are quintessentially classical themes.¹⁹⁰ Peckham builds his opinion, in fact, by drawing on these ideas both critically, by emphasizing the threat to classical order of an opposite result, and affirmatively, by treating the Constitution as a classic ac-

¹⁸⁸ *Id.* at 56 (emphasis added).

¹⁸⁹ For example, Peckham noted:

In looking through statistics regarding all trades and occupations, it may be true that the trade of baker does not appear to be as healthy as some other trades, and is also vastly more healthy than still others. To the common understanding the trade of a baker has never been regarded as an unhealthy one. Very likely physicians would not recommend the exercise of that or any other trade as a remedy for ill health. Some occupations are more healthy than others, but we think there are none which might not come under the power of the legislature to supervise and control the hours of working therein, if the mere fact that the occupation is not absolutely and perfectly healthy is to confer that right upon the legislative department of the Government. It might be safely affirmed that almost all occupations more or less affect the health.

Id. at 59. Peckham continued in the same vein at some length. See *id.* at 59-61; see also *id.* at 62 (apparent cross-reference). One of the stronger "liberty of contract" references in the opinion, see *id.* at 61, which is frequently quoted, see, e.g., Kennedy, *Classical Legal Thought*, *supra* note 173, at 13, comes at the close of this part of Peckham's discussion. Read in context, it seems to me, the "contract" reference functions as a conclusion, summing up in its own forcefulness the momentum of the prior passage.

¹⁹⁰ There is perhaps a hazard in my emphasis:

It is common to equate late nineteenth century thought with conceptualism, that is with . . . a *deductive* process of defining the boundaries and content of liability. This is misleading to the extent that it suggests that the concepts were just "there," as arbitrary [sic] starting points for judicial reasoning. They were, on the contrary, crucial components in the larger individualist argument designed to link the very general proposition, that the American system is based on freedom, with the very concrete rules and doctrines of the legal order.

Kennedy, *Form and Substance*, *supra* note 173, at 1730-31 (emphasis in original). The idea of style, though, is sufficient (I believe) for the purpose of introducing a sense of contingency into the analysis. The concepts were not "just 'there,'" *id.*; Peckham simply treated them in this way. I do not mean to dispute the existence of the process of legitimation or mediation that Kennedy notes. Rather, I would emphasize as well the precariousness of the rationalization—a feature that I believe the notion of style highlights. See *supra* text accompanying note 143; see also *infra* note 191.

count.¹⁹¹ The language in which the Constitution was written—its me-

¹⁹¹ One alternative way of reading *Lochner* would emphasize the substance of the categories with which Peckham worked. See, e.g., Duker, *Mr. Justice Rufus W. Peckham: The Police Power and the Individual in a Changing World*, 1980 B.Y.U. L. REV. 47.

Professor Kennedy, by contrast, adopts a more structural approach. In his view, the crucial fact is the essentially identical character of all participants within the legal universe that cases like *Lochner* presupposed.

In the Classical systemization, the concept that was most significant . . . was that of a constitutionally delegated power absolute within its sphere. As time went on, all legally significant action came to be thought of as the exercise or creation of such powers, whether the particular actor was public or private, state or federal, legislative or judicial.

Kennedy, *Classical Legal Thought*, *supra* note 173, at 8-9. The significance of this identity, Kennedy argues, lay in its mediating capacity. For example,

Classical legal thought (and in particular the concept of a power absolute within its sphere) appeared to permit the resolution of the basic institutional conflicts between populist legislatures and private businesses, between legislatures and courts over the legitimacy and extent of judicial review, and between state and federal governments struggling for regulatory jurisdiction . . .

Id. at 9. "Activity within the spheres of power represented liberty, autonomy, and unbridled mastery for legal actors. By the the sharp delineation of boundaries, the virtues of . . . an unleashing of . . . energy were to be secured without the dangers of anarchy . . ." *Id.* at 8.

In his discussion of *Lochner* itself, Kennedy therefore emphasizes identities. For example, he quotes the same "delusive name" passage I set out earlier, see *supra* text accompanying note 188; he does so, however, not in connection with any discussion of the idea of categories as names, but in order to make a point about the "sameness" of the police power and individual right. "The two concepts are mutually limiting." Kennedy, *Classical Legal Thought*, *supra* note 173, at 11. He also notes Peckham's similarly categorical conception of the judicial role, see *id.* at 11-12, and Justice Harlan's analogous method in his dissent, see *id.* at 12-14, as well as Harlan's apparent equation of federal and state power, see *id.* at 14.

It is not that I disagree with Kennedy directly. The identities were there; on their own terms, they indeed represented social conflict as order. See generally Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, excerpted in P. BREST & S. LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* 230-34 (2d ed. 1983). But Kennedy makes the legal theory look too secure. The interchangeable categories manifested themselves through images that, although giving plausibility to the sense of identity, at the same time suggested bases for critique. Indeed, we will see that in *Lochner*, Justice Harlan, for all of the common ground he shared with Justice Peckham, seized upon the idea of naming (or Peckham's treatment of naming) as one foundation for his dissent. See *infra* text accompanying note 197.

For purposes of the present discussion, it is also interesting to note Kennedy's handling of a second case. As further evidence of the tendency toward identification within the legal thought of the period, Kennedy notes two aspects of Justice Brewer's opinion for a unanimous Supreme Court in the Pullman Strike case, *In re Debs*, 158 U.S. 564 (1895). First, Kennedy observes that, in order to justify the exercise of federal commerce power to break the strike, Brewer

analogizes the exercise of the sovereign legislative will of a state to the exercise of private will by the citizen and asserts that the absolute power of the federal government within its sphere of commerce is the same with respect to each. The assertion of the identity of the commerce power in the two relations gives it definition, as against individuals, since the Court can draw on the whole body of case law about federal-state conflicts. . . .

Kennedy, *Classical Legal Thought*, *supra* note 173, at 16. Second, Brewer defended the power of a federal court to issue an antistrike injunction by identifying federal power in this context with state jurisdiction over public nuisances. "The federal government's entitlement to an injunction was defined by the right of public authorities to abate as public nuisances obstructions to their highways." *Id.* at 17.

Debs in isolation plainly reveals what Kennedy would emphasize. But if we step back slightly, and look also at the surrounding cases, we can see that Brewer's opinion has a strangely

dium—possessed as its fundamental feature a capacity for defining taxonomies that represented, in essence, the same principle, restated as the idea of separation of powers, through which the Constitution structured political order and thus accomplished its purpose. Constitutional law was thus in substance inseparable from the process of categorizing, of treating constitutional language as a set of well-defined terms.¹⁹²

subversive cast.

Kennedy's first "equation" has its origin in this sentence in the *Debs* opinion: "If a State with its recognized powers of sovereignty is impotent to obstruct interstate commerce, can it be that any mere voluntary association of individuals within the limits of that State has a power which the State itself does not possess?" 158 U.S. at 581. Beyond Kennedy's "identification," there is obviously a second dimension in Brewer's phrasing. The juxtaposition of "recognized powers" and "mere voluntary association," the territorial specification "within the limits," and the background image of state power as barred from federal subjects combine to suggest an idea of hierarchy—or rather of hierarchy upset. Brewer's point, at least partly, was not symmetry but asymmetry. And this second theme has a larger resonance. The idea of private associations as akin to government, and as thus out of place, would subsequently provide the organizing image for Justice Peckham in *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899). In *Addyston*, Peckham, citing *Debs*, see 175 U.S. at 230, held that private "regulation" of interstate commerce by means of contract was not only unprotected by liberty of contract, see *id.* at 228-35, but indeed supplied constitutional authorization for enforcement of the Sherman Act, see *id.* at 240-41.

Brewer's referral to nuisance law—Kennedy's second subject—was not entirely original to the *Debs* case. Insofar as it rested on an analogy of state power to clear an "obstructed highway," *Debs*, 158 U.S. at 587, and federal authority to keep "those highways of interstate commerce free from obstruction," *id.* at 586, Brewer's argument in *Debs* paralleled and amplified that developed by Justice Harlan in dissent in *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), characterizing "combinations" as obstructing interstate commerce, see *id.* at 36-37 (Harlan, J., dissenting). Once we see this connection, *Debs* suddenly becomes a delicate case. In drawing on Harlan's ideas, Brewer was in effect (whatever his intent) challenging constitutional orthodoxy—the central place of the manufacturing/commerce distinction, etc.—that *E.C. Knight* had only recently affirmed in the antitrust context. We can now see why Brewer did not justify the federal injunction under the Sherman Act, see 158 U.S. at 600, but instead relied on a more vague constitutional authority, see Kennedy, *Classical Legal Thought*, *supra* note 173, at 17. We can also see why Harlan relied on *Debs* for support in reasserting his views in *Northern Sec. Co. v. United States*, 193 U.S. 197, 336-37 (1904), as the Supreme Court fragmented in its effort to formulate a consistent approach to identifying interstate commerce in antitrust cases, see *id.* at 360 (Brewer, J., concurring); *id.* at 364 (White, J., dissenting); *id.* at 400 (Holmes, J., dissenting). Finally, we see the basis for one of the grand ironies of constitutional law, that the underlying rationale in *Debs*—the obstruction idea—would ultimately become the working principle in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), and thus not only overturn the old constitutional order, but affirm federal protection of collective bargaining as well.

The point, ultimately, is this: the system of categories Kennedy describes did not possess merely the identity-structures Kennedy notes, but also took on a substantive aspect, as a set of names of social phenomena that government either would or would not address. In this latter manifestation, the categories supplied a way to describe not only order but disorder. And it is clear that for the users of the terminology, this latter diagnostic capability had particular appeal. But as it turned out, as descriptions of disorder, the categories themselves became disruptive, justifying close federal scrutiny of contracts in *Addyston*, and reinforcing conflict over definitions of interstate commerce in *Debs*. The categories, used not merely to represent a legal order but the world in which it operated, not only fixed but crossed boundaries. See *infra* text accompanying note 228.

¹⁹² This was a particularly happy phenomenon for judges who, if they saw their reasoning process as also generally one of categorizing, were thus able to treat constitutional review as involving in no fundamental sense "nonjudicial" behavior. Peckham seemed to appreciate the situation:

This is not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State it is valid, although the

And yet, the idea of language as taxonomy, as a set of well-defined names, is and was clearly artificial. We may disagree with Peckham's list of traditional types of legislation; perhaps we would add new categories. More fundamentally, we might reject the idea of listing or setting up categories in the first place. Arguably, words as such, especially legal terms, are ambiguous. It is context (we would say) which fixes meaning. Justice Peckham's classicism, we can see, not only organized but potentially undermined his argument.

It was clear, even at the time of *Lochner*, that the vulnerable point of Peckham's argument involved his reliance on naming. Justice Holmes, we know, tended toward skepticism—with respect to the possibilities of well-defined names as with much else.¹⁹³ “It is hard to exhaust the possibilities of a general proposition,” Holmes wrote, with somewhat heavy-handed irony, in *Jaster v. Currie*,¹⁹⁴ a decision handed down one week after *Lochner*. This skepticism plainly underlay the fundamental proposition of the dissent in *Lochner*, as it would later become the foundation of a Holmesian free speech jurisprudence: “A constitution . . . is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.”¹⁹⁵ For Holmes, we can see, Peckham's commitment to classifying would have been too implausible to be treated as part of what was “really” at issue. Thus, it might reasonably seem to Holmes that the only pertinent aspects of the *Lochner* decision were the result and the obvious “extra-legal” explanation. “This case is decided upon an economic theory which a large part of the country does not entertain.”¹⁹⁶

judgment of the court might be totally opposed to the enactment of such a law. But the question would still remain: Is it within the police power of the State? and that question must be answered by the court.

198 U.S. at 56-57. Kennedy develops this idea at greater length. See Kennedy, *Classical Legal Thought*, *supra* note 173, at 7-8, 11-12.

¹⁹³ See, e.g., White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51, 74-77 (1971).

¹⁹⁴ 198 U.S. 144, 148 (1905). Holmes continued:

Therefore it may be dangerous to say that doing an act lawful itself as a means of doing another act lawful in itself cannot make a wrong by the combination. It is enough to say that it usually does not have that result, and that the case at bar is not an exception to the general rule.

Id. In a well-known passage, Holmes later wrote: “A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.” *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

¹⁹⁵ 198 U.S. at 75-76 (Holmes, J., dissenting); see *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

¹⁹⁶ 198 U.S. at 75 (Holmes, J., dissenting).

The dispute about the possibilities of language was much more explicit in the now less well-known dissent of Justice Harlan. Harlan, like Peckham, saw the issue as the classification of the New York statute as "health legislation." Harlan found it "impossible, in view of common experience, to say that there is here no real or substantial relation between the means employed by the State [maximum hour law] and the end sought to be accomplished by its legislation [public health or safety]."¹⁹⁷ The legislation was thus a constitutionally proper "police" enactment.¹⁹⁸ But Harlan's analysis differed from that of the majority not simply because he reached a different categorical conclusion but because he took a different view of the process of naming itself. Harlan was prepared to acknowledge the possibility of ambiguity:

I do not stop to consider whether any particular view of this economic question presents the sounder theory. What the precise facts are it may be difficult to say. It is enough for the determination of this case, and it is enough for this court to know, that the question is one about which there is room for debate and for an honest difference of opinion.¹⁹⁹

The common consensus was not consensus but indecision. Approaches to naming in ambiguous cases were questions of "theory." The real issue was who decided which theory to accept. For Harlan, in *Lochner* this choice was one for the state legislature. "[T]he health and safety of the people of a State are primarily for the State to guard and protect."²⁰⁰

Justice Harlan, thus, did not on every level disagree with Justice Peckham. "Arguable" cases are conceivable only against a background of "clear" cases. Harlan took for granted that there was something we could regard as the essence of "health legislation." He also acknowledged the possibility of what Peckham called "delusive names." "[T]he police power cannot be put forward as an excuse"²⁰¹ It is just that names were only sometimes "rigid designators." Judges, Harlan thought, must be sensitive to the presence in language of two kinds of consensus. Some words, it was commonly understood, had definite meanings; other words, it was equally well-known, had indefinite

¹⁹⁷ *Id.* at 69 (Harlan, J., dissenting).

¹⁹⁸ The question of the fit of means and ends, itself a dispositive inquiry in modern constitutional law, was penultimate for Harlan, merely preliminary to the choice of category. Here again, Harlan paralleled Peckham. See *id.* at 61-62.

¹⁹⁹ *Id.* at 72 (Harlan, J., dissenting).

²⁰⁰ *Id.* at 73; see also Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495 (1908).

²⁰¹ 198 U.S. at 66 (Harlan, J., dissenting) (quoting *Holden v. Hardy*, 169 U.S. 366, 391 (1898)).

meanings. In Harlan's view, Peckham erred in excluding the latter possibility.

But Harlan's approach was unstable. If legislation of a certain sort is relatively commonplace, that fact itself will presumably go a long way toward establishing, at minimum, the existence of a "consensus of disagreement" that would then shield the ostensible police legislation from invalidation.²⁰² Harlan himself made the point that the question of hours of work "has been the subject of enactments by Congress and by nearly all of the States."²⁰³ Within Harlan's scheme, apparently only unusual statutes would be constitutionally vulnerable. As a result, the idea of "constitutional restraint," entirely independent of legislative redefinition, seems to lose much of its force.²⁰⁴ It is this point, presumably, that Peckham meant to make, in effect addressing Harlan, in the striking passage at the close of the majority opinion in *Lochner* describing the rush of legislation.²⁰⁵ Having raised the possibility of ambiguous names, Justice Harlan undermined, even as he attempted to clarify, the language-based constitutional order.

Justice Holmes, of course, had rejected nominal jurisprudence entirely. But like Harlan, he could not entirely surrender the idea of an independent constitutional law. Harlan had preserved at least the outline of Peckham's system. The alternative that Holmes put forward, however, was notably question-begging, and seemingly flew in the face of his own warning against reliance on public opinion:

I think that the word liberty, in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, 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.²⁰⁶

Ironically, as it was later employed by Justice Frankfurter, Holmes's formulation would be criticized, most famously by Justice Black, as paradigmatic of the very "judicial legislation" that Holmes had so artfully skewered.²⁰⁷

The Holmes and Harlan dissents revealed the vulnerability of

²⁰² This assumption would later become the starting proposition for the "Brandeis brief." See, e.g., *Muller v. Oregon*, 208 U.S. 412, 419-21 (1908).

²⁰³ 198 U.S. at 72 (Harlan, J., dissenting).

²⁰⁴ "Constitutional restraint" was Peckham's phrase, see *id.* at 56, but Harlan had earlier made a similar point in *Smyth v. Ames*, 169 U.S. 466, 527 (1898).

²⁰⁵ See 198 U.S. at 63-64.

²⁰⁶ *Id.* at 76 (Holmes, J., dissenting).

²⁰⁷ Compare, e.g., *Rochin v. California*, 342 U.S. 165, 169-72 (1952), with, e.g., *id.* at 175-77 (Black, J., concurring).

Peckham's classical vision. Neither dissent, however, suggested much in the way of a workable alternative perspective, or so Peckham, at least, seemed to believe. There was no alternative to his jurisprudence except the abyss.²⁰⁸

2. The Disappearance of Liberty of Contract

Court decisions both before and after *Lochner* frankly celebrated freedom of contract as a mechanism of economic liberty: a social equalizer, subversive of class stratification.²⁰⁹ The idea of liberty of contract itself suggested what was wrong with challenged legislation. In *Lochner*, however, Peckham proceeded differently. Legislative interference with freedom of contract triggered inquiry, but thereafter dropped out of the analysis, except for a few rhetorical flourishes. The idea of the police power, its content, and the need for its limitation, were the principle subjects of Peckham's concern. The state, not the individual, became the focus.

One reason, perhaps, for this gestalt shift becomes clear if we explore a second feature of Peckham's opinion. The *Lochner* opinion relied only minimally upon earlier Supreme Court decisions.²¹⁰ For the most part, the majority explained its conclusions in broader jurisprudential terms: by reference to a particular picture of constitutional law and the implications of that picture. To the extent that prior cases were discussed, they were described largely in terms of their "different" facts.²¹¹ This limited use of precedent is not surprising in one sense. The idea of a taxonomy of types of legislation, after all, was fundamental to the constitutional system within which Peckham worked. His references to other cases in factual terms were simply illustrations of his overall approach, part of the exercise in classification.²¹² There is, however, an air of defensiveness in this part of the opinion. It is especially palpable in Peckham's discussion of *Holden v. Hardy*,²¹³ the case he considered at most length.²¹⁴

²⁰⁸ A similar sense that constitutional law was simply unimaginable once traditional taxonomies lost their hold shows up in commerce clause opinions a few years later, during the period in which the taxonomies in fact collapsed. See, e.g., *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918), *overruled*, *United States v. Darby*, 312 U.S. 100 (1941); *United States v. A.L.A. Schechter Poultry Corp.*, 76 F.2d 617, 624 (Hand, J., concurring), *rev'd in part*, 295 U.S. 495 (1935).

²⁰⁹ See *supra* note 180.

²¹⁰ See 198 U.S. at 53, 64.

²¹¹ See *id.* at 54-56; see also *id.* at 63.

²¹² It may also have been the case, of course, that Peckham simply did not see the need for extensive use of citations. See generally Pratt, *Rhetorical Styles on the Fuller Court*, 24 AM. J. LEGAL HIST. 189 (1980).

²¹³ 169 U.S. 366 (1898).

²¹⁴ See *Lochner*, 198 U.S. at 54-55.

The legislation in *Holden* was practically a model for that at issue in *Lochner*. Utah regulated the hours of miners, New York restricted the hours of bakers—the form is identical. In *Lochner*, Peckham acknowledged that the Supreme Court in *Holden*, upholding the Utah law, had written an ambitious opinion, including “[a] review of many of the cases on the subject”²¹⁵ His only quotation from the *Holden* opinion, however, was its quotation of language in the state court opinion. This quoted language, as Peckham reproduced it, amounted only to a statement without explanation that “this case is distinguishable.”²¹⁶ Peckham thus practically forces us to ask, “What did the Supreme Court *itself* have to say in *Holden v. Hardy*?” Justice Brown’s majority opinion in *Holden* is in fact rather confused. We can see clearly, however, why Peckham, a dissenter in *Holden v. Hardy*,²¹⁷ would have no interest in reproducing Brown’s discussion.

Justice Brown understood the fourteenth amendment to be concerned primarily with legal differentiations in the status of individuals; whether on the basis of race or sex, disregard in the individual case of established law, use of differentiating classifications not grounded in the police power, or changes by a state in “its general system of jurisprudence.”²¹⁸ These last changes, for example, might be entirely proper instances of “the law . . . forced to adapt itself to new conditions of society”²¹⁹ The authority of the states to change their legal systems was nonetheless limited. State practice, in order to conform with “due process,” must respect “natural and inherent principles of justice” and thus refrain from taking “one man’s property, or right to property . . . for the benefit of another, or for the benefit of the State, without compensation. . . .”²²⁰ Freedom of contract entered Justice Brown’s discussion as one form of the right to acquire property.²²¹ He observed,

²¹⁵ *Id.* at 54.

²¹⁶ It was held that the kind of employment . . . and the character of the employees . . . were such as to make it reasonable and proper for the State to interfere to prevent the employees from being constrained by the rules laid down by the proprietors in regard to labor. The following citation from the observations of the Supreme Court of Utah in that case was made by the judge writing the opinion of this court, and approved: “. . . This law applies only to the classes subjected by their employment to the peculiar conditions and effects attending underground mining and work in smelters. . . . Therefore it is not necessary to discuss or decide whether the legislature can fix the hours of labor in other employments.”

Id. at 54-55 (quoting *State v. Holden*, 14 Utah 96, 99, 46 P. 1105, 1106 (1896), *aff’d*, 169 U.S. 366 (1898)).

²¹⁷ See *Holden v. Hardy*, 169 U.S. 366, 398 (1898) (Peckham, J., dissenting without opinion).

²¹⁸ *Id.* at 383.

²¹⁹ *Id.* at 387; see *id.* at 385-86 (“law is, to a certain extent, a progressive science”).

²²⁰ *Id.* at 390.

²²¹ See *id.* at 391.

however, that "[t]his right of contract . . . is itself subject to certain limitations which the state may lawfully impose in the exercise of its police powers."²²² These limits were implicit in the very definition of the right to contract, restricting the exercise of the right in order to limit injury to "the equal enjoyment of others having an equal right" or to "the rights of the community."²²³ Brown noted that laws setting such limits were widespread and were commonly drafted to respond to particular "exigencies and to secure the safety of persons peculiarly exposed to . . . dangers."²²⁴

The statute at hand fit the pattern.²²⁵ It "does not profess to limit the hours of all workmen, but merely those who are employed in underground mines, or in the smelting, reduction, or refining of ores or metals."²²⁶ The legislative judgment concerning the hazard of long workhours was thus, in these contexts, reasonable. The Utah Supreme Court, Brown added, agreed. It emphasized both the particular hazards and the narrow scope of the law.²²⁷ It also seemed to Justice Brown that the legislature might properly treat contractual relationships, in this context, as one source of the problem. His argument here is remarkable, in light of *Lochner* and our usual assumptions about the turn-of-the-century Court's attitude toward liberty of contract.

[T]he proprietors of these establishments and their operatives

²²² *Id.*

²²³ *Id.* at 392 (quoting *Commonwealth v. Alger*, 61 Mass. 53, 84-85 (1851)).

²²⁴ 169 U.S. at 393; see *id.* at 393-95.

²²⁵ Brown's approach at this stage is reminiscent of the initial inquiry by Justice Curtis in *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 312-13 (1852), concerning whether the statute at issue resembled in form other pilotage laws.

²²⁶ 169 U.S. at 395.

²²⁷ *Id.* at 396-97. The excerpt from *State v. Holden* in Justice Brown's opinion is considerably longer than the passage Justice Peckham repeated in the *Lochner* opinion. See *supra* note 216. The longer version was the more accurate. As Justice Peckham concluded, the Utah court did limit the reach of its decision, but the court also emphasized the narrow reach of the Utah legislation in order to show the relationship between the bill and particular hazards and thus the appropriateness of the police power classification. See *State v. Holden*, 14 Utah 96, 98-99, 46 P. 1105, 1106 (1896), *aff'd*, 169 U.S. 366 (1898). In a companion opinion, the Utah court explained this emphasis on specificity in another way, by reference to the fourteenth amendment prohibition against legislative creation of arbitrary classifications:

[W]e have no doubt that class legislation is forbidden. But some pursuits are attended with peculiar hazards and perils, the injurious consequences from which may be largely prevented by precautionary means, and laws may be passed calculated to protect the classes of people engaged in such pursuits. It is not necessary to extend the protection to persons engaged in other pursuits not attended with similar dangers. To them the law would be inappropriate and idle. So, if underground mining is attended with dangers peculiar to it, laws adapted to the protection of such miners from such danger should be confined to that class of mining

Utah v. Holden, 14 Utah 71, 87-88, 46 P. 756, 759 (1896), *aff'd*, 169 U.S. 366 (1898); see also *id.* at 95, 46 P. at 761-62. The two approaches were reciprocal: legislation not coming within the police power created arbitrary classifications. The inspiration here, as in *Holden v. Hardy*, was as much or more the idea of equal protection as the idea of due process. See *id.* at 87, 46 P. at 759.

do not stand upon an equality, and . . . their interests are, to a certain extent, conflicting. The former naturally desire to obtain as much labor as possible from their employés, while the latter are often induced by the fear of discharge to conform to regulations which their judgment, fairly exercised, would pronounce to be detrimental to their health or strength. In other words, the proprietors lay down the rules and the laborers are practically constrained to obey them. In such cases self-interest is often an unsafe guide, and the legislature may properly interpose its authority.

. . . [T]he fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. "The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer."²²⁸

²²⁸ 169 U.S. at 397. There was nothing in the lower court opinions that in any way resembled Justice Brown's discussion of the conditions of contracting as a justification for the Utah legislation. Nor were the arguments of counsel, insofar as I can discover, explicit in foreshadowing Justice Brown's approach. See *id.*, 42 L. Ed. 780, 786-87 (1898) (summarizing argument of counsel); *State v. Holden*, 14 Utah 71, 76-80 (1896) (same). Counsel did contend that the Utah statute "would be a proper health regulation for preserving to a citizen his ability to work and support himself is not only humane but is preventing a burden on the people." 42 L. Ed. at 786. Moreover, counsel asserted, "[t]he private opinions of judges who criticize the policy of regulating the affairs and contracts of persons who are *sui juris* is fully met by the decisions of the courts in the cases cited below in which the law was held to be valid." *Id.* at 787. All of the listed cases involved state court decisions. Only one case concerned working hour restrictions per se. See *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383 (1876) (upholding sixty hour workweek in any given establishment for women and children). Only one case involved legislation conferring special protections for miners. See *Warren v. Sohn*, 112 Ind. 213, 13 N.E. 863 (1887) (upholding law giving priority to perfected wage liens of miners and royalty liens of land owners over other secured creditors of mining companies). Several opinions, however, approved of legislative paternalism. See, e.g., *State v. Ah Chew*, 16 Nev. 50, 55-56 (1881) (approving law prohibiting sale or gift of opium except by druggist pursuant to prescriptions). And most cases did indeed involve legislation regulating or prohibiting certain contracts or contract terms. Sometimes, it is clear that the prompting concern was fraud, see *Hawthorne v. People*, 109 Ill. 302, 308-09 (1883), or hardship, see *Maloney v. Newton*, 85 Ind. 565, 567, 570 (1882); *Taylor v. Saurman*, 110 Pa. 3, 6, 1 A. 40, 41-42 (1885). Although the courts are silent in this regard, in other cases legislative fear of unequal bargaining power appears to have prompted the law at issue. See, e.g., *Churchman v. Martin*, 54 Ind. 380, 383-84 (1876) (law prohibiting attorney fee clause in bills, notes, or other written evidence of indebtedness). Occasionally, the idea behind legislation or a common law rule seems to have been that the contractual process was simply not the proper way to resolve a given matter. See, e.g., *Smith v. Tyler*, 51 Ind. 512, 516-17 (1875) (refusing to enforce settlement reducing rights of judgment creditor); see also *Bauer v. Samson Lodge*, 102 Ind. 262, 268-69, 1 N.E. 571, 574-75 (1885) (dictum) (disapproving of promises to refrain from litigation). And finally, a few cases brought the ideas together by seeing the dynamics of contract or competition as reasons for regarding contract as an inappropriate decisionmaking process. See, e.g., *People v. Havnor*, 149 N.Y. 195, 204, 43 N.E. 541, 544, *appeal dismissed*, 170 U.S. 408 (1896) (competition may drive

Holden v. Hardy, in all its parts, is thus a quite complex opinion. It begins with the phenomenon of changing social conditions. Legislation is an appropriate exercise of the police power if it addresses new hazards to public health, safety, or morality. We can judge the matter by looking not merely to the reasonableness of the legislature's assumptions about the existence of such hazards but also (and perhaps this is itself the main test of reasonableness) to the particularity with which the legislature tailors its bill. Changes in social circumstances, *Holden* seems to assume, have an ad hoc, uneven quality; legal changes, if not arbitrary, should reflect this fact. To this point, Justice Brown's approach is plainly classical. Constitutional law is a set of categories. In contrast with *Lochner*, however, the process of classifying is not one that emphasizes ideas of language. Assumptions about the nature of social change, rather, provide the means of matching challenged legislation with constitutional categories.

But this is only half of the analysis. *Holden* ultimately wavers, with subversive consequences, in its style of argument. For Justice Brown, the law is not simply a response to, but another part of the problem.²²⁹ New hazards are a result of increasingly complex social transactions or interactions—interactions that usually take the form of patterns of contracts. Problematic interchange, in other words, both presupposes and manifests itself through the exercise of legal rights. Remedial legislation may therefore properly treat the legal system as

barbers to work without rest unless law prescribed day of rest); see also *Davis v. State*, 68 Ala. 58 (1880) (upholding law prohibiting shipment of cotton at night). Whether or not Justice Brown ever read these cases, they do suggest that, notwithstanding the confident arguments of opposing counsel, see *Holden v. Hardy*, 169 U.S. at 368-80, there was at least some support in some prior cases for Brown's approach.

Some of these cases are discussed in Frankfurter, *supra* note 175, and Pound, *supra* note 181.

²²⁹ Justice Brown notably refused to take seriously the role of law in setting starting points for social interaction in *Plessy v. Ferguson*, 163 U.S. 537 (1896), from our perspective his most famous (or infamous) decision. He distinguished "political" from "social" equality, see *id.* at 544, holding that the fourteenth amendment addressed only the political sphere, see *id.*, and justified this categorical separation on the ground that legal distinctions among races "do not necessarily imply the inferiority of either race to the other," *id.* It was simply not within the power of law, Brown assumed, to change social prejudices. The state legislature, in requiring racial segregation of railway passengers, was simply responding to "the established usages, customs and traditions of the people." *Id.* at 550; see *id.* at 551. No more than state law, the Constitution could only take established attitudes (as opposed to government procedures) as given. "If one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane." *Id.* at 552. For Brown, the argument that "enforced separation . . . stamps the colored race with a badge of inferiority," *id.* at 551, made no sense: law, in the social sphere, could hardly have such a powerful effect. One echo of *Holden v. Hardy*, though, does appear in *Plessy*. Once more, Brown reveals an insistent sensitivity to the risk that coercion may corrupt consensual relationships. "If the two races are to meet upon terms of social equality, it must be the result of natural affinities, a mutual appreciation of each other's merits and a voluntary consent of individuals." *Id.*; see *id.* at 544, 551 ("enforced commingling" would accentuate "difficulties of the present situation"); see also Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era - Part I: The Heyday of Jim Crow*, 82 COLUM. L. REV. 444, 465-70 (1982).

itself subject to correction, and prohibit those exercises of rights that the law initially recognized or created but that are now provocative of hazards. Can a classical system of legal thought address features of law itself? It may have to assume, as Brown indeed does, that the hazards that law creates are ordinarily ad hoc, isolated, or separate. Otherwise, there would be no obvious features of proper remedial legislation distinguishing it categorically from arbitrary rearrangements of legal rights.

The starting point at this stage, however, was the idea that *rights in interaction* are at the root of the matter. Interaction is in principle unbounded. A legal style based on separation is thus always at risk. General legislation, grounded in systematic critique, becomes imaginable. It would not address the problems of only particular lines of work, but take the form of systematic response to the hazards created by prior arrangements of legal rights. From a classical perspective, such legislation would be simply unanalyzable; given the assumptions about social and legal hazards in *Holden*, it would also be unassailable. Constitutional law, thus conceived, carries with it the possibility of its own irrelevance—a built-in silence in the face of its most radical challenge. A constitutional law that must in this way acknowledge itself as parochial and of only limited relevance, is, whatever its immediate appearance, not truly classical.

We can see that in *Lochner* it only *seems* that Justice Peckham said little about *Holden v. Hardy*. We can now account for Peckham's marginal denunciations of paternalism,²³⁰ rhetorical ornaments without provoking correlatives in the opinions of either Harlan or Holmes. It is, we now suspect, *Holden* that Peckham assailed. More fundamentally, Peckham's organization of the *Lochner* opinion at various levels incorporated responses to Justice Brown's opinion. Justice Vann, concurring in the decision of the New York Court of Appeals in *Lochner* upholding the bakers' law, had defended the legislation (prefiguring Brandeis) by taking judicial notice of masses of scientific data concerning the special risks bakers faced.²³¹ His point, obviously, was to demonstrate the statute's harmony with Brown's approach in *Holden*.²³² We can see,

²³⁰ See, e.g., 198 U.S. at 61 ("Statutes of the nature of that under review, limiting the hours in which grown and intelligent men may labor to earn their living, are mere meddlesome interferences with the rights of the individual . . .").

²³¹ See *People v. Lochner*, 177 N.Y. 145, 168-74, 69 N.E. 373, 382-84 (1904) (Vann, J., concurring), *rev'd*, 198 U.S. 45 (1905). The Supreme Court was clearly aware of Vann's opinion; Justice Harlan borrowed from it freely in his dissent. See 198 U.S. at 70-72 (Harlan, J., dissenting).

²³² The majority opinion in the New York Court of Appeals decision also relied heavily upon *Holden v. Hardy*. See *People v. Lochner*, 69 N.E. 373, 374-76, 380 (1904), *rev'd*, 198 U.S. 45 (1905); see also Freund, *supra* note 175, at 412-13.

therefore, the argumentative reason for Peckham's insistent defensive classicism. His repeated assertion that judgment in favor of the New York law would remove the boundary to the police power repeatedly rested upon the claim that the legislation was only superficially particular; the hazards that it addressed were commonplace, the corroborating data (by implication) untrustworthy. Peckham did not openly dismiss empiricism in rigorous form or explicitly reject the claim to priority of the specialized language of science.²³³ But the very language of his opinion, in its claim to commonsense universality and real reference, was itself a response.²³⁴

²³³ In 1904, the year before he wrote for the majority in *Lochner*, Justice Peckham confronted, in wonderfully comic circumstances, another question involving the importance of specialized knowledge for judicial naming. *Benziger v. United States*, 192 U.S. 38 (1904), raised the issue whether certain painted plaster figures of angels and saints were "statuary" and thus subject to tariff or "specimens or casts of sculpture" and therefore duty free. *See id.* at 38-44. Federal tariff officials, taking the view that the figures were "statuary," secured the testimony of artists, marketers of the figures, and customs officials concerning the appropriate classification. Peckham's opinion summarized the chaos that not surprisingly ensued. For example,

Another witness for the government was not willing to swear that the figures were not casts of sculpture, while still another said that in his judgment the figures in question were plaster casts in sculpture. He also thought that they might be termed casts of sculpture. Another witness for the government thought they might be called casts of bad sculpture . . .

Id. at 49; *see also id.* at 50 (similar confusion in testimony of salesmen and customs examiners). Peckham rejected the testimony as useless. *See id.* at 49. He also dismissed the argument that use was critical: that the casts at issue were mass produced and would be used as statues whereas "true" casts were not mass produced and were used by the artist to preserve a work or used by a museum to preserve a copy of a rare or ancient work. *See id.* at 48. The test, thought Peckham, was "how it is made." *Id.*; *see id.* at 49. The figures were indeed constructed in the same fashion as artists' casts; casts they therefore were. *See id.* at 50-51, 55.

In *Lochner*, as in *Benziger*, Peckham saw the issue as one of separating opinion from the actual classification itself.

The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose.

198 U.S. at 64. The passage was ambiguous: "natural effect of such statutes when put into operation" sounds a lot like "effect in practice"—a use test. *Benziger* is inconsistent with that reading. And indeed, set in context, it seems clear that the working term for Peckham was "natural effect," to be discerned from "the character of the law and the subject upon which it legislates." *Id.* Peckham's test was a test of essence, of what (or how) *the law* was made; consequences were to be discerned by working with or through the relevant legal language.

²³⁴ For contemporary critics, Peckham's rejection of science in favor of commonsense was the key point in criticizing *Lochner*. "Has not the progress of sanitary science shown that common understanding is often equivalent to popular ignorance and fallacy?" Freund, *supra* note 175 at 416. The whole point of Frankfurter's article was a celebration of the "Brandeis brief" and the triumph of "authoritative data" in post-*Lochner* working-hours cases. Frankfurter, *supra* note 175, at 364. "Courts, with increasing measure, deal with legislation affecting industry in the light of a realistic study of the industrial conditions affected." *Id.* at 366; *see id.* at 370 (restating Freund's criticism of *Lochner*). Pound's criticism of liberty of contract to a large degree rested on an association of that doctrine with judicial ignorance of "fact." "More than anything else, ignorance of the actual situations of fact for which legislation was provided and supposed lack of legal warrant for knowing them, have been responsible for the judicial overthrowing of so much social legislation." Pound, *supra* note 181, at 470; *see id.* at 480 (factual criticism of *Lochner*).

It should also be apparent why Justice Peckham emphasized the idea of bounded state power and not freedom of contract. The idea of contract played a subversive role in *Holden*. The idea of interaction, rather than separation, emerged as an important theme because Justice Brown defined the police power as a response to the exercise of rights to contract,²³⁵ rather than as simply addressing problems of health, safety, or morality in the abstract. And because Brown set the right to contract in its original egalitarian (as well as individualist) context, describing as "discriminatory" unconstitutional legislative interferences with the right, we are not surprised that he also described private inequality as problematic for freedom of contract. Liberty of contract became a doubly critical concept, making us sensitive to both governmentally caused and privately caused disadvantage. Freedom of contract became a boundary-crosser. It disrupted, in an entirely *anticlassical* fashion, the separate status of rights and powers, of the private and the public.

It is not surprising, therefore, that Peckham treated contract as a residual. We know only indirectly that liberty of contract is infringed; the primary question is whether the state is acting within the police power. Peckham was also careful, in discussing the police power, to suppress the inequality notion, separating "labor" and "health" legislation, thereby obscuring the possible causal connection between inequality of bargaining power and unhealthy working conditions, and thus leaving concern for inequality vulnerable to individualist dismissal.²³⁶

²³⁵ In *Lochner*, Peckham mentioned only in passing the relation of the police power and the consequences of liberty. See 198 U.S. at 53.

²³⁶ See *id.* at 57, 58-61. Shortly after *Lochner*, Peckham again had occasion to avoid focusing on the details of private contract and to emphasize instead more public concerns. *Louisville & N.R.R. v. West Coast Co.*, 198 U.S. 483 (1905), involved a challenge to the practice of a railroad, which operated a wharf in Pensacola, Florida, of shipping to that wharf (rather than to its inland depot) only that freight which would be loaded on ships "in regular lines running in connection with the . . . Railroad" or ships owned by a particular company. *Id.* at 485. The railroad had originally permitted the naval stores company to use the wharf, although the company's freight was loaded on ships not meeting the railroad's condition. Subsequently, the railroad denied access; the unauthorized ships were in competition with a shipper then negotiating wharf rights with the railroad (which also competed overland with the unauthorized ships). See *id.* at 486. We would probably analyze a case like this in a fashion emphasizing its antitrust dimension (the railroad wharf was evidently the only wharf in Pensacola, see *West Coast Naval Stores Co. v. Louisville & N.R.R.*, 121 F. 645, 646, 650 (5th Cir. 1903)) or the implications for contract law of the pattern of permission, reliance, and revocation. In fact, however, in this diversity case, counsel for the naval stores company argued that the wharf was a public wharf (even if privately owned) and that the railroad was obliged therefore to operate the wharf as a nondiscriminating common carrier. Justice Peckham rejected the argument, noting initially the private ownership of the wharf, the existence of the inland depot as an alternative terminus for the rail line, and the failure of city officials, in approving construction of the wharf, to condition its use upon common carrier operation. See 198 U.S. at 494-98. But Peckham did not proceed to defend the right of the railroad, as wharf operator, to engage in the specific competition-restricting practices the railroad openly acknowledged in the case at hand. See *id.* at 485-86. Instead, immediately after recognizing in the

Holden v. Hardy had demonstrated that freedom of contract could be subversive of classical order. In *Lochner*, as if in response, contract ideas were never more than part of the background for any of the Justices.²³⁷ Harlan ignored inequality of bargaining power as a justification for legislation; so apparently did Holmes;²³⁸ Brown, astonishingly, joined Peckham.

B. *Kennedy's Blackstone: Perspective and Artifice*

In the years since *Lochner*, language has seemed to be only superficially the medium of law. For the most part, usage no longer commits us; rather, our commitments fix usage. A classicism of the *Lochner* sort, one that starts with a process of naming, thus makes less sense to us. The classical style, however, has not disappeared from our jurisprudence. It has simply taken different forms.

For example, we often depict order in law as a reflection of some decisive social pattern. Law and economics commonly represents markets as reaching or potentially reaching equilibrium, and law as either properly facilitating or simulating or improperly frustrating or distorting market transactions.²³⁹ Marxist legal theory is similarly classical; at least to the extent that it treats law as reinforcing, legitimating, or incorporating in its structure images of social relationships that represent as natural what are in fact artificial, if still fixed, forms of class hierarchy.²⁴⁰ Jurisprudential borrowings from analytic or moral philoso-

abstract the right of the railroad to contract as it saw fit, see *id.* at 497-98, Peckham (as if not to focus on the implications of the right) shifted perspective and (paradoxically) justified the railroad's restriction on wharf access by reference (again abstractly) to common carrier principles, noting the scarcity of wharf space and the imperatives of orderly scheduling. See *id.* at 498-500.

²³⁷ Subsequent cases would rehabilitate liberty of contract, addressing the equality issue directly. See, e.g., *Coppage v. Kansas*, 236 U.S. 1 (1915). *Lochner* itself, however, for a time would appear to be only an isolated case in the "hours" law context—the end of an era. See generally Frankfurter, *supra* note 175.

²³⁸ A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.

Lochner, 198 U.S. at 76 (Holmes, J., dissenting). In *Coppage v. Kansas*, however, Holmes would indeed emphasize inequality of bargaining power, and cite first *Holden v. Hardy*. See *Coppage*, 236 U.S. at 27 (Holmes, J., dissenting).

²³⁹ See *supra* note 169.

²⁴⁰ For example, Mark Tushnet has suggested an outline of a sophisticated Marxist theory of law. See Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1345-59 (1979). Tushnet, in filling in his picture of "law as a form of incomplete hegemony," *id.* at 1347, recognizes that there is a "deviant structure" within American public law that "associates group activity and political action" and that "is the ideological expression of the contradictions within American capitalism." *Id.* at 1351. But Tushnet thinks that this "deviant structure" is expressed only in ways that preserve existing class arrangements. The mediating idea is that of the "rule of law":

The theory of the rule of law . . . expresses a vision of equality and individualism

phy are in this regard not much different. It is ordinary language, moral equilibrium, or the priority of the individual that we now represent as fixed, and in its fixity, determinative of our legal discourse.²⁴¹

Classicism in these contemporary forms has two prominent features. That which law reflects appears in principle as universal. Law and economics distrust theories of market failure; Marxist work emphasizes, in one way or another, the priority of class structure; philosophical borrowings often treat obscurity in underlying concepts as unfinished business rather than limit. That which law reflects is also in some sense clear—determinable, fixed, or settling. The organizing image is now the mirror.²⁴²

Classicism of this modern sort is in one sense merely a phenomenon of the microcosmos. We may see in any one legal medium evidence of underlying order; but the fact that we cannot decide which medium is of utmost relevance means that, as real as each medium, there is also an anticlassical aggregate—a chaos of competing resolutions.²⁴³ Classicism in contemporary legal writing, it may therefore seem, is merely conventional. It summarizes a set of assumptions that we use in organizing our work, but that we also understand are partly fictional—devices for making points that are always more limited or tentative than they initially appear to be. Classicism, perhaps, is a form of overstatement for tactical or heuristic reasons.

that is consistent with social relations within the dominated classes. Through its role as an arbiter whose neutrality is ordinarily apparent and frequently real, the state provides an ideological expression of the fragmentation of the dominated classes: if injustice occurs, recourse can be had to the neutral state and thus alternative institutions premised on ideas of solidarity may be avoided.

Id. at 1350. In the end, Tushnet concludes that, although "[t]he deviant structure is . . . secreted in the interstices of the dominant one," *id.* at 1351, it comes into play only at the margins, and thus is not inconsistent with (indeed legitimizes) "the general role of the state in reproducing capitalist relations of production . . ." *id.* The classical element, obviously, lies in the emphasis on law as "reproducing capitalist relations"; conflict, while acknowledged, ends up as peripheral.

²⁴¹ I do not mean to suggest that ideas such as these, as philosophers use them outside of legal analysis, always display such a classical tendency.

²⁴² Cf. R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979).

²⁴³ Abstract legal theory thus replicates a situation that often appears within the doctrinal structures courts and commentators discern in more traditional legal media. Attempts to set up categorical rules and to fix the balance of interests are commonplace in legal analysis. In isolation, each doctrinal formula expresses a classical image of order. Categorization presupposes the possibility of clarification; interest balancing assumes the existence of a background hierarchy. But together, the two images subvert order. From the perspective of each, the other is arbitrary. Nonetheless, we are unwilling to abandon either analytic figure. The importance and difficulty of assigning both images a place is a recurring theme, for example, in antitrust law, see, e.g., Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (I) & (II), 74 *YALE L.J.* 775 (1965); 75 *YALE L.J.* 373 (1966), in constitutional law, see, e.g., Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 *HARV. L. REV.* 1482 (1975); Redish, *The Content Distinction in First Amendment Analysis*, 34 *STAN. L. REV.* 113 (1981), and in tort law, see, e.g., *Barker v. Lull Eng'g Co.*, 20 *Cal. 3d* 413, 418, 430-31, 573 *P.2d* 443, 446, 454, 143 *Cal. Rptr.* 225, 228, 236 (1978).

I think, however, that classical style persists as more than convention. In its contemporary expressions, it is not merely rhetoric but reflex—the point from which we regularly start; a means of organization we may suspect but which we seem unable to put aside. Classical style retains intensity. As demonstration, I will explore in some detail Duncan Kennedy's essay, *The Structure of Blackstone's Commentaries*.²⁴⁴ Kennedy puts classical predispositions to work, ironically, as a destabilizing mechanism. As we will see, though, Kennedy's subversive program is caught, and reveals its vulnerability, within a classicism of its own.

1. Kennedy's Blackstone: An Initial Summary

Kennedy argues that, although the ways in which we often organize legal thought may suggest an overall order, the ordering in fact constitutes a "mediation" of what we also treat as a fundamental existential contradiction. Our sense of individuality competes with our fear of isolation; our need for community fights our fear of the drowning mass.²⁴⁵ This set of conflicts, Kennedy appears to believe, is an inescapable fact; but it is also a fact that our political theory regularly attempts to deny.²⁴⁶ Liberalism is the currently prevailing political vision.²⁴⁷ It would obscure our contradictory impulses by restating the conflicts in terms of relationships among individuals and between individuals and government, and then asserting that these relationships can be stabilized.²⁴⁸ For Kennedy, law within liberal thought functions as one means of accomplishing this overall strategy. Law takes the form of a false picture of order. Its artificial constructions are distorted images of our situation permitting us to see as ordered what we know (or fear) is in fact (or would otherwise be) contradictory.²⁴⁹

Blackstone's *Commentaries* is an early illustration of the phenomenon. Blackstone's synthesis represented eighteenth century English common law as a system for protecting rights. These rights were in their origins understandable in liberal terms; they obviously addressed questions of the relationship among individuals or between individuals and the state. And they were also in specific content limited in fashions understandable in these same liberal terms. This latter limitation was the crucial phenomenon. Because we can see Blackstone's "rights" as

²⁴⁴ Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979).

²⁴⁵ See *id.* at 211-13.

²⁴⁶ See *id.* at 211-14.

²⁴⁷ See *id.* at 216.

²⁴⁸ See *id.* at 217.

²⁴⁹ See *id.* at 214-17.

bounded, we can see his society as something other than an aggregate of competing claims. Because we can see these rights as justifiably bounded in liberal terms, we can regard rights-enforcing agencies such as courts as not themselves threatening to disrupt individual security or stabilized interpersonal dealings.²⁵⁰ Kennedy identifies as mediations the specific devices that Blackstone employed in order to describe law as rights-protecting and yet self-limiting. These mechanisms, we can see, are artificial; they merely misrepresent contradiction as resolved, rather than resolve it in truth.

Kennedy begins by discussing Blackstone's initial organizational differentiation of rights and wrongs. This distinction enabled Blackstone to treat the traditional crazy-quilt of common law and equitable actions (legal responses to "wrongs") as *in toto* protecting liberal rights.²⁵¹ The domain of wrongs encompassed the traditional "stuff" of the law. Criminal as well as civil common law and equitable actions were relevant on their own terms here. In discussing wrongs, Kennedy treats Blackstone as engaging in nothing more than straightforward description. The point, it seems to Kennedy, is not the specific manner in which Blackstone rendered the actions that he described as responses to wrongs, but the fact that Blackstone juxtaposed wrongs with rights. Rights became the theoretical justification or source of content for traditional legal institutions. Set apart from law as such, rights (to the extent that they and their boundaries could be described in liberal terms) legitimated law, identifying it as not arbitrary and as indeed of beneficial substance. Because of the extensive and detailed nature of the law, the idea of rights in turn acquired credibility from its legal installation. The idea of rights, through its legal incorporation, could become the working mediator of conflict—the practical unit of social order.²⁵²

The key, for Kennedy, thus becomes Blackstone's definition of rights. Blackstone distinguished between the rights of persons and the rights of things. Within the category of rights of persons, Blackstone set up two further groupings: absolute and relative rights. Absolute rights were those of individuals as such, involving guarantees of the security of individual interests in life, liberty, and property, protected against both private and public invasion. These rights, however, were not

²⁵⁰ See *id.* at 258-64, 265.

²⁵¹ See *id.* at 249-55. Kennedy sees Blackstone's willingness to defend even jurisdictional vagaries as clear evidence of Blackstone's commitment to the correspondence of legal actions and liberal rights. Thus, the distinction between law and equity becomes a historical accident, because law and equity both treated as substance the same set of liberal rights. Unlike truly separate jurisprudential systems, their differences were historical accidents rather than systematic, as reflected in their changing commitments to strict construction (in order to limit state interference with rights) and liberality (in order to permit redress against new wrongs or modify older actions).

²⁵² See *id.* at 261-62, 381-82.

Blackstone's main concern. The absolute rights that the *Commentaries* specifically describe are few and narrow; actions to redress wrongs against these rights are similarly limited in scope. Relative rights received much more attention. These rights were social artifacts in the sense that they could not be explained by reference to the interests of individuals in isolation. Instead, relative rights took as their subject the situation of individuals in society. Blackstone thought that the content of these rights could be understood by conceiving of society, in its various public and private dimensions, as a series of hierarchies in balance. King, lords, and commons all possessed prerogatives vis a vis each other, but each group's claims were also limited. Master and servant, husband and wife, parent and child, and church and state were similarly caught up in reciprocal relations of right and duty.²⁵³

Kennedy argues that Blackstone's distinction between absolute and relative (or individual and social) rights worked first to legitimate the rather narrow scope of individual rights as such. Blackstone could treat social rights as substitutes for individual rights and justify the substitution by reference to the "convenience" or necessities of social life or to the "fact" of implied consent: the tacit agreement of individuals living in society that coexistence required restriction of individual liberty. Kennedy also argues that Blackstone's description of social hierarchies as organizations of reciprocating rights and duties in fact enables the *Commentaries* to present as libertarian or liberal what were indeed precisely those authoritarian or traditional features of society against which we might expect the idea of individual rights to stand as critique. Implied consent, reciprocity, and balance were utterly liberal themes, recognizing respectively the priority of the individual, limitation as the organizing principle of society, and the necessity for devices to prevent governing institutions from overwhelming individuals. To represent these ideas as informing the substance of law, in particular that part of the law constitutive of established social institutions, was thus to legitimate both law and liberal order with a vengeance.²⁵⁴

Interestingly, Kennedy sees Blackstone as reconstructing law as a mediating structure in a different way in the context of property law. The emphasis is not on hierarchy but on individualization. In Blackstone's view, property rights do not describe a set of relationships among individuals in feudal fashion. Rather, each form of property becomes a separate possessory right to a particular thing. Described in property terms, society becomes simply an aggregate of individuals in

²⁵³ See *id.* at 273-85.

²⁵⁴ See *id.* at 294-311, 372-82.

possession, each a stranger to the other's holdings.

For Kennedy, this way of representing property law is notably artificial. Blackstone, for example, analyzes in property terms what Kennedy thinks we would today conceive as the central part of contract law, picturing contracts as legally protected because (or to the extent that) they take as their subject the disposition of some piece of property. The promise becomes simply the form of conveyance. To account for the enforceability of promises as such, therefore, Blackstone clearly has to struggle; he argues, it seems, that the right to damages for breach of promise constituted the underlying or ultimate subject of transfer—a kind of conditional property right much like a debt.²⁵⁵ As Kennedy notes, however, this property scheme, but for its forced quality, would be a powerful legitimator and mediator. Feudal or post-feudal property institutions would acquire liberal endorsement as individual rights. The possibility of a liberal ordering of society (of individuals coexisting in society) thus receives a dramatic demonstration.²⁵⁶

2. The Organizing Ambitions of Kennedy's Enterprise

Why Blackstone? The apparent political aims of Kennedy's essay, its explicit methodology, and its implicit stylistic appeals combine in suggesting the peculiar appropriateness of the *Commentaries* as an illustration of the artifice of mediation. These three aspects of Kennedy's work, as we will see shortly, also ultimately contribute to the difficulties in Kennedy's reading of Blackstone.

Initially, it should be clear that from Kennedy's perspective the effort to represent conflict as order is perhaps heroic but certainly mistaken. *The Structure of Blackstone's Commentaries* is not a tribute to Sir William Blackstone's existential grit. Kennedy's essay is politically radical. Its underlying message is that we should reject (or try to reject) the liberal denial of contradiction—if not the fact of contradiction itself.²⁵⁷

²⁵⁵ See *id.* at 337-42. Kennedy describes an especially artificial reification as taking place in Blackstone's description of rents, franchises, political and ecclesiastical offices, and rights appurtenant to such offices. In analyzing these legal phenomena, we might emphasize their relational characteristics. Blackstone, however, suppressed the hierarchical dimension by portraying these legal complexes as objects—"incorporeal hereditaments." See *id.* at 342-46; see also *infra* text accompanying notes 302-06.

²⁵⁶ See Kennedy, *supra* note 244, at 311-50, 364-66, 381.

²⁵⁷ See, e.g., *id.* at 221, 354-55, 382. Kennedy's argument is not Marxist. Once we become aware of the artifice in the *Commentaries*, we learn nothing about the relationship between the legal devices in use and any particular social structure; instead we recover only a sense of the fundamental contradiction. See *id.* at 220-21. If law is superstructure in Kennedy's system, its base is not some social formation such as class structure or economic priority. Kennedy is quite explicit about this. See *id.* at 362-63 n.56. Nothing in *The Structure of Blackstone's Commentaries*

As a means of encouraging this repudiation, *The Structure of Blackstone's Commentaries* adopts an approach that is both ahistorical and historicist. Neither the context in which Blackstone wrote—his personal situation; the particular legal, political, social, and economic environment; the intellectual climate; the identity of his intended readership—nor the circumstances of reception—the actual readership, the uses to which readers put the *Commentaries*, the legal and social surroundings of readers—are very important for Kennedy's project. Blackstone's *Commentaries* is in isolation the focus. Kennedy treats it as a text largely complete; itself the point of entry, fixing (rather than fixed by) the relevant environment.

Kennedy singles out Blackstone, however, in order to take advantage of the historicist predisposition of Kennedy's readers. We expect Blackstone to be different from ourselves and thus we are prepared in advance to be persuaded by Kennedy's demonstrations of contingency. *The Structure of Blackstone's Commentaries* assumes that its readers approach Blackstone with a set of assumptions about both the problems of political theory that lie in the background of legal analysis²⁵⁸ and of the usual categories of legal analysis per se.²⁵⁹ Kennedy does not emphasize context; he assumes that his readers will naturally do so. This is not inconsistency but rather ju-jitsu. We find it easy to see Blackstone reconstructing *his* past in describing English common law because we have already done something similar to Blackstone: labeled his ideas as artificial through the very act of placing them in *our* past.²⁶⁰ Kennedy in the end therefore prepares us for the next step—the recognition that what we treat as present is similarly susceptible to reconceptualization.

Implicit in Kennedy's approach is a deep appreciation of the parameters of classical style. To a degree, *The Structure of Blackstone's Commentaries* disguises its underlying classicism. Kennedy's essay identifies itself as incomplete—an introduction for a proposed larger work.²⁶¹ Moreover, the immediate subject of this ostensible fragment is not the entirety of Blackstone's treatise, but, initially at least, only its organization—the structure of its table of contents.²⁶² And finally, in its tactics of persuasion, Kennedy's essay proceeds by calling attention to the elements in Blackstone's approach that mark it as different from

ies supplies any meaningful clue concerning society as it exists independently of its legal conceptualization; at bottom, within law, we encounter only contradiction.

²⁵⁸ See, e.g., Kennedy, *supra* note 244, at 354-62.

²⁵⁹ See, e.g., *id.* at 265-72, 320-28.

²⁶⁰ See, e.g., *id.* at 368.

²⁶¹ See *id.* at 209.

²⁶² See *id.* at 211, 221-22, 223-25.

modern conventional legal analysis. This assertion of a break with the past, we might think, is fundamentally anticlassical.²⁶³

Kennedy nonetheless works with the *Commentaries* (for the most part) as though Blackstone's text were self-contained—in this sense a universal or complete account. Moreover, as Kennedy represents it, the *Commentaries* claims to function as an ordering. This is indeed the crucial point. Unless Kennedy can represent Blackstone as describing the laws of England as ordered or harmonious, Kennedy's project stalls. The artifice of the *Commentaries* loses its instructive force. Moreover, in the end Kennedy does not assert that in any deep sense what Blackstone produced was *not* an ordered jurisprudence. Kennedy suggests only that Blackstone's order, although real, was constructed or artificial; an effort to disguise or deny the basic contradictions.²⁶⁴ In a sense, *The Structure of Blackstone's Commentaries* at this point once more ceases to be classical. It calls our attention to a central chaos. But the reason for this revelation is classical in its assumptions about the nature of radical politics. Kennedy expects us to reject (or want to reject) liberalism as a whole once we see its contradictory form.²⁶⁵ We (as offended classicists) will acquire radical ambitions, at least *want* to substitute systems of thought, even if we cannot yet describe the alternative universe.²⁶⁶

3. Kennedy's Blackstone: Difficulties

Kennedy's ultimate classicism, however, also points to the difficulty in his argument. We may not, after all, be predisposed to regard Blackstone's work as a unity and to respond therefore to a demonstration of its artificiality by rejecting it whole. It is possible to see, initially from Kennedy's own account, that there are elements in Blackstone's work that simply do not fit in Kennedy's picture. Blackstone, we can observe, was not only (or always) constructing law as a representation of an ordered society free from liberal contradiction. Law and society coexisted in a more complex and ambiguous relation than that of a flattering portrait and its subject. In that relationship, there was included the possibility of an image of law as more fragmentary, and a picture of society as less resolved and more in conflict, than Kennedy's

²⁶³ See generally J.F. KERMODE, *supra* note 144; Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1018-24 (1981).

²⁶⁴ See Kennedy, *supra* note 244, at 379-82.

²⁶⁵ This strategy also appears, for example, in the form of a rhetoric of injured innocence in Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 671-73 (1981).

²⁶⁶ But see *infra* text accompanying note 349.

own conclusions would suggest.²⁶⁷

a. *The Incompleteness of Kennedy's Account: the Status of Contract*

In Blackstone, is English law entirely explainable by liberal principles? Is the match of law and liberal society only approximate? Or are law and liberal society more like interdependent terms—incapable of definition without reference to each other? Kennedy appears to believe that his project will proceed successfully so long as we assent to one or another of these formulations.²⁶⁸ Law and liberal society correspond: this idea as such does not seem to require much elaboration. *The Structure of Blackstone's Commentaries* nonetheless suggests, inadvertently as it were, that correspondence is in fact a complicated concept. Blackstone, it appears from Kennedy's own account, did not conceive of law as simply an expression or constitution of society, but as separate and at times both subordinate and aggressive. Blackstone's images of law in this regard ultimately undermine Kennedy's argument. Artifice seems less surprising. Initially, we may glimpse this unruly Blackstone in Kennedy's discussion of contract.

It is important for Kennedy that Blackstone does not treat contract as defining a doctrinal category, as one of the basic concepts the law celebrates and elaborates.²⁶⁹ Instead, Kennedy notes, Blackstone divides the field of contracts into two areas. First, contracts are subjects, even if secondarily, for legal analysis. In discussing the relative rights of persons, Blackstone represents certain relationships, such as marriage or master and servant, as creations of contract.²⁷⁰ In the context of the rights of things, Blackstone similarly describes contract as the device by which individuals create property rights in choses in action or other forms of personal property.²⁷¹ Second, Kennedy notes that in the *Commentaries* references to contracts are prominent in rhetorical or justificatory as well as strictly legal settings. The idea of implied consent and

²⁶⁷ See *infra* text accompanying notes 296-332. In order to simplify the citational forms, in those instances in which I refer to Kennedy's interpretation of particular passages in Blackstone, I will supply a citation to Kennedy's quotation, but not to the pertinent page in the *Commentaries*. In the instances in which I set out passages in Blackstone to which Kennedy does not refer, I will supply the reference in the *Commentaries*.

²⁶⁸ At different stages in his essay, Kennedy appears to invoke variations on each of these formulations. He recognizes "nonliberal elements" in Blackstone's approach, Kennedy, *supra* note 244, at 272; see *id.* at 264-72, but Kennedy also occasionally describes Blackstone as at least aiming to represent English law in a way "that made it appear to correspond almost exactly" with liberal values, *id.* at 236. By the close of the essay, Kennedy depicts the *Commentaries* as a "concrete model" that "put law and legal reasoning at the center at least of the lawyers' understanding of what liberalism was." *Id.* at 364 (emphasis in original).

²⁶⁹ See *id.* at 322.

²⁷⁰ *Id.* at 323.

²⁷¹ See *id.* at 321-22.

attendant images of social contract are invoked by Blackstone, for example, in his discussion of relative rights—as support for the limiting impact of those rights upon absolute rights and also as support for the internal limits in the definitions of relative rights.²⁷²

Kennedy makes much of Blackstone's legal treatment of contract. Its artificiality is easy for us to see given the sharp difference between our unified and emphasized treatment of contracts and Blackstone's dividing and subordinating approach. Moreover, the legitimating and mediating role of the *Commentaries* is particularly easy to see when we attempt to account for Blackstone's way with contracts. Kennedy concludes that contract divides as it does for Blackstone because Blackstone wishes to defend social hierarchy and to minimize the significance of competing feudal and commercial hierarchies. In pursuit of these ends, it is only natural that Blackstone separates status-creating contracts from commercial promises, and treats the latter as simply an instance of a highly individualized, nonrelational law of property.²⁷³ For Kennedy, a similar stabilizing purpose underlies Blackstone's rhetorical use of implied consent. Implied consent or the idea of social contract as an exchange of liberty for security provides one of the constitutive elements (convenience and hierarchy are others) of the picture of civil society as order that Blackstone's law constructs.²⁷⁴

Kennedy, however, does not explore, even though he enables us to see, the *similarities* in Blackstone's references to contract. Contract is a mechanism for creating a relationship of a certain sort. Contract similarly is the means by which individuals acquire a property right in a chose in action or in some other (less abstract) form of personal property. Finally, at the rhetorical level, civil society is not a *process* of contracting; instead, even if only metaphorically, contract is *prior* to civil society and therefore important in explaining *how* society comes to be but not itself an important *part* of society. Within the civil society that Blackstone's law posits, contracting per se is not a celebrated feature. Liberty of contract, as Kennedy notes, has no special significance.²⁷⁵ Contract in all of its manifestations figures instrumentally.

Blackstone's treatment of contract thus raises a question about Kennedy's assumption of an easy correspondence between law and society in the *Commentaries*. Contract for Blackstone, it appears, is never a legal entity as such, whether descriptively or normatively. What is important for Blackstone is the set of legal rights and the social order it

²⁷² See *id.* at 307-11, 323-24; see also *id.* at 316 (implied consent and rules of property).

²⁷³ See *id.* at 350.

²⁷⁴ See *id.* at 376, 381.

²⁷⁵ See *id.* at 283-84.

organizes. Legal rights and social order of course presuppose contract, but only as a matter of genetic history. From Blackstone's perspective, contract therefore becomes something like a natural phenomenon: of causal relevance, but nonetheless to be treated as though it were qualitatively different from the real subject at hand. As a result, Blackstone's "real subject" acquires a more complex "reality." To the extent that the legal regime and civil society are each the product of a "natural history" (the end-result of processes of contracting), the relationship between the two becomes more important. What were (what Kennedy treats as) analytical categories or alternative forms of reference seem to take on an empirical bulk—and thus invite investigation.

b. *The Incompleteness of Kennedy's Account: the Status of Blackstone's Concept of Civil Society*

The divergence of Blackstone's and Kennedy's assumptions becomes clearer in Kennedy's discussion of the notion of "civil society" as such.²⁷⁶ This discussion plays a decisive part in *The Structure of Blackstone's Commentaries*. It comes at the close of the essay, after Kennedy has explained how Blackstone's descriptions of the rights of persons and things, because they are couched in liberal terms, legitimate hierarchial or traditional aspects of English law. Kennedy, in taking up the concept of civil society, seeks to show that the liberal account of law in turn also validates liberal political theory as a way of disposing of contradiction.

Blackstone's liberal representation of law, because of the law's all-encompassing quality (in both subject and detail of treatment), offered reassurance that the liberal program might achieve its objective of ordering relations among individuals and between individuals and government. Importantly, from Kennedy's perspective the reassurance that Blackstone provides is manifestly artificial as well. The references in the *Commentaries* to civil society, although presented as decisive in explaining the content of English law, routinely involve appeals to the binding commitments of implied consent, elaborations of the properties of fictional entities, or assertions of convenience (public policy) that from the modern point of view are notably question-begging. At another level, Kennedy notes, Blackstone himself in effect acknowledged the falsity of his picture of order. By describing civil society as something other than a way of invoking natural law and as also defining rather than merely restating the powers of government, the *Commentaries* implicitly recognized a conflict between the content of

²⁷⁶ See *id.* at 351-82.

civil society and both ideal concepts of individual rights and political reality. Kennedy's discussion of civil society thus summarizes both the success and failure of Blackstone's version of liberal mediation.

In making these various points, Kennedy tends to regard Blackstone as treating civil society simply as that which law establishes—a utopian image built into (and perhaps made real by) the legal system rather than a real phenomenon in its own right. Civil society is “predicated” on an “imaginary harmony”²⁷⁷—a “notion.”²⁷⁸ Kennedy refers to “the laws of civil society”²⁷⁹ or “its rules”²⁸⁰ in a way that brings to mind ideas of scientific laws as analytically exhaustive of what they describe, but that also indicates that “the laws” Kennedy mentions are “the laws of the community”²⁸¹—the legal system as such. Kennedy indeed equates the substance of the law—“hierarchy and property”—with “[c]ivil society.”²⁸² Civil society and law are thus opposite sides of the same coin. Their relative priority cannot be in issue.

Kennedy's account nonetheless suggests that in Blackstone the relationship of law and civil society may be more complicated. For example, Kennedy quotes the following passage from the *Commentaries*:

But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish²⁸³

The argument, as Kennedy notes, is obviously an invocation of implied consent; the contractual reference is quite explicit.²⁸⁴ But the passage is also more complicated. Society, as Blackstone pictures it, is both prior to the individual (“enters into society”) and to law, in the sense that law is not simply a restatement in rules of civil society and thus presumably difficult to describe separately from the perspective of the individual.²⁸⁵ Law is not itself “so valuable a purchase” or among “the

²⁷⁷ *Id.* at 371.

²⁷⁸ *Id.* at 378.

²⁷⁹ *Id.* at 375.

²⁸⁰ *Id.* at 374.

²⁸¹ *Id.* at 376.

²⁸² *Id.*; see also *id.* at 374.

²⁸³ *Id.* at 310.

²⁸⁴ See *id.* at 375-76.

²⁸⁵ The differing emphasis in Kennedy's writing and in the *Commentaries* is also apparent in other parts of Kennedy's essay. For example, Kennedy writes: “Blackstone's initial presentation of the notion of civil society contained no references to a conflict between its rules—the relative rights of persons and the rights of things—and the regime of natural and divine law that existed in the state of nature.” *Id.* at 374. Law, it appears, is civil society in rule form. But Kennedy also quotes Blackstone:

advantages of mutual commerce."²⁸⁶ For the individual, law is merely "the price"; for society, law is similarly secondary: "those laws, which the community has thought proper to establish."²⁸⁷ In this sentence, at least, the vividness of the language, giving a restitutionary spin to the contract metaphor, suggests that for Blackstone society was somehow an independent phenomenon, vis à vis the law as much as the state or the individual.

The differing assumptions of Kennedy and Blackstone about the status of civil society are especially apparent in Kennedy's analysis of the following statement from the *Commentaries*:

The right of property in all external things being solely acquired by occupancy . . . and preserved and transferred by grants, deeds, and wills, which are a continuation of that occupancy; it follows, as a necessary consequence, that when I have once gained a rightful possession of any goods or chattels, either by a just occupancy or by a legal transfer, whoever either by fraud or force dispossesses me of them, is guilty of a transgression against the law of society, which is a kind of secondary law of nature. For there must be an end of all social commerce between man and man, unless private possessions be secured from unjust invasions: and, if an acquisition of goods by either force or fraud were allowed to be sufficient title, all property would soon be confined to the most strong, or the most cunning²⁸⁸

Kennedy emphasizes what he sees as Blackstone's false rigor:

The passage . . . illustrates, *for us*, the problematic character of even the simplest piece of liberal legal reasoning. First, Blackstone has constructed the postulated property right, on the basis of convenience, from a natural right which is only to occupancy *for use*. We are dealing with an offense against the "law of society," which is only a "secondary" law of nature. Unless the derivation of social from natural law is

For when civil society is once formed, government at the same time results of course, as necessary to preserve and keep that society in order. Unless some superior be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature, without any judge upon earth to define their several rights, and redress their several wrongs.

Id. "[A]t the same time," to be sure, but it is "government" (law) that "results." Blackstone writes about society and law as more nearly distinct formations.

²⁸⁶ *Id.* at 310.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 364 (Kennedy's quotation of Blackstone).

valid, the rest of the reasoning is unpersuasive. . . . Second, "force and fraud" are extremely vague, and the characterization of the taking as "unlawful," an "unjust invasion," is question-begging if we are concerned with the judge's discretion.²⁸⁹

Is Blackstone engaging simply in "legal reasoning," as Kennedy assumes? In Kennedy's terms, a "postulated property right" is "constructed" through an argument from "convenience"; there is a "derivation of social from natural law." But as Blackstone puts it, the "law of society" is not, as Kennedy characterizes it, "*only* a 'secondary' law of nature." Rather, "the law of society . . . *is a kind of* secondary law of nature"—stands in the place of, rather than follows from, the law of nature. The "law of society" is not law in the institutional or narrow sense. Preceding clauses in Blackstone's sentence suggest that "rightful possession," "just occupancy," and "legal transfer" are indeed references to already established legal conclusions as such, whereas the "law of society" is both different and still open to analysis, the subject of the *next* sentence in Blackstone: "For there must be"

The context of Blackstone's sentence confirms the differentiation within his reference. As Kennedy notes,²⁹⁰ this passage serves an introductory purpose in Book Three, whose topic is "private wrongs"—that is, civil actions for breach of personal or property rights. By this stage, Blackstone had completed his discussion of property rights as such; hence, perhaps, the limited conclusory references to "rightful possession," "just occupancy," and "legal transfer." Blackstone, however, was only beginning the discussion of civil actions protecting property rights; an analysis of the underlying rationale for these actions was thus up to this point absent and also at this point appropriate. If Blackstone treated civil society as distinct from the legal apparatus per se, a reference to the implications of the concept of civil society (in this sense its "laws") was thus organizationally proper. Given this reading, of course, Kennedy also errs in criticizing Blackstone's references to "force and fraud" as "vague." The specific contours of legally enforceable wrongs were yet to be treated.²⁹¹

I do not mean to argue that Blackstone's analysis is *not* "problematic." The distinct "civil society" that I find in the above-quoted passage must still suggest compelling arguments on its own terms if Blackstone's conclusions are to be persuasive. My point is narrower: that

²⁸⁹ *Id.* at 365.

²⁹⁰ *See id.* at 364.

²⁹¹ *See* 3 W. BLACKSTONE, COMMENTARIES *162, *163-66.

Kennedy is treating as internal to a process of "legal reasoning" what Blackstone supposes within his own legal argument to be instead an extrinsic reference.²⁹²

Blackstone's use of the term "convenience," in the preceding passage and elsewhere in Kennedy's quotations, reinforces the sense of "extrinsicness." "Convenience" is a justification for restricting rights but it is also a *bounded* restriction—in effect a constitutional restraint on government. This combination of justification and restraint is one that Kennedy finds importantly illuminating. It is both an importantly liberal and an obviously artificial element of Blackstone's jurisprudence.²⁹³ Kennedy, however, does not really try to explain why Blackstone conceives of "convenience" as a self-limiting concept; Kennedy's point is that plainly we would not do so.²⁹⁴ If society from Blackstone's perspective were truly distinct in its features, and thus independent of legal reactions to it, "convenience" would indeed become a term that was applicable only up to a point. A "real" society constrains the idea of adaptation by supplying it with a definite reference.²⁹⁵

²⁹² Blackstone's uses of a phrase such as "law of society" may appear to be more open-ended than I am suggesting. Thus, in discussing games laws, he writes:

Nor, certainly, in these prohibitions is there any *natural* injustice, as some have weakly enough supposed: since as Puffendorf observes, the law does not hereby take from any man his present property, or what was already his own, but barely abridges him of one means of acquiring a future property, that of occupancy; which indeed the law of nature would allow him, but of which the laws of society have in most instances very justly and reasonably deprived him.

2 *Id.* at *412. "[L]aws of society" in this passage seems to refer simply to "municipal laws," see *id.* at *411, and thus the narrow legal apparatus as such. But it is also clear that Blackstone's discussion at this point retains an importantly abstract quality. He immediately follows the passage I have quoted with a transition: "Yet, however defensible these provisions in general may be, on the footing of reason, or justice, or civil policy, we must notwithstanding acknowledge that, in their present shape, they owe their immediate original to slavery." *Id.* at *412. This is the beginning of Blackstone's account of the particular configuration of the relevant English law. See *id.* at *412-19.

²⁹³ See Kennedy, *supra* note 244, at 370-71.

²⁹⁴ See *id.* at 304-07, 370-71, 377-78.

²⁹⁵ A similar explanation appears to cover what Kennedy describes as Blackstone's unconcerned reference, in his treatment of law and equity, to two contradictory jurisprudential principles as equally relevant: strictness (to protect rights) and liberality (to adapt the law to new situations). See *id.* at 252-55.

It is an often made point that eighteenth century views of scientific method strongly influenced Blackstone. See, e.g., D. BOORSTIN, *THE MYSTERIOUS SCIENCE OF THE LAW* 11-30 (1974); Posner, *Blackstone and Bentham*, 19 J. L. & ECON. 569 (1976); Siegel, *The Aristotelian Basis of English Law, 1450-1800*, 56 N.Y.U. L. REV. 18, 56 (1981). The usual argument, however, seems to be that Blackstone undertook what he conceived to be a scientific ordering of the substance and structure of legal institutions; Blackstone did not purport to write a general sociology. The idea that I am in the process of developing is somewhat different. I am suggesting that, while Blackstone may have attempted to describe a set of relatively autonomous legal institutions, it also appears that Blackstone, in order to accomplish his description, had to postulate and occasionally represent society as an entity distinct from law *per se*. This separate society, I think, was one that Blackstone perhaps aspired to portray as itself scientifically ordered. But as we will see shortly, Blackstone's description of the relationship of legal institutions and conceptions of society repro-

c. *The Implications of Kennedy's Simplification of Blackstone: the Organization of Book Two*

It seemed to Blackstone that there was "nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property."²⁹⁶ Book Two of the *Commentaries*, discussing what Blackstone calls the "rights of things," is arguably the most important part of the larger project.²⁹⁷ The organization of Book Two, it turns out, provides a substantial clue concerning the question that my preceding discussion of Kennedy implicitly raises: Why does it matter that Blackstone's representation of the relationship of law and civil society was complex rather than simple?

As we have seen, *The Structure of Blackstone's Commentaries* treats the "rights of things" as one of its primary topics. Kennedy makes three main points. First, he notes that Blackstone's discussion of property rights includes matters with which we are today familiar, such as questions of contract or tort law or distinctions between property rights and obligations.²⁹⁸ Blackstone's account, however, is surprisingly fragmentary and gives little emphasis to what we would regard as primary.²⁹⁹ Second, Kennedy emphasizes the strained character of Blackstone's analysis of property.³⁰⁰ In order to describe property rights as relations of individuals to objects rather than as relations among individuals, the *Commentaries* must engage in a series of reifications. Blackstone's representation of estates in land as distinct from each other, and thus as types of objects, may be plausible.³⁰¹ But his effort to portray certain essentially feudal hierarchial relationships as matters of possessing "incorporeal hereditaments,"³⁰² and even more obviously his attempt to treat the right to damages for breach of contract as an object-like chose in action,³⁰³ cannot help but advertise his artifice. Fi-

duced tensions as well, tensions that the separation of law and society is responsible for illuminating. See *infra* text accompanying notes 330-32.

In noting that Blackstone registers what appears to be underlying conflict in eighteenth century English society, I do not mean to suggest that Blackstone was self-consciously writing to reveal that conflict, or even that he was always aware of it. Rather, Blackstone's method, insofar as it treated law as responding to what he regarded as social phenomena, picked up such conflict automatically. My argument thus involves no challenge to the long-held view of Blackstone as largely approving of the state of the law as he described it.

²⁹⁶ 2 W. BLACKSTONE, COMMENTARIES *2.

²⁹⁷ In any event, the subject-matter of Book Two fell within Blackstone's field of greatest expertise and interest. See Doolittle, *Sir William Blackstone and his Commentaries on the Laws of England (1765-9): A Biographical Approach*, 3 OXFORD J. LEGAL STUD. 99, 106 (1983).

²⁹⁸ See Kennedy, *supra* note 244, at 322, 325-26, 327.

²⁹⁹ See *id.* at 322-25, 326, 327-28.

³⁰⁰ See, e.g., *id.* at 318-20, 332-34.

³⁰¹ See *id.* at 335-37.

³⁰² See *id.* at 342-46.

³⁰³ See *id.* at 337-42.

nally, Kennedy offers an explanation for why the idea of hierarchy fits so comfortably within Blackstone's discussion of the rights of persons,³⁰⁴ but seemingly has little place in the *Commentaries*' account of property law as collecting an aggregate of objects.

[T]here was nothing within the law of persons that contradicted the image of an organic whole composed of roles well ordered according to an uncontroversial rational scheme. The power of the feudal lords and that of modern merchants were alike incompatible with hierarchial good order, but both were given a kind of invisibility when it was denied that their characteristic forms of property had anything to do with social relations.³⁰⁵

Blackstone's approach is certainly not ours. Does it really make sense, however, to think of his reifications as efforts to obscure feudal and merchant power? Kennedy does not attempt to assess the significance in eighteenth century English society of the institutions and relationships Blackstone summarized in his idea of incorporeal hereditaments. Nor does Kennedy consider the possibility that Blackstone's reification did not so much cause offices, franchises, advowsons, and the like to recede from political consciousness as work to bring these relationships more into view. Offices, for example, were obviously an explicit part of the currency of eighteenth century politics.³⁰⁶ Whatever Kennedy's view of the ultimate importance of incorporeal hereditaments, he does not mean to argue that Blackstone was hostile to "commercial policy." *The Structure of Blackstone's Commentaries* assumes, and supplies ample evidence, that the opposite proposition is more nearly true.³⁰⁷ Plainly, the reification of estates made their purchase and sale seem less controversial;³⁰⁸ so too, the similar reification of contract eased recognition of the negotiability of commercial paper.³⁰⁹ Reification, it may seem, yields a clear bias in favor of commerce. Of course, a preference for commerce is consistent with an effort (conscious or unconscious) to disguise its troubling hierarchial aspects. Kennedy, however, makes no effort to identify whatever disturbing social or economic expressions of implicit merchant power existed in eighteenth

³⁰⁴ See *supra* text accompanying notes 253-54.

³⁰⁵ Kennedy, *supra* note 244, at 350; see *id.* at 346-50.

³⁰⁶ On the politics of offices in the first part of the eighteenth century, see, e.g., B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 47-50, 102-04 (1967); E. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACTS 175-88, 197-206* (1975).

³⁰⁷ See, e.g., Kennedy, *supra* note 244, at 328-32.

³⁰⁸ See *id.* at 330; see also *id.* at 332-34.

³⁰⁹ See *id.* at 348.

century England.³¹⁰ It is difficult to see, therefore, precisely what Blackstone was trying to hide. As a result, we may suspect that Kennedy's evaluation of reification in Blackstone is perhaps an artifact of Kennedy's own classicism, of the commitment his essay makes to demonstrate the coherence of the *Commentaries*.

Even a brief glance at Blackstone's arrangement of Book Two adds weight to this suspicion. A series of oppositions organize Book Two. At the theoretical level, Blackstone's elaborate discussion of the conceptual bases of property, which treats personal property as primary and real property as derivative,³¹¹ is matched by a similarly extended description of Blackstone's version of the feudal system and the approaches to real property that it set up as dominant. The feudal emphasis on real property is one that Blackstone shares.³¹² Despite the contrary implications of its theoretical introduction, Book Two leaves personal property to the end, and models its summary on the prior treatment of real property.³¹³ Within the discussion of real property, the feudal approach to tenures is juxtaposed with the modern—the point for Blackstone is a process of simplification, of open-ended obligations to superiors giving way to fixed taxes.³¹⁴ Tenures, as the “public” dimension of property rights, are opposed to “estates,” in which relationships among private individuals are summarized, as Kennedy notes, in reified form.³¹⁵ But within the discussion of estates, feudal influences reappear. In the discussion of freehold estates (against which other more conditional holdings are juxtaposed), the organizing distinction is between inheritable and not inheritable freeholdings,³¹⁶ a distinction whose origin Blackstone explains by referring to the relationship of heritability and feudal rituals of investiture, summarized in the idea of seisin,³¹⁷ and whose significance becomes clear in the next major opposition, between estates and title.³¹⁸

At this point, Blackstone's concern is not the content of property rights but their transfer. The possibility of free transfer, he notes, arises

³¹⁰ Kennedy's observations about Blackstone's disguise of hierarchy are perhaps prompted more by Kennedy's aim of educating his readers about the implications of *their own* standard legal devices. See, e.g., *id.* at 334.

³¹¹ See 2 W. BLACKSTONE, COMMENTARIES *3-7.

³¹² See *id.* at *44-58; see also *id.* at *384-85.

³¹³ See *id.* at *384-520.

³¹⁴ See *id.* at *59-102.

³¹⁵ See *id.* at *103-94; Kennedy, *supra* note 244, at 335-37. I do not mean to suggest that Kennedy is unaware of these various organizational distinctions in Blackstone. See, e.g., *id.* at 328-30 (discussing land tenures). I emphasize Blackstone rather than Kennedy at this point in order to note aspects of the *Commentaries* of which Kennedy is aware, but which he does not stress.

³¹⁶ See 2 W. BLACKSTONE, COMMENTARIES *104.

³¹⁷ See *id.*

³¹⁸ See *id.* at *195.

because of the relaxation of feudal rules.³¹⁹ But analytically, his account emphasizes transfer of title by descent.

The doctrine of descents . . . is a point of the highest importance; and is indeed the principal object of the laws of real property in England. All the rules relating to purchases, whereby the legal course of descents is broken and altered, perpetually refer to this settled law of inheritance, as a *datum* or first principle universally known, and upon which their subsequent limitations are to work.³²⁰

The opposed concept of title by purchase carries its own feudal trace; its subordinate terms regularly reveal an emphasis on ideas of renunciation or failure—a kind of reverse of the idea of commitment summarized in the feudal rituals of investiture and seisin. Thus, in discussing title by purchase, Blackstone separates escheat, occupancy, prescription, forfeiture, and alienation.³²¹ The analysis of alienation, which ought to be the most commercial, is for Blackstone mostly an account of ceremony—the form of a deed,³²² the procedures of record,³²³ the character of special custom,³²⁴ and (closing a circle with the law of descent) the mechanics of devise.³²⁵ Blackstone's account of personal property is organized in parallel with his account of title by purchase.³²⁶

As I hope the preceding summary illustrates, there is a complexity of tone in Book Two that Kennedy's analysis of the rights of things simply does not suggest. Arguably, the *Commentaries* conceives of the legal apparatus of property law as responding to two organizational imperatives. "Civil society" was the expression of one of these impulses. Blackstone's image of feudal society was the other. The "official" position of Book Two was that the legal apparatus gave priority to the values or concerns summarized in the image of civil society; feudal influences were receding.³²⁷ Kennedy takes Blackstone at his word on this point.³²⁸ The actual organization of Book Two, however, is not consis-

³¹⁹ See *id.* at *287-90.

³²⁰ *Id.* at *201.

³²¹ See *id.* at *241-44.

³²² See, e.g., *id.* at *296-308, *311-16.

³²³ See *id.* at *344-64.

³²⁴ See *id.* at *365-72.

³²⁵ See *id.* at *373-83.

³²⁶ See *id.* at *400-520 (title by occupancy, custom, succession, marriage, and judgment; gift, grant, and contract; bankruptcy; and testament and administration). A brief introductory discussion of the types of personal property is reminiscent of the earlier discussion of tenures and estates. See *id.* at *384-99.

³²⁷ See, e.g., *id.* at *76-77, *384-85.

³²⁸ See Kennedy, *supra* note 244, at 328-31; see also *id.* at 244-46 (triumph of commercial over feudal concerns as the theme of Blackstone's account of the evolution of remedial actions).

tent with this straightforward picture. At the working level, the *Commentaries* repeatedly treats feudal elements as primary.

Blackstone is not, however, simply contradicting himself. Rather, his legal apparatus is caught up in conflict. It may work to minimize feudal relationships. The legal mechanics, however, begin by clarifying those relationships, as Blackstone's ambitious discussion of the law of descents attempts. Or feudal relationships remain as useful models. The dynamics of commitment and renunciation, of ceremony as the function of law, is fundamental in Blackstone's account of what he himself regards as "antifeudal" transfers. We can see an analogous emphasis on the surrender of claims as the essence of transfers even in Blackstone's introductory theorizing.³²⁹

Indeed, herein may lie whatever unity Book Two possesses: the legal apparatus, in Blackstone's view, seems to deploy feudal conceptions against feudalism itself. Legal analysis clarifies and limits obligations chiefly by specifying processes of commitment and renunciation. Blackstone emphasizes this idea in his historical account of the decline of feudal tenures.³³⁰ He incorporates the same theme as the strategy explaining his emphasis on the law of descent, and he restates the point once more in his summaries of the mechanics of transfers of real property by purchase and in his descriptions of transfers of personal property as well. Perhaps we can now see why Blackstone, without an obvious sense of contradiction, is able both to celebrate commercial policy and to treat commercial law as nonetheless derivative of the older law of real property. In effect, law brings itself into conformity with civil

³²⁹ See 2 W. BLACKSTONE, COMMENTARIES *8-13.

³³⁰ Chapters four, five, and six of Book Two are in effect a series of variations on the themes of arbitrariness and definiteness. Initially, Blackstone describes the introduction of feudalism into England as a kind of rational and limited bargain. It was not the work of "the mere arbitrary will and power of the conqueror," *id.* at *48, "but rationally and freely adopted by the general assembly of the whole realm, in the same manner as other nations of Europe had before adopted it, upon the same principle of self-security," *id.* at *50. The abuses of feudalism were a kind of breach of this limited contract.

[T]he Norman interpreters . . . gave a very different construction to this proceeding; and therefore took a handle to introduce not only the rigorous doctrines which prevailed in the duchy of Normandy, but also such fruits and dependencies, such hardships and services, as were never known to other nations; as if the English had in fact, as well as theory, owed every thing they had to the bounty of their sovereign lord.

Id. at *51. In substance as well as origin, feudal obligations were arbitrary, insofar as they "were all personal, and uncertain as to their quantity or duration." *Id.* at *74. Attempts to supply substitute forms of service, ultimately through "pecuniary satisfaction," *id.*, compounded the arbitrariness of feudal arrangements by making possible a series of discretionary exactions—"a wretched means of raising money to pay an army of occasional mercenaries," *id.* at *76. Efforts at reform, ultimately successful, aimed to reduce lordly discretion, with respect to both timing and amount. See *id.* at *74-75, *76-77. Modern English tenures, Blackstone held, were the precise opposite of feudal "slavery," *id.* at *76—"socage" tenures "were liquidated and reduced to an absolute certainty," *id.* at *78.

society by reifying and aggressively employing the inner logic of feudal society.³³¹

I may be summarizing my reading of Book Two overly strongly. Blackstone is not Milsom.³³² The deficiency in Kennedy's account, however, should be apparent. Ironically, *The Structure of Blackstone's Commentaries* understates the use that Blackstone makes of reification. Not just estates, incorporeal hereditaments, and contracts, but civil society, feudal society, and the legal apparatus per se acquire an objective cast in Blackstone's analysis. The latter set of differentiations, we can see, is apparently not for the purpose of representing harmony, but rather is the means by which Blackstone conceptualizes what he regards as a fundamental conflict. *The Structure of Blackstone's Commentaries* also appears to err in characterizing Book Two as antihierarchical. Blackstone opposes feudal hierarchy. But he does so by emphasizing that the same logic of hierarchy that animates feudal relationships is also discoverable within commercial transactions. It is the ubiquity of legal ceremonies of commitment and renunciation that permits the installation of "commercial policy" within legal mechanics.³³³

4. Kennedy's Kennedy

Kennedy presents to his readers an account of the unifying devices

³³¹ It is customary to emphasize the weaknesses in Blackstone's account of feudal society. See, e.g., Kennedy, *supra* note 244, at 328. But insofar as Blackstone gave prominence to notions of dependency, ritual, and commitment, his writing parallels standard subsequent work. See, e.g. 1 M. BLOCH, *FEUDAL SOCIETY* 145-62 (trans. ed. 1961). Moreover, as Kennedy makes clear, the real question is not the accuracy in detail of Blackstone's descriptions of Norman and Saxon institutions, but the function these descriptions serve in his larger project. See Kennedy, *supra* note 244, at 235-37.

³³² See S.F.C. MILSOM, *THE LEGAL FRAMEWORK OF ENGLISH FEUDALISM* (1976); Palmer, *The Feudal Framework of English Law* (Book Review), 79 MICH. L. REV. 1130, 1132-40 (1981); see also *infra* text accompanying notes 475-78.

³³³ Conflict in Blackstone is ultimately a type of cognitive dissonance: the internal dynamic of mercantile or capitalist relationships, which we would regard as individualist and subjective, are described as expressions of feudal logic, as instances of ritual and commitment, and thus implicitly hierarchical. It is this that Kennedy does not see. He acknowledges that Blackstone sets up "two warring 'policies.'" Kennedy, *supra* note 244, at 328. In Kennedy's account, however, Blackstone's "war" ends in an unequivocal victory. "The subsequent history of the law of property was that of the progress of the 'commercial policy,' which had gradually undermined and then finally simply abolished its predecessor." *Id.* The internal carryover of feudal forms is missing in Kennedy's account. For example, he reads Blackstone's introductory "philosophical" account of the origins of property transfers as involving a "will theory," see *id.* at 315—an emphasis on voluntarism that we might regard as characteristic of commercial or capitalist transactional imagery. But "will" in this passage in Blackstone is will expressed in a certain way, as a public renunciation, see 2 W. BLACKSTONE, *COMMENTARIES* *9; the family resemblance to feudal preoccupations with ritual and commitment is apparent. Kennedy asserts that Blackstone's reifications "make it hard to keep in mind" that property rules "relate people to one another in patterns of domination and submission." Kennedy, *supra* note 244, at 336. But this is precisely what Blackstone's amalgams permit us to see.

in the *Commentaries*. He intends for us to see that Blackstone's devices, and thus the success of Blackstone's work as an ordering, is manifestly artificial rather than natural. *The Structure of Blackstone's Commentaries* dramatizes Blackstone's artifice by repeatedly emphasizing the sharp differences between his approach and the standard features of contemporary legal analysis. These contrasts do not just undermine any claim of Blackstone to having offered a "natural" description.³³⁴ The modern jurisprudence, we may suspect, is similarly artificial in its unity. By the end of his essay, Kennedy indeed insists on this point.³³⁵ If we reject Blackstone as artificial, therefore, we must repudiate our own standard ways of thinking as well.

Are we in fact moved to reject Blackstone because of his artifice? It is difficult to read Kennedy's essay and not compare it with standard accounts of eighteenth century English thought. Recent writers on Blackstone, for example, have by and large emphasized what is missing or only barely present in the *Commentaries*. Kennedy himself notes, but does not dwell on, Blackstone's refusal to address the innovation of cabinet government.³³⁶ Blackstone, it appears, also gave little hint of the emergence of elaborate rules of evidence,³³⁷ omitted any real discussion of the use of documents of settlement to resolve problems created by the rules of descent,³³⁸ and did not accurately portray the extent of the independence of equity jurisprudence from common law concepts.³³⁹ These deficiencies are in addition to what many commentators regard

³³⁴ "Given the premise of the convenience of absolute dominion, and the fictional entities of estate, hereditament and chose in action, the rules of the property system could be seen as flowing 'naturally' from the characteristics of objects." Kennedy, *supra* note 244, at 348. This passage, I think, is illustrative of the way in which Kennedy refers to "naturalness" as one of Blackstone's aims. Kennedy's metaphor identifies nature and logic. See *id.* at 266 ("flowed directly"). Kennedy treats the measure of Blackstone's achievement, as well as its legitimating and mediating political consequences, as a function of the extent to which Blackstone makes obviously artificial legal rules look "plausible" in light of the natural logic of liberal philosophy. See, e.g., *id.* at 262. Kennedy's identification of nature and logic is consistent with work that emphasizes a scientific dimension in the *Commentaries*. See *supra* note 295. It is also consistent with Kennedy's claim that Blackstone's work represents an advance in this history of liberal theory, insofar as writers such as Hobbes and Locke had failed to see that law might be "the linchpin of liberal theory." Kennedy, *supra* note 244, at 382; see, e.g., T. HOBBS, A DIALOGUE BETWEEN A PHILOSOPHER AND A STUDENT OF THE COMMON LAW OF ENGLAND 55 (1971) (subordinating importance of claims of reason in law: "It is not Wisdom, but Authority that makes a Law"). And yet, it is not clear that Blackstone would have readily accepted Kennedy's identification. The *Commentaries* frequently emphasizes artifice, see, e.g., 2 BLACKSTONE, COMMENTARIES *13-14; indeed, this seems to be partly the point of the famous "Gothic castle" passage that Kennedy quotes. See Kennedy, *supra* note 244, at 245; see also Doolittle, *supra* note 297, at 109-10 (Blackstone's early use of metaphor of law as a "huge, irregular pile" of appurtenances only implicitly ordered); *infra* text accompanying note 349.

³³⁵ See Kennedy, *supra* note 244, at 354-62.

³³⁶ See *id.* at 269.

³³⁷ See Green, *Introduction*, 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND ix (S. Katz ed. 1979) [hereinafter cited as CHICAGO BLACKSTONE].

³³⁸ See Simpson, *Introduction*, 2 CHICAGO BLACKSTONE, *supra* note 337, at xi.

³³⁹ See Langbein, *Introduction*, 3 CHICAGO BLACKSTONE, *supra* note 337, at viii.

as Blackstone's failure to give due attention to the newly developing commercial law.³⁴⁰

The terms in which, however falsely, Blackstone's work claimed completeness may nonetheless be interesting.³⁴¹ And yet, Kennedy's particular analysis of the organization of the *Commentaries* remains difficult to reconcile with our ordinary picture of eighteenth century English society.³⁴² It is common, in recent historical writing, to emphasize the divergences of point of view characteristic of the era.³⁴³ For example, a currently prestigious interpretation of the American Revolution starts from the proposition that American colonists, influenced by English dissidents, perceived the purportedly balanced constitution of English society as in a state of crisis.³⁴⁴ Other work portrays English society from the perspective of its lower ranks. Official legal institutions may have embodied principles of hierarchy in both their orderliness and their apparent arbitrariness,³⁴⁵ but these institutions were also frequently of only problematic relevance, in conflict with out-law institutions and surviving local or customary jurisprudence.³⁴⁶ Recent writing also adds to this picture of fragmentation by underscoring the insularity of the official politics of the period,³⁴⁷ and by exploring

³⁴⁰ See, e.g., G. JONES, *THE SOVEREIGNTY OF THE LAW* xxxix (1973).

³⁴¹ See Milson, *The Nature of Blackstone's Achievement*, 1 OXFORD J. LEGAL STUD. 1 (1981).

³⁴² In the brief sketch that follows, I do not attempt to offer anything like a complete description of the recent work in eighteenth century Anglo-American history. I refer to only a few prominent works, and I summarize only a few of the more obvious themes. A closer study would be much more intricate in its claims.

³⁴³ It is *not* that we now reject out of hand the idea that "the political structure of the eighteenth century possessed adamant strength and profound inertia." J. PLUMB, *THE ORIGINS OF POLITICAL STABILITY: ENGLAND 1675-1725* xviii (1967). Rather, much recent work appears to treat this conclusion as more accurate as a retrospective statement than as an account of the experience of the period. In any event, its persuasiveness seems to depend importantly upon the perspective from which English society is viewed. For a provocative summary of recent work, see Zaller, *The Continuity of British Radicalism in the Seventeenth and Eighteenth Centuries*, 6 EIGHTEENTH CENTURY LIFE 17 (1981).

³⁴⁴ See, e.g., B. BAILYN, *supra* note 306.

³⁴⁵ See Hay, *Property, Authority and the Criminal Law*, in D. HAY, P. LINEBAUGH, C. WINSLOW, J. RULE & E. THOMPSON, *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND* 17-63 (1975) [hereinafter cited as *ALBION'S FATAL TREE*].

³⁴⁶ See, e.g., E. THOMPSON, *supra* note 306, at 27-54, 119-41 (1975). The essays in *ALBION'S FATAL TREE*, *supra* note 345, apart from Hay's initial work, all pick up this theme. See, e.g., Winslow, *Sussex Smugglers*, in *id.* at 119-66; Rule, *Wrecking and Coastal Plunder*, in *id.* at 167-88.

³⁴⁷ Interestingly, even writers who would disconnect the English politics of the period from any latent or express large-scale social conflicts do not treat the period as one of stability. See, e.g., J. CLARK, *THE DYNAMICS OF CHANGE: THE CRISIS OF THE 1750S AND ENGLISH PARTY SYSTEMS* (1982). Thus, in Professor Clark's view, political conflict remains the norm; as his argument runs, however, immediate questions of office and priority were the motive force for the political "game," as opposed to any extrinsic interests or concerns. This perspective is interesting at least in part because it presupposes a certain social "fragmentation" restrictive of politics to only a limited group—in itself perhaps evidence of the disintegration of "balance"; of the absence of any genuinely society-summing constitution.

the popularity of the rhetoric of conspiracy and plot.³⁴⁸ This sense of fragmentation, of course, fits readily with a picture of society as artificial. Notably, literary historians tell us that the critical sensibility of the era was one in which art and nature were often opposed, to the detriment of nature.³⁴⁹

Kennedy may have misjudged his readers. We expect to find evidence of conflict, tension, and artifice in Blackstone, as I think we in fact do find it. *The Structure of Blackstone's Commentaries*, as a result, works against the grain. Kennedy treats the specific historical context as in detail irrelevant. The *Commentaries* in isolation is the sole subject. Even within Kennedy's analysis of Blackstone's work itself, the emphasis is once more general. Kennedy insists that we treat the *Commentaries* as a classic, that we read it as a self-contained and unified account, accurately summarized in the logic of its organizing principles.

Of course, Kennedy's classicism has a subversive aim. But it is too easy to see that Blackstone wrote something other than an entirely classical account. The *Commentaries* drew upon the techniques of classicism—referred to images of hierarchy; isolated, categorized, and reified. Blackstone's argument, however, was also open in its artifice, obviously registered tension, and remained, in its strictly legal aspect, importantly fragmentary. We see Blackstone as fabricating distinctive images of feudal and civil society; treating the legal apparatus as distinct from both, in order to represent a world in which law transformed as well as responded. Law and society appear in Blackstone as in transition as much as in balance. Kennedy, by treating Blackstone as manufacturing but a single and straightforward object, simplifies Blackstone.

In the end, Blackstone's complexity matches our expectations. Kennedy counts on our surprise. His classical style, however, is perhaps more thorough-going than that of either his subject or of his readers.

V. ANTICLASSICAL STYLE

Nothing requires us to conceive of law in classical terms as the working out of some organizing or differentiating principle of universal applicability and settling result. And indeed there are in our jurisprudence occasional traces of an anticlassical way of regarding law. We do in fact sometimes bring to legal analysis an expectation that law is in

³⁴⁸ See Wood, *Conspiracy and the Paranoid Style: Causality and Deceit in the Eighteenth Century*, 39 WM. & MARY Q. 401 (1982).

³⁴⁹ See, e.g., 1 W. WIMSATT & C. BROOKS, *LITERARY CRITICISM: A SHORT HISTORY—CLASSICAL & NEO-CLASSICAL CRITICISM* 314-36 (1957).

conflict with itself (not just for the moment or unfortunately but rightly so).³⁵⁰ By conflict I do not mean some slow-moving and deep dialectic.

³⁵⁰ Robert Gordon has argued that "historical" writing about law—writing that relates prominent features of law to aspects of a particular time and place—by its very nature introduces an element of contingency and conflict into our view of what the law "is." Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981). Gordon, however, devotes the bulk of his essay to a description of the mechanisms that we commonly apply in order to minimize the impact of historicism. See *id.* at 1024-45.

Even within ostensibly "doctrinal" legal writing, though, notions of conflict sometimes play an important part. For example, Professor Deutsch writes the following by way of introduction to his discussion of *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. 1981)—an important case in the "new" corporations law of derivative actions:

In a strict common-law system, the law is a set of precedents. As the realists taught us, however, what law is, in fact, is simultaneously a set of human institutions—a process designed and operated by humans—and a set of precepts treated as binding obligations: as rules governing the activities in which humans engage. What makes this situation paradoxical is that law is successful as a process for resolving conflicts because both of the disputing parties feel justified in arguing that the law is on their side; yet the fact is that people in the end revere the law because what it promises is stability: a stability premised on a logical structure whose clear and definite standards are fundamentally incompatible with the potential conflict that permits both parties to the dispute to appeal to legal rules.

Deutsch, *Zapata Corporation v. Maldonado: Assessing a Precedent*, 5 CORP. L. REV. 40, 40-41 (1982); see also Deutsch, *Precedent and Adjudication*, 83 YALE L.J. 1553 (1974) (demonstrating the shift in apparent implications of a given decision as precedential context changes). Professor Cover makes a similar point in discussing the law of federal jurisdiction:

For some time the jurisdictional structure of "our federalism" has struck me as comprehensible only as a blueprint for conflict and confrontation, not for cooperation and deference. It seems unfashionable to seek out a messy and indeterminate end to conflicts which may be tied neatly together by a single authoritative verdict. Unquestionably, my perverse perspective may be carried too far. I ultimately do not want to deny that there is value in repose and order. But the inner logic of "our federalism" seems to me to point more insistently to the social value of institutions in conflict with one another.

Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 682 (1981); see also Field, *The Uncertain Nature of Federal Jurisdiction*, 22 WM. & MARY L. REV. 683 (1981). Interestingly, both of the passages I have just reproduced reveal not only arguments that presuppose conflict but also some sense that this notion is generally resisted. Professor Cover adopts an apologetic tone; Professor Deutsch refers to "paradox" and apparently assumes the coexistence of "a logical structure" alongside "dispute."

It is not merely occasional commentators who recognize irreducible conflict as "built-in" to some legal rules. Judicial acknowledgements, however, tend to be more indirect. For example, antidilution clauses or similar provisions in convertible bond indentures may be drafted with their characteristic specificity because courts, if asked to enforce these clauses, ordinarily will read them quite literally, and in the process give little weight to indenture language that is not on its face immediately pertinent. See, e.g., *Broad v. Rockwell Int'l Corp.*, 642 F.2d 929, 948-58 (5th Cir.), *cert. denied*, 454 U.S. 965 (1981); *Wood v. Coastal States Gas Corp.*, 401 A.2d 932, 939 (Del. 1979). But see *Pittsburgh Terminal Corp. v. Baltimore & O.R.R. Co.*, 680 F.2d 933, 941 (3d Cir. 1982); *Van Gerner v. Boeing Co.*, 520 F.2d 1373, 1383-85 (2d Cir.), *cert. denied*, 423 U.S. 947 (1975). Arguably, the policy of literal reading originates in a judicial aim of facilitating capital markets by assuring a uniform interpretation of standard indenture terms. See *Sharon Steel Corp. v. Chase Manhattan Bank*, 691 F.2d 1039, 1048 (2d Cir. 1982), *cert. denied*, 103 S. Ct. 1253 (1983). It is hard to see, however, why investors would be reassured *ex ante* by the knowledge that, in the event of controversy, courts will enforce only precisely applicable indenture provisions even if this policy yields an arbitrary result in the case at hand. The emphasis on literal reading may make more sense if, as a matter of policy, courts are unprepared to adopt a preference either for the interest of creditors in the security of their investments or for the conflicting interest of

I mean something on the order of a melee or brawl: here and now and surface-shattering. Law, we sometimes start by assuming, is strictly speaking without ground. No one of its parts, terminologies, or indeed extra-legal complements can always claim content in isolation. Assertions of priority or questions of characterization are inevitably vulnerable to contest; legal order is inconclusive. Framed so generally, these propositions are hardly controversial. It remains important to remember, however, that at the working level we usually draw back from ideas like these. We by and large act as though we believe that anticlassical predispositions yield critical insight only: an awareness of classical artifice but no sense of substitutes. Such a conclusion, though, is too strong. Anticlassical style is not without affirmative dimension. The positive contribution, however, may not take a form that we expect.

A. *Description as an Anticlassical Model*

Ordinarily, we treat criticism and suggestion as separated phases of a larger process of replacement. The dynamic of legal theory is one of substitution. But substitution and related ideas (displacement, priority, preeminence) are straightforwardly classical notions. They refer to operations by which we persuade ourselves of order or blind ourselves to conflict—represent differing phenomena only one at a time. At the level of our understanding of transitions in legal regimes, we proceed in a fashion analogous to the method with which Justice Peckham, for example, worked within his particular regime. Peckham, we recall, was careful to treat the hours law as either a health law or a labor law; as either police legislation or unconstitutional.³⁵¹

Once we recognize the classical form of our usual images of

corporations in financial flexibility. Notably, even in cases in which courts know where their sympathies lie, they persist in operating within the literal reading paradigm, sometimes with awkward results. Compare, e.g., *Merritt-Chapman & Scott Corp. v. New York Trust Co.*, 184 F.2d 954, 957-59 (2d Cir. 1950), *cert. denied*, 340 U.S. 931 (1951), with, e.g., *id.* at 959-60 (Clark, J., dissenting). Courts may be tentative in their preferences in part because the interest that creditors wish to protect is difficult to describe straightforwardly. See, e.g., Klein, *The Convertible Bond: A Peculiar Package*, 123 U. PA. L. REV. 547 (1975); Kaplan, *Some Further Comments on Anti-Dilution Clauses*, 23 BUS. LAW. 893 (1968).

³⁵¹ See *supra* text accompanying notes 174-238. *The Structure of Blackstone's Commentaries* also illustrates our usual classical model of change. Kennedy interprets Blackstone's reification of property, for example, as a technique for suppressing feudal or commercial hierarchies that, if they were perceived as coexisting with the social hierarchy of balance and relative rights, would disrupt (what is in Kennedy's view) Blackstone's overall picture of established social hierarchy as ordered legal liberty. Blackstone (Kennedy thinks) thus suppressed for the purpose of establishing: substituted one ordering scheme in place of others. Kennedy reads Blackstone in this way to begin (at least) a similar process of substitution. He would show his readers how legal structures like Blackstone's obscure the fundamental contradiction in liberal thought. For his readers a disestablishment would presumably follow. Revealed as contradictory, liberal thought would lose its appeal. See *supra* text accompanying note 334.

change in legal theory, we cannot avoid considering the possibility that those images as well could be subject to change. Were we to make the transition from a classical to an anticlassical set of expectations, we might note, among other things, a modification in our assumptions about the relationship of differing legal theories to each other. I think we can begin to identify how in substance our assumptions would alter. To this end, we need to consider briefly what we might somewhat awkwardly call the "rhetorical metaphysics" of classical and anticlassical style.

Distinguishing styles makes us aware of the set of analogies in terms of which we express our assumptions about background realities or normative possibilities. For example, in framing legal analysis within the classical style, we assert the "rightness" of our conclusions (or of what we expect to conclude) by describing those conclusions in ways that suggest images of order, of clear-cut differentiation, of organizing principles of universal applicability. These images in and of themselves add rhetorical force to our conclusions. But they are also derivative. They borrow their persuasiveness in part from yet another implicit analogy. That reference is to logic. Through the medium of classical imagery, we assert that the judgmental element in our legal analysis is like the judgmental element in traditional logical analysis. The experience of law within the classical mode, we might say (parodying Holmes), is logic. We presuppose or work to achieve a separation of the relationship and content of legal elements. This effort makes most sense if (in the logical manner) we wish to highlight relationship in the abstract; if it is awareness of relationships we believe supplies normative force.³⁵² The relationships that we emphasize are often themselves specifically logical. In *Lochner*, for example, the key idea is disjunction; in Kennedy's essay, the notion of contradiction or negation is equivalently prominent.

There are other rhetorically forceful images besides logic, and herein lies the possibility of anticlassical style. We might, for example, treat description as the model for legal judgment.³⁵³ In this case, we

³⁵² Cf. R. BARTHES, *WRITING DEGREE ZERO* 44-45 (trans. ed. 1968).

³⁵³ I refer here to a kind of description that is not subordinate to narrative—otherwise we would continue to confront a relational emphasis like that within the logical paradigm. See Hamon, *Rhetorical Status of the Descriptive*, 61 *YALE FRENCH STUD.* 1 (1981). The idea of non-narrative description as a ruling image, although obviously literary in its immediate origins, seems to me to be suggested also by efforts in contemporary Anglo-American philosophy to relax the distinction between the normative and the descriptive in moral theory, see, e.g., M. WHITE, *WHAT IS AND WHAT OUGHT TO BE DONE* (1981); Sen, *Rights and Agency*, 11 *PHIL. & PUB. AFF.* 1 (1982), or to break down (at least partially) strict differentiations of notions of the analytic and the empiric or of concepts of necessity and possibility, see, e.g., S. KRIPKE, *NAMING AND NECESSITY* (1980).

would not regard as an affirmative step the thorough-going separation of relationship and content. Instead, the prevailing critical indictment is now incompleteness. We abandon categorization as *our* analytical preliminary; if we note the use of systems of classification, it is only as an explanation for a particular absence. Instead, we represent both critique and affirmative suggestion as an identification of what is missing. The success of this project depends upon the specificity of its depiction; the dynamic of our argument emphasizes content and *deforms* relationship. The operative image is that of the fragment.

Description functions as an analogy. There is still a possibility of normative expression. The terms of value, however, change. We no longer ascribe merit or label defect through the use of classical images that in turn mirror the operations of logic. Instead, we give direction to legal discussion by invoking images of rendering or representing. Critical statements emphasize the notion of incompleteness. Affirmative proposals represent themselves as additions. Positive and negative accounts are thus not so clearly contrary, in relationship to each other, as within the classical style. In a fashion that in the abstract is difficult to distinguish from criticism, the positive anticlassical account simply emphasizes in greater detail what a given classical regime leaves out.

Conflict is plainly built-in. It is as though there were no first or final description. Any particular legal account always defines itself as against others. In principle, no description is final; each is possibly incomplete. As one result, classical forms as such do not disappear entirely within a descriptive jurisprudence. They persist first of all as foils for anticlassical description; they become a kind of orienting ornament. But more interestingly, to the extent that classical representations are indeed plausible as renderings, they also have a place as critique and suggestion. Of course, classical *expectations* do disappear from legal rhetoric. Universality—a conclusive account—is no longer either aspiration or possibility. Strictly speaking, therefore, it is only neoclassicism that remains;³⁵⁴ in law, as in other domains, one form (always among others) of anticlassical response.³⁵⁵

³⁵⁴ Cf. J.F. KERMODE, *THE CLASSIC* 70-75 (1975).

³⁵⁵ Recent writing of Professors Kennedy and Unger displays a significant neoclassical aspect. Kennedy defends an "ad hoc paternalism" that is in one sense classical because it involves a claim of definite moral knowledge. But Kennedy's paternalism is nonetheless avowedly nonsystematic, originating in context rather than some sense of moral hierarchy and overlaid also by an inescapable sense of the risk of "wrong" intervention. See Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 638-49 (1982). Unger's idea of "deviationist" or "enlarged" legal doctrine at one level involves a process of working out existing legal norms to their fullest extent or freeing them from ad hoc qualifications. This initially classical enterprise of clarification may conclude, however, by revealing underlying doctrinal conflicts or suggesting a basis

B. Anticlassical Criticism: Problems of Incompleteness in Social Justice in the Liberal State

The anticlassicism I have been describing is not simply latitudinarianism. Not all classical constructs are susceptible of ready recasting. Those that do not succeed as description lose their claim on our attention. We may therefore re-read ostensibly classical accounts from the new point of view, attempting to identify those elements in a particular account that, once they are in emphasis, we can then judge in descriptive terms.

As an exemplary subject in this regard, I propose *Social Justice in the Liberal State*,³⁵⁶ Bruce Ackerman's notable philosophical venture. Professor Ackerman usually writes about more narrowly "legal" matters.³⁵⁷ His new book, at one level, illustrates the recent tendency to treat seemingly extra-legal phenomena as relevant for and formative of law: as ultimate legal media.³⁵⁸ At the crucial stage in its argument, *Social Justice in the Liberal State* is also, I believe, notably classical in its expectations.³⁵⁹ Ackerman develops an approach that he believes is

for reversing emphasis. The process, Unger asserts, also breaks down the boundary contemporary legal "formalism" would establish between legal and other forms of political discourse. Deviationist doctrine, moreover, is an analytically "incomplete" phenomenon—a kind of methodological preliminary to more "visionary" efforts. See Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

³⁵⁶ B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980).

³⁵⁷ Ackerman's best-known work, however, has a distinctive interdisciplinary quality. See, e.g., B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* (1977); B. ACKERMAN, S. ROSE-ACKERMAN, J. SAWYER & D. HENDERSON, *THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY* (1974).

³⁵⁸ See *supra* text accompanying notes 126-37. *Social Justice in the Liberal State* addresses immediately legal questions only occasionally. See, e.g., B. ACKERMAN, *supra* note 356, at 305-12 (discussing constitutional notions of separation of powers, bills of rights, and judicial review). In this book, Ackerman writes in the more general language of political philosophy. And yet, it should be clear to any reader who is familiar, for example, with the uses Professor Michelman has made of the writings of John Rawls, see, e.g., Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1218-24 (1967), that *Social Justice in the Liberal State* is potentially a relevant legal reference work. We have here the foundations at least of a jurisprudence. See B. ACKERMAN, *supra* note 356, at 311-12. Indeed, the topics Ackerman discusses, as illustrating the implications of his philosophical investigations, include such standard subjects of recent or recurring legal controversy as abortion, educational ideology, free speech, inheritance, attitudes toward the environment, affirmative action, immigration policy, and the rights of the handicapped.

In the discussion that follows, I will not draw directly upon the usual concepts of political philosophy in assessing *Social Justice in the Liberal State*. For critical analyses of this sort, see, e.g., Alexander, *Liberalism as Neutral Dialogue: Man and Manna in the Liberal State*, 28 U.C.L.A. L. REV. 816 (1981); Harman, *Liberalism Without Foundations?* (Book Review), 91 YALE L.J. 397 (1981); *Symposium on Social Justice in the Liberal State*, 93 ETHICS 328 (1983).

³⁵⁹ Not all parts of *Social Justice in the Liberal State* appeal to classical norms. For example, Ackerman asserts that the ultimate justification for taking seriously the value of neutrality lies in our sense of a necessary tentativeness in political philosophy. See B. ACKERMAN, *supra* note 356, at 349-78, discussed *infra* text accompanying notes 402-03. Moreover, in discussing the implementation of the specific principles he develops, Ackerman repeatedly makes points like the following:

exhaustive within its sphere—and he regards this sphere as defining the crucial issues for contemporary political philosophy. He concedes that in practice various factors may frustrate the working of his organizing principles. He treats these factors, however, as primarily “complications.” They do not so much add to his argument as make it more difficult. Repeatedly, Ackerman insists upon the priority of his special perspective. He regularly distinguishes his approach from its contractarian and utilitarian cousins³⁶⁰ and intermittently argues vehemently against more thorough-going alternatives.³⁶¹

Initially, I will discuss *Social Justice in the Liberal State* in general outline. At this point, both the particular classicism of the book and the descriptive difficulties which that classicism creates will become apparent. I then explore the relationship of several particular parts of the book to the central points of Ackerman’s argument. The idea here is to associate the descriptive difficulties with our sense of what in Ackerman’s work is most problematic. The result, I think, is both an illustration of the process of descriptive transformation and, through that process, a critical illumination. We will see, in short, a demonstration of the normative dimension in anticlassical style.

1. Dialogue as Presence and Absence

Three notions are basic to *Social Justice in the Liberal State*. Initially, Ackerman treats as given the proposition that the ultimate subject of political philosophy is the *distributional question* of who gets what.³⁶² The second basic idea is *dialogue*. Ackerman believes that political philosophy should not take as its immediate topic such substantive questions as the distribution of prerogatives, the terms of the social contract, or the balance of costs and benefits. The proper focus is more appropriately process: how we arrive at a decision about distribution. The most congenial process is dialogue. Indeed, Ackerman suggests that

Liberal government, in the end, is an expression of hope—that citizens, by reasoning together, can domesticate the power struggle that is an unavoidable part of their social situation. This aspiration is constantly at war with another reality—that government is itself a central focus of the power struggle, permitting exploiters to cement their power over their fellow citizens. There can be no hope for a “final” institutional solution to this tension between aspirations and reality.

B. ACKERMAN, *supra* note 356, at 312-13. As we will see, however, there is a strikingly classical dimension in the operation, in theory if not practice, of the principles that Ackerman infers from values like neutrality. It is this dimension, in fact, that gives *Social Justice in the Liberal State* its claim to originality. See Flathman, *Egalitarian Blood and Skeptical Turnips*, in *Symposium on Social Justice in the Liberal State*, *supra* note 358, at 357, 358.

³⁶⁰ See, e.g., B. ACKERMAN, *supra* note 356, at 99-103, 133-38, 336-45.

³⁶¹ See *id.* at 12-15; 360-65.

³⁶² See *id.* at 3.

it is through reference to the idea of dialogue that the question of distribution becomes a subject for analysis in the first place.³⁶³ The third fundamental notion is *constraint*. Although dialogue is in theory open to all comers, it is nonetheless a patterned relationship. To engage in it, individuals must accept certain preconditions.³⁶⁴

Ackerman identifies three such requirements. An individual who claims a given prerogative, and who becomes caught up in dialogue, must be able to supply a reason the prerogative is properly hers or his, and not the property of someone else. Moreover, the reason must be consistent; it must not contradict a reason the individual has offered or might offer as support for some other claim. Finally, the reason must also be neutral. It cannot reduce to an assertion that a particular set of views (concerning certain claims) are simply better than all others or that the individual who advances those views is simply better than all other persons who might contest given claims.³⁶⁵

Most of *Social Justice in the Liberal State* sets forth the conclusions about distribution and about political society generally that Ackerman obtains by reworking various controversies in light of his ideas of dialogue and constraint. I will discuss some of these conclusions shortly. But what is interesting for present purposes, because it is both classical and ultimately paradoxical, is the complex relationship of the two terms of dialogue and restraint.

Dialogue is a useful concept for political philosophy only if, in elaborating it or otherwise working with it, we discover grounds for choice: reasons for preferring some possible systems of social organization over others. Ackerman thus cannot speak of dialogue without also speaking of constraint. He has to insist that he is referring to only a certain kind of discourse; his process, he must admit, is exclusive. This does not mean that Ackerman must adopt an essentialist metaphysic and allege that the restrictions he imposes are intrinsic to the very idea of dialogue itself. Constraints, however, must be somehow defensible.³⁶⁶

³⁶³ See *id.* at 3-4.

³⁶⁴ See *id.* at 4-11.

³⁶⁵ Ackerman sets an important limit on the reach of this neutrality requirement by supposing that neutrality is relevant only if (1) conflicting views are those of persons whom Ackerman identifies as "citizens" or (2) the claim of superiority is relative to such "citizens." See *id.* at 91; see also *infra* text accompanying note 420.

³⁶⁶ Justification in theory could be strictly independent of the idea of dialogue itself. See also *infra* text accompanying note 403. The limiting conditions on discourse might seem appealing because of considerations that hold true even if the conditions are treated as relevant to other forms of decision process, such as solitary introspection or voting subject to agenda constraints. But Ackerman's particular limits are too strong to be easily identified as universal.

Within Ackerman's system for example, it is not enough that an individual advance a reason her or his claim to a given prerogative is at least as good as the reason behind the claim of anyone else. The proffered reason instead must absolutely distinguish the claim: establish the priority of

Ackerman's chief efforts at persuasion are implicit, comprehensive, and instrumental.³⁶⁷ Together, all three limits are constitutive elements of a particular form of dialogue that, because of what it makes possible, is itself of sufficient appeal to validate the particular conditions. There is no circularity in this. It is not the identity of the restraints as such, but the result of their interaction, that gives to dialogue its appeal.

This act of political imagination is enough to establish the *conceptual coherence* of liberalism, to reveal the liberal method of dialogue as one that can, in principle, generate a *harmonious vision of social order*. The harmony is of a distinctive kind. It does not promise an end to ambiguity, disagreement, disappointment; it does not promise an idyllic social union where all mankind loses itself in lyric praise of cosmic order. Instead of the standard utopian reverie, it offers each citizen the chance to achieve self-understanding without subordinating himself to the meanings imposed by others; it bids us glimpse a *deeper harmony* in the dialogue that provides the *social foundation* for all subsequent disagreement.³⁶⁸

The expectations—the rhetorical figures of success—are clearly classical. In context, even the reference to “ambiguity, disagreement, disappointment” confirms the overall effect. For Ackerman, these phenomena are in one sense superficial (“a deeper harmony”). They are, moreover, a by-product of “the conceptual coherence of liberalism.” The constraints incorporated in Ackerman's dialogue prevent certain kinds of claims from being asserted and, in shielding other claims from

the claim vis a vis all others. See B. ACKERMAN, *supra* note 356 at 41-42. Ackerman's rationality requirement, therefore, appears to be more severe than that which, for example, social choice theorists traditionally employ. See, e.g., K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 19-21 (2d ed. 1963). The consistency condition is equally pointed. Ackerman insists that consistency be demonstrable: that an individual be able to show that a certain reason, in cases other than the case at hand, supports the claim that the individual would then make. See, e.g., B. ACKERMAN, *supra* note 356, at 42, 91-92. This herculean obligation sets *Social Justice in the Liberal State* in opposition to forms of argument holding that consistency, or other aggregate requirements, are by-products of some “invisible hand,” and not truly or realistically capable of proof “in advance” in an individual case. See, e.g., C. LINDBLOM, *THE INTELLIGENCE OF DEMOCRACY* (1965). Finally, the neutrality rule, as Ackerman represents it, is simultaneously (and strikingly) agnostic and doctrinaire. It excludes from conversation all references to taboo, custom, or belief as such. See, e.g., B. ACKERMAN, *supra* note 356 at 40-41. But it also denies the possibility of skepticism about the results of dialogue per se. Neutrality prohibits such likely devices for managing substantive doubt as log-rolling arguments of the form “but you won last time” unless those arguments can be restated in a more impersonal form. Ackerman does not pretend to regard the neutrality principle as self-justifying. See, e.g., *id.* at 327-48; see also *infra* text accompanying notes 372-74.

³⁶⁷ Ackerman, however, does discuss the idea of neutrality separately at the close of the book. See B. ACKERMAN, *supra* note 356, at 349-79; *infra* text accompanying note 402.

³⁶⁸ B. ACKERMAN, *supra* note 356, at 231 (emphasis added).

objection, both protect diversity of opinion (up to a point) and permit even imprudent (ultimately disappointing) exercise of prerogatives. In sum, it is as contributions to a classical account that Ackerman defends his conditions. In combination, they yield order.

But this classicism is also paradoxical. The conditions work (achieve order and acquire value) because they exclude certain sorts of argument.³⁶⁹ The form of discourse *Social Justice in the Liberal State* recommends is one in which participants attempt to show the impropriety of particular assertions in the light of the limiting rules. Argument ends, therefore, not so much with an agreed upon result as with a choking silence.³⁷⁰ What participants wish to say they cannot. This is hardly dialogue in any ordinary sense. The paradox here is important. How is it, exactly, that Ackerman narrows discussion? What is the precise form of his censorship? If we take these questions seriously we end up describing *Social Justice in the Liberal State* as a form of dessicated description: as abstracting detail from the idea of dialogue; as taking content away from its own central term.

The three constraints first of all deprive the idea of dialogue of subject matter. Topics for discussion cannot include (as we have already noted) matters concerning which participants would refer to belief, custom, or taboo in explaining their views.³⁷¹ But Ackerman does not merely exclude belief from his universe. He must also ban science and history. Ackerman does not make this point explicitly. His constraints, however, seem to permit little room for scientific or historical discourse. Ackerman apparently assumes that "factual" claims are not a theoretically important part of political argument.³⁷² Statements about the world susceptible to a testing empiricism cannot easily account, within his system, as justifications for claims. Such statements could be checked for consistency only weakly. An individual could not

³⁶⁹ See Barber, *Unconstrained Conversations: A Play on Words, Neutral and Otherwise*, in *Symposium on Social Justice in the Liberal State*, *supra* note 158, at 330, 332; Hyde, *Is Liberalism Possible?* (Book Review), 57 N.Y.U. L. REV. 1031, 1035-39 (1982).

³⁷⁰ See, e.g., B. ACKERMAN, *supra* note 356, at 85-86, *see also* R. NOZICK, *PHILOSOPHICAL EXPLANATIONS* 1, 4-8 (1981).

³⁷¹ See *supra* note 366.

³⁷² Our story simply defines a social environment in which we are deprived of all the familiar cop-outs that permit us to evade the liberal question of legitimacy. Thus, neither you nor I are free to "solve" the power struggle by a show of brute force; nor can we fritter away our time by talking about important, yet ultimately, secondary issues of implementation.

B. ACKERMAN, *supra* note 356, at 33-34; *see, e.g., id.* 19-22, 108-09, 223. "All too often, discussions of basic principle get bogged down in the practical difficulties involved in implementing policy in a complex and uncertain world." Ackerman, *What is Neutral About Neutrality?*, in *Symposium on Social Justice in the Liberal State*, *supra* note 358, at 372, 377. For analysis questioning Ackerman's distinction, *see* Fishkin, *Can There Be a Neutral Theory of Justice?*, in *id.* at 348, 354-56. *See also supra* note 353.

assert differing statements of fact concerning the same subject. But with regard to different subjects, consistency fixes no clear measure. The world, after all, may be a rather arbitrary place. Moreover, such assertions, if we try to evaluate them in Ackerman's terms, seemingly violate the first part of the neutrality rule. Reference to empirical verification would cause an individual's assertions to become claims "that his conception of the good is better than that asserted by any of his fellow citizens."³⁷³ But even if I am pushing the limits of the language here, if "better" does not readily encompass allegations of natural or social "fact," this much at least would still be clear: at minimum, Ackerman's dialogue does not anticipate empiricist controversy.³⁷⁴

A second sort of "abstraction" involves the idea of dialogue itself. Discourse, as Ackerman imagines it, is strongly individualist.³⁷⁵ The claims participants assert are claims that they bring to the discussion; worked out in advance, they are the separate products of separate individuals, and not the group. Dialogue does not change the views of individuals; it tests them. Apparently, if individuals adjust their claims as a result of dialogue, they do so for pragmatic reasons only. Particular claims, it turns out, cannot be stated in the form specified by the limiting conditions. Or at least, if individuals genuinely change their views, we do not know it from Ackerman's account. His emphasis is on the process of rejection, on the mechanics of discovering defective claims. In defending his scheme, he does not claim that *consensus* is the result of dialogue. "It does not promise an end to ambiguity, disagreement, disappointment; it does not promise an idyllic social union"³⁷⁶ Instead, as if in confirmation of the individualist stance, there is "self-understanding without subordinating."³⁷⁷ The individual holds to her or his views, aware of their character; possesses her or his claims, aware of both their limits and the extent of their protection. All of this is admirably, if a little self-consciously, tough-minded. It is also strikingly strange. Ackerman's dialogue has nothing to do with persuasion.³⁷⁸

³⁷³ B. ACKERMAN, *supra* note 356, at 11; *see also id.* at 356.

³⁷⁴ Ackerman indeed explicitly sets up his analysis as "prior" to factual inquiry. *See id.* at 22.

³⁷⁵ "Liberty, Equality, Individuality are the watchwords of the liberal state." *Id.* at 347.

³⁷⁶ *Id.* at 231.

³⁷⁷ *Id.*

³⁷⁸ The absence of any developed notion of persuasion is one of the most vividly "present" features of Ackerman's book.

We can note first of all the inconsistency in the various discussions of changes of mind. Although Ackerman sometimes recognizes the possibility, *see, e.g., id.* at 127, in other contexts he plainly does not, *see, e.g., id.* at 44, 54. Moreover, his important argument that only the views of present participants are relevant, *see, e.g., id.*, at 115-16, works only if he assumes that present participants will not alter their views. His idea, for example, of genetic domination, of some char-

2. Tom Swift and Jonathan Swift

The substantive consequences of Ackerman's simplification of the idea of dialogue are not always immediately apparent. Indeed, they reveal themselves, most fundamentally, only indirectly: in an underlying awkwardness and inconsistency in important parts of the book.

Initially, Ackerman would locate his readers on board a spaceship, having just reached a distant planet, engaged in discussion with fellow colonists about the political organization of their imminent society.³⁷⁹ The moderator of the discussion is the Commander. She rules on whether given claims (assertions concerning proper distribution) satisfy Ackerman's conditions.³⁸⁰ The Commander also functions as implementer; "armed with a perfect technology of justice," she can immediately and costlessly put into effect any decision she concludes is just.³⁸¹ Within Ackerman's scenario, all conceivable forms of property reduce

acteristics treated as disfavored by all participants deciding on the traits of future generations, see *id.*, would presumably lose much of its significance if present participants were characterized as conceivably changing their minds on what is disfavored: it would then be difficult to describe many traits as rejectable without reference to some more substantive notion than present consensus.

Much of what is controversial about Ackerman's rationality requirement stems from the impediments that his rule creates for any recognition of the possibility of persuasion. Ackerman's insistence that political institutions require an affirmative justification for their existence, for example, arguably explains his failure to explore the possibility that first in time rules (or a whole class of similar rules), like the random distribution rules that Ackerman occasionally endorses, may derive from an awareness that there are some questions that we cannot easily resolve (an insight which presupposes the idea of persuasion as a reverse image) and that therefore the appropriate institutions, in some circumstances, might be those that make reason-giving irrelevant. Compare *id.* at 38 with *id.* at 120-24. The emphasis on comprehensiveness, we can see, also plainly carries with it a dismissal of the possibility of persuasion: its effect is to exclude the partial orderings, easy cases, or symbolic parables with which persuasive efforts ordinarily start. See *id.* at 41.

The neutrality requirement also blocks access to an idea of persuasion. Here the striking illustrations emerge in Ackerman's discussion of education. He equates persuasion with imposing a point of view (improper in his scheme): "the liberal state is not committed to a system of liberal education because it wishes to indoctrinate children in one vision of the good rather than another." *Id.* at 159. Ackerman thus at least seems to deemphasize both the idea of mastery and the virtue of passionate teaching in his educational theory. See *id.* at 157-59. Competence becomes a requirement that "the early effort must provide the child with skills that he may find useful in a variety of self-definitions." *Id.* at 157. This probably means basic literacy but clearly the fundamentality of the obligation disappears in Ackerman's formulation. Somewhat similarly, with respect to intense teaching, Ackerman rather equivocally notes: "intolerance may often be pedagogically useful—so long as it is not permitted to envelop the child for too long a time." *Id.* at 159. The question here is not whether Ackerman's theory of education leaves anything out; rather, the issue is to what extent it is possible to be definite. Ackerman's neutrality becomes a kind of tentativeness, attributing a striking degree of fragility to the student mind. His fear of indoctrination would be mitigated were he to take advantage of, rather than attempt to reconcile, the built-in conflict in educational processes. Especially if family views differ from those of the teacher (but perhaps even if this is not the case), children may resist even intensely communicated teacher beliefs. If he noted such possibilities, Ackerman could restore to his account of schooling the more central role for fervor we expect to find.

³⁷⁹ See *id.* at 31.

³⁸⁰ See *id.* at 32.

³⁸¹ *Id.* at 31.

to manna, a magical substance of infinite use although of limited quantity.³⁸²

Questions of personal relations also acquire a fantastic context. In Ackerman's discussion, the authority of parents over children figures initially in a problem concerning the content of instructions to be given a Master Geneticist who is "capable of making test-tube babies on demand."³⁸³ Transactional systems are the work of a Master Designer.³⁸⁴ Exchange of ideas or property takes place via "a transmitter-shield" that permits an individual to communicate with or block communication with any other person, with regard to any or all possible ideas or transactions.³⁸⁵

Because Ackerman sets his discussion within this artificial environment, he is able to work through to conclusion a wide range of issues: questions of the distribution of wealth, immigration, genetic engineering, adoption, abortion, infanticide, educational theory, free exchange, inheritance, environmental policy, and population control, among others.³⁸⁶ Ackerman counts such a plenitude of definite results as justifying his decision to simplify.³⁸⁷ But it also obviously raises a question. What happens when we take away the magic devices and try to use the idea of restrained dialogue in more complicated settings? At this point, the results are markedly less abundant.

For example, it is revealing to juxtapose the "artificial" analysis of the distribution of wealth that takes place early in *Social Justice in the Liberal State* with its later, more "realistic" discussion. Initially, the appropriate rule is equal distribution. For an individual to claim a right to no more manna than anyone else receives certainly requires no assertion of a superior conception of the good or any form of personal

³⁸² See *id.*

³⁸³ *Id.* at 113-14.

³⁸⁴ *Id.* at 172.

³⁸⁵ *Id.* at 172-77.

³⁸⁶ Ackerman initially derives an equal distribution rule for wealth distribution. See *id.* at 53-59. His immigration discussion focuses first on the difficulty and then on the defense of restrictions. See *id.* at 88-95. Ackerman ultimately looks to the idea of a lottery in dealing with questions of genetic engineering. See *id.* at 113-24. He links adoption with genetic engineering, holding that any "right" to adopt refers only to human-born children and not to laboratory "creations." *Id.* at 124-26. Ackerman would permit abortions in general, except perhaps those sought for the sheer "joy" of having an abortion. *Id.* at 128. He concludes that a legislature could nonetheless prohibit infanticide. See *id.* at 128-29. For a discussion of Ackerman's educational theory, see *supra* note 378; B. ACKERMAN, *supra* note 356 at 139-67. In the absence of monopoly, or more generally given an initially fair distribution of entitlements, Ackerman supports free exchange. See B. ACKERMAN, *supra* note 356, at 177-86. But he finds the idea of inheritance (intra-family transfers) difficult to defend. See *id.* at 201-12. Ackerman argues for compromise positions on environmental issues. See *id.* at 102-03, 212-17. He treats population as presumptively subject to control; no one has an unqualified right to children. See *id.* at 217-21.

³⁸⁷ See, e.g., B. ACKERMAN, *supra* note at 22, 28-29.

priority.³⁸⁸ When Ackerman complicates the situation, however, equal distribution becomes a more equivocal and thus less useful proposition. People differ in many ways with respect to what they may be said to have, both because there are many things to possess, and because people differ in their circumstances, for reasons of history, biology, or other factors. Achieving equal distribution is thus an obviously large task. Ackerman does not pretend to argue that the achievement is possible. Instead, he conceives of government as a kind of technology for achieving equality, subject to a budget constraint.³⁸⁹ The issue now becomes not what distribution rule is best (Ackerman continues to treat equal distribution as presumptively appropriate) but what strategy the government should adopt in eradicating inequality.³⁹⁰

What should be the first targets? How much effort should be spent in dealing with any one type of inequality? How much effort should be spent overall? Ackerman would answer questions like these by returning to his constraints on dialogue. If we cannot redress all inequalities, we must have reasons for targeting some and not others, and these reasons must be both consistent and neutral. The conclusion that follows, he believes, is a rule of equal sacrifice.³⁹¹ We cannot organize government in a way that causes it to ignore altogether the disadvantages of some persons while striving to ameliorate (even if only partially) the conditions of others. This is an elegant proposition. It mirrors nicely the original rule of equal distribution. Unfortunately, however, the idea of equal sacrifice, like that of equal distribution, yields only a few implications in a realistic environment.

To be sure, Ackerman can argue straightforwardly within his terms that government efforts directed against inequality must encompass, up to a point, not only prohibitions against compounding disadvantage (e.g., discrimination against the blind) but affirmative compensation as well.³⁹² The distribution of deprivation, and not the fact of deprivation itself, is what we seek to control within the terms of Ackerman's system. Government in effect ignores the initial inequality, and thus violates the equal sacrifice rule, if it fails to recognize that, in conferring special benefits (e.g., educational preferences) upon the disadvantaged, it could multiply inequalities in ways that would ulti-

³⁸⁸ See *id.* at 55-57. But see Harman, *supra* note 358, at 400-01. Ackerman does not argue that his equal distribution rule is the only rule that would satisfy the dialogue limitations. See B. ACKERMAN, *supra* note 356, at 66-67. Within the context of his book, however, this tentativeness plays little role: Ackerman in fact works with no other rule.

³⁸⁹ See B. ACKERMAN, *supra* note 356, at 253.

³⁹⁰ See *id.* at 235-37. But see Fishkin, *supra* note 372 (with complex set of goods even preliminary measure of inequality is difficult).

³⁹¹ See B. ACKERMAN, *supra* note 356, at 237-39.

³⁹² See *id.* at 240-49.

mately equalize their distribution. An unequal benefit for blind persons offsets their unequal burden within the distributional balance. The argument for affirmative action thus derives from an awareness that inequalities are always multiple. This is the same idea, we have already seen, that animates the parent equal sacrifice principle.

Ackerman, though, is inconsistent in his treatment of multiplicity. Sometimes, as in his affirmative action argument, he emphasizes the idea of multiple inequalities as an aggregate and nothing more. Indeed, Ackerman at one point discusses at some length the multidimensional character of inequality in part in order to criticize (among others) radical theorists who emphasize class conflict or some other systematic social deformation.³⁹³ At other times, though, Ackerman appears to assume that within the aggregate of inequalities there are indeed patterns. He believes that it is possible to identify some persons who are unequivocal losers.³⁹⁴ Here he is proceeding inconsistently vis a vis his argument against radical systematizers. If there are some inequalities that are more vivid, or that reappear in various guises, should not we address these first, in advance of more occasional wrongs? It would seem so. The end state, after all, is not equality but equal sacrifice; in effect, randomly distributed deprivation.

Finally, in yet other instances, Ackerman suppresses the idea of multiple inequalities altogether. For example, he recognizes an exception to his overall notion of government as an engine of equality in cases in which government benefits to the already well-off would work to general advantage:

[T]he statesman must assert, first, that the prospect of one or another special advantage will serve as an incentive for the increased production of some scarce resource that would not have been supplied under the regime of strictly equal sacrifice; second, that he can design a tax scheme that will deprive the advantaged of some of the extra resources they produce, without leaving them fewer rights than they would have possessed under the equal sacrifice regime . . . and third, that the extra taxes will be spent in a way that gives the disadvantaged a richer set of liberal entitlements than they would have had. . . . If all three of these conditions apply, the empirical groundwork has been laid for a success-

³⁹³ See *id.* at 244-45.

³⁹⁴ This assumption lay behind his first formulation of the equal sacrifice rule; it also informs his brief account of relations between rich and poor nations. See *id.* at 256-57. Ackerman himself acknowledges the initial simplification. See *id.* at 244.

ful claim of general advantage.³⁹⁵

Ackerman concedes that there is a practical difficulty with this idea. We must be satisfied that the general benefits are substantial when compared with the special gain the well-off acquire. But there may be difficulties of assessment (both factual and normative) in making this judgment.³⁹⁶ There is, however, a more fundamental problem. If we do not think solely in terms of the well-off and the not well-off, but recognize (as before) a multiplicity of groups, favored or disfavored in terms of a multitude of criteria of value, and if we treat government benefits as similarly numerous, no group singularly benefits. The taxing scheme therefore becomes unnecessary. The logic of Ackerman's argument leads to a variation on the Kaldor-Hicks theme that, given overall social benefit, no compensation need be paid to those who are made worse off.³⁹⁷ This is not at all, obviously, what Ackerman intends.

The point I wish to make is not simply that Ackerman's elaboration of the equal sacrifice idea shifts unsteadily and to its disadvantage. Rather, we should be aware of the reasons that lie behind the instability. Ackerman is acutely conscious of the importance of making the transition from his deliberately fictional first scenario to a setting of greater verisimilitude.³⁹⁸ He means, therefore, to show that there is a plausible form of description that is consistent with, or even suggested by, his analytical framework. In fact, however, that framework is of little representational utility. The object of the idea of constrained dialogue is to generate results. It was in order to demonstrate resolving capacity, as it were, that Ackerman constructed his first simplified setting. When he wishes to change scenes, he holds constant his special classicism, his sense of analysis as a process of decisive order. The analytic process, as he now conceives of it, is therefore not a representation of an environment *per se*, but of an agency acting upon an environment. The setting becomes raw material; the real concern is with what is done to the material.

It is not surprising therefore that Ackerman conceives of inequality as undifferentiated diversity or that, true to this image, he fails to watch carefully his own various accounts of unequal circumstances.

³⁹⁵ *Id.* at 258-59.

³⁹⁶ See *id.* at 259-61. In an analysis similar to his approach to environmental questions, see *infra* text accompanying note 410, Ackerman emphasizes that the sense of the "contestability" of privilege is the crucial thing. But while he shows that the judgments are difficult, and thus implicitly supposes that outcomes will be various, he does not (cannot) address the possibility of a systematic pattern in the judgments: in this instance, because his organizing formulation treats the problem of privilege in terms of the individual case.

³⁹⁷ For discussion of the Kaldor-Hicks argument, see K. ARROW, *supra* note 366, at 38-42.

³⁹⁸ See B. ACKERMAN, *supra* note 356, at 31-34.

The reason for being of his analytic system, after all, is the production of order. It would be rhetorically surprising (if not subverting) if Ackerman were to represent that order as a reworking of some prior pattern. In Ackerman's later descriptive phase, the environment becomes clearly the analogue of manna in the earlier part. Structure, history, the experience of "fact," are simply not parts of the description.³⁹⁹ And we can see, in Ackerman's ultimate image of government as a technology of change, acting upon a resisting but still plastic context, that the initial preoccupation with imaginary simplifying technology was not so much fanciful ornament as presentiment.

There is more to *Social Justice in the Liberal State*, however, than subject-matter and setting. Important parts of the book depend surprisingly little upon specific context. I am referring here to Ackerman's discussion at the conclusion of *Social Justice in the Liberal State* concerning possible reasons we might adopt his principles of constraint⁴⁰⁰ and also to his earlier treatment of the idea of citizenship and its implications.⁴⁰¹ For our purposes, what is most interesting about the questions of justification and citizenship is the tension in the relationship between Ackerman's analysis in these contexts and his approach elsewhere.

Much of *Social Justice in the Liberal State* is simply a demonstration of how constrained dialogue works. The characteristics of that operation (its classical decisiveness and universal relevance) are implicit assertions of the appeal of the principles. Ackerman does not address until the close of the book the question whether his constraints are defensible in other than functional terms. Focusing in particular upon the neutrality requirement, he claims that the constraints fit well with our experience of political theory: with our sense of the tentativeness of theory, of the difficulty in establishing the priority of any given systematic account of the good, of the hazards of recognizing such priority—in short, with our sense of political inquiry as seeking to be systematic but

³⁹⁹ After discussing discrimination against (and in favor of) the blind, Ackerman writes:

So much for blindness. I have chosen the example of genetic domination to emphasize that the case for compensation . . . does not require proof that a group has been shamelessly exploited in the past by oppressors who proudly justified their action by explicitly authoritarian pronouncements. . . . Even a polity that had throughout its history been devoted to liberal principles would have to confront the need for some forms of affirmative action

Id. at 249. He means to argue in this passage that affirmative action is fundamental because widely relevant. *See id.* But by proceeding in this way, Ackerman also sets up a rhetorical structure within which the fact that past acts of exploitation were explicit and shameless would itself count for little in the analysis. *See id.*; *see also id.* at 352-53 (in example decision is either conditioned or not); *infra* note 422.

⁴⁰⁰ *See* B. ACKERMAN, *supra* note 356, at 349-78.

⁴⁰¹ *See id.* at 69-167.

as always also open-ended and conversational.⁴⁰² This account of the justification of constrained dialogue, we might note, has two obvious features. It is on its own terms distinctly anticlassical, both representing itself as descriptive (of how political theory "feels"), as well as celebrating tentativeness, incompleteness, and the fragmentary character of political ideas. And yet, we also know that the constraints themselves contradict this image of dialogue; in their operation the constraints precisely empty dialogue of this sort of content.

As Ackerman has noted, there is no reason a theory must inevitably be justified by the same sort of arguments as those that the theory deploys in its operation.⁴⁰³ But if the value of neutrality acquires its appeal from our sense of the danger of authoritarian solutions and from a tolerance of diversity that grows out of skepticism about the possibility of devising a frequently decisive political theory, it is not difficult to see Ackerman's justifications of the value of neutrality as a critique of the very implications that he deduces from that value. This suspicion deepens when we consider Ackerman's discussion of citizenship. His ideas about dialogue are a source of real difficulties—as Ackerman apparently realizes. His efforts at repair, however, have a distinctly nondecisive and ad hoc air. We not only sense that Ackerman's own argumentative mechanism should prompt skepticism; we are reminded once more of the resources of political argument Ackerman denies his censorial engine.

In *Social Justice in the Liberal State*, the idea of citizenship serves to limit the class of persons whose interests the constraints of liberal dialogue protect. Ackerman does not believe that all persons are entitled to expect that others will observe in dealing with them the limits (or at least the neutrality limit) liberal dialogue fixes.⁴⁰⁴ The full benefits of liberal discourse are shared only by persons who are in fact capable of asserting that their claims are of equal moment, and who themselves act in accord with liberal restraints. All others, for all practical purposes, are simply so much manna.⁴⁰⁵ Standing by itself, this is a re-

⁴⁰² See *id.* at 358-69. "These, then are four of the main highways to the liberal state: realism about the corrosiveness of power; recognition of doubt as a necessary step to moral knowledge; respect for the autonomy of persons; and skepticism concerning the reality of transcendent meaning." *Id.* at 369.

⁴⁰³ See Ackerman, *supra* note 372, at 387. In *Social Justice in the Liberal State*, itself, however, Ackerman emphasized and asserted congruence between the process of justifying the value of neutrality and the internal mechanics of his constrained dialogue. See B. ACKERMAN, *supra* note 356, at 359.

⁴⁰⁴ See B. ACKERMAN, *supra* note 356, at 75.

⁴⁰⁵ "While citizens need only invoke the concept of Neutral dialogue to vindicate their rights, non-citizens must depend upon the policy choices of *citizens* if they are to acquire rights on their own behalf. . . . [T]he fate of non-citizens will be an appropriate subject for majoritarian politics." *Id.* at 71 (emphasis in original).

markably powerful conclusion. It leaves unprotected the interests of the natural environment, animals, all unborn persons including not only future generations but present fetuses as well, small children, the mentally or communicatively handicapped, criminals, members of communities that refuse to adhere to liberal ideas, presumably all speakers of only foreign languages, and more certainly those persons from cultural backgrounds radically distinct from liberal society.⁴⁰⁶ In principle, all members of this class are vulnerable to any conceivable form of treatment. At least at first glance, there is no reason liberal citizens cannot devour their own children or butcher them for sale to other citizens.⁴⁰⁷

Not surprisingly, Ackerman deploys a series of arguments in an effort to mitigate the consequences of the citizenship idea. With regard to the natural environment, for example, he argues that all citizens share an interest in common, and that therefore no citizen may propose to transform permanently the environment without violating the neutrality principle. Such a permanent transformation, at least if inconsistent with the views of other citizens, could be defended only by a forbidden assertion of the priority of a particular conception of the relation of nature and humanity.⁴⁰⁸ Of course, an absolute preservationist stance would be similarly vulnerable to challenge.⁴⁰⁹ Ackerman regards the resulting tension as a healthy agnosticism. Middle positions—partial transformations and partial preservations—are in his view the appropriate environmental policies.⁴¹⁰

The question of the treatment of children triggers a series of responses. If a decision made at the time a child is not a citizen will affect the child adversely but will not preclude the child from subsequently becoming a citizen, the proponent of the act must supply a liberal justification.⁴¹¹ Ackerman in this case treats both time periods as of equal relevance; the fact of sequence is unimportant. Alternatively, if the proposed course of action is more drastic, and will cause the child to cease to exist, for example, by way of contraception, abortion, or infanticide, the interests of the child do not trigger a requirement of liberal argument because the child will never become a citizen. There is therefore no time period in which the claims of a now-adult child would be perti-

⁴⁰⁶ See *id.*; see also Barber, *supra* note 369, at 333-35 (even among citizens emphasis on dialogue works to the benefit of the more articulate).

⁴⁰⁷ Usually absent the Swiftian overtones, this has become a standard criticism of Ackerman. See, e.g., Alexander, *supra* note 358, at 838-44; Hyde, *supra* note 369, at 1052-53; Posner, *Lawyers as Philosophers: Ackerman and Others*, 1981 A.B.F. RESEARCH J. 231, 242-43.

⁴⁰⁸ See B. ACKERMAN, *supra* note 356, at 103.

⁴⁰⁹ See *id.* at 102.

⁴¹⁰ See *id.* at 103.

⁴¹¹ See, e.g., *id.* at 122-23.

nent.⁴¹² By analogy to the environmental context, however, present citizens may object to a situation in which there is an absolute license to kill. Abortion for abortion's sake may be prohibited;⁴¹³ and given the availability of contraception and abortion, infanticide is arguably subject to ban.⁴¹⁴ Ackerman develops yet another kind of argument in order to deal with forms of child-raising that would prevent the child from ever acquiring citizenship capacity. Within a liberal state, the application of liberal principles may not be arbitrarily limited. All relationships involving claims of prerogative that could be mediated by dialogue must be mediated by dialogue.⁴¹⁵ An individual, therefore, may not raise a child in a way that prevents dialogue between parent and child from ever occurring. Child-rearing must take a form that makes it possible for the child to acquire citizenship capacity.

More "defensive" versions of this last argument figure in other parts of the citizenship discussion. For example, Ackerman contends that an individual not only forfeits status as a liberal citizen by committing acts in violation of liberal principles but also becomes subject to preventive detention if it is clear that the individual is about to violate another persons's rightful prerogatives.⁴¹⁶ Similarly, the state may limit immigration of persons who do not at the time of entry possess the relevant capacity but who could subsequently acquire it, if the presence of those persons during the period of transition threatens the stability of liberal society.⁴¹⁷ Of course, such "reason of state" claims have limits. Preventive detention must indeed be necessary and the risk of rights-violation real.⁴¹⁸ Similar requirements constrain immigration limits. Indeed, Ackerman argues that restraints on immigration cannot be more drastic than either the citizenship idea or the necessity rule would allow.⁴¹⁹ Oddly, however, he does not assert, as in the child-rearing context, that if dialogue is possible it is mandatory. Instead, Ackerman contends that, while only citizens may claim a right to neutral treatment,⁴²⁰ to deny the right to persons who are in all respects similar to present citizens violates the more generally applicable consistency requirement.⁴²¹

This much at least should be clear: the idea of citizenship is at the

⁴¹² See, e.g., *id.* at 127-29. See generally *id.* at 110-11.

⁴¹³ See *id.* at 128.

⁴¹⁴ See *id.* at 129.

⁴¹⁵ See *id.* at 144-46.

⁴¹⁶ See *id.* at 84-85.

⁴¹⁷ See *id.* at 93-95.

⁴¹⁸ See *id.* at 85-87.

⁴¹⁹ See *id.* at 95.

⁴²⁰ See *id.* at 91.

⁴²¹ See *id.* at 91-92.

base of a remarkably awkward structure of arguments. Ackerman's decision to treat citizenship as a clear-cut category yields a proposition with implications from which he immediately attempts to retreat. The effort at amendment is in the end only partly successful. Ackerman has to strain to analogize the situation of wildlife and human fetuses in order to introduce at least some difficulty into the abortion question. Incredibly, he is unable to provide any firmer foundation for prohibitions against infanticide than a kind of legislative discretion. The rights of children are not at all straightforward. They depend upon either the act of imagination of treating the different time periods as simultaneous or a substituting assertion of the interests of the state or present adults. The state is oddly circumscribed; it is utterly free to act for reasons of liberal necessity in connection with questions of immigration and preventive detention, and yet it is utterly powerless absent such reasons. Ad hoc exercise in the close and lexical reading of the constraints on dialogue competes with synthetic structural argument. Difficult questions are represented as matters of agnostic compromise among mutually unpersuaded groups or as an almost neurotic shuttling back and forth between prohibition and license.⁴²²

The reason for this clumsiness should also be apparent. There are no figurative resources in the language of Ackerman's dialogue. It cannot encompass the imagined speech of future generations, or of the presently incompetent, or the interactive if indirect communication between nature and humanity or between the mentally or communicatively handicapped and those who are "whole." Ackerman must thus engage in imaginative acts of the very sort that he denies to liberal discourse—invent proxies or relax time—in order to posit a situation in which that discourse is relevant. He is trapped within a classical language whose basic image he must treat literally in order to achieve the necessary decisive effects. And yet the issues that Ackerman here confronts are by and large profoundly anticlassical: matters that even Ackerman senses ought to be difficult to resolve; questions first of all of imagination, or of a search for relevant metaphors.⁴²³ We are concerned with politics as an act of literacy creation, an act of persuasion: constitutive rather than dispositive of the good. Ackerman struggles to adapt his classical mechanism.⁴²⁴ The effort, however, is obvious enough to

⁴²² See Hyde, *supra* note 369, at 1048.

⁴²³ See, e.g., Parfit, *Future Generations: Further Problems*, 11 PHIL. & PUB. AFF. 113, 171-72 (1982).

⁴²⁴ Responding to criticism of the limited resources of language within constrained dialogue, Professor Ackerman has partly conceded the point. "Neutrality is a way of talking. It is not the only way; nor even the way that does justice to the full complexity of each person's search for meaning and fulfillment." Ackerman, *supra* note 372, at 389. But he also asks, "[C]an't we engage

undermine the results. Professor Ackerman, so elaborately imaginative in presenting his scheme, in the end falls short—imagination is not part of the scheme itself.

C. *From Incompleteness to Addition: A Positive Anticlassical Reading of Communication and the Evolution of Society*

We must still explore the positive cast to description. How is it that we move forward, through a sense of what is missing to a view of what we might add? How is it possible to see the critical and the utopian as almost the same category? To show what answering these questions involves, I need one last subject. My choice may appear to be an unlikely one.

Jürgen Habermas does not write within the American legal tradition, however stretched (by Ackerman, for example) it may have become.⁴²⁵ Habermas is instead a German social theorist, of the line that

in both constrained and unconstrained dialogue, shifting the conversational key as the occasion requires?" *Id.* at 372. Neutral dialogue has a special (and limited) function. It "marks the boundary of the most extensive form of dialogic community. . . ." *Id.* at 375. "[W]e . . . speak neutrally to one another when we find we have nothing better to say." *Id.* at 390.

This compromise position, however, is not entirely satisfactory. It appears to be subtly inconsistent with an important theme in *Social Justice in the Liberal State*—the priority of political theory over intuition, tradition, or deduction from some master philosophy. "In a liberal state, all other forms of social dependence are subordinated to the dialogic processes of Neutral conversation." B. ACKERMAN, *supra* note 356, at 347 (emphasis in original); see also *id.* at 353. In both versions, neutral dialogue may be but one form of conversation among many. But in his original presentation, Ackerman treated non-neutral talk as always precarious—subject to challenge. The revised view retains the notion of neutral dialogue as a "conversation stopper", Ackerman, *supra* note 372, at 373 (emphasis in original), but there is now also a kind of quantitative proviso; an assurance that, in light of the use of other modes of discourse capable of constructing agreement, liberal rules will ordinarily not be invoked. They become instead a kind of "blackball." "Neutrality permits a polis-like community to find a voice when dealing with outsiders beyond the gates . . ." *Id.* at 375. Constrained dialogue now works to preserve consensus, it would seem, rather than to challenge it.

Even if I am reading too much into Ackerman's recent comments, by failing to take into account their dialectical setting, see Barber, *supra* note 369, the effort to characterize constrained dialogue as one among many alternative conversational forms remains flawed. The possibility Ackerman does not address is that political discourse may be constitutive at the same time as it is analytical; that assessing claims also involves characterizing them; and that characterization may regularly contaminate assessment. Professor Fishkin, I believe, makes a version of this point when he discusses how *Social Justice in the Liberal State* fails to supply a noncontroversial theory of the good—an argument I do not think Ackerman entirely confronts. Compare Fishkin, *supra* note 372, at 352-55, with Ackerman, *supra* note 372, at 377-83. More generally, giving visibility to analytic "contamination" is precisely the purpose of the idea of style. We will see in the next section how Ackerman's difficulty in this context appears in a more pronounced form in some of the writings of Jürgen Habermas. See *infra* text accompanying notes 505-12.

⁴²⁵ Habermas's own writings exhibit few (if any) efforts to address questions that, in their own terms, fall within the usual or immediate subjects of controversy in American legal theory. References to Habermas's work, however, do appear in legal writing—especially in connection with theories of freedom of speech. See, e.g., Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293 (1982); Chevigny, *Philosophy of Language and Free Expression*, 55 N.Y.U. L. REV. 157 (1980); see also, e.g., Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781,

runs from Kant, Hegel, and Marx, through Weber, Heidegger, and Freud, to Marcuse, Horkheimer, and Adorno.⁴²⁶ Habermas is thus an unfamiliar subject; my approach to his work will also be unconventional. I do not, as commentators on Habermas usually do, take up the body of his writings as a whole,⁴²⁷ or even examine his two best-known works: *Knowledge and Human Interests*⁴²⁸ and *Legitimation Crisis*.⁴²⁹ *Communication and the Evolution of Society*,⁴³⁰ my focus for the most part, is nothing more than a collection of articles.⁴³¹ In fact, I will reduce the scope of my discussion even further, exploring in depth only parts of three essays.⁴³²

This narrowing, though, is more a matter of bibliography than substance. The particular discussions we will address take up questions that are utterly central for Habermas. Their subjects, moreover, explain why I confront Habermas at all. In studying *Lochner* and Kennedy's *Blackstone*, we became sensitive to the relationship of "law and society" as it was repressed or as it forced its way within writings that were self-consciously concerned with mostly law by itself. By contrast, Habermas takes social arrangements generally as his primary topic; ideas about law are more the part within the whole—although, as it turns out, a theoretically crucial part. Moreover, Habermas connects the larger discussion of social arrangements with a set of ideas about the characteristics of unimpeded discourse. This latter notion is Ackerman's idea inside out: instead of developing a picture of plausible constraints on dialogue and then deriving conclusions from the implications of those constraints, Habermas specifies as much as possible what it means for speech to be experienced as "free," and takes these liberating

798 & n.46, 802 & n.59 (1983).

⁴²⁶ See generally D. HELD, INTRODUCTION TO CRITICAL THEORY: HORKHEIMER TO HABERMAS (1980).

⁴²⁷ See, e.g., T. MCCARTHY, THE CRITICAL THEORY OF JURGEN HABERMAS (1978).

⁴²⁸ J. HABERMAS, KNOWLEDGE AND HUMAN INTERESTS (trans. ed. 1971).

⁴²⁹ J. HABERMAS, LEGITIMATION CRISIS (trans. ed. 1975).

⁴³⁰ J. HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY (trans. ed. 1979).

⁴³¹ In part, I limit my discussion because Habermas has recently published in Germany a new work, *Theorie des kommunikativen Handelns*, which importantly increases the range of his discussion, incorporating, for example, what Habermas means to be an important critique of Max Weber. See Honneth, Knodler-Bunte & Widmann, *The Dialectics of Rationalization: An Interview with Jurgen Habermas*, 49 TELOS 5 (1981). Any effort at an all-encompassing examination of Habermas's ideas at this point, therefore, would be premature. At least in part, though, I examine Habermas for illustrative purposes; moreover, I end up with ideas that do not derive from Habermas per se, but from what is missing in Habermas. These ideas, although Habermas helps us see them, ought to be able to stand on their own.

⁴³² These essays are: *What Is Universal Pragmatics?*, in COMMUNICATION AND THE EVOLUTION OF SOCIETY, *supra* note 430, at 1-68; *Historical Materialism and the Development of Normative Structures*, in *id.* at 95-129; *Toward a Reconstruction of Historical Materialism*, in *id.* at 130-77. Although I separately identify these essays here, I will not do so in subsequent references, in order to simplify the citational apparatus.

conditions as his starting point.

It may seem as though I am in the process of proclaiming Habermas as the "answer"—what was missing, or what was complicating, in Ackerman's book or in the other work that we have been discussing up to this point.⁴³³ My course is not quite so straightforward. Habermas's writing, insofar as I discuss it, relies in important ways upon formulations that, if we regard them as asserting the status of description, are immediately challengeable. This difficulty, as well, appears to implicate the more obviously classical aspects of Habermas's ideas. Habermas, in a sense, is caught within the same predicament as Peckham, Kennedy, and Ackerman. But because Habermas reverses the previous background and foreground, we see something more in identifying what it is in his account that seems absent or only artificially rendered. We see, I think, an affirmative alternative—still only in outline perhaps, but at least promising a greater specificity than our responses to Peckham, Kennedy, or Ackerman might have suggested.

1. Society, Law, and the Presuppositions of Communication in *Communication and the Evolution of Society*

Habermas describes a sequence of stages of social development in which particular institutions emerge as responses to distinctive sorts of problems.⁴³⁴ Family or kinship structures appear as a reaction to problems of security requiring a differentiation of society from external nature. "Power over nature came into consciousness as a scarce resource."⁴³⁵ Functioning as an organizing mechanism of a state or collective political regime, legal institutions address the question of regulation *within* the social system. "Legal security came to consciousness as a scarce resource."⁴³⁶ Habermas represents recognition of the separate (and now problematic) status of the economy and acknowledgement of the complementary role of the state as a third stage. "Value came into consciousness as a scarce resource."⁴³⁷ The social system and external

⁴³³ Professor Ackerman regards the work of Habermas as consistent with *Social Justice in the Liberal State*, at least insofar as both Ackerman and Habermas start from notions of dialogue or communication. See Ackerman, *supra* note 372, at 375 & n.1; see also *infra* text accompanying notes 469-72, 479-89. Ackerman, though, does not explore in detail the relationship of his ideas and those of Habermas. Others, however, have made the attempt. See, e.g., Weale, Book Review, 65 MINN. L. REV. 685, 691-92, 699 (1981).

⁴³⁴ For the most part, my discussion of Habermas will move from back to front. I begin with his conclusion both because we can therefore immediately see something of the relevance of his work, and because one central theme in my discussion will be the difficult relationship of the conclusions that Habermas adopts and the ideas that he initially sets up as his organizing devices.

⁴³⁵ J. HABERMAS, *supra* note 430, at 165.

⁴³⁶ *Id.*

⁴³⁷ *Id.*

nature are no longer simply subjects for differentiation, but interact through mechanisms of exchange. The fourth institutional development has not yet fully emerged. It would involve a set of social responses to the problem of adjusting the relationship of society and the internal or "subjective" perspectives of the individuals who comprise it. "[T]he supply of motivation or meaning" becomes the scarce resource.⁴³⁸

Within this progression the role of legal institutions is particularly significant. The larger theme is the organization of social "consciousness." That consciousness is present merely primitively at the first stage, in the simple demarcation of society and nature.⁴³⁹ Only when society begins to become its own subject, by way of the ordering operations of legal institutions, does "consciousness" become an active "self-consciousness" which may then proceed to specify itself further in the remaining stages of integration.⁴⁴⁰ The picturing and thus the possible regulation of the material and motivational "economies" require important shifts in the perspective from which society views itself. But each of these subsequent moves is also simply an application of the idea implicit in the initial act of "legal" imagination. The definition of society is less a matter of describing some external "other" that society is *not*, and more a question of conceiving of society as a reaction to itself as "other": as *both* "state of nature" and response. Legal institutions, although not the last (and in this sense "highest") social forms to emerge, are nonetheless peculiarly crucial as first and therefore paradigmatic modes of social self-consciousness.

Habermas is explicit about the illustrative role of legality at a second step in his analysis. As part of a preliminary effort to establish the plausibility of his ultimate statement of the historical sequence, Habermas discusses the idea of "structures of consciousness."⁴⁴¹ It is as "structures of consciousness" that Habermas describes his sequence of social forms. Such structures are "intersubjective"—they function simultaneously within the individual consciousness as mechanisms for de-

⁴³⁸ *Id.* at 166. In *Legitimation Crisis*, Habermas discusses at greater length the notion of a society in which the question of the attitudes of individuals about the society (and thus the notion of legitimacy) is itself a central feature of the society's politics. See J. HABERMAS, *supra* note 429, at 68-92; see also J. HABERMAS, *Legitimation Problems in the Modern State*, in *COMMUNICATION AND THE EVOLUTION OF SOCIETY*, *supra* note 430, at 178-205.

⁴³⁹ Habermas argues that in "neolithic societies," J. HABERMAS, *supra* note 430, at 165, the differentiation of society and nature took a simple "we-they" form: there is only "a single plane of reality," *id.* at 156. "The experience of powerlessness in relation to the contingencies of external nature had to be interpreted away in myth and magic." *Id.* at 165.

⁴⁴⁰ Habermas explicitly and extensively borrows from the cognitive psychology of (chiefly) Piaget and Kohlberg. See, e.g., *id.* at 154-56; see also *Moral Development and Ego Identity*, in *id.* at 69-94. As we will see shortly, Habermas regards social and individual phenomena as similar in structure in important ways. See *infra* note 442 and accompanying text.

⁴⁴¹ J. HABERMAS, *supra* note 430, at 99.

fining or expressing personal identity and also "externally" or "objectively" as the rationalizing principles of explicit social institutions.⁴⁴² Language is the quintessential intersubjective phenomenon. Among the more specialized structures, Habermas regards law and morality as especially visible.

When the background consensus of habitual daily routine breaks down, consensual regulation of action conflicts . . . provides for the continuation of communicative action with other means. To this extent, law and morality mark the core domain of interaction. One can see here the identity of the conscious structures that are, on the one hand, embodied in the institutions of law and morality and that are, on the other hand, expressed in the moral judgments and actions of individuals.⁴⁴³

Other structures maintain rather than restore consensus, and thus differ from law and morality in both their function and prominence. They are nonetheless "homologous" insofar as they too are "structures of linguistically established intersubjectivity."⁴⁴⁴

The ultimate explanation for the way in which Habermas approaches law lies in the intellectual context that Habermas treats as relevant for his work. At one level, he purports to be "reconstructing" or rehabilitating Marxist theories of history.⁴⁴⁵ Emphasizing intersubjective structures is the crucial step in the program.

Habermas begins with the traditional Marxist concept of "mode of production," and its associated distinction between the "forces of production" and the "relations of production." He then links the two subsidiary concepts with two characteristic forms of communication.⁴⁴⁶ The "forces of production" encompass labor, as well as the technical

⁴⁴² "If one examines social institutions and the action competences of socialized individuals for general characteristics, one encounters the same structures of consciousness." *Id.* at 98-99.

⁴⁴³ *Id.* at 99.

⁴⁴⁴ *Id.* These "other structures" at one level take the form of related progressions in the development of individual egos and social "world-views." *See id.* at 99-106. From another perspective, the parallelism involves not so much consciousness per se as the question of the terms in which the idea of "identity"—whether individual or group—acquires content. *See id.* at 106-16. The distinction here is not altogether straightforward. Habermas, I gather, is trying to describe two aspects of the same phenomenon. How we regard ourselves (whether as individuals or group) is first a question we can answer by specifying what we experience as "subjective," but a full answer also requires us to set out the factors we see as "objectively" differentiating us from our environment.

⁴⁴⁵ *See generally* G. COHEN, *KARL MARX'S THEORY OF HISTORY: A DEFENSE* (1978).

⁴⁴⁶ Marxist critics of Habermas emphasize that this sharp distinguishing of modes of communication is not to be found in the work of Marx himself. *See, e.g.,* J. SENSAT, *HABERMAS AND MARXISM: AN APPRAISAL* 97-122 (1979); *see also infra* note 505 and accompanying text.

knowledge and organizational arrangements pertaining to its use.⁴⁴⁷ Insofar as it brings the "forces of production" together, communication (by whatever means) has an instrumental or strategic object. It is designed for, and concerns itself with, achieving the immediate goals of the production process.⁴⁴⁸ By contrast, the "relations of production" embrace those institutions that fix who shall control the "forces of production" as well as who shall share (and in what way) in the results.⁴⁴⁹ The subject of communications in this context is justification.⁴⁵⁰ The forms of interchange do not refer immediately to some "external" set of facts, but rather take as their concern conformity with norms whose content and application emerge through the process of interchange itself.⁴⁵¹ Because such arguments about "rights" have this self-contained quality, Habermas conceives of this discourse as itself a kind of action—"communicative action."⁴⁵²

Habermas thus associates the "relations of production" with his ideas about "intersubjective structures."⁴⁵³ He also asserts the priority of "relations of production" over "forces of production."⁴⁵⁴ The interesting element in capitalism is not the relationship of financing and labor processes per se, but the role of the market as a central idea or image within a system of justifying a hierarchical social structure.⁴⁵⁵ Within Habermas's scheme, it is thus no longer theoretically important

⁴⁴⁷ J. HABERMAS, *supra* note 430, at 138.

⁴⁴⁸ *See id.* at 131-32, 145.

⁴⁴⁹ *Id.* at 138-39.

⁴⁵⁰ *Id.* at 139.

⁴⁵¹ *See id.* at 132, 146; *see also id.* at 97-98. Habermas attaches great weight to the notion that certain forms of communication are self-contained in the sense that the process of communication itself—some variation on dialogue—is a source of conclusions as well. We will see, however, that in referring to such processes Habermas treats them as incorporating analogues to "external" references. This incorporation creates difficulties for his argument. *See infra* text accompanying notes 500-01.

⁴⁵² J. HABERMAS, *supra* note 430, at 132. Habermas in fact restricts the sense in which he will treat "communicative action" as "self-contained"; he would regard "symbolic" communications as a separate form of action. *See infra* text accompanying note 491.

⁴⁵³ J. HABERMAS, *supra* note 430, at 97-98, 140-41.

⁴⁵⁴ *Id.* at 145-48. Habermas would concede that at moments of social transformation, as institutions embodying one set of intersubjective structures or relations of production give way to a second regime, the events that mark the moment of transition will occur at the practical level of the "production forces." *See id.* at 146-47. He insists, however, that the triggering events are not simply an atheoretical and autonomous "problem-generating mechanism" that operates independently of the state of affairs at the more abstract level of "relations of production." He would distinguish two aspects in transition "crises": the appearance of "new" problems incapable of resolution within the usual terms of the old social structures (such problems may be genuinely exogenous in origin); and the response to the problem—the stage at which practice presupposes and restates theory. *See infra* notes 457 & 478. Writing within the vocabulary of systems and learning theory, *see* J. HABERMAS, *supra* note 430, at 125, Habermas concludes: "[O]nly when a new institutional framework has emerged can the as-yet unresolved system problems be treated with the help of the accumulated cognitive potential; from this there results an increase in production forces." *Id.* at 147 (emphasis in original); *see also id.* at 120.

⁴⁵⁵ Compare J. HABERMAS, *supra* note 430, at 123 with *id.* at 144, 165-66.

whether economic arrangements condition "the general process of social, political and intellectual life."⁴⁵⁶ Economic arrangements, in their normative aspect, are hardly distinguishable from the other theoretical structures.⁴⁵⁷ If economic notions have priority, it is only at the capitalist stage of social development.⁴⁵⁸ At other points in the sequence, for example, ideas of kinship or legality may organize "the institutional core that determines the dominant form of social integration."⁴⁵⁹

Because such theoretical structures fix the imaginative environment for more specifically instrumental activity, it is clear that social transformations take place most importantly at this imaginative level. As a result, any logic of change can define no more than a set of possibilities. Transitions depend upon crises that will make themselves felt at the theoretical level of the system of justification. Such crises, however, are not initially the creation of theory. They take the form of events whose specific character or timing cannot themselves be predicted or induced from within the justificatory horizon. Revolution is contingent.⁴⁶⁰

Habermas nonetheless believes that there is indeed a logic of social transitions, however historically contingent. This logic describes various "levels of social integration"⁴⁶¹ in which the society increasingly differentiates itself from what it treats as "natural."⁴⁶² There is initially a "pre-conventional stage" in which "actions, motives, and acting subjects are still perceived on a single plane of reality." A "conventional stage"

⁴⁵⁶ K. MARX, *Preface*, in A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY 20-21 (M. Dobb ed. 1970), quoted in J. HABERMAS, *supra* note 430, at 142-43.

⁴⁵⁷ I do not mean to overstate the clarity with which Habermas makes this point. On the one hand he writes: "[I]dealism belongs in a most natural way to the conditions of reproduction of a species that must preserve its life through labor and interaction, that is, also by virtue of propositions that can be true and norms that are in need of justification." J. HABERMAS, *supra* note 430, at 97 (emphasis in original). But he nonetheless insists: "In its developmental dynamics, the change of normative structures remains dependent on evolutionary challenges posed by unresolved, economically conditioned, system problems and on learning processes that are a response to them. In other words, culture remains a superstructural phenomenon. . . ." *Id.* at 98 (emphasis in original); see also *id.* at 143. Habermas reconciles these two propositions by treating the Marxist analysis of transformation as "descriptive" and as therefore supplying (tactical) detail, *id.* at 147 (emphasis in original), within an overall account to which Habermas's own identification of a built-in "idealism" contributes the "analytic answer" as to "why a society takes an evolutionary step and how we are to understand that social struggles under certain conditions lead to a new level of social development," *id.* at 147-48 (emphasis in original). He finally insists therefore not only upon an at least theoretical priority for "relations of production," see *supra* note 454, but upon the substantive autonomy of such intersubjective structures as well: "The rules of communicative action do develop in reaction to changes in the domain of instrumental and strategic action; but in doing so they follow their own logic." J. HABERMAS, *supra* note 430, at 148.

⁴⁵⁸ See J. HABERMAS, *supra* note 430, at 144; see also *id.* at 150-52.

⁴⁵⁹ *Id.* at 154.

⁴⁶⁰ See, e.g., *id.* at 122-23, 140-41, 147; see also *supra* notes 454 & 457.

⁴⁶¹ J. HABERMAS, *supra* note 430, at 157 (emphasis in original).

⁴⁶² See *id.* at 156.

follows, in which reasons for action are socially expressed as separate from (or prior to) specific concrete situations but in which the abstracted reasons are themselves treated as given within "an existing system of norms." Finally, in a "post-conventional stage," "systems of norms lose their quasinatural validity" and instead "require justification from universalistic points of view."⁴⁶³ This progression ultimately yields the historical sequence that I described initially.⁴⁶⁴ It is possible to identify a "dominant form of social integration"⁴⁶⁵ such as kinship, legalist, or capitalist ideas and institutions and associate it with a given level in the progression. We may then observe how this association manifests itself within the society in terms of the "special institutions" (law and morality) of conflict resolution,⁴⁶⁶ the "structures of world views" that these institutions themselves presuppose,⁴⁶⁷ and the even more background "general structures of action."⁴⁶⁸

Movement from one level to another, as we have already seen, is historically contingent. But there is a dynamic built into the sequence that at least predisposes movement to run in the direction of increasing universalization. This bias has its origins in the intersubjective character of forms of social integration—their simultaneous impact upon both the organization of social institutions and individual consciousness. The crucial phenomenon takes place at the individual level. Forms of social integration are relevant for individuals chiefly insofar as they figure in the processes by which individuals reach understanding with each other.⁴⁶⁹ Habermas conceives of these processes as at bottom all forms of dialogue or speech. As such, processes of reaching understanding incorporate predispositions in favor of certain values.⁴⁷⁰ The very act of engaging in speech directed at reaching understanding, even in advance of its eventual conclusion, already involves commitments to norms of comprehensibility, sincerity, truthful representations of fact, and rightful claims of justification.⁴⁷¹ Taken together, these commitments encourage the reciprocal growth of a sense of self-consciousness and an awareness of the separate, contingent, and abstract character of the

⁴⁶³ Habermas at this point is explicitly characterizing societies within the vocabulary that Piaget and others developed in the context of child psychology. See *supra* note 440.

⁴⁶⁴ See *supra* text accompanying notes 434-38.

⁴⁶⁵ J. HABERMAS, *supra* note 430, at 154.

⁴⁶⁶ *Id.* at 156.

⁴⁶⁷ *Id.* at 157.

⁴⁶⁸ *Id.*; see also *supra* note 444.

⁴⁶⁹ See, e.g., J. HABERMAS, *supra* note 430, at 97, 168, 173, 175; see also *id.* at 1.

⁴⁷⁰ Habermas at this point extrapolates from Anglo-American philosophical studies of "speech acts." See, e.g., J. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962); J. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* (1969).

⁴⁷¹ See J. HABERMAS, *supra* note 430, at 65-66; see also *id.* at 50-65.

claims made by and within dialogue. It makes sense for parties to dialogue to accept each other's commitments, assuming that the content of the dialogue is not entirely ritualized, only if these commitments are not treated as given, but rather are "testable" through the process of interchange itself.⁴⁷²

"Communicative action" at the individual level, insofar as it seeks to rationalize itself in this way, is thus always potentially an occasion for social critique. The effort of individual participants to test each other's initial claims to comprehensibility, sincerity, truth, and rightness may suggest to the participants that it is the larger social context, the particular integrating images to which the individuals refer in the course of their exchange, that obstructs their efforts to maintain the appropriate communicative stance.

Rationalization here means extirpating those relations of force that are inconspicuously set in the very structures of communication. . . . Rationalization means overcoming such systematically distorted communication in which the action-supporting consensus concerning the reciprocally raised validity claims—especially the consensus concerning the truthfulness of intentional expressions and the rightness of underlying norms—can be sustained in appearance only, that is, counter-factually. The stages of law and morality, of ego demarcations and world-views, of individual and collective identity formations, are stages in this process.⁴⁷³

It becomes possible, therefore, to conceive of "revolutions" or shifts in organizing forms of social integration as outgrowths (in timing and specific character historically contingent) of a critical sensibility always built into any particular organizing form at the level of individual consciousness. Given events for which a particular set of integrating ideas cannot account, but which nonetheless manifest themselves in fact and adversely within society, innovations may emerge. Individuals and ultimately society at large may account for and acknowledge these innovations on the basis of a critique and reimagination of society along lines that, within the logic of "forms of social integration" are increasingly universal. Institutional emphases will change accordingly.⁴⁷⁴ In this way, critical propensities at the individual level may replicate themselves socially.

⁴⁷² See *id.* at 62-64.

⁴⁷³ *Id.* at 119-20 (emphasis deleted).

⁴⁷⁴ See, e.g., *id.* at 161-63.

2. Problematic Aspects of the Habermas Enterprise—and the Implicit Alternative View

Habermas insists on describing his work as tentative or preliminary. Its ambition is nevertheless extraordinary. My summary only faintly suggests the exhaustive efforts that Habermas undertakes both to explore his ideas from all relevant theoretical perspectives, and to attempt (partly through this contextual self-consciousness) to specify precisely what his ideas are. We can see that there is an important classical dimension to Habermas's project. He purports to describe the outlines of a universal history, makes the consequences of regarding circumstances in universal terms the substantive theme of that history, justifies this theme through an identification of individual and social perspectives, and relies repeatedly in elaborating all of this upon techniques of categorization. This classical ambition summarizes precisely what is valuable in Habermas's work—its synthetic contribution. From the perspective of this essay, however, classicism is also provocative. We expect to find evidence of strain.

There is indeed a certain tense ambiguity in the Habermas account of law. Legality is from one perspective a ruling image. It provides the core notion for the forms of social integration (and thus the mechanisms of individual self-definition) that we associate with the emergence of the state (as distinct from kinship institutions) as an explicit social phenomenon. But this status is, in theory, only temporary. The ideas that we associate with capitalism—concepts like value and exchange—replace legality as ruling images of integration, as society increases in self-consciousness, bringing labor (the relationship of society and nature) within the realm of explicit specification and justification. Legal institutions, however, do not simply disappear. Their function of restoring consensus guarantees them a continuing place within the larger social structure. Apparently, however, even if legal institutions remain separate, ideas of legality, upon which the legal institutions draw in reasserting order, alter as dominant principles of integration change. Order after the transition takes a new form (while also still legal) so as to accommodate itself to society's restated image.

What does it mean to say that legal institutions are autonomous and at the same time expressions or reflections of some master idea we treat as not merely nonlegal but as replacing legality itself as an organizing form of social integration? Habermas would prefer to keep this question at a distance.⁴⁷⁵ He indicates, however, in a very brief

⁴⁷⁵ See, e.g., *id.* at 116, 175.

discussion of the origins of capitalist institutions, that the possibility of economic forms was itself a result of the emergence of notions of legal order in place of kinship arrangements.⁴⁷⁶ The establishment of a centralized state, for which law provided the necessary conceptual apparatus, opened up (in a now more systematic way) the possibility of distribution and redistribution of wealth. Opportunities became "privileges," and holdings became "rights." Habermas seems to suggest that, insofar as legal institutions provided a way of conceiving of arrangements and rearrangements of opportunities and holdings, they anticipated the idea of exchange, the organizing image for the next stage. On this view, therefore, the transformation is almost automatic, at least at the theoretical level. From within the legal perspective, capitalist ideas and institutions would appear to be simply extensions of the original idea of legality.

This account, however, requires careful hedging. For one thing, Habermas only hints at it.⁴⁷⁷ There is also an obvious subversive potential. We could presumably run the explanation "backwards" as well, in order to describe kinship institutions as they appear legally—as anticipations of *their* replacement. Similarly, the "next forward" shift, from capitalist to post-capitalist structures, would also be susceptible of a purely legal account, as a further development of ideas of rights, order, arbitrariness, etc. But if the legal perspective in this way provides a basis for describing the entire sequence, the ideas Habermas associates with each of the other stages should be equally enveloping. At any one point in the overall process, the situation may be equally well characterized in terms of each of the sets of ideas and institutions that have so far emerged. This is plainly *not* what Habermas had in mind. He suggests in another part of his discussion that from the vantage point of prior structures of integration, the successor forms sometimes appear to be only equivocal advances.⁴⁷⁸ Legal institutions, for example, promise greater order but also make possible more rigid hierarchies than would occur within kinship regimes. Habermas regards affinity, order, exchange, and legitimacy (if these are indeed the respective touchstones of each form of social integration) as truly distinct organizing concepts, and not merely restatements of each other.

The easiest way to acknowledge the differences in the forms of integration would be to treat them as conflicting or competing with

⁴⁷⁶ See *id.* at 162-63.

⁴⁷⁷ But see *id.* at 122.

⁴⁷⁸ See *id.* at 163. Transitions take place because of shifts in the nature of the problems confronting society. Such transitions, however, also assume an equally contingent successful implementation, in the process of addressing new crises, of an (already implicit) theoretical reconceptualization. See also *supra* notes 454 & 457.

each other. On this view, for example, legal institutions would not cheerfully accommodate themselves to the new capitalist images of order. Nor would kinship institutions readily accept either legal or capitalist dress. Resistance becomes the norm. The extent to which any one integrative scheme dominates would be a matter of historical contingency; theoretically, this is an always-open question. But this is also not what Habermas intends to conclude. He imagines the contribution of theory to be the description of a sequence of stages—a genuine progression. He must therefore treat *replacement* as a theoretically describable phenomenon; explain why the results of competition among organizing ideas fall into certain patterns. And this, of course, is precisely the point of the argument Habermas raises concerning the inherent tendency toward increasing self-consciousness or universality in “communicative action.” This bias at the individual level, Habermas suggests, may also work itself out socially, through a concatenation of individual acts and judgments, as a tendency toward increasingly universal forms of integration.

What we can see, at the least, is the degree to which even arguments of detail within the Habermas scheme, like that about the meaning of legal autonomy, return us to the question of the presuppositions of speech. The larger structure holds together only because (or if) Habermas is persuasive in his analysis of the commitments inextricably intertwined with the idea of discourse. It seems to me, however, that at this fundamental level there are indeed deficiencies in Habermas’s approach. The choices he makes in describing “speech,” at the critical stage before he identifies the presupposed values, are neither more nor less controversial than their alternatives. This exclusion has important consequences. We lose at the very outset of the Habermas analysis a perspective that, were we to follow its line, would return us to the question of the relationship of the legal order and other forms of integration, but now at an angle that emphasizes what Habermas would avoid—a model of conflict, rather than of consensus or replacement.

In explaining my argument, it is helpful to begin indirectly, by distinguishing it from a more familiar criticism of Habermas’s theory. This latter approach isolates his notion of the presuppositions of speech outside the context of his theoretical enterprise as a whole.⁴⁷⁹ The commitments that Habermas sees us as making as we attempt to achieve an understanding among ourselves become the characteristics of an “ideal speech situation” we may employ as a normative reference in judging

⁴⁷⁹ See, e.g., R. BUBNER, *MODERN GERMAN PHILOSOPHY* 182-202 (trans. ed. 1981); White, *Rationality and the Foundations of Political Philosophy: An Introduction to the Recent Work of Jurgen Habermas*, 41 J. POL. 1156 (1979).

actual forms of social interchange. Moreover, the presence in fact of these characteristics serves as a guarantee of the appropriateness of whatever conclusions "free discourse" may eventually yield.⁴⁸⁰ The "ideal speech situation" on this view is an analogue of the "original position" of John Rawls (or Ackerman's spaceship).⁴⁸¹

This characterization finds sanction in some of the writing of Habermas himself,⁴⁸² and it is, of course, a helpful device for adding specificity to the argument that discourse is always in tendency both destabilizing and transforming within the Habermas society. The image of the "ideal speech situation," however, is also misleading. Unlike Rawls, Habermas does not rely upon his analytic figure by itself for normative inspiration. Habermas does not attempt to (and plainly could not) draw out of the essentials of speech alone a series of specific propositions about the proper structure of a just society. If we regard the "ideal speech situation" in isolation, therefore, we may find it to be a disappointingly inconclusive image,⁴⁸³ dangerously subject to authoritarian manipulation,⁴⁸⁴ and thus without much a priori appeal as an organizing form for normative inquiry.⁴⁸⁵ But we also thereby misconceive Habermas's aim. Habermas would present us with an account of social transformation that includes, as its crucial point, a description of those values and institutions that will tend to operate with normative force within the society. He does not mean to claim, however, that his portrayal of the normative can in any sense be separated from its de-

⁴⁸⁰ "[T]ruth is not the fact that a consensus has been reached, but rather that at all times and places, if only we enter into discourse, a consensus can be arrived at under conditions which show the consensus to be warranted. Truth means 'warranted assertability.'" Habermas, *Theories of Truth* (unpublished manuscript), quoted in Croasmun & Chervitz, *Beyond Rhetorical Relativism*, 68 Q.J. SPEECH, 1, 4 n.11 (1982).

⁴⁸¹ See, e.g., McPherson, *Mill's Moral Theory and the Problem of Preference Change*, 92 ETHICS 252, 265-66 (1982).

⁴⁸² The notion of the "ideal speech situation" is apparently set out at greatest length in an essay that remains untranslated. See Habermas, *Wahrheitstheorien*, in WIRKLICHKEIT AND REFLEXION: FESTSCHRIFT FÜR WALTER SCHULZ 211-65 (1973). The relevant portions of this essay are summarized in T. MCCARTHY, *supra* note 427, at 305-10. If commentators thus tend to emphasize the "natural rights" or "social contract" characteristics of dialogue in Habermas, see, e.g., R. BUBNER, *supra* note 479, at 195-99, it may also be in part a consequence of the tendency to treat *Knowledge and Human Interests*, which indeed brings forms of discourse per se to the forefront, as still Habermas's primary work, see White, *Reason and Authority in Habermas: A Critique of the Critics*, 74 AM. POL. SCI. REV. 1007, 1014 (1980). My approach here obviously differs. In discussing Habermas chiefly by way of *Communication and the Evolution of Society*, I implicitly accept an alternative view (at some risk of distortion) that the later Habermas work involves an important reformulation. See generally T. MCCARTHY, *supra* at 53-125, 126.

⁴⁸³ See, e.g., R. BUBNER, *supra* note 479, at 186-90; D. HELD, *supra* note 426, at 376.

⁴⁸⁴ See, e.g., Alford, *Correspondence*, 75 AM. POL. SCI. REV. 463-64 (1981); see also White, *supra* note 482 (defending Habermas against such arguments).

⁴⁸⁵ See, e.g., Alexander, *Looking for Theory: "Facts" and "Values" as the Intellectual Legacy of the 1970s*, 10 THEORY & SOC'Y 279, 285-86 (1981).

scriptive context.⁴⁸⁶

Habermas does not purport, in the manner of perhaps Rawls or Kant, to represent the presuppositions of speech as having their origins in intuitions that we can in some sense treat as private or personal—as prior to social experience per se. He instead regards speech and its implications as first of all a communal and empirical phenomenon.⁴⁸⁷ Only because, in our ordinary language use, we in fact characteristically make certain suppositions in reaching understandings does it make sense to treat those suppositions as fundamental—for us.⁴⁸⁸ Abstract inconclusiveness is simply beside the point. The presuppositions are never relevant in isolation. They become salient only insofar as they call attention to some feature of a specific social structure and thereby increase the pressure for an (inspired) reimagination of the structure, in terms that no longer require the objectionable element.⁴⁸⁹

What is truly vulnerable in the theory of communicative action, I believe, exists at a stage yet more preliminary in Habermas's argument than his identification of the presuppositions of speech. He must first describe what he means by "speech" before he can investigate its assumptions. This original description, we can readily see, involves a great deal of excluding. At the outset, Habermas restricts his focus in this way:

The task of universal pragmatics is to identify and reconstruct universal conditions of possible understanding. . . . I take the type of action aimed at reaching understanding to be fundamental. Thus I start from the assumption (without undertaking to demonstrate it here) that other forms of social action—for example, conflict, competition, strategic action in general—are derivatives of action oriented to reaching

⁴⁸⁶ In *Legitimation Crisis*, and in other more recent works Habermas emphasizes the "reactive" role of the ideal speech situation. See J. HABERMAS, *supra* note 429 at 113; Habermas, *The Entwinement of Myth and Enlightenment: Re-Reading Dialectic of Enlightenment*, 26 *NEW GERMAN CRITIQUE* 13, 30 (1982).

⁴⁸⁷ See J. HABERMAS, *supra* note 429, at 21-25 (distinguishing Kantian approach).

⁴⁸⁸ In adopting a theoretical attitude, in engaging in discourse—or for that matter in any communicative action whatsoever—we have always (already) made, at least implicitly, certain presuppositions, under which alone consensus is possible For a living being that maintains itself in the structures of ordinary language communication, the validity basis of speech has the binding force of universal and unavoidable—in this sense transcendental—presuppositions. . . . If we are not free then to reject or to accept the validity claims bound up with the cognitive potential of the human species, it is senseless to want to "decide" for or against reason, for or against the expansion of the potential of reasoned action.

Id. at 177.

⁴⁸⁹ See White, *supra* note 482, at 1013.

understanding.⁴⁹⁰

It is not just strategic or instrumental acts, and their associated reflections in communication, that are distinguished and set aside. Habermas would also treat as distinct what he calls "symbolic action": in his definition, "modes of action that are bound to nonpropositional systems of symbolic expression."⁴⁹¹ Habermas does not so much defend as simply postulate these categories. He does suggest, however, that strategic and symbolic action are in analytic terms merely derivative or degenerate forms of communication directed toward reaching understanding. Strategic acts or utterances suspend the presupposed assertion of sincerity; symbolic acts lack any reference to a separate measure of truth—they are their own subject.⁴⁹²

Within the realm of understanding, Habermas engages in another considerable effort at paring. The communicative action he would treat as fundamental must include both an "illocutionary" or "performative" component, which indicates the relationship that the speaker envisions with the addressee,⁴⁹³ as well as a "propositional" element, which asserts or expresses "a state of affairs."⁴⁹⁴ Such "propositionally differentiated speech actions"⁴⁹⁵ must also be "institutionally unbound."⁴⁹⁶ Habermas here is emphasizing the illocutionary or performative dimension. The particular context of communication cannot be so well-defined as to limit the means by which a person signals an attempt at reaching understanding to something like the repetition of ritual phrases (as in the institutions of gambling or marriage, for example). Finally, "institutionally unbound propositionally differentiated speech actions" must also take this form explicitly and cannot, in their illocutionary aspect, be altered by their context.⁴⁹⁷ In a second and stronger sense, therefore, they must also be self-contained or "context free." Habermas sees these last requirements as noncontroversial because he treats as given Searle's "principle of expressibility."⁴⁹⁸ "[I]n a given language, for every interpersonal relation that a speaker wants to take

⁴⁹⁰ J. HABERMAS, *supra* note 430, at 1.

⁴⁹¹ *Id.* at 41. Concerning the difficulty of this distinction, see *infra* text accompanying notes 500-01.

⁴⁹² See J. HABERMAS, *supra* note 430, at 41.

⁴⁹³ *Id.* at 34.

⁴⁹⁴ *Id.* at 37.

⁴⁹⁵ *Id.* at 38.

⁴⁹⁶ *Id.* at 39.

⁴⁹⁷ *Id.* at 39-40.

⁴⁹⁸ See J. SEARLE, *supra* note 470, at 19-21. Arguably, Habermas gives more weight to the principle of expressibility than philosophers of language or students of linguistics would warrant. See Thompson, *Universal Pragmatics*, in HABERMAS: CRITICAL DEBATES 116, 125-26 (J. Thompson & D. Held eds. 1982); see also *infra* text accompanying notes 506-12.

up explicitly with another member of his language community, a suitable performative expression is either available or, if necessary, can be introduced through a specification of available expressions."⁴⁹⁹

Obviously, the values Habermas discovers as presupposed by "communicative action" are already implicit in his initial characterization of speech "aimed at reaching understanding." Excluding strategic behavior establishes sincerity as definitionally present. Setting aside symbolic action necessarily leaves a discourse that can only refer outside itself in order to come to a conclusion (rule on its own success or failure), thus setting the stage for recognizing truth (the standard for judging outside "facts") and rightness (the pertinent reference in evaluating allusion to external "norms") as values that are already assumed. This preliminary loading, however, is only objectionable if it is problematic. Is there a plausible argument why we should not rigorously separate strategic, symbolic, and "communicative" action? In fact, I think, there are three such arguments.

First, because Habermas draws a strict line between "symbolic" and "communicative" action, he ends up blurring a second line that he would prefer to keep clear as well: that between "factual" and "normative" discourse. Habermas purports to distinguish factual and normative argument by treating factual claims as immediately referring *outside* the discourse itself to something established "within the world"; by contrast, normative argument discovers within its own process of elaboration that which it treats as binding.⁵⁰⁰ But if normative argument is not to be contaminated by symbolic elements, it must also be the case that the *experience* of such a discourse is one of finding and applying rules. This experience is difficult to distinguish from that of referring to conclusory facts. Indeed, Habermas, as he writes casually about factual and normative argument, gives every appearance of treating the two as essentially the same; as differing only in the sources to which they refer.⁵⁰¹

This matters because normative argument plays a crucial role

⁴⁹⁹ J. HABERMAS, *supra* note 430, at 40.

⁵⁰⁰ It would be notably bizarre to treat Habermas as adopting a rigorous distinction between "facts" and "values" inasmuch as *Knowledge and Human Interests*—his best-known work—takes as a central task the identification of the "interests" that lie behind various epistemological perspectives. See generally J. HABERMAS, *supra* note 428. He does, however, regard it as possible to separate "empirical" and "normative" inquiries at least momentarily. See Habermas, *supra* note 486, at 17-18. This distinction may stand if appeals to "fact" are regarded within an exchange as noncontroversial. If dispute arises, however, discourse may end up at a level that is hard to characterize as other than "normative." See T. MCCARTHY, *supra* note 427, at 291-317. For an important discussion of similar fact/value problems in American legal theory, see Casebeer, *The Judging Glass*, 33 U. MIAMI L. REV. 59, 98-124 (1978).

⁵⁰¹ See, e.g., J. HABERMAS, *supra* note 429, at 102-17.

within the logic of social transformation. It is the tendency in such discourse to move toward the more universal that sets up the possibility of shifts in perspective and therefore dominant institutions. If such shifts must take the form of discoveries of new rules (because only new levels of rules count as legitimate references within normative argument), and if rules have to possess a decisive and thus "fact-like" quality, there will presumably be few occasions on which participants in fact break through to the new level. The logic of transformation thus becomes a barrier as well. It would seem that if normative argument develops enough of a critical facility to move past initially proposed rules, it will be more often an occasion for frustration than understanding.⁵⁰³

Second, because Habermas so strongly differentiates "strategic" and "communicative" action, he builds contradictory impulses into his overall theoretical structure. Excluding strategic behavior, it seems to me, increases the significance of context within communicative exchange, whether the relevant environment takes the form of facts or norms. The psychology of individual participants becomes irrelevant. Habermas seems to move in the opposite direction, however, in his effort to describe precisely the sort of speech aimed at understanding which he treats as his starting point. He identifies a discourse in which context plays as little role as possible. There are no relevant conventions (or institutional dictates) and no reference need be made to anything other than the content of discourse in order to discover either its propositional substance or the relationships that it anticipates. Habermas posits these latter conditions for good reason. The potentially transforming discourse he would emphasize must be both "free" and "universal." It must depend for its conclusion only upon the unrestricted interchange of the participants. Conventional discourse is hardly revolutionary. Free discussion must also express its conclusions in terms that are not so specific to the particular dialogue as to seem to those who are engaged in it (or to persons involved in subsequent exchanges) to be nonrepeatable. Unique events are usually politically

⁵⁰³ The possibility that normative discourse will result in persuasive social critique diminishes even further if we interpret Habermas as continuing to hold to the view that the biases social institutions impose may be analogous to the distortions which psychoanalytic theory suggests the subconscious imposes on an individual's accounts, for example, of childhood experiences. See Habermas, *On Systematically Distorted Communication*, 13 *INQUIRY* 205 (1970). Normative discourse would not only have to generate new "rule" formulations, but it would also have to possess the same capacities as psychoanalysis—a discourse that in its traditional form possesses asymmetrical and manipulative elements that importantly distinguish it from the "open" dialogue that Habermas uses as his model. Arguably, these "forced" aspects of psychoanalysis serve to generate motivation within that process; it is an open question whether the predispositions of dialogue set up a strong enough bias to play an equivalent role. See I. BALBUS, *MARXISM AND DOMINATION* 230-33 (1982).

irrelevant.

Is this a genuine contradiction? Arguably, the initial ban on strategic behavior increases the persuasiveness of Habermas's subsequent insistence on the universal character of the conversation. One ordinarily important (but here unnecessary) use of references to the particular context, after all, lies in confirming the plausibility of the conclusion that the parties meant what they said. It may be asserted, as well, that Habermas is in truth concerned with two distinct kinds of contexts. Both institutional rituals and peculiar behavioral qualifications serve to block communicative action from treating as its proper context the more general environment of facts and norms. Only close scrutiny of this latter realm strikes Habermas as holding transformational potential; he thus does not act contradictorily in disposing of less significant environmental elements. Finally, we should also remember that, in any event, Habermas describes his model of communicative action not so much as a specification of the way conversationalists will actually behave but as a tendency to which they will gravitate, an aspiration they will pursue, if understanding is at least one of their objectives. The model, before it begins to operate as a critique of forms of social integration, takes as its subject and works to purify a given dialogue itself. Strategic behavior, Habermas may acknowledge, is a possibility within a communicative exchange, but it is a possibility *against* which the exchange will struggle. If we do not forget to keep Habermas's image within its context, in other words, much of the appearance of artificial exclusion disappears.

These arguments, however, in the end simply deepen our sense of contradiction. The critical sensibility that Habermas would describe as striving to constitute discourse along the lines of his "communicative action" can become an agent of social change only if its purifying impulse moves beyond a concern with the sincerity of individual conversationalists to encompass a sense of the distorting effect of given forms of social integration, insofar as these forms purport to suggest resolving norms for use within the exchange. How does this transition take place? Habermas at one point seems to suggest that integrative structures, if they are vulnerable to critique, will reveal their defects within discourse as participants first accuse and then acquit each other of insincerity (strategic behavior), coming to understand in the process that it is the background norms themselves which are introducing the false note.⁵⁰³ If this is the case, though, the possibility of strategic behavior becomes difficult to describe as simply a threshold problem to be resolved before proceeding. It is in fact a recurring risk, indeed the *moti-*

⁵⁰³ See J. HABERMAS, *supra* note 430, at 119-20; see also *id.* at 63.

vating risk; it must be ubiquitous if the effort at understanding is to reach the critical stage.⁵⁰⁴

From this perspective, though, it is difficult to see how Habermas can plausibly set aside the particularized contexts of gesture and convention. The first remains relevant at least as a check against suspected insincerity; the second, we may begin to speculate, is nothing more than the introductory device through which forms of integration express their proposed and possibly false conclusions. Moreover, if the dynamic of transformation in fact assigns to the possibility of strategic action the crucial role of "motivating fear," plausibility requires that the risk be real. Sometimes such behavior must be present and not readily detectable. But this in turn suggests that "understanding" is ultimately an overly simple way of characterizing the result of "communicative action." Indeed, we might suspect that the real objective for Habermas is not "agreement" but "universality"—in the sense of the potential reproducibility (and thus the possible political impact) of communicative conclusions. "Agreement" need not actually be present, therefore, if "universality" were otherwise achievable. Two doors now open. We should at least consider the possibility that the significance of interchange may instead (or also) lie in its "symbolic" success or failure. If we can conceive of such interchange as building "symbols," strategic behavior or technical discourse might play an affirmative as well as negative part.⁵⁰⁵ Lenin, we may conclude, is not easy to escape.⁵⁰⁶ The entire system of distinctions, apparently, fails in its claim of methodological necessity, in the process collapsing in on itself. The pressure has its source in the very program—the theory of social transformation—that the system was supposed to make possible.

Third, these labyrinthine explorations in one sense simply confirm what we already suspect even before we are aware of the difficult relationship between the starting assumptions and ultimate theory set out in *Communication and the Evolution of Society*. The idea of the "expressibility of language," which Habermas treats as a largely unanalyzed axiom, is increasingly an explicit subject of study.⁵⁰⁷ Much

⁵⁰⁴ For a similar criticism, elaborated within the perspective of Derrida, see M. RYAN, *MARXISM AND DECONSTRUCTION* 112-16 (1982); see also *infra* note 509 and accompanying text.

⁵⁰⁵ Habermas's effort to separate strategic and symbolic communication from "communicative action" per se is thought by many commentators to be difficult to defend. See, e.g., D. HELD, *supra* note 426 at 389-98. Marxist critics, for example, have argued that relaxing the separation makes it possible to return work and its environment to the center of social theory—in contrast to its place on the "instrumental" periphery within the Habermas argument. See Eyerman & Shipway, *Habermas on Work and Culture*, 10 *THEORY & SOC'Y* 547, 554-64 (1981); see also J. SENSAT, *supra* note 446.

⁵⁰⁶ See V. LENIN, *WHAT IS TO BE DONE?* (trans. ed. 1943).

⁵⁰⁷ See generally *supra* note 498.

of this work, moreover, appears to share a common theme that does not fit at all well within Habermas's system of distinctions. We might begin with the recent renewed appreciation of the extent to which metaphoric uses of language organize our everyday (or even technical) expressions, and not just our specialized "literary" utterances.⁵⁰⁸ At a more difficult level, other contemporary writing communicates a vaguely subversive or uneasy sense that much of what we would treat as the substance of even our most abstract thought (indeed the very idea of "substance") emphasizes as well the priority we attach to an image of a "faithful" (spoken) speech as against an always potentially reproducible, and therefore partly autonomous and "resisting" writing.⁵⁰⁹ The implicit metaphors in the substance of what we believe seem to reject the primary institutions of communication within which our beliefs take form.⁵¹⁰ Finally, there is a more and more widespread recognition of both the ubiquity and the inevitable difficulty of reading and interpretation (and thus the need for some hermeneutic theory) within our analysis.⁵¹¹

These perceptions all establish as problematic, as precisely *not* the appropriate subject for axiomatic simplification, the ways in which our uses of language acquire "expressibility." In addition, we are predisposed by the cumulative effect of all of these efforts to regard "expressibility" as at least partly a function of "self-reference," of language folding back on itself. We therefore find it difficult, as Habermas would insist, to set aside strategic and symbolic aspects of exchange. It is precisely these dimensions that are most immediately illuminated by our sensitivity to both the ambiguity and the creative potential of our uses of "quotation" and other semantic "parasites." What all of this indicates, moreover, is that, if our communicative practice at the individual

⁵⁰⁸ See, e.g., G. LAKOFF & M. JOHNSON, *METAPHORS WE LIVE BY* (1980).

⁵⁰⁹ See generally J. DERRIDA, *OF GRAMMATOLOGY* (trans. ed. 1976). Derrida's writing comes closest to confronting Habermas in the context of Derrida's exchange with Searle. See Derrida, *Signature Event Context*, 1 *GLYPH* 172 (1977); Searle, *Reiterating the Differences: A Reply to Derrida*, 1 *GLYPH* 198 (1977); Derrida, *Limited Inc abc . . .*, 2 *GLYPH* 162 (1977). Habermas indirectly responds to arguments of the Derridean type through a critical discussion of Nietzsche. See Habermas, *supra* note 486, at 29-30. Habermas defends his distinctions as "working" devices that, because of their "ideal" status, themselves constitute a discourse "which admits this everlasting impurity. . . ." *Id.* at 30; see also Wright, *Derrida, Searle, Context, Games, Riddles*, 13 *NEW LIT. HIST.* 463, 469-76 (1982).

⁵¹⁰ The larger political implications of Derrida's work are a subject of controversy among interested commentators. Compare, e.g., M. RYAN, *supra* note 504, with, e.g., Graff, *Textual Leftism*, 49 *PARTISAN REV.* 558 (1982).

⁵¹¹ Recent legal writing explicitly faces questions of hermeneutic theory. See, e.g., Tushnet, *supra* note 425. At a relatively abstract level, there is already considerable controversy. Compare, e.g., Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739 (1982) (emphasizing role of "interpretive community" in keeping hermeneutic problems manageable in legal thought), with, e.g., Levinson, *Law as Literature*, 60 *TEX. L. REV.* 373 (1982) (asserting "fragmenting" character of problems of interpretation).

level suggests anything for social theory, it is a picture of conflict. Forms of social integration perhaps emerge in sequence but never thereafter fully reconcile themselves to each other. Rather, they each account for the others in terms of their own ruling ideas. Each form of social integration emphasizes in the others the trace of itself: asserts itself, in a way, as dominant metaphor.

Habermas does not so much argue against this vision as simply attempt to exclude it. Perhaps as a result, therefore, it is relatively easy to treat the difficulties in his enterprise as the starting point for an anticlassical reimagining of his program. These are the ideas, now stated in positive form, that are missing in Habermas: Social transformations are utterly contingent, never settled, always at issue; no form of social integration, once emerged, relinquishes its claim to priority. Discourse, mirroring and prefiguring this larger conflict, is itself always a theater of confrontation, as sincere efforts at reaching understanding never entirely free themselves, but indeed build upon, the "forceful" effects of strategic postures and (successful) symbolic creations.⁵¹² Finally, within the subversive reworking of Habermas's views, we return to jurisprudence. The ideas around which legal institutions organize themselves are chronically unsettled. Legal institutions are on the one hand the scene of conflict, as other forms of social integration present themselves as sources of ideas of order which within the legal setting appear as simultaneously foreign and familiar. But legal ideas are also aggressive. They purport to reinterpret kinship, economic, or motivational systems in jurisprudential terms. The question with which we began, as to how law reconciles itself with other social forms, is an invitation to conflict. It defies settling answer.

VI. PROSPECTS

The classical style sets up a curious politics when it suggests to legal writers and readers that some version of definitiveness is an appropriate measure of success. It requires writers to obscure what they know to be the constructed quality of their work. It encourages readers, in the face of a work's claim to completeness, to defer. The implicit assertion of the work is that there is nothing left to say. Criticism within classical style is precarious. Exposing the constructed character of work with which we disagree is in one sense a real accomplishment.

⁵¹² For one illustration of how it is possible to construct a social theory in which symbolic aspects of communication are not rigorously separated from other dimensions of discourse and action, see P. BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 159-97 (trans. ed. 1977); see also Cameron, *Moral Rules as Expressive Symbols*, 90 *MIND* 224 (1981).

A demonstration of artifice nonetheless presupposes a modeling of its own and is therefore always potentially vulnerable to an analogue of its own classical critique.

Anticlassical style, of course, is no less biasing. It encourages legal writers to see their work as always reacting, indeed dissenting, to other work. It communicates to readers that their response ought to be aggressive; that they should expect something to be missing, and search out the absence. Readers are thus also dissenters. Both classical and anticlassical style may degenerate. Classicism is vulnerable to the corruption of a hidden sophistication—a secret appreciation of artifice that regards criticism as merely a breach of decorum. The result is ossification and decadence. The danger of anticlassical writing is apparent. It may yield only an angry chaos. We should be aware, however, that the risks of either style are in one sense the same. Style is a matter of choice—and thus so are its risks.

This is an essay about possibility. Not only in the efforts of Habermas, but in those of Ackerman, Kennedy, and Peckham, and indeed in those of Stevens and Strong, I have attempted to recover ideas that the authors treat as central working principles, but that also suggest, at points of strain, alternative perspectives. The justification for this effort at one level lies in whatever plausibility the notions of medium and style may possess—or reflexively, in whatever confirmation my studies may provide for these notions. In another sense, however, the work of this essay succeeds (or not) depending upon the power of the more specific hypothesis: that we may usefully imagine, for legal writing, an anticlassical style.

We end up with the image of description, and the proposition that the sense of incompleteness and addition defines parameters within which legal analysis (in these terms never more than momentarily “strictly legal”) struggles to establish itself. It is within this context that my various close readings and extracted reversals claim credibility. But in the light of this approach, we also see that my efforts here always pull up short. The accounts I offer are repeatedly parasitic. They are no more than illustrations or suggestions of what an alternative way of proceeding might look like—illustrations in the form of reverse images of incomplete but still themselves more concrete works. Legal description, ultimately, must be more freestanding than this essay. It must mark out and map aspects of legality that, in terms of both their novelty and susceptibility to detailed representation, function in a reverse pattern, as first addition and thereafter critique, filling the gaps in (and thereby subverting) prior accounts. This is the work that remains to be done.