THE SUPREME COURT
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FOREWORD: *NOMOS* AND NARRATIVE

*Robert M. Cover**

A. A violent order is disorder; and
B. A great disorder is an order. These
Two things are one. (Pages of illustrations.)
— Wallace Stevens[1]

I. INTRODUCTION

We inhabit a *nomos* — a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void.[2] The student of law may come to identify the normative world with the professional paraphernalia of social control. The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.[3] For every constitution there is an epic, for each decalogue a scripture.[4] Once understood in the context of the narratives

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* Chancellor Kent Professor of Law and Legal History, Yale University.

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[1] W. STEVENS, *Connoisseur of Chaos*, in THE COLLECTED POEMS OF WALLACE STEVENS 215 (1954).

[2] On the idea of "world building" with its normative implications, see, for example, P. BERGER, THE SACRED CANOPY (1967); P. BERGER & T. LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY (1966); J. GAGER, KINGDOM AND COMMUNITY (1975); K. MANNHEIM, IDEOLOGY AND UTOPIA (1936); *cf.* P. BERGER, *supra*, at 19 & *passim* (invoking the idea of a "nomos," or "meaningful order").

[3] I do not mean to imply that there is an official, privileged canon of narratives. Indeed, although some canons, like the Bible, integrate legal material with narrative texts, modern legal texts (with the possible exception of some court opinions) do not characteristically do so. It is the diffuse and unprivileged character of narrative in a modern world, together with the indispensability of narrative to the quest for meaning, that is a principal focus of this Foreword.

[4] Prescriptive texts change their meaning with each new epic we choose to make relevant to them. Every version of the framing of the Constitution creates a "new" text in this sense. When the text proves unable to assimilate the meanings of new narratives that are nonetheless of constitutive significance, people do create new texts — they amend the Constitution. Thus, the

that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.

In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse — to be supplied with history and destiny, beginning and end, explanation and purpose.[5] And every narrative is insistent in its demand for its prescriptive point, its moral. History and literature cannot escape their location in a normative universe,[6] nor can prescription, even when embodied in a legal text, escape its origin and its end in experience, in the narratives that are the trajectories plotted upon material reality by our imaginations.[7]

This *nomos* is as much "our world" as is the physical universe of mass, energy, and momentum. Indeed, our apprehension of the structure of the normative world is no less fundamental than our appreciation of the structure of the physical world. Just as the development of increasingly complex responses to the physical attributes of our world begins with birth itself, so does the parallel development of the responses to personal otherness that define the normative world.[8]

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adoption of the 13th, 14th, and 15th amendments may be seen as the creation of new texts to fit new constitutive epics. But other ways of creating texts may be less "official" and more dangerous. A deep division about the constitutive epics may lead to secessionist prescriptive texts — competing prescriptions to go with the competing narratives. *Compare* CONFEDERATE STATES OF AM. CONST. art. IV, § 2, cl. 1 (providing that a slave may not become free by transit in free territory), *with* U.S. CONST. art. IV, § 2, cl. 3 (fugitive slave clause). For the narrative context of this prescriptive conflict, see R. COVER, JUSTICE ACCUSED 86–88, 284 n.10 (1975).

[5] This point is similar if not identical to that made by the late Lon Fuller in L. FULLER, THE LAW IN QUEST OF ITSELF (1940).

[6] *See, e.g.*, White, *The Value of Narrativity in the Representation of Reality*, in ON NARRATIVE 1, 20 (W. Mitchell ed. 1981) ("The demand for closure in the historical story is a demand, I suggest, for moral meaning, a demand that sequences of real events be assessed as to their significance as elements of a *moral* drama."); *see also id.* at 23 (suggesting that the demand for closure in the representation of "real events" "arises out of a desire to have real events display the coherence, integrity, fullness, and closure of an image of life that is and can only be imaginary").

[7] There is a thick contextuality to all moral situations. *Cf.* C. GEERTZ, THE INTERPRETATION OF CULTURES 5 (1973) ("[M]an is an animal suspended in webs of significance he himself has spun."). For discussions of the "social texts" that form these contexts, see C. GEERTZ, NEGARA (1980); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982). On the agonistic circumstances of all interpretation, see H. BLOOM, THE ANXIETY OF INFLUENCE (1973). The thick context of literary and political theory is examined in Q. SKINNER, FOUNDATIONS OF MODERN POLITICAL THOUGHT (1978). On the central place of history and the human person in any account of law, see J. NOONAN, PERSONS AND MASKS OF THE LAW (1976).

[8] *See, e.g.*, E. ERIKSON, CHILDHOOD AND SOCIETY 247 (1950); L. KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT (1981); J. PIAGET, THE MORAL JUDGMENT OF THE CHILD (1932); J. PIAGET, PLAY, DREAMS AND IMITATION IN CHILDHOOD (1962). For an extended theoretical definition of the implications of "otherness," see 1–3 J. BOWLBY, ATTACHMENT AND LOSS (1969–1980), especially 1 *id.* at 177–298 (1969). It is instructive to note the structural similarity of theories of development, such as those of Piaget, Erikson, Bowlby, and Kohlberg,

The great legal civilizations have, therefore, been marked by more than technical virtuosity in their treatment of practical affairs, by more than elegance or rhetorical power in the composition of their texts, by more, even, than genius in the invention of new forms for new problems. A great legal civilization is marked by the richness of the *nomos* in which it is located and which it helps to constitute.[9] The varied and complex materials of that *nomos* establish paradigms for dedication, acquiescence, contradiction, and resistance. These materials present not only bodies of rules or doctrine to be understood, but also worlds to be inhabited. To inhabit a *nomos* is to know how to *live* in it.[10]

The problem of "meaning" in law — of legal hermeneutics or interpretation — is commonly associated with one rather narrow kind of problem that confronts officials and those who seek to predict, control, or profit from official behavior.[11] A decision must be made

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that include emotional, social, and moral components. All stress a system in which development is from a physiological, somatic dependence or interdependence to an awareness of abstract and cultural artifacts. A similar development is entailed in the acquisition of a concept such as space. *See, e.g.*, J. PIAGET & B. INHELDER, THE CHILD'S CONCEPTION OF SPACE (1967).

[9] The Greek and Hebrew legal civilizations are remembered by us now chiefly for their magnificent use of narrative to explore great normative questions in relation to which the precise technical handling of an issue is of secondary importance. *See infra* pp. 19–25 (discussion of biblical texts). For one (perhaps idiosyncratic) view of the integration of Greek ideals of law and justice with other great cultural achievements of ancient Hellas, see 1–2 W. JAEGER, PAIDEIA (1939–1943), especially 1 *id.* (1939).

[10] I mean here to suggest a rough correspondence to the Kuhnian understanding of "science" not as a body of propositions about the world nor as a method, but as paradigms integrating method, belief, and propositions — a doing. *See* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962); M. POLANYI, PERSONAL KNOWLEDGE (1958).

[11] The traditional problems are outlined in W. BISHIN & C. STONE, LAW, LANGUAGE AND ETHICS (1972). Even those who have expanded the concept of hermeneutics have often considered legal hermeneutics to be in large part addressed to a set of operational problems. *See, e.g.*, H. GADAMER, TRUTH AND METHOD (G. Barden & J. Cumming trans. 1975). Gadamer, commenting on a practice I assume he thought characteristic of legal scholarship and dogmatics as practiced in its continental form, wrote: "Legal hermeneutics does not belong in this context [a 'general theory of the understanding and interpretation of texts'], for it is not its purpose to understand given texts, but to be a practical measure to help fill a kind of gap in the system of legal dogmatics." *Id.* at 289. The entire discussion of legal hermeneutics in *Truth and Method* is disappointingly provincial in several ways. First, it is entirely statist and therefore does not raise the question of the hermeneutic problems peculiar to all systems of objectified normative texts (statist and nonstatist alike). But it also inadequately addresses the question of the destruction of the hermeneutic in the necessarily apologetic functions of an officialdom. Finally, in *Truth and Method*, the problem of application is seen as the characteristic difficulty. Thus, even when Gadamer denies the possibility of a straightforward application of general laws to specific facts, he discusses the "problem" of legal hermeneutics as this problem. *See, e.g.*, *id.* at 471 ("The distance between the universality of the law and the concrete legal situation in a particular case is obviously essentially indissoluble.").

Several of the problems addressed in this Foreword have been suggestively treated by James White, first in J. WHITE, THE LEGAL IMAGINATION (1973), and later in White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415 (1982). I am indebted

about the incidence of a legal instrument. "Is an airplane or a baby carriage a 'vehicle' within the meaning of the statute prohibiting vehicles in the park?" "Is the statutory requirement of a minimum hourly wage a denial of liberty or property without due process of law?" There is a conventional understanding that a certain consequence follows from the instrument's classifying a thing as "*X*." There is a dispute about the appropriate criteria for classification.[12] Such problems of official application of legal precepts form one important body of questions about meaning in law. But I want to stress a very different set of issues.

The normative universe is held together by the force of interpretive commitments — some small and private, others immense and public. These commitments — of officials and of others — do determine what law means and what law shall be.[13] If there existed two legal orders with identical legal precepts and identical, predictable patterns of public force, they would nonetheless differ essentially in meaning if, in one of the orders, the precepts were universally venerated while in the other they were regarded by many as fundamentally unjust.[14]

I must stress that what I am describing is *not* the distinction between the "law in action" and the "law in the books." Surely a law may be successfully enforced but actively resented. It is a somber fact of our own world that many citizens believe that, with *Roe v. Wade*,[15] the Supreme Court licensed the killing of absolutely innocent human beings. Others believe that the retreat from *Furman v. Georgia*[16] has initiated a period of official state murder. Even if the horror and resentment felt by such persons fails to manifest itself in the pattern of court decisions and their enforcement, the meaning of the normative world changes with these events. Both for opponents of abortion and for opponents of capital punishment the principle that "no person shall be deprived of life without due process of law" has assumed an ironic cast. The future of this particular precept is now freighted with that irony no less than with the precedents of *Roe* and *Furman* themselves.

Just as the meaning of law is determined by our interpretive commitments, so also can many of our actions be understood only in

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to Professor White for the ways in which he has explored the range of meaning-constituting functions of legal discourse.

[12] *See* W. BISHIN & C. STONE, *supra* note 11 (collecting cases and materials).

[13] On commitment, see *infra* pp. 44–60.

[14] We commonly express and sometimes confuse our sense of this difference through a chronological projection of an ontological distinction. We speak of one legal order as "decadent" or "crumbling" and often think that this quality will *make a difference* — will cause a change over time. This projection onto chronology may entail a serious prediction, of course, but I would suggest that it is as frequently a metaphor (the propositions are so vague that they are never seriously testable) for a deficiency we believe to inhere in a state of affairs.

[15] 410 U.S. 113 (1973).

[16] 408 U.S. 238 (1972).

relation to a norm. Legal precepts and principles are not only demands made upon us by society, the people, the sovereign, or God. They are also signs by which each of us communicates with others. There is a difference between sleeping late on Sunday and refusing the sacraments,[17] between having a snack and desecrating the fast of Yom Kippur,[18] between banking a check and refusing to pay your income tax. In each case an act signifies something new and powerful when we understand that the act is in reference to a norm. It is this characteristic of certain lawbreaking that gives rise to special claims for civil disobedients. But the capacity of law to imbue action with significance is not limited to resistance or disobedience. Law is a resource in signification that enables us to submit,[19] rejoice, struggle,[20] pervert, mock,[21] disgrace, humiliate, or dignify.[22] The sense that we make of our normative world, then, is not exhausted when we specify the patterns of demands upon us, even with each explicated by Hercules to constitute an internally consistent and justified package. We construct meaning in our normative world by using the irony of jurisdiction,[23] the comedy of manners that is *malum prohibitum*,[24] the

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[17] *See, e.g.*, W. STEVENS, *Sunday Morning*, in THE COLLECTED POEMS OF WALLACE STEVENS, *supra* note 1, at 66–70.

[18] This point is illustrated in Irving Howe's description of Yiddish radicalism on the Lower East Side:

> That the anarchists and some of the social democrats chose to demonstrate their freedom from superstition by holding balls and parades on Yom Kippur night, the most sacred moment of the Jewish year, showed not merely insensitivity but also the extent to which traditional faith dominated those who denied it.

I. HOWE, WORLD OF OUR FATHERS 106 (1976).

[19] On domination and submission, see Hay, *Property, Authority and the Criminal Law*, in D. HAY, P. LINEBAUGH, J. RULE, E. THOMPSON & C. WINSLOW, ALBION'S FATAL TREE 17 (1975).

[20] *See, e.g.*, R. KLUGER, SIMPLE JUSTICE (1975).

[21] The story of Gary Gilmore provides a powerful example of the use of law for mockery. *See* N. MAILER, THE EXECUTIONER'S SONG (1979).

[22] Law's expressive range is profound, and as with other resources of language, the relation of law's manifest content to its meaning is often complicated. Consider the question of using capital punishment to *express* the dignity of human life and its ultimate worth:

> This view of the uniqueness and supremacy of human life has yet another consequence. It places life beyond the reach of other values. The idea that life may be measured in terms of money . . . is excluded. Compensation of any kind is ruled out. The guilt of the murderer is infinite because the murdered life is invaluable . . . . The effect of this view is, to be sure, paradoxical: because human life is invaluable, to take it entails the death penalty. Yet the paradox must not blind us to the judgment of value that the law sought to embody.

Greenberg, *Some Postulates of Biblical Criminal Law*, in THE JEWISH EXPRESSION 18, 26 (J. Goldin ed. 1970) (footnote omitted).

[23] *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). *Marbury* is a particularly powerful example of a general phenomenon. *Every* denial of jurisdiction on the part of a court is an assertion of the power to *determine* jurisdiction and thus to constitute a norm.

[24] With the recognition, already well developed in ancient Greek thought, of the relativity and essentially contingent character of much of the preceptual material in any society, there arises the possibility of making fun of the specific precepts of a society and especially of the

surreal epistemology of due process.[25]

A legal tradition is hence part and parcel of a complex normative world. The tradition includes not only a corpus juris, but also a language and a mythos — narratives in which the corpus juris is located by those whose wills act upon it. These myths establish the paradigms for behavior. They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic. These myths establish a repertoire of moves — a lexicon of normative action — that may be combined into meaningful patterns culled from the meaningful patterns of the past. The normative meaning that has inhered in the patterns of the past will be found in the history of ordinary legal doctrine at work in mundane affairs; in utopian and messianic yearnings, imaginary shapes given to a less resistant reality; in apologies for power and privilege and in the critiques that may be leveled at the justificatory enterprises of law.

Law may be viewed as a system of tension or a bridge linking a concept of a reality to an imagined alternative — that is, as a connective between two states of affairs, both of which can be represented in their normative significance only through the devices of narrative.[26] Thus, one constitutive element of a *nomos* is the phenomenon George Steiner has labeled "alternity": "the 'other than the case', the counterfactual propositions, images, shapes of will and evasion with which we charge our mental being and by means of which we build the changing, largely fictive milieu for our somatic and our social existence."[27]

But the concept of a *nomos* is not exhausted by its "alternity"; it is neither utopia nor pure vision. A *nomos*, as a world of law, entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures. A *nomos* is a present world constituted by a system of tension between reality and vision.

Our visions hold our reality up to us as unredeemed. By themselves the alternative worlds of our visions — the lion lying down with the lamb, the creditor forgiving debts each seventh year, the state all shriveled and withered away — dictate no particular set of transformations or efforts at transformation. But law gives a vision depth of field, by placing one part of it in the highlight of insistent and immediate demand while casting another part in the shadow of the millenium. Law is that which licenses in blood certain transformations while authorizing others only by unanimous consent. Law is

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heavy investment authority structures have in something bearing no necessary (*malum in se*) relation to the great and potentially tragic clashes of good and evil. When the devil is of our own creation, he becomes comic.

[25] *See* G. GILMORE, THE AGES OF AMERICAN LAW 111 (1977) ("In Hell there will be nothing but law, and due process will be meticulously observed.").

[26] *See* White, *supra* note 6.

[27] G. STEINER, AFTER BABEL 222 (1975).

a force, like gravity, through which our worlds exercise an influence upon one another, a force that affects the courses of these worlds through normative space. And law is that which holds our reality apart from our visions and rescues us from the eschatology that is the collision in this material social world of the constructions of our minds.

The codes that relate our normative system to our social constructions of reality and to our visions of what the world might be are narrative. The very imposition of a normative force upon a state of affairs, real or imagined, is the act of creating narrative. The various genres of narrative — history, fiction, tragedy, comedy — are alike in their being the account of states of affairs affected by a normative force field. To live in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the "is" and the "ought," but the "is," the "ought," and the "what might be." Narrative so integrates these domains. Narratives are models through which we study and experience transformations that result when a given simplified state of affairs is made to pass through the force field of a similarly simplified set of norms.

The intelligibility of normative behavior inheres in the communal character of the narratives that provide the context of that behavior. Any person who lived an entirely idiosyncratic normative life would be quite mad. The part that you or I choose to play may be singular, but the fact that we can locate it in a common "script" renders it "sane" — a warrant that we share a *nomos*.[28]

In Part II of this Foreword, I first contrast an ideal form for the creation of a *nomos* — of a legal world conceived purely as legal meaning — with the more familiar notion of law as social control. Next, I elaborate the unfamiliar idea of a *nomos* by providing an extended illustration through the use of biblical texts. I have chosen this material because the Bible constitutes a conventionally circumscribed corpus of integrated prescriptive and narrative material that can serve as an artificially simplified model. The sections that follow then apply the model to the more complex problems of creating constitutional meaning — problems that we meet in our own world — but concentrate on the creation of such meaning outside the official courts. Two distinct versions of *nomos* — the insular and the redemptive — are explored. Part III then introduces the special role of commitment in living out legal meaning; it contrasts the nature of the commitments necessary on the part of communities that affirm a legal meaning opposed to that of the state with the nature of the commit-

[28] The warranty of sanity is worth only as much as the social processes that generate it. I perceive a difference, however, between the collective outrages that we sometimes label madness and the idiosyncratic act of an individual.

ment of official judges. Part IV concludes by offering a critique, based on the principles and methods developed throughout the Foreword, of *Bob Jones University v. United States*.[29]

II. Legal Worlds and Legal Meaning

The *nomos* that I have described requires no state. And indeed, it is the thesis of this Foreword that the creation of legal meaning — "jurisgenesis" — takes place always through an essentially cultural medium.[30] Although the state is not necessarily the creator of legal meaning, the creative process is collective or social. In the following Section, I shall suggest a social basis for jurisgenesis and a corresponding social basis for the process that destroys legal meaning in the interest of social control.

A. Jurisgenesis

According to one of Judaism's oldest rabbinic traditions

> Simeon the Just [circa 200 B.C.E.] said: Upon three things the world stands: upon Torah; upon the temple worship service; and upon deeds of kindness.[31]

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[29] 103 S. Ct. 2017 (1983).

[30] The state becomes central in the process not because it is well suited to jurisgenesis nor because the cultural processes of giving meaning to normative activity cease in the presence of the state. The state becomes central only because, as I shall argue in Part III, an act of commitment is a central aspect of legal meaning. And violence is one extremely powerful measure and test of commitment.

[31] Mishnah, *Aboth* I:2. The exact identity and dates of Simeon the Just are unknown. Most scholars now believe that he was the high priest Simeon II — son of Onias II — who favored the Seleucids in their attempt to wrest Judea from the Ptolemaic dynasty. *See* 14 Encyclopaedia Judaica 1566–67 (1972). For a critical and historical study of the aphorism of Simeon the Just, see Goldin, *The Three Pillars of Simeon the Righteous*, 27 Am. Acad. for Jewish Research Proc. 43 (1958).

The Hebrew word *Torah* was translated into the Greek *nomos* in the Septuagint and in the Greek scripture and postscriptural writings, and into the English phrase "the Law." "*Torah*," like "*nomos*" and "the Law," is amenable to a range of meanings that serve both to enrich the term and to obscure analysis of it. In particular, all three terms suggest Paul's polemic against the Law. The Hebrew "*Torah*" refers both to law in the sense of a body of regulation and, by extension, to the corpus of all related normative material and to the teaching and learning of those primary and secondary sources. In this fully extended sense, the term embraces life itself, or at least the normative dimension of it, and "*Torah*" is used with just such figurative extension in later rabbinics. For a discussion of these senses of "*Torah*," see E. Urbach, The Sages 286 (1979). The word *Torah* also connotes a canon of normatively authoritative material and its study. For the observation that, in contrast to the use of the term in earlier scriptural sources, "*Torah*" is always singular in Deuteronomic writing "in compliance with the notion of a canonized Torah," see M. Weinfeld, Deuteronomy and the Deuteronomic School app. A at 338 (1972). Certainly in postbiblical writings the appearance of "*Torah*" in the plural has an extraordinary, unusual, and therefore expressive power. *See, e.g.*, "The Beraitha of Rabbi Jose," in Babylonian Talmud, *Sanhedrin* 88b.

The "world" of which Simeon the Just spoke was the *nomos*, the normative universe. Three hundred years later, after the destruction of the Temple whose worship service was one of the pillars upon which the "world" of Simeon the Just stood, Rabbi Simeon ben Gamaliel said, "Upon three things the world [continues to] exist[]: upon justice, upon truth, and upon peace."[32]

These two parallel aphorisms are reported within a single chapter in the talmudic tractate *Aboth* and frame the chapter's contents. Of the aphorisms, the great sixteenth century codifier, commentator, and mystic, Joseph Caro, wrote the following:

> [F]or Simeon the Just spoke in the context of his generation in which the Temple stood, and Rabbi Simeon ben Gamaliel spoke in the context of his generation after the destruction of Jerusalem. Rabbi Simeon b. Gamaliel taught that even though the temple no longer existed and we no longer have its worship service and even though the yoke of our exile prevents us from engaging in Torah [study of divine law and instruction] and good deeds to the extent desirable, nonetheless the [normative] universe continues to exist by virtue of these three other things [justice, truth, and peace] which are similar to the first three. For there is a difference between the [force needed for the] preservation of that which already exists and the [force needed for the] initial realization of that which had not earlier existed at all. . . . And so, in this instance, it would have been impossible to have created the world on the basis of the three principles of Rabbi Simeon ben Gamaliel. But after the world had been created on the three things of Simeon the Just it can continue to exist upon the basis of Rabbi Simeon b. Gamaliel's three.[33]

Caro's insight is important. The universalist virtues that we have come to identify with modern liberalism, the broad principles of our law, are essentially system-maintaining "weak" forces. They are virtues that are justified by the need to ensure the *coexistence* of worlds of strong normative meaning. The systems of normative life that they maintain are the products of "strong" forces: culture-specific designs of particularist meaning. These "strong" forces — for Caro, "Torah, worship, and deeds of kindness" — *create* the normative worlds in which law is predominantly a system of meaning rather than an imposition of force.

Caro's commentary and the aphorisms that are its subject suggest two corresponding ideal-typical patterns for combining corpus, discourse, and interpersonal commitment to form a *nomos*. The first such pattern, which according to Caro is world-creating, I shall call "paideic," because the term suggests: (1) a common body of precept

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[32] MISHNAH, *Aboth* I:18.

[33] J. CARO, BEIT YOSEF at TUR: HOSHEN MISHPAT 1 (translation by R. Cover). For a useful biographical study of Caro, see R. WERBLOWSKY, JOSEPH KARO, LAWYER AND MYSTIC (1962). On the significance of the *Beit Yosef*, see 5 ENCYCLOPAEDIA JUDAICA 195–96 (1971).

and narrative, (2) a common and personal way of being educated into this corpus, and (3) a sense of direction or growth that is constituted as the individual and his community work out the implications of their law. Law as Torah is pedagogic. It requires both the discipline of study and the projection of understanding onto the future that is interpretation. Obedience is correlative to understanding. Discourse is initiatory, celebratory, expressive, and performative, rather than critical and analytic. Interpersonal commitments are characterized by reciprocal acknowledgment, the recognition that individuals have particular needs and strong obligations to render person-specific responses. Such a vision, of course, is neither uniquely rabbinic nor ancient.[34] The vision of a strong community of common obligations has also been at the heart of what Christians conceive as the Church.

The second ideal-typical pattern, which finds its fullest expression in the civil community, is "world maintaining."[35] I shall call it "imperial."[36] In this model, norms are universal and *enforced* by institutions. They need not be taught at all, as long as they are effective. Discourse is premised on objectivity — upon that which is external to the discourse itself. Interpersonal commitments are weak, premised only upon a minimalist obligation to refrain from the coercion and violence that would make impossible the objective mode of discourse and the impartial and neutral application of norms.

Karl Barth, writing of Christian community and civil community, stressed the absence in civil community of the strong forces of nor-

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[34] Indeed, some might question the application of what scholars have found to be a distinctly Greek concept to the very different Jewish civilization of the ancient world. *Cf.* W. JAEGER, EARLY CHRISTIANITY AND GREEK PAIDEIA (1961) (discussing interplay of Jewish and Greek intellectual traditions in early Christianity). For an application of the term "paideia" to the Torah-centered civilization of the Jews, see B. SEPTIMUS, HISPANO-JEWISH CULTURE IN TRANSITION: THE CAREER AND CONTROVERSIES OF RAMAH 3 (1982) (describing Ramah as a figure "[b]orn of the old aristocracy of Andalusia and educated in the best tradition of its Judeo-Arabic *paideia*").

[35] I have borrowed the term but not the concept from Berger. *See* P. BERGER, *supra* note 2, at 29. Berger posits a social control function that attends upon the achievement of a socially constructed "world." The precarious "world" is threatened "by the human facts of self-interest and stupidity." *Id.* Without disputing Berger here, I would stress that the point I will be making is a bit different. The social bases of world construction are narrow, and we construct many "worlds." The problem of "world maintenance" is a problem of the *coexistence* of different worlds and a problem of regulating the splitting of worlds. *See infra* pp. 60–68.

[36] The term "imperial" may not be ideal. I mean to suggest by it an organization of distinct nomic entities, just as an empire presupposes subunits that have a degree of juridical and cultural autonomy. Pluralism is obviously very close to what I am trying to convey. But a pluralism may be one of interests and objectives. It does not necessarily entail or even suggest a pluralism of legal meaning, which is my particular concern here. It is also the case that the slightly negative connotation of "imperial," its association with violence, is intended. I mean to give the virtues of "justice, truth, and peace" their due, but I also mean to suggest the price that is paid in the often coercive constraints imposed on the autonomous realization of normative meanings.

mative world building that are present in the Church and, I would add, in other paideic communities:

> The civil community embraces everyone living within its area. Its members share no common awareness of their relationship to God, and such an awareness cannot be an element in the legal system established by the civil community. No appeal can be made to the Word or Spirit of God in the running of its affairs. The civil community as such is spiritually blind and ignorant. It has neither faith nor love nor hope. It has no creed and no gospel. Prayer is not part of its life, and its members are not brothers and sisters.[37]

Barth emphasizes the absence from civil community of strong interpersonal bonds, of the common meanings found in shared ritual or prayer, and of a common corpus — Torah, creed, or gospel — that is taught, believed in, and recognized as the moving normative force of the community.

Of course, no normative world has ever been created or maintained wholly in either the paideic or the imperial mode. I am not writing of types of societies, but rather isolating in discourse the coexisting bases for the distinct attributes of all normative worlds. Any *nomos* must be paideic to the extent that it contains within it the commonalities of meaning that make continued normative activity possible. Law must be meaningful in the sense that it permits those who live together to express themselves with it and with respect to it. It must both ground predictable behavior and provide meaning for behavior that departs from the ordinary.

Yet from the mundane flow of our real commonalities, we may purport to distill some purer essence of unity, to create in our imaginations a *nomos* completely transparent — built from crystals completely pure. In this transparent *nomos*, that which must be done, the meaning of that which must be done, and the sources of common commitment to the doing of it stand bare, in need of no explication, no interpretation — obvious at once and to all. As long as it stands revealed, this dazzling clarity of legal meaning can harbor no mere interpretation. The shared sense of a revealed, transparent normative order corresponds to the ideal type of the paideic *nomos*.

The divinely ordained normative corpus, common ritual, and strong interpersonal obligations that together form the basis of such a paideic legal order may indeed be potent. They combine to create precepts and principles enough to fill our lives, as well as to fit those precepts into the common narratives locating the social group in relation to the cosmos, to its neighbors, to the natural world. The precepts, then, not only are there — they are also infused with the

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[37] K. BARTH, *The Christian Community and the Civil Community*, in COMMUNITY, STATE AND CHURCH 149, 151 (1960).

full range of connotation that only an integrated set of narratives can provide.

But the very "jurispotence" of such a vision threatens it. Were there some pure paideic normative order for a fleeting moment, a philosopher would surely emerge to challenge the illusion of its identity with truth.[38] The unification of meaning that stands at its center exists only for an instant, and that instant is itself imaginary. Differences arise immediately about the meaning of creeds, the content of common worship, the identity of those who are brothers and sisters. But even the *imagined* instant of unified meaning is like a seed, a legal DNA, a genetic code by which the imagined integration is the template for a thousand real integrations of corpus, discourse, and commitment.[39] Such real integration occurs around particular constellations of creed and ritual — Torah and Temple worship — concurred in by a particular group of brothers and sisters. And to their common understanding of creed and ritual is added a common understanding of their relation to the primordial, imaginary, *true* unity that occurred in a vanished instant of long ago.

Thus it is that the very act of constituting tight communities about common ritual and law is jurisgenerative by a process of juridical mitosis. New law is constantly created through the sectarian separation of communities. The "Torah" becomes two, three, many Toroth as surely as there are teachers to teach or students to study.[40] The radical instability of the paideic *nomos* forces intentional communities — communities whose members believe themselves to have common meanings for the normative dimensions of their common lives —

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[38] It may be argued that the strange machinery of indirection that Plato suggests in *The Laws* is, in fact, a device to deflect such a philosophical attack upon the cohesive meaning of integrated myths and precepts. *See* Pangle, *Interpretive Essay* on PLATO, THE LAWS OF PLATO 375 (T. Pangle trans. 1980).

[39] The imagined "instant" is one in which the *nomos* is transparent. Such a vision may appear to be mystical, but it departs from the phenomenology of mysticism in its exoteric universalizability — that which makes it law and not experience. Theophany, as an essentially *legislative* event, may be perplexing and complex but cannot be esoteric or gnostic. It is no wonder that in the Jewish mystical traditions the divine manifestations in creation (*ma'aseh b'reishit*) and the manifestation in Ezekiel's vision of the chariot (*ma'aseh merkavah*) have played the central role in gnostic or esoteric mystical traditions, whereas the equally or even more dramatic revelation at Sinai stands at the heart of a predominantly exoteric, public interpretive tradition. On the esoteric traditions, see generally G. SCHOLEM, MAJOR TRENDS IN JEWISH MYSTICISM (rev. ed. 1946). For a magnificent collection of the exoteric midrashic tradition regarding Sinai, see S. AGNON, ATEM RE'ITEM (1958–1959). Sinai's position at the heart of an open exegetical tradition concerning narrative and its meaning is a fitting basis for the evolution of Jewish law (*halakah*), for "[h]alakah is an exoteric discipline." I. TWERSKY, RABAD OF POSQUIÈRES, A TWELFTH CENTURY TALMUDIST at xxiii (rev. ed. 1980).

[40] *See* BABYLONIAN TALMUD, *Sanhedrin* 88b. "Originally there were not many disputes in Israel. . . . But when the disciples of Shammai and Hillel who had not studied well enough increased [in number], disputes multiplied in Israel, and the Torah became as two Toroth." *Id.*

to maintain their coherence as paideic entities by expulsion and exile of the potent flowers of normative meaning.[41]

It is the problem of the multiplicity of meaning — the fact that never only one but always many worlds are created by the too fertile forces of jurisgenesis — that leads at once to the imperial virtues and the imperial mode of world maintenance. Maintaining the world is no small matter and requires no less energy than creating it. Let loose, unfettered, the worlds created would be unstable and sectarian in their social organization, dissociative and incoherent in their discourse, wary and violent in their interactions. The sober imperial mode of world maintenance holds the mirror of critical objectivity to meaning, imposes the discipline of institutional justice upon norms, and places the constraint of peace on the void at which strong bonds cease.

The paideic is an etude on the theme of unity. Its primary psychological motif is attachment. The unity of every paideia is being shattered — shattered, in fact, with its very creation.[42] The imperial is an etude on the theme of diversity. Its primary psychological motif is separation.[43] The diversity of every such world is being consumed from its onset by domination. Thus, as the meaning in a *nomos* disintegrates, we seek to rescue it — to maintain some coherence in the awesome proliferation of meaning lost as it is created — by unleashing upon the fertile but weakly organized jurisgenerative cells an organizing principle itself incapable of producing the normative meaning that is life and growth.

In the world of the modern nation-state — at least in the United States — the social organization of legal precept has approximated the imperial ideal type that I have sketched above, while the social organization of the narratives that imbue those precepts with rich significance has approximated the paideic. We exercise rigid social control over our precepts in one fashion or another on a national level. There is a systematic hierarchy — only partially enforced in practice, but fully operative in theory — that conforms all precept articulation

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[41] Consider, for instance, how the Massachusetts Bay Colony handled basic controversies during its first decades. The holistic integrity of the colony was maintained by exclusion and expulsion; the expulsion of Roger Williams and Anne Hutchinson are examples of this approach. *See* G. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS 47–51 (1960).

[42] Consider the psychodynamics of attachment and separation as expressed in the work of John Bowlby, *see* 1–3 J. BOWLBY, *supra* note 8. The family stands as a metaphor for the inner intensity of the paideic mode. But the objectification that accompanies nomizing activity shatters the strong psychic bonds.

[43] *Cf.* 2 *id.* (1973) (explicating notion of separation as a stage of psychological development). I am tempted at least to invite comparison between the psychological dimension of the paideic/imperial distinction and the differences some scholars have suggested exist between male and female psychologies of moral development. *See* C. GILLIGAN, IN A DIFFERENT VOICE 5–23 (1980) (discussing the inadequacies of what the author perceives to be the male-centered approach of the essays later collected in L. KOHLBERG, THE PHILOSOPHY OF MORAL DEVELOPMENT (1981)).

and enforcement to a pattern of nested consistency. The precepts we call law are marked off by social control over their provenance, their mode of articulation, and their effects.[44] But the narratives that create and reveal the patterns of commitment, resistance, and understanding — patterns that constitute the dynamic between precept and material universe — are radically uncontrolled. They are subject to no formal hierarchical ordering, no centralized, authoritative provenance, no necessary pattern of acquiescence. Such is the radical message of the first amendment: an interdependent system of obligation may be enforced, but the very patterns of meaning that give rise to effective or ineffective social control are to be left to the domain of Babel.[45]

Authoritative precept may be national in character — or at least the authoritative text of the authoritative precepts may be. But the meaning of such a text is always "essentially contested,"[46] in the degree to which this meaning is related to the diverse and divergent narrative traditions within the nation. All Americans share a national text in the first or thirteenth or fourteenth amendment, but we do not share an authoritative narrative regarding its significance.[47] And even were we to share some single authoritative account of the framing of the text — even if we had a national history declared by law to be

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[44] The classic statement of the hierarchy of precepts and their pattern of nested consistency is to be seen partly in J. GRAY, THE NATURE AND SOURCES OF THE LAW (1909), which is to some extent a catalogue of types of controlled precepts, and in H.L.A. HART, THE CONCEPT OF LAW (1961), especially chapters three and five, which establish the nested character of "primary" and "secondary" rules. Dworkin's critique of the "positivism" articulated by Hart does not deny the social control over precept articulation that I am positing here. Though Dworkin disagrees with Hart about how the judge, in particular, as one source of privileged precept articulation, goes about his or her judicial task, Dworkin does not deny the special social control exercised by virtue of the office. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 81–82 (1977).

[45] I use the term Babel advisedly. It suggests not incoherence but a multiplicity of coherent systems and a problem of intelligibility among communities. If law is given meaning through mythos, and if the domain of mythos is characteristically narrower than that of precept, we are indeed in Babel. Dworkin's concerns converge in some ways with those expressed here. In his later work, Dworkin concedes the open character of the materials to which the "Herculean" judge appeals in reaching the "right answer." This openness is tantamount to the preconditions for the "Babel" I posit in text. *See* R. DWORKIN, *supra* note 44, at 105–30. Dworkin's chain novel analogy, *see* Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 541–42 (1982), suggests the intelligibility, through retrospective harmonization, of any single interpretive effort even though it be interpersonal in character. But like the "Herculean" dimension of Dworkin's jurisprudence, the chain novel concept ignores the problem of interpenetrability or comprehensibility between interpretive efforts or traditions, each of which is independently defensible or even "right."

[46] For an introduction to the notion of an "essentially contested concept," see W. GALLIE, PHILOSOPHY AND THE HISTORICAL UNDERSTANDING 157–91 (1964).

[47] One obvious way in which tales can differ is in their beginning and ending points. The first amendment tale can begin with ancient Egypt, with 1776, or with 1789. The point is that constitutional scripture can be part of a sacred history that starts when God's church and man's earthly dominion coincide, or it can be a specific answer to a specific question raised about the national compromises struck between 1787 and 1789.

authoritative — we could not share the same account relating each of us as an individual to that history. Some of us would claim Frederick Douglass as a father, some Abraham Lincoln, and some Jefferson Davis. Choosing ancestry is a serious business with major implications. Thus, the narrative strand integrating who we are and what we stand for with the patterns of precept would differ even were we to possess a canonical narrative text.

The conclusion emanating from this state of affairs is simple and very disturbing: there is a radical dichotomy between the social organization of law as power and the organization of law as meaning. This dichotomy, manifest in folk and underground cultures in even the most authoritarian societies, is particularly open to view in a liberal society that disclaims control over narrative. The uncontrolled character of meaning exercises a destabilizing influence upon power. Precepts must "have meaning," but they necessarily borrow it from materials created by social activity that is not subject to the strictures of provenance that characterize what we call formal lawmaking. Even when authoritative institutions try to create meaning for the precepts they articulate, they act, in that respect, in an unprivileged fashion.

Mark DeWolfe Howe argued this point almost twenty years ago when he pointed out that the Supreme Court had appropriated a singularly Jeffersonian, secular perspective on the establishment clause. Howe observed that the establishment clause could be understood as well, if not better, from an evangelical Christian perspective. He wrote:

> A frank acknowledgment that, in making the wall of separation a Constitutional barrier, the faith of Roger Williams played a more important part than the doubts of Jefferson probably seemed to the present Court to carry unhappy implications. Such an acknowledgment might suggest that the First Amendment was designed not merely to codify a political principle but to implant a somewhat special principle of theology in the Constitution — a principle, by no means uncontested, which asserts that a church dependent on governmental favor cannot be true to its better self.[48]

Howe combined his astute observation of distinct establishment clause narratives with a still more salient, if largely undeveloped, observation about the work of the Supreme Court:

> Among the stupendous powers of the Supreme Court of the United States, there are two which in logic may be independent and yet in fact are related. The one is the power, through an articulate search for principle, to interpret history. The other is the power, through the disposition of cases, to make it . . . .

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[48] M. HOWE, THE GARDEN AND THE WILDERNESS 7–8 (1965).

> . . . .
> . . . . I must remind you, however, that a great many Americans . . . tend to think that because a majority of the justices have the power to bind us by their law they are also empowered to bind us by their history. Happily that is not the case. Each of us is entirely free to find his history in other places than the pages of the *United States Reports*.[49]

The question Howe addressed concerned which narrative tradition should inform the Court's decisions. What he did not write with sufficient clarity is that, whichever story the Court chooses, alternative stories still provide normative bases for the growth of distinct constitutional worlds through the persistence of groups who find their respective meanings for the first amendment in the radically different starting points of Roger Williams and Thomas Jefferson. In this respect, as we shall see, the first amendment's religion clauses are not atypical.

B. The Thickness of Legal Meaning

One great strength and one great dilemma of the American constitutional order is the multiplicity of the legal meanings created out of the exiled narratives and the divergent social bases for their use. But before I address that situation, I shall elaborate in more concrete form the processes by which even a single self-enclosed world produces a system of normative meaning. To do so I shall take the highly simplified case of the Bible — simplified because the Bible is a literary artifact of a civilization and no more captures the full range of contested possibilities of ancient Israel than any similarly small composite of our texts would capture the full range of our normative potential. Still, I think the Bible has something to offer as an illustration of the ways in which precepts and narratives operate together to ground meaning.

Imagine two legal systems, each with identical precepts dictating private and official action: the oldest son is entitled to succeed his father as head of the family and to receive a double portion of the family inheritance. We might imagine one society in which such a precept is simply stated, routinely obeyed, and subject only to the ordinary tensions of human psychology and ingenuity.[50] Contrast such an imaginary legal order with the one we find pictured in the Bible. We know that throughout the ancient Near East, some such rule prevailed; that it is assumed in all the Pentateuchal narratives; and

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[49] *Id.* at 3–5.

[50] I do not know, in fact, whether it is psychologically realistic to suppose that such a precept can ever be unproblematic in the same way that precepts providing for the priority of secured creditors are unproblematic. But assume for a moment that such is the case. Perhaps in an untroubled society, younger children go off to conquer and rule provinces.

that it is expressed in Deuteronomy chapter 21, verses 15 through 17, in a somewhat particularized form:

> If a man has two wives, one loved and the other hated, and both the loved and hated have borne him sons, but the first born is the son of the hated wife — when he leaves his inheritance to his sons he may not prefer the son of the beloved wife over the elder son of the hated wife. He must acknowledge the first born son of the hated wife and give him the double portion. For he is the first fruit of his loins and to him is the birthright due.[51]

The very casuistic phrasing of this precept suggests an extremely problematic psychodynamic. But the narrative materials in which the precept is embedded present even more complex dimensions of apparent contradiction and complication.

The Deuteronomic material has been included in a biblical canon together with a rich set of accompanying narratives. Long before the final redaction of the canon, many of the texts and stories existed as parts of a common sacred heritage of the people who produced Deuteronomy.[52] These texts included: (1) the story of Cain and Abel, in which God accepts the sacrifice of Abel, the younger son, rather than that of Cain, the elder, and in which Seth, the third born, ultimately becomes the progenitor of the human race;[53] (2) the story of Ishmael and Isaac, in which Ishmael, the first fruit of Abraham's loins, is cast out so that the birthright might pass to Isaac, the later son born of the preferred wife;[54] (3) the story of Esau, the first-born son of Isaac, who is denied his birthright by the trickery of Jacob, his younger brother;[55] and (4) the story of Joseph and his brothers, in which Joseph — a younger child of the preferred wife — is favored by his father, dreams of his own primacy, provokes retaliation, and comes to rule over his brothers in an improbable political ascendancy in another land.[56] Indeed, all of the stories of the patriarchs revolve around the

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[51] *Deuteronomy* 21:15–:17. For the general legal rule, see Speiser, *Comment* on THE ANCHOR BIBLE: GENESIS at 210 (E. Speiser trans. 1964):

> Legally, the older son was entitled to a double and preferential share of the inheritance, especially in Hurrian society. But since the status of older son . . . could be regulated by a father's pronouncement, irrespective of chronological precedence, and since the legacy in this instance had been established by divine covenant, the emphasis of tradition on transfer of the birthright in a deathbed blessing — with Yahweh's approval . . . — can be readily appreciated.

Id. at 213. Whatever the specific Hurrian legal context, Speiser's analysis and all similar ones miss much of the point of the creation of meaning through law. The later, Davidic legal traditions of the Israelites did not recognize a right on the part of the patriarch to designate an "eldest" son. The stories, whatever their origin, were therefore used in the manner explicated in the text. The literary intentions of the author or redactor are sketched in an illuminating way in R. ALTER, THE ART OF BIBLICAL NARRATIVE 42–46 (1981).

[52] *See* S. LEIMAN, THE CANONIZATION OF HEBREW SCRIPTURE (1976).

[53] *Genesis* 4:1–:5, 4:25–:26.

[54] *Id.* 21:1–:14.

[55] *Id.* 25:29–:34, 27:1–:40.

[56] *Id.* 37:1–47:12. The motif also reappears almost gratuitously when Jacob crosses his hands

overturning of the "normal" order of succession[57] — a pillar of the legal civilization that is formally enunciated in the code portions of Deuteronomy itself.[58]

The motif continues to be prominent in stories beyond the patriarchal narratives; it appears, modified, in tales of political rather than familial succession. Solomon's rise to the Davidic throne surely recalls the theme,[59] as does the dominance of Moses over Aaron.[60] Weaker forms of the motif appear in the Prophet Samuel's birth and succession to the place of Eli the Priest as national leader,[61] and in David's succession to the throne of Saul.[62] In both these cases, the story involves a younger child's incorporation into a dynastic household and his ultimate ascendance over the older sons of the father, the natural successors to power.

Now in order to understand any legal civilization one must know not only what the precepts prescribe, but also how they are charged. In the Bible there is no earthly or heavenly precept so heavily loaded as that of Deuteronomy chapter 21, verses 15 through 17, because there is no precept rendered so problematic by the narratives in which the law is embedded. This does not mean that the formal precept was not obeyed. Indeed, the narratives in question would lose most if not all of their force were it not for the fact that the rule *was* followed routinely in ordinary life.[63] What is distinctive about the biblical narratives is that they can never be wholly squared either with the formal rule — though some later rabbis tried to do so[64] —

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in blessing Joseph's children Manasseh and Ephraim. *Id.* 48:8–:20. The text provides no story of a dynamic between the two sons of Joseph, nor does it provide any background concerning Joseph's — or, for that matter, Jacob's — feelings for them. The incident seems to come out of the blue, but of course it fits the typology: when Jacob crosses his hands in blessing his grandchildren, he is not merely using what may or may not have been a legitimate legal technique for circumventing the general rule; he is also enacting, as Jacob the father, the typology that is so closely associated with Jacob the son and brother.

[57] "[T]here is one theme that recurs frequently in the early books of the Bible: the passing over of the first-born son, who normally has the legal right of primogeniture, in favor of a younger one." N. FRYE, THE GREAT CODE 180–81 (1982). My discussion borrows heavily from Frye, who does not, however, see the significance of the theme as equally a matter of divine destiny, grace, and choice, on one hand, and a problem of the place of *law* in the human affairs that also constitute sacred history on the other. Frye's analysis does entail the theme of the sacrifice of the first born, which adds greater richness to the complexities I suggest here.

[58] *See* M. WEINFELD, *supra* note 31, at 188.

[59] 1 *Kings* 1:1–:53.

[60] *Exodus* 4:14–:16.

[61] 1 *Samuel* 3:11–:21.

[62] 2 *Samuel* 5:1–:5.

[63] A narrative concerning American life in the 1920's is not startling if it describes characters sipping alcoholic drinks despite prohibition — for in fact that law was routinely disobeyed, and what is portrayed is a simple fact of life, not the hand of divine destiny or the specter of revolution.

[64] "And Esau spurned the birthright." *Genesis* 25:34. "Scripture is testifying to his wicked-

or with the normal practice. It is tempting to reconcile the stories to the rule by creating exceptions or by positing circumstances that would remove the case from the rule. These strategies may be useful to the later legist whose concern is a consistent body of precepts. Life in the normative world of the Bible, however, required a well-honed sense of where the rule would end and why.

In a society in which the norm of succession is relatively unproblematic, compliance or noncompliance, resistance or acquiescence may vary according to the contingencies of each instance calling for application of the rule — the relative power of the parties, the emotions running among them, the possible outcomes presented. In ancient Israel such contingencies remain part of the narrative; the individual personalities and ambitions of Jacob and Joseph surely add much to our understanding of their stories. But in every instance in the Bible in which succession is contested, there is a layer of meaning added to the event by virtue of the fact that the mythos of this people has associated the divine hand of destiny with the typology of reversal of this particular rule. When Joseph recounts his dream to his brothers, we are confronted not only with a foreboding of a challenge to the rule, not only with a hint of a possible conflict over succession, but also, more importantly, with a claim to the divine role in destiny that accompanies such a challenge to the precept. To be an inhabitant of the biblical normative world is to understand, first, that the rule of succession can be overturned; second, that it takes a conviction of divine destiny to overturn it; and third, that divine destiny is likely to manifest itself precisely in overturning this specific rule.

In depicting the relationship between divine destiny and rules of succession, the biblical narratives reveal and reinforce a great fault line in the normative topography of the Israelites. It is natural to identify the later-born brother with the latecoming tribe or nation or church. Stories relating the travail of siblings who are unambiguously eponymous suggest the war of neighbors. If Jacob is Israel and Esau is Edom, there is an implicit correspondence between the private law norm of familial succession — rendered problematic by the divine hand of destiny (aided by human deceit) — and an "international" law regulating relations among those who have long been well settled and those who are self-proclaimed wanderers or newcomers. One must know the narratives to live as the problematic latecomer and usurper but bearer of destiny nonetheless, to have the fine-tuned sense

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ness in despising the worship of God." RASHI, at *Genesis* 25:34. Commentators supposed the birthright to have been associated with familial sacrificial responsibilities, as well as (or rather than) with a double portion. "[He despised] also this, the birthright, for he saw his father had no wealth." IBN EZRA, at *Genesis* 25:34. The traditional commentators frequently combine disapproval of Jacob's method or character with firm assertions of the unworthiness of Esau to be the inheritor of the birthright. *See, e.g.*, N. LEIBOWITZ, STUDIES IN BERESHIT (GENESIS) 264–69, 275–78 (A. Newman trans. 2d ed. 1974) (collecting materials).

of a horizon of will and of divine destiny at which the objective, universalized norm ceases to operate.[65]

The problem addressed by these biblical narratives is also an instance of a still more general problem of political legitimacy. Every legal order must conceive of itself in one way or another as emerging out of that which is itself unlawful. This conception is the mythic or narrative restatement of the positivist's concept of the rule of recognition or *Grundnorm*. The discontinuity that is appealed to may be purely fictitious, wholly mythic, or scientifically historical. We may point to a theophany, a revolution, a migration, a catastrophe. But whether the narrative device is that of Robinson Crusoe, the Pilgrim Fathers, the conquest of Canaan, or Mount Sinai, the sacred beginning always provides the typology for a dangerous return. Revelation and (to a lesser extent) prophecy are the revolutionary challenges to an order founded on revelation.[66] Secession is the revolutionary re-

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[65] Robert Alter's discussion of the relationship between norms and destiny seems sensible to me:

> If one insists on seeing the patriarchal narratives strictly as paradigms for later Israelite history, one would have to conclude that the authors and redactor of the Jacob story were political subversives raising oblique but damaging questions about the national enterprise. Actually, there may be some theological warrant for this introduction of ambiguities into the story of Israel's eponymous hero, for in the perspective of ethical monotheism, covenantal privileges by no means automatically confer moral perfection . . . .

R. ALTER, *supra* note 51, at 45–46. If I may rephrase the point, the eternal conflict between the "lawful" on one hand and destiny and purpose on the other is thus exemplified on the canvas of this law and its eponymous protagonists.

[66] This insight is the basis of many of the great works of religious literature, such as the "Grand Inquisitor" chapter of F. DOSTOEVSKY, THE BROTHERS KARAMAZOV (1880). Another well-known instance is the story of *Achnai's Oven* in rabbinic literature, in which the disputing rabbis reject the call of a voice from heaven intervening in the argument on the side of one of the parties. *See* BABYLONIAN TALMUD, *Baba Metzia* 59. According to one plausible interpretation of the story, God rejoiced when his "children" (the Sages) vanquished him through a legal argument rejecting divine intervention. A very useful discussion that also serves to introduce the vast rabbinic literature on the story may be found in Englard, *Majority Decision vs. Individual Truth: The Interpretations of the "Oven of Achnai" Aggadah*, TRADITION, Spring–Summer 1975, at 137. The issues raised by this *midrash* are connected to the theoretical, philosophical, and theological disputes that raged in Judaism for hundreds of years concerning the relative authority of law and prophecy. *See, e.g.*, A. REINES, MAIMONIDES AND ABRABANEL ON PROPHECY (1970). The extraordinary trial of Anne Hutchinson in Massachusetts Bay in 1637 also demonstrates the dangerous character of a return to revelation in a legal world founded on revelation. *See, e.g.*, C. ADAMS, ANTINOMIANISM IN THE COLONY OF MASSACHUSETTS BAY, 1636–1638, at 285–336 (1894); G. HASKINS, *supra* note 41, at 48–50.

The phenomenon of the dangerous return to myths of origin has been most thoroughly noted with respect to religious eschatological movements and with respect to the challenge that prophecy and revelation present for a church. But there are secular examples as well. Consider the analysis of political oppression by the relatively staid Joseph Story in his *Commentaries on the Constitution*: "If there be any remedy at all . . . it is a remedy never provided for by human institutions. It is by a resort to the ultimate right of all human beings in extreme cases to resist oppression, and to apply force against ruinous injustice." 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 395, at 374–75 (Boston 1833). Consider also Gary

sponse to an order founded on consent or social contract.[67] The return to foundational acts can never be prevented or entirely domesticated. As we remember the special discontinuities that endow foundational acts with their authority, we cannot but risk drawing the inference that they are exemplary. There are a host of techniques for fending off such a conclusion, but they are not foolproof; nor are they persuasive to a person sufficiently convinced of the destiny or providence that marks him or her as its agent.

The biblical narratives always retained their subversive force — the memory that divine destiny is not lawful. So it was that Paul could put the narratives to the service of a revolutionary allegorical extension of the typology in his Epistle to the Galatians.[68] There the Jews with their law are compared to Hagar and Ishmael, the firstcomers, whose claim is based on law. The new Christian Church is Sarah and Isaac, the later comers, who lack any legal entitlement but who hold the divine promise of destiny. The whole edifice of law is thus torn down through an allegory upon the pervasive narrative motif that itself relates the problematic dimension of rules to the mystery of destiny. It is particularly powerful to use in the critique of the law of Israel an allegory built on the theme that itself expresses the extralegality of Israel's destiny.

Thus, to know the narratives is not only to know of the psychofamilial complexities of succession, not only to see the motif of overturning the rule of succession as a vehicle for the problem of dynastic succession, but also to understand that motif as an expressive vehicle for the *unresolved* moral problems of geopolitics and as a potential source of sectarian division.

I have used biblical material in this first pass at the problem of legal meaning for several reasons. First, the material is conventionally bounded. The canon establishes both that all biblical narrative is relevant to normative meaning and that no other material is. Second, it is familiar. Third, it demonstrates the irrelevance of genre to the creation of legal meaning. The narratives in question are relevant to the meaning of the biblical *nomos* not because they are true, but

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Wills' interesting discussion of Abraham Lincoln's tendency to appeal to the Declaration of Independence, often in contexts that, from the perspective of the "slave power," must have seemed an uncomfortable recalling of revolutionary overtones. *See* G. WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE at xvi–xxi (1978).

[67] In the American experience, the myth of social contract has led theorists to value both the right of expatriation (or withdrawal of the individual), *see* G. WILLS, *supra* note 66, at 82–84; Tucker, *Appendix* to 2 W. BLACKSTONE, COMMENTARIES at note K (S. Tucker ed. & comm., Philadelphia 1803), and the right of secession of the constituent polities, the states, *see* E. BAUER, COMMENTARIES ON THE CONSTITUTION 1790–1860, at 253–308 (1952).

[68] *Galatians* 4:22–:31. The allegory is discussed briefly in N. FRYE, *supra* note 57, at 186, and is given a more interesting treatment in S. HANDELMAN, THE SLAYERS OF MOSES 87–88 (1982).

because they are biblical. That is, they are within a convention of established materials for interpretation. In the discussion that follows, I shall address problems of "meaning" within our own *nomos*. These materials are less well bounded. There are no easy conventions for the creation of meaning. Still, we must wade in to understand our own dilemma.

C. The Creation of Constitutional Meaning

The biblical worlds of normative meaning were built around a sacred text that included both precept and narrative. The text constituted the paideic center for the interpretive traditions that grew from it. Historically, the texts we know as the Bible did not always occupy the uncontested, conventionally defined center of the tradition; but in attempting to understand the creation of legal meaning, we can treat the tradition from a distant perspective that simplifies analysis. In our own normative world, there is no obvious central text, certainly none that exhaustively supplies both narrative and precept. Nonetheless, the Constitution of the United States declares itself to be "supreme Law."[69] Many of our necessarily uncanonical historical narratives treat the Constitution as foundational — a beginning — and generative of all that comes after. This is true even though the Constitution must compete with natural law, the Declaration of Independence, the Articles of Confederation, and the Revolution itself for primacy in the narrative tradition. Finally, the Constitution is a widespread, though not universally accepted basis for interpretations; it is a center about which many communities teach, learn, and tell stories.

Most of the literature concerning constitutional meaning has focused primarily on the work of courts and secondarily on that of other state officials. I shall start with the work of nonofficials and deal only in conclusion with the ways in which officials create or destroy meaning. I take this approach because I believe that, in the domain of legal meaning, it is force and violence that are problematic. I shall explore the special status of meaning in a context accompanied by violence only after I have considered the processes through which meaning is created in contexts less clearly marked by force than are the state's decrees. This Section will first discuss the ways insular communities establish their own meanings for constitutional principles through their constant struggle to define and maintain the independence and authority of their *nomos*. Next, I shall consider the jurisgenerative processes of groups dedicated to radical transformations of constitutional meaning as it affects the application of state power. These subsections will then constitute the backdrop against which I

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[69] U.S. CONST. art. VI, § 2.

shall discuss, in Section D, the work of courts, which commonly inhibit — but occasionally foster — the processes of creating legal meaning.

1. The Origin of Legal Meanings in Interpretive Communities. — (a) Insular Autonomy. — Among the briefs amici curiae submitted to the Supreme Court in *Bob Jones University v. United States*[70] is one in the form of a simple narrative written by the Church of God in Christ, Mennonite, and submitted by counsel on behalf of the church. It reads in part:

> There is in our consciousness a strong sense of an often torturous history, in which our predecessors passed through periods of extreme hardship and suffering, a history that includes the records of many martyrs who suffered for those tenets that still constitute our confession of faith. A notable feature of our church history is that of a church in a migratory status, migrating from one place, or nation, to another in search of religious consideration or toleration, a defenseless people looking for a place to be. This has left within us an extremely high regard for religious liberty. We consider the religious liberty that this nation concedes as possibly its greatest virtue.[71]

In this narrative, a community of 7700 believers identifies itself with more than 7000 sixteenth century "brethren" put to death on the Continent,[72] and with wandering Mennonite communities during the intervening four centuries.[73]

The Mennonite brief in this respect is not unique. In the brief on behalf of the respondents in *Wisconsin v. Yoder*,[74] the following characterization appears:

> The Amish of this case come before the Court in familiar role: the passive and peaceable objects of civil wrath. . . . [T]heir history . . . reaches back . . . to the Switzerland of 1525 where their ancestors sought a return to a Golden Age. These were the "Anabaptists" who attempted, not Church reform, but restoration of a lost and primitive Christianity. To be "First Century Christians" demanded . . . a *separated community of peaceableness and mutual aid* . . . .
>
> The "separated community" implied not only separation from "the world" but also *the separation of church and state* as a safeguard of religious liberty.[75]

This common narrative generates three dimensions of the Anabaptist *nomos*. First, it builds upon a vision of the insular community of first

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[70] 103 S. Ct. 2017 (1983).

[71] Brief Amicus Curiae in Support of Petition for Writ of Certiorari on Behalf of Church of God in Christ, Mennonite at 1–2, *Bob Jones University* (No. 81-3) (footnotes and internal quotation marks omitted) [hereinafter cited as Mennonite Brief].

[72] *See id.* at 1 & n.1.

[73] *See id.* at 1–2 & n.2.

[74] 406 U.S. 205 (1972).

[75] Brief for Respondent at 12, *Yoder* (No. 70-110) (footnotes omitted).

century Christianity. For the Anabaptist, the aspiration to life as a member of a first century primitive church has become a stronger referent than the external constraints imposed by contemporary reality. The vision is thus the fixed point in the Anabaptist's experience of history. Second, the narrative establishes a series of temporal "realities" in the dilemmas posed by various civil authorities. These "realities" are the historically contingent variable. Finally, the narrative creates a *people* dedicated to the vision — a people whose actions and norms for action render the vision a constant, with the various civil demands constituting shifting variables around it. It is the internal *law*[76] of the Anabaptist community that creates the bridge between the vision and the reality. And it is the character of that bridge that determines whether it will hold the vision steady.

The structure of the Anabaptist *nomos* determines the place within it, and therefore the meaning, of the principle of free exercise of religion enunciated in the United States Constitution. This principle, as a part of Mennonite belief, is eloquently presented in the Mennonite amicus brief in *Bob Jones University*:

> The tremendous stress that we have faced and face when we find ourselves in conflict between the will of secular government and what we understand as the will of God constitutes one of the most difficult aspects of our religious experience.
>
> Our faith and understanding of scripture enjoin respect and obedience to the secular governments under which we live. We recognize them as institutions established by God for order in society. For that reason alone, without the added distress of punitive action for failure to do so, we always exercise ourselves to be completely law abiding. Our religious beliefs, however, are very deeply held. When these beliefs collide with the demands of society, our highest allegiance must be toward God, and we must say with men of God of the past, 'We must obey God rather than men', and *these are the crisis from which we would be spared.*[77]

The purpose of the first amendment free exercise clause for members of this church is constituted, in part, by a live sense of the crisis of obligation posed by their religious beliefs. Now logically, any person who considers his or her obligation to the law of the state to be measured by some standard — ethical, religious, or political —

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[76] It is a fair question whether we ought to characterize a "primitive" Christian Church as a community living under a "law." The rejection of the "law" as the fundamental connection between God and the individual and between God and the Church is critical to the beliefs of this community. Nonetheless, from an external perspective, the community undoubtedly builds a normative world that it treasures and self-consciously preserves. Moreover, the rejection of "the covenant of law" for that of grace does not imply an absence of law from the internal functionings of earthly communities. Indeed, the coherent and normative force of Amish doctrine is argued forcefully in the Amish brief in *Yoder*. *See id.* at 14–26; *infra* pp. 29–30.

[77] Mennonite Brief, *supra* note 71, at 3–4 (footnotes omitted).

that is external to the law itself faces the same potential dilemma as do the Mennonites and the Old Order Amish. But not all of us who affirm an external limit to the obligation we owe the law identify ourselves with narratives in which just such a theoretically possible dilemma becomes the paradigmatic crisis — "one of the most difficult aspects of our religious experience." The Mennonite narratives, whether the quasi-sacred tales of martyrs[78] or the more recent stories of conscientious objectors,[79] help to create the identity of the believer and to establish the central commitment from which any law — and especially any organic law — of the state will be addressed. The hopes, fears, and possibilities that this point of identity and commitment brings into focus have, of course, major implications for the generality of the principle laid down in the *Bob Jones University* decision.

What troubled the Mennonites, the Amish, and various evangelical and other religious groups was not the specific loss of tax-exempt status for a religious school discriminating on the basis of race. Few, if any, of the amici curiae filing briefs in support of Bob Jones University or Goldsboro Christian Schools discriminate on the basis of race or face IRS action threatening their tax-exempt status.[80] The principle that troubled these amici was the broad assertion that a mere "public policy," however admirable, could triumph in the face of a claim to the first amendment's special shelter against the crisis of conscience.

I am making a very strong claim for the Mennonite understanding of the first amendment. That understanding is not to be taken as simply the "position" of an advocate — though it is that. I am asserting that within the domain of constitutional meaning, the understanding of the Mennonites assumes a status equal (or superior) to that accorded to the understanding of the Justices of the Supreme Court. In this realm of meaning — if not in the domain of social control — the Mennonite community creates law as fully as does the judge. First, the Mennonites inhabit an ongoing *nomos* that must be marked off by a normative boundary from the realm of civil coercion, just as the wielders of state power must establish their boundary with a religious community's resistance and autonomy. Each group must accommodate in its own normative world the objective reality of the

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[78] *See id.* at 1 & n.1.

[79] *See id.* at 3 n.4.

[80] *See* Brief *Amici Curiae* of the American Baptist Churches in the U.S.A., joined by the United Presbyterian Church in the U.S.A. at 1, *Bob Jones University* (No. 81-3); Brief for the Center for Law and Religious Freedom of the Christian Legal Society, as *Amicus Curiae* in Support of a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit at 2, *Bob Jones University* (No. 81-3); Brief of *Amicus Curiae* General Conference Mennonite Church in Support of Petition for a Writ of Certiorari at 1, *Bob Jones University* (No. 81-3).

other. There may or may not be synchronization or convergence in their respective understandings about the normative boundary and what it implies. But from a position that starts as neutral — that is, nonstatist — in its understanding of law, the interpretations offered by judges are not necessarily superior. The Mennonites are not simply advocates, for they are prepared to live and do live by their proclaimed understanding of the Constitution. Moreover, they live within the complex encodings of commitments — their sacred narratives — that ground the understanding of the law that they offer.

The *Bob Jones University* case, of course, presented an opportunity to explore other, very different and conflicting narratives and principles. I shall return to these later. For the moment, it is enough to mark the association of this one genre of central narrative with one of the understandings of constitutional meaning. This understanding not only dictates a preferred rule — that a bona fide religious practice cannot be defeated by a claim of public policy — but also fits that rule into a more comprehensive view of legal/moral obligation and constitutional destiny:

> We believe that God has blessed in a very special way, the noble consideration toward sincere religious convictions that this nation has extended . . . .
>
> Our intense desire, or continual prayer is that this nation may continue to enjoy the protection and blessing of Almighty God, that it may ever be a safe place where people such as we may have a place to life [sic] and search out the will of God for us in tranquility.[81]

The principle of separateness is constitutive and jurisgenerative. It is not only a principle limiting the state, but also one constitutive of a distinct *nomos* within the domain left open. The Amish hammered upon this point in their *Yoder* brief:

> There exists no Amish religion apart from the concept of the Amish community. A person cannot take up the Amish religion and practice it individually. The community subsists spiritually upon the bonds of a common, lived faith, sustained by "common traditions and ideals which have been revered by the whole community from generation to generation."[82]

The Amish insist upon the essentially nomian character of the world they construct:

> To call their beliefs "non-doctrinal", or to infer that these beliefs constitute eccentric but dispensable customs, merely because they are not expressed on printed texts, decrees and regulations, is misleading.

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[81] Mennonite Brief, *supra* note 71, at 4.

[82] Brief for Respondent at 21, *Yoder* (No. 70-110) (quoting J. HOSTETLER, AMISH SOCIETY 131 (2d ed. 1968)).

> Amish "doctrine" (*i.e.*, teaching) is supremely certain and clearly known, being safeguarded to each generation by means of an *oral tradition* which contains and repeats the essential teachings.[83]

Ultimately, it is the state's capacity to tolerate or destroy this self-contained *nomos* that dictates the relation of the Amish community to its political host. The Amish and Mennonite narratives are clear about the typologies of accommodation, oppression, and resistance. The response of the Amish to attacks by civil authority upon the nomian insulation of their world "has been to sell their farms and to remove to jurisdictions, here or abroad, wherein hopefully they will be allowed peaceably to follow the will of God."[84]

There is a powerful, almost physical image at work in the conception to which the Amish and Mennonites implicitly appeal in their constitutional confession. The image is one of a dedicated, sacred space, a refuge carved out from the general secular, legal space of the state. Within the dedicated nomic refuge, there is an accommodation to a religious rule of recognition expressed in Acts 5:29 — "We ought to obey God rather than men" — instead of submission to the principle, embodied in article VI, section 2 of the Constitution, that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the land." The self-referential supremacy of each system is, of course, mitigated by the partly principled, partly prudential rules of deference that each manifests in relation to the other.[85]

The free exercise clause is only one of many principles that may be employed to create boundaries for communities and their quasi-autonomous law. Professor Carol Weisbrod's excellent study of nineteenth century utopian communities demonstrates the power of freedom of contract to create nomic insularity.[86] It is not surprising that she finds that the voluntaristic character of the ideology of these communities — especially the Shaker community — dominated their constitutional thought, just as the vision of free exercise dominates Amish and Mennonite constitutional theory.[87]

Property and corporation law have also been bases for claims to creation of an insulated nomic reserve. The company town, mine, or plant often asserts a right to law creation and enforcement with respect to social relations. Such claims were a pervasive condition of indus-

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[83] *Id.* at 14–15 (footnote omitted).

[84] *Id.* at 26.

[85] It is, of course, entirely in keeping with tradition to see the meaning of all human history centered upon a remnant and a refuge for the remnant. From a secular perspective on the Constitution, the free exercise clause's creation of small, dedicated, nomic refuges may appear to be merely an (unimportant) accommodation to religious autonomy. But for the Mennonites, the clause is the axis on which the wheel of history turns.

[86] C. WEISBROD, THE BOUNDARIES OF UTOPIA (1980).

[87] *See id.* at 61–79 (discussion of Shaker contract ideology).

trial life throughout the nineteenth and early twentieth centuries; they retain some importance today, even though the extreme conditions of nineteenth century Pullman, Illinois, are seldom replicated.[88] Perhaps the most compelling historical example of the use of private law in the generation of a *nomos* was the creation of a polity out of the corporate charter of Massachusetts Bay.[89] And although such dramatic instances of the normative authority of the corporate charter are rare, modern corporation law continues to bear the formal character of a grant of norm-generating authority.[90]

The point that is relevant here is not only that private lawmaking takes place through religious authority, contract, property, and corporate law (and of course through all private associational activity), but also that from time to time various groups use these universally accepted and well-understood devices to create an entire *nomos* — an integrated world of obligation and reality from which the rest of the world is perceived. At that point of radical transformation of perspective, the boundary rule — whether it be contract, free exercise of religion, property, or corporation law — becomes more than a rule: it becomes constitutive of a world. We witness normative mitosis. A world is turned inside out; a wall begins to form, and its shape differs depending upon which side of the wall our narratives place us on.

The constitutional visions of the Amish, the Mennonites, the utopian communities, the early Mormons, the Pilgrims, and the emigrant Puritans elevated the importance of associational autonomy. Although all of these groups had a place in their normative worlds for civil authority, and although some would transform civil authority into an intolerant arm of their own substantive vision when the chance arose, all, finding themselves within a state not under their control, sought a refuge not simply *from* persecution, but *for* associational self-realization in nomian terms. This norm-generating autonomy might be formally granted in charter language.[91] It might be implicit in a

[88] Pullman was more than a town. It was an ideology, benevolent in origin and intent if oppressive in effect. *See, e.g.*, S. LENS, THE LABOR WARS 85–87 (1973); R. SENNETT, AUTHORITY 62–66 (1980).

[89] Professor Barbara Black has eloquently described the processes by which a private law document came to have overpowering effect as the public law of the Massachusetts Bay Colony for the colony's entire first charter period. *See* B. Black, The Judicial Power and the General Court in Early Massachusetts (1634–1686) ch. 1 (1975) (unpublished Ph.D. dissertation, Yale University Department of History). *See generally* G. HASKINS, *supra* note 41, at 189–221 (discussing colonists' use of the charter to develop an independent legal order).

[90] The radical character of "corporations" and their basis in natural law thought is explored in O. GIERKE, NATURAL LAW AND THE THEORY OF SOCIETY, 1500–1800, at 162–95 (E. Barker trans. 1957).

[91] The Charter of the Massachusetts Bay Colony granted the colony authority "from tyme to tyme to make, ordeine, and establishe all manner of wholesome and reasonable orders, lawes, statutes, and ordinances, direccions, and instruccions not contrarie to the lawes of this our realme of England." CHARTER OF THE MASSACHUSETTS BAY COLONY (1629), *quoted in* G. HASKINS, *supra* note 41, at 27.

principle of religious liberty, freedom of contract, or protection of property. Typically, however, communities with a total life-vision, a *nomos* entirely of their own, find their own charters for the norm-generating aspects of their collective lives. The state's explicit or implicit acknowledgment of a limited sphere of autonomy is understood from within the association to be the state's accommodation to the extant reality of nomian separation. Such an acknowledgment is welcome as a preventative of suffering, but it does not create the inner world.

Freedom of association is the most general of the Constitution's doctrinal categories that speak to the creation and maintenance of a common life, the social precondition for a *nomos*.[92] From the point of view of state doctrine, the simplest way to generalize the points that I have made concerning the ways in which various groups have built their own normative worlds is to recognize that the norm-generating aspects of corporation law, contract, and free exercise of religion are all instances of associational liberty protected by the Constitution. Freedom of association implies a degree of norm-generating autonomy on the part of the association.[93] It is not a liberty to *be* but a liberty and capacity to create and interpret law — minimally, to interpret the terms of the association's own being.[94]

To elaborate the doctrine of associational rights, however, is simply to assume for ourselves the perspective of the state official looking out. The center of the Amish *nomos* is the New Testament;[95] the center of the Shaker *nomos* is a vivid and literal social contract.[96]

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[92] On the natural law of associational liberties, see O. GIERKE, *supra* note 90. For a fascinating contemporary exploration of the philosophical foundations of associational freedoms in American constitutional doctrine — or rather an exploration of the potential incorporation of such freedoms into American constitutional doctrine — see Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983). There is, of course, a vast difference between the individual right of free association recognized in NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958), and a group right to autonomous status. *Cf.* Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976) (contrasting individualistic and group-oriented approaches to equal protection analysis).

[93] *See* Howe, *The Supreme Court, 1952 Term — Foreword: Political Theory and the Nature of Liberty*, 67 HARV. L. REV. 91, 91 (1953) ("[G]overnment must recognize that it is not the sole possessor of sovereignty, and that private groups within the community are entitled to lead their own free lives and exercise within the area of their competence an authority so effective as to justify labeling it a sovereign authority.").

[94] The religion clauses of the Constitution seem to me unique in the clarity with which they presuppose a collective, norm-generating community whose status as a community and whose relationship with the individuals subject to its norms are entitled to constitutional recognition and protection.

Respect for a degree of norm-generating autonomy has also traditionally been incident to the federal government's relations with Indian tribes. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

[95] *Cf.* J. HOSTETLER, *supra* note 82, at 21–23, 75–92 (explaining the influence of biblical precepts in the Amish normative order).

[96] "A theological perspective on the covenant and a reference to Locke's view of the original

Groups assume different constitutional positions in order to create boundaries between the outside world and the community in which real law grows — in order to maintain the jurisgenerative capacity of the community's distinct law. We ought not lightly to assume a statist perspective here, for the *nomos* of officialdom is also "particular" — as particular as that of the Amish. And it, too, reaches out for validation and seeks to extend its legitimacy by gaining acceptance from the normative world that lies outside its core.

The principles that establish the nomian autonomy of a community must, of course, resonate within the community itself and within its sacred stories. But it is a great advantage to the community to have such principles resonate with the sacred stories of other communities that establish overlapping or conflicting normative worlds. Neither religious churches, however small and dedicated, nor utopian communities, however isolated, nor cadres of judges, however independent, can ever manage a total break from other groups with other understandings of law. Thus it is that the Shaker understanding of "contract" is hardly independent of understandings of contract that were prevalent in the nineteenth century. The Amish concept of church-state relations is not entirely independent of secular, libertarian concepts of such relations. The interdependence of legal meanings makes it possible to say that the Amish, the Shakers, and the judge are all engaged in the task of constitutional understanding. But their distinct starting points, identifications, and stories make us realize that we cannot pretend to a unitary law.

Sectarian communities differ from most — but not all — other communities in the degree to which they establish a *nomos* of their own. They characteristically construct their own myths, lay down their own precepts, and presume to establish their own hierarchies of norms. More importantly, they identify their own paradigms for lawful behavior and reduce the state to just one element, albeit an important one, in the normative environment. Even an accommodationist sectarian position — one that goes to great lengths to avoid confrontation or the imposition upon adherents of demands that will in practice conflict with those imposed by the state — establishes its own meaning for the norms to which it and its members conform.

(b) Redemptive Constitutionalism. — Liberty of association is not exhausted by a model of insular autonomy. People associate not only to transform themselves, but also to change the social world in which they live. Associations, then, are a sword as well as a shield. They include collective attempts to increase revenue from market transac-

consensual nature of government are found here together, in a single document, which provided the legal form of the Shaker community." C. WEISBROD, *supra* note 86, at 75–76. The Shakers took the position of strict insularity: they believed that civil law did not create the Shaker associations, though as a practical matter civil law had to be consulted to "see that we did not trespass upon [its] premises." *Id.* at 76 (internal quotation marks omitted).

tions, to transform society through violent revolution, to make converts for Jesus, and to change the law or the understanding of the law. Despite the interactive quality that characterizes transformational associations, however, such groups necessarily have an inner life and some social boundary; otherwise, it would make no sense to think of them as distinct entities. It is this social organization, not the datum of identity of interest, that requires the idea of liberty of association.[97] Commonality of interests and objectives may lead to regularities in social, political, or economic behavior among numbers of individuals. Such regularities, however, can be accommodated within a framework of individual rights. When groups generate their own articulate normative orders concerning the world as they would transform it, as well as the mode of transformation and their own place within the world, the situation is different — a new *nomos*, with its attendant claims to autonomy and respect, is created. Insofar as the vision and objectives of such a group are integrative, however, the structure of its *nomos* differs from that of the insular sectarian model.

Any group that seeks the transformation of the surrounding social world must evolve a mechanism for such change. There must be a theory and practice of apostolic ministry to the unconverted, a theory and practice of Leninist selection of cadres and class-consciousness-raising activity, or a theory and practice of legislation and deliberative politics. Of course, some associations — most limited-purpose ones — strive for small change in a world understood to be unproblematic if ill defined. This is less true of other associations. It is least true when the transforming association has its own vision, which it fits together with its conception of reality and its norms to create an integrated whole. The discontinuities between the respective visions, constructions of reality, and norms posited by some such associations and by the state's authoritative legal institutions may be considerable. I shall use "redemptive constitutionalism" as a label for the positions of associations whose sharply different visions of the social order require a transformational politics that cannot be contained within the autonomous insularity of the association itself.

I use the term "redemptive" to distinguish this phenomenon from the myriad reformist movements in our history. Redemption takes place within an eschatological schema that postulates: (1) the unredeemed character of reality as we know it, (2) the fundamentally different reality that should take its place, and (3) the replacement of the one with the other. The term "redemptive" also has the conno-

[97] One of the fundamental questions regarding group litigation is the extent to which and the circumstances in which mere commonality of interest ought to suffice to ground party status — that is, status as an entity for purposes of litigation as opposed to extralitigational social organization. Professor Stephen Yeazell has put this issue in historical context in a recent series of articles. *See* Yeazell, *From Group Litigation to Class Action* (pts. 1 & 2), 27 UCLA L. REV. 514, 1067 (1980); Yeazell, *Group Litigation and Social Context*, 77 COLUM. L. REV. 866 (1977).

tation of saving or freeing *persons*, not only "worlds" or understandings. I have chosen a word with the religious connotations of both personal and cosmic freedom and bondage, because the paradigmatic cases I have in mind require just such a heavy weight of meaning. I shall use the examples of radical antislavery constitutionalism and the civil rights movement to illustrate the phenomenon. Both movements set out to liberate persons and the law and to raise them from a fallen state. This way of thinking about law and liberty — shared as well by the women's movement and the right-to-life movement — is obviously tied to the religious traditions that invoke the vocabulary of redemption.

2. Antislavery Constitutionalism: The Competition Between Insular and Redemptive Models. — If there was a fault line in the normative topography of American constitutionalism — akin in significance and expressive power to the principle of succession in biblical life — it was, for four score and ten years, the place of slavery within the union. Certain particular rules associated with that institution, such as the fugitive slave acts, came to assume an expressive potential comparable to that of Deuteronomy 21:15–:17. Rescuing fugitives, and aiding and abetting them or their rescuers, were at once practical acts and symbolic ones. In context, such acts did much more than measure the relative strength of a person's commitments to liberty and to union. Constitutionalism was central to the meaning of the conflict over slavery because that conflict raised the ultimate question of authority versus meaning — the jurisprudential equivalent of theodicy in religion.[98] I and others have canvassed the constitutionalism of antislavery elsewhere at some length.[99] In this subsection, I want to focus on two groups in particular and on one aspect of their thought.

The position of Garrisonian abolitionists with respect to the United States Constitution is well known. It is best epitomized by Wendell Phillips' speech on the occasion of the seizure in Boston of George Latimer, a runaway slave: "There stands the bloody [fugitive slave] clause — you cannot fret the seal off the bond. The fault is in allowing such a Constitution to live an hour. . . . I say, my curse be

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[98] In *Justice Accused*, *see* R. COVER, *supra* note 4, I discuss the way the authority structure of judicial jurisdiction put an end to the exploration of constitutional bases for an attack on the fugitive slave laws. Professor Dworkin constantly addresses the hermeneutic of the free judge, *see* Dworkin, *The Law of the Slave-Catchers*, 1975 TIMES LITERARY SUPP. (London) 1437 (Book Review) (reviewing R. COVER, *supra* note 4), without speaking to the constraints of jurisdiction. *See infra* pp. 53–60 (discussing hermeneutics of jurisdiction).

[99] The leading work on antislavery constitutional thought is W. WIECEK, THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760–1848 (1977). For an analysis of the varieties of critical and synthetic antislavery legal thought, see R. COVER, *supra* note 4, at 149–58. On the apologetic functions of law, see *id.* at 119–23; M. TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810–1860 (1981). Of great value in placing the constitutional arguments in the broader contexts of antislavery thought and action is D. DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION, 1770–1823 (1975) (especially ch. 11).

on the Constitution of these United States."[100] I have argued elsewhere that the Garrisonians interpreted and analyzed the Constitution in a manner consistent with the dominant professional methods of their day (and of our day as well).[101] By these interpretive methods, the Garrisonians reached the conclusions that the Constitution permitted the states to create and perpetuate slavery as part of their municipal law, that the Constitution guaranteed certain national protections for slavery where it did exist, and that the Constitution imposed upon citizens of free states the obligation to cooperate in the corrupt national bargain to aid and perpetuate slavery. Of course, having reached these conclusions, Garrison, Phillips, and their followers opted for a radically different course from the one taken by the mainstream bench and bar. They eschewed participation in and renounced obligation to government under such a Constitution.[102]

The Garrisonian move, like that of religious sectarians, was a move toward nomian insularity — the rejection of participation in the creation of a general and public *nomos*. It is therefore not surprising to find that the insular quality of antislavery anticonstitutionalism was connected to a more general nomian insularity. Indeed, William Wiecek, the leading historian of antislavery constitutionalism, has argued that Garrisonian anticonstitutionalism is incomprehensible and absurd "[i]f not integrated with its nonconstitutional components."[103] Garrisonian "perfectionism," a millenial philosophy, held that each person had an obligation to attain perfection in this life by foreswearing sin. The withdrawal of perfectionists to their enclosed nomian island, the Garrisonians believed, would ultimately cause the dissolution of government. The immediate action required of perfectionists was therefore disengagement from participation in the state. This disengagement did not entail physical or social insularity, but a radical insularity of the normative world alone.

From such a perspective of committed insularity, the hermeneutic interest of the Garrisonian lay not in fitting the Constitution into the definition of a perfectionist community. Because the Constitution was a powerful symbol for most Americans, *renunciation* of constitutional obligation was an expressive act that created a boundary defining fidelity to the implications of perfectionist beliefs. When Wendell Phillips and Roger Taney "agreed" that the fugitive-from-labor clause of article IV of the Constitution dictated the return of runaway slaves, they agreed, in one sense, on the "meaning" of the Constitution. The more important "meaning" that Phillips sought to establish, however, was a denial of the self-referential norm of obligation found in the

[100] W. Phillips, Speech at Faneuil Hall, Boston (Oct. 30, 1842), *quoted in* I. BARTLETT, WENDELL PHILLIPS: BRAHMIN RADICAL 117–18 (1961).

[101] *See* R. COVER, *supra* note 4, at 150–54.

[102] *See id.* at 151; W. WIECEK, *supra* note 99, at 228–48.

[103] W. WIECEK, *supra* note 99, at 228.

supremacy clause of article VI. Thus, it was Phillips' total normative world — his Garrisonian perfectionism — that made his constitutional stance intelligible within the community of resistance and within the *nomos* that supported it. Roger Taney's positivist interpretation, on the other hand, assumed a principle justifying obedience to the Constitution.[104]

The relationship among vision, reality, and norm in Garrisonianism needs to be explored. Garrisonian perfectionism, because of its comprehensive demand upon conduct, required a system of norms sharply delineating the distinctions between those who strove for Christ-like perfection and the rest of the world. Its own norms thus demarcated the distinctions found in the present reality. But reality is only one ground for norms. Vision is the other. By demarcating reality, perfectionist Garrisonian norms necessarily gave up any emphasis on the process of transformation itself.[105]

This trade-off is instructive, for it was made in a completely different manner by the archrivals of Garrisonian theorists — those whom Wiecek calls radical constitutionalists.[106] We can best understand the nature of the difference by attending to the normative journey of a person who passed from Garrisonianism to radical constitutionalism — Frederick Douglass. This is Douglass' own account of his change of heart with regard to constitutional interpretation:

> Brought directly, when I escaped from slavery, into contact with abolitionists who regarded the Constitution as a slaveholding instrument, and finding their views supported by the united and entire history of every department of the government, it is not strange that I assumed the Constitution to be just what these friends made it seem to be. . . . But for the responsibility of conducting a public journal [in Western New York], and the necessity imposed upon me of meeting opposite views from abolitionists outside of New England, I should in all probability have remained firm in my disunion views. My new circumstances compelled me to re-think the whole subject, and to study with some care not only the just and proper rules of legal interpretation, but the origin, design, nature, rights, powers, and

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[104] *See* Scott v. Sandford, 60 U.S. (19 How.) 393 (1857). Imagine a simple world in which everyone took the position of Roger Taney, and contrast it with another simple world in which half the people took Taney's position and the other half the position of Wendell Phillips. In the first world, we would see a consensus on the meaning of the law of the fugitive slave. In the second world, no such consensus would form, because there would be disagreement about the law's justification and about how a person should behave in relation to the law. The two groups in the second world could only be said to agree on the meaning of the document abstracted from any need or desire to act upon it. But by its own terms the text is a ground for action. And no two people can be said to agree on what the text requires if they disagree on the circumstances in which it will warrant their actions.

[105] *See* W. WIECEK, *supra* note 99, at 247.

[106] Wiecek examines the philosophy, tactics, and influence of the radical constitutional antislavery movement in *id.* at 249–75.

> duties of civil governments, and also the relations which human beings sustain to it. By such a course of thought and reading I was conducted to the conclusion that the Constitution of the United States — inaugurated to "form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty" — could not well have been designed at the same time to maintain and perpetuate a system of rapine and murder like slavery, especially as not one word can be found in the Constitution to authorize such a belief.[107]

Undoubtedly, Douglass is correct in his appreciation of the community as the source and sustenance of ideas about law. I have already suggested in what way the issue of constitutional interpretation was central to the definition of the Garrisonian community with its holistic vision of perfection on earth. For Frederick Douglass, more than for any other leading abolitionist, a different need was primary. Douglass was *the* escaped slave. His escape constituted a redemption and the beginning of his real life.[108] Douglass' greatest need was for a vision of law that both validated his freedom and integrated norms with a future redemptive possibility for his people. The radical constitutionalists criticized the Garrisonians precisely for their failure to adopt such a vision. The Garrisonian alternative seemed, to the constitutionalists, an abdication: "Dissolve the Union, on this issue, and you delude the people of the free States with the false notion that their responsibilities have ceased, though the slaves remain in bondage. Who shall stand up as deliverers, then?"[109] When Frederick Douglass asserted his psychological and political independence from his Boston abolitionist benefactors, he chose, in part, to break with Garrisonian anticonstitutionalism by embracing a vision — a vision of an alternative world in which the entire order of American slavery would be without foundation in law.[110]

William Wiecek's assessment of radical constitutionalism is that, "[i]n the short run, [it] was a failure."[111] He points out that the radicals became increasingly sectarian, although he attributes a long-term significance to their use of natural law in constitutional exe-

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[107] F. DOUGLASS, LIFE AND TIMES OF FREDERICK DOUGLASS 261–62 (R. Logan ed. 1967).

[108] Several times in his autobiography, Douglass invoked an image of the beginning of his life to describe his freedom. *See id.* at 202, 216, 259. And frequently he wrote and spoke of his fear of being returned to slavery. *See id.* at 218–19; Letter from Frederick Douglass to Henry C. Wright (Dec. 22, 1846), *reprinted in* 1 F. DOUGLASS, THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 204 (P. Foner ed. 1975).

[109] CONVENTION OF RADICAL POLITICAL ABOLITIONISTS, PROCEEDINGS OF THE CONVENTION OF RADICAL POLITICAL ABOLITIONISTS 44 (New York 1855).

[110] On Douglass' break with the Garrisonians, see 2 F. DOUGLASS, *supra* note 108, at 48–66. For a forceful statement of Douglass' constitutional position, see his speech, The Constitution of the United States: Is It Pro-Slavery or Anti-Slavery? (Mar. 26, 1860), *reprinted in id.* at 467–80.

[111] W. WIECEK, *supra* note 99, at 274.

gesis.[112] The sectarian character of radical abolitionist normative thought, however, is of a peculiar sort. Utopian constitutionalism such as that envisioned by the radicals has as its raison d'être the transformation of the conditions of social life. It arises out of the utopian's inability to bear the dissonance of the lawfulness of the intolerable, and it is therefore, like all nomic eschatology, extremely unstable. Its adherent must either give up his connection with what is the case, including the predictable patterns of behavior of other actors, or give up the vision. The vision of slavery destroyed by the power of law requires for its fulfillment the participation of the larger community that exercises state power. The logic of perfectionism permits the pursuit of a pure *nomos* without a polis. But for a *nomos* to be redemptive in the sense posited by Douglass' vision, more is necessary.

If law reflects a tension between what is and what might be, law can be maintained only as long as the two are close enough to reveal a line of human endeavor that brings them into temporary or partial reconciliation. All utopian or eschatological movements that do not withdraw to insularity risk the failure of the conversion of vision into reality and, thus, the breaking of the tension. At that point, they may be movements, but they are no longer movements of the law.

While their movement lasted, the radical constitutionalists contributed to an immense growth of law. They worked out a constitutional attack upon slavery from the general structure of the Constitution; they evolved a literalist attack from the language of the due process clause and from the jury and grand jury provisions of the fifth and sixth amendments; they studied interpretive methodologies and self-consciously employed the one most favorable to their ends; they developed arguments for extending the range of constitutional sources to include at least the Declaration of Independence. Their pamphlets, arguments, columns, and books constitute an important part of the legal literature on slavery,[113] which, I believe, would substantially eclipse contemporaneous writings in, say, American tort law. Their work reveals a creative pulse that proliferates principle and precept, commentary and justification, even in the face of a state legal order less likely to hold slavery unconstitutional than to declare the imminent kingship of Jesus Christ on Earth.[114] In the workings of a

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[112] *See id.*

[113] Much of this antislavery literature is cited and discussed in R. COVER, *supra* note 4, at 149 n.*; W. WIECEK, *supra* note 99, at 249–75.

[114] *Compare* Vidal v. Mayor of Philadelphia, 43 U.S. (2 How.) 127, 198 (1844) ("So that we are compelled to admit that although Christianity be a part of the common law of the State, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public."), *with* Scott v. Sandford, 60 U.S. (19 How.) 393, 411 (1857) ("[T]here are two clauses in the Constitution which point directly and specifically to the negro

committed community with common symbols and discourse, common narratives and interpretions, the law undeniably grew.

D. "Jurispathic" Courts

The reader may have tired by now of my insistence upon dignifying the internal norms, redemptive fantasies, briefs, positions, or arguments of various groups with the word "law." In an imaginary world in which violence played no part in life, law would indeed grow exclusively from the hermeneutic impulse — the human need to create and interpret texts.[115] Law would develop within small communities of mutually committed individuals who cared about the text, about what each made of the text, and about one another and the common life they shared. Such communities might split over major issues of interpretation, but the bonds of social life and mutual concern would permit some interpretive divergence. I have played out a fantasy to some extent in suggesting that we can see the underlying reality of the jurisgenerative process in the way in which real communities do create law and do give meaning to law through their narratives and precepts, their somewhat distinct *nomos*.

But the jurisgenerative principle by which legal meaning proliferates in all communities never exists in isolation from violence. Interpretation always takes place in the shadow of coercion. And from this fact we may come to recognize a special role for courts. Courts, at least the courts of the state, are characteristically "jurispathic."

It is remarkable that in myth and history the origin of and justification for a court is rarely understood to be the need for law. Rather, it is understood to be the need to suppress law, to choose between two or more laws, to impose upon laws a hierarchy. It is the multiplicity of laws, the fecundity of the jurisgenerative principle, that creates the problem to which the court and the state are the solution. For example, in Aeschylus' literary re-creation of the mythic foundations of the Areopagus, Athena's establishment of the institutionalized law of the polis is addressed to the dilemma of the moral and legal indeterminacy created by two laws, one invoked by the Erinyes and the other by Apollo.[116]

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race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.").

[115] By texts, I mean not only self-conscious, written verbal formulae, but also oral texts, *see, e.g.*, S. LIEBERMAN, *The Publication of the Mishnah*, in HELLENISM IN JEWISH PALESTINE 83, 87 (2d ed. 1962); Tedlock, *The Spoken Word and the Work of Interpretation in American Indian Religion*, in TRADITIONAL AMERICAN INDIAN LITERATURES 45 (K. Kroeber ed. 1981), and "social texts," which entail the "reading" of meaning into complex social activity, *see, e.g.*, C. GEERTZ, THE INTERPRETATION OF CULTURES, *supra* note 7, at 3–30; C. GEERTZ, NEGARA, *supra* note 7.

[116] *See* AESCHYLUS, ORESTEIA (R. Lattimore trans. 1953); *id.* at 133 (*The Eumenides*); R.

Just as there are myths in which courts arise out of "polynomia," so there are stories in which polynomia arises out of the loss of courts. In a famous talmudic passage, Rabbi Jose re-creates the halcyon days before the destruction of Jerusalem, where the Great Sanhedrin sat and whence the Law went out to all Israel. After the end of that court, the Law became two laws.[117] The state of unredeemed controversy, the problem of too much law, is thus seen to be either solved by the authority of courts or caused by the failure or lack of authority of courts.

We find a closely parallel set of arguments when we move from antiquity to the foundations of our own Supreme Court. It, too, is a solution to the problem of too much law. Consider, for example, the classic apology for a national supreme court in *The Federalist*:

> To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one SUPREME TRIBUNAL. . . . If there is in each State a court of final jurisdiction, there may be as many different final determinations on the same point as there are courts. There are endless diversities in the opinions of men. We often see not only different courts but the Judges of the came [sic] court differing from each other. To avoid the confusion which would unavoidably result from the contradictory decisions of a number of independent judicatories, all nations have found it necessary to establish one court paramount to the rest, possessing a general superintendence, and authorized to settle and declare in the last resort a uniform rule of civil justice.[118]

KUHNS, THE HOUSE, THE CITY, AND THE JUDGE 63–94 (1962) (comparing attitudes toward law expressed by Athena, Apollo, and the Erinyes in the trial scene of *The Eumenides*). The Erinyes recognize the jurispathic element of the law of the *polis* in their complaint: "Gods of the younger generation, you have ridden down the laws of the elder time, torn them out of my hands." AESCHYLUS, *The Eumenides*, lines 778–79, 808–09, in AESCHYLUS, ORESTEIA, *supra*, at 163–64. The transition from the blood feud to civil justice is not a transition from "no law" to "law," or even, necessarily, from greater to less total violence. On the ways in which law characterizes the entire "meaning" of feuding behavior, see William Miller's extraordinary work, Miller, *Choosing the Avenger*, 1 LAW & HIST. (forthcoming 1983).

[117] *See* BABYLONIAN TALMUD, *Sanhedrin* 88b.

[118] THE FEDERALIST No. 22, at 148–49 (A. Hamilton) (E. Bourne ed. 1947). Strictly speaking, the passage quoted concerns the narrow issue of adjudication respecting treaties. But the argument clearly applies more broadly, and elsewhere in *The Federalist* Hamilton refers implicitly to the discussion quoted above as the justification for a single supreme tribunal. *See id.* No. 81, at 119 (A. Hamilton).

Sixteen years after *The Federalist*, William Cranch, justifying his first venture into reprinting the decisions of the Supreme Court, wrote:

> Uniformity, in such cases [in which little information can be derived from English authority], can not be expected where the judicial authority is shared among such a vast number of independent tribunals, unless the decisions of the various courts are known to each other. Even in the same court, analogy of judgment can not be maintained if its adjudications are suffered to be forgotten. . . .
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> . . . One of the effects, expected from the establishment of a national judiciary, was the uniformity of a judicial decision; an attempt, therefore, to report the cases decided by the Supreme Court of the United States, can not need an apology . . . .

Modern apologists for the jurispathic function of courts usually state the problem not as one of *too much* law, but as one of *unclear* law. The supreme tribunal removes uncertainty, lack of clarity, and difference of opinion about what the law is. This statist formulation is either question begging or misleading. To state, as I have done, that the problem is one of too much law is to acknowledge the nomic integrity of each of the communities that have generated principles and precepts. It is to posit that *each* "community of interpretation" that has achieved "law" has its own *nomos* — narratives, experiences, and visions to which the norm articulated is the right response. And it is to recognize that different interpretive communities will almost certainly exist and will generate distinctive responses to any normative problem of substantial complexity.

On the other hand, to state the problem as one of unclear law or difference of opinion about *the* law seems to presuppose that there is a hermeneutic that is methodologically superior to those employed by the communities that offer their own law. One might suppose that this assumption had been put to rest by Justice Jackson's famous aphorism: "We are not final because we are infallible, but we are infallible only because we are final."[119] Any claim to a privileged hermeneutic method appears unfashionable today, but it has ancient roots and tenaciously persists in the law. Chief Justice Edward Coke's response to King James' claim to exercise jurisdiction personally is one classic formulation of the privileged hermeneutic position:

> [T]hen the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life . . . or fortunes of his subjects are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience . . . .[120]

And contemporary jurists who speak of special expertise are but mouthing a variant of this position.

Alternatively, the statist position may be understood to assert implicitly, not a superior interpretive method, but a convention of legal

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Cranch, *Preface* to 5 U.S. (1 Cranch) at iii–iv (1804). Thus, hierarchical authority and an apparatus for communicating its decisions are alike prescribed as the solutions to the self-evidently problematic condition of polynomia.

[119] Brown v. Allen, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

[120] Prohibitions del Roy, 12 Co. 63, 64–65, 77 Eng. Rep. 1342, 1343 (K.B. 1655). Pocock sees the tension between natural reason and the technical knowledge of any specific law as an element in the dilemma of the status of the disciplines of practical action in the normative and intellectual worlds. It is a dilemma to which historicism and the associated hermeneutics are a proffered solution. *See* J. POCOCK, THE MACHIAVELLIAN MOMENT 3–30 (1975).

discourse: the state and its designated hierarchy are entitled to the exclusive or supreme jurisgenerative capacity. Everyone else offers suggestions or opinions about what the single normative world should look like, but only the state creates it. The position that only the state creates law thus confuses the status of interpretation with the status of political domination. It encourages us to think that the interpretive act of the court is privileged in the measure of its political ascendance.

Although this second position may be good state law — the Constitution proclaims itself supreme — the position is at best ambiguous when viewed as a description of what the various norm-generating communities understand themselves to be doing. Insular communities often have their own, competing, unambiguous rules of recognition. They frequently inhabit a *nomos* in which their distinct *Grundnorm* is supreme from its own perspective. The redemptive constitutional model offers a more ambiguous perspective on the conventions of constitutional discourse. At times, redemptive groups may adopt an oracular jurisprudence, or at least one that is not naively positivist in character. They may assert their constitutionalism as the true constitution and denounce that of the courts as not only misguided, but also "void." At the same time, it would be strange indeed to find the redemptive constitutionalist unwilling to concede the superior practical effects of securing the acquiescence of judges, legislators, and governors in the radical revisions that he offers up as the only true constitutional meanings. It is surely possible to articulate a radical redemptive constitutionalism in which the statist convention — that the officials of the state make law — is accepted. The theoretical problems of the status of critical insight in such a positivist ordering will, for practical reasons, be ignored.

Theorists who appeal to the general justice of the political structure of which the courts are a part make a somewhat different sort of claim for the special position of judicial interpretation. Professor Owen Fiss has asserted such a claim:

> In what ways is the interpretation of the judge uniquely authoritative? There are two answers to this question. . . . [First, a] judicial interpretation is authoritative in the sense that it legitimates the use of force against those who refuse to accept or otherwise give effect to the meaning embodied in that interpretation.
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> The second sense of authoritativeness . . . stresses not the use of state power, but an ethical claim to obedience — a claim that an individual has a moral duty to obey a judicial interpretation, not because of its particular intellectual authority . . ., but because the judge is part of an authority structure that is good to preserve.[121]

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[121] Fiss, *supra* note 7, at 755–56 (footnotes omitted).

Fiss goes on to emphasize that the claim to institutional virtue and hence the claim to obedience through conscience depend on a rejection of the "nihilism" that would deny the possibility and the value of interpretation itself.[122]

By posing the question as one involving a choice between the judicial articulation of values (albeit contested) and nihilism, Fiss has made too easy the answer to his question about the institutional virtue of the judiciary and of the political system of which the judiciary is a part. The real challenge presented by those whom Fiss calls "nihilists" is not a looming void in which no interpretation would take place. Even those who deny the possibility of interpretation must constantly engage in the interpretive act. The challenge presented by the absence of a single, "objective" interpretation is, instead, the need to maintain a sense of legal meaning despite the destruction of any pretense of superiority of one *nomos* over another. By exercising its superior brute force, however, the agency of state law shuts down the creative hermeneutic of principle that is spread throughout our communities. The question, then, is the extent to which coercion is necessary to the maintenance of minimum conditions for the creation of legal meaning in autonomous interpretive communities.

The insular communities and redemptive movements that generate their own constitutional law have to this point been considered almost as if they operated in a world in which opposing meanings had no connection with force and violence. In the next Part, I shall consider one of the elements that I have thus far ignored — the commitments essential to the living of a law in a violent world.

III. COMMITMENT

In the normative universe, legal meaning is created by simultaneous engagement and disengagement, identification and objectification. Because the *nomos* is but the process of human action stretched between vision and reality,[123] a legal interpretation cannot be valid if no one is prepared to live by it. Certain thinkers may be dismissed as "merely" utopian, not only because they posit standards for behavior radically different from those by which we are accustomed to living, but also because they fail to posit alternative lives to which we would commit ourselves by stretching from our reality toward their vision.[124]

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[122] *Id.* at 762–63.

[123] I mean to evoke, without commitment to it, Nietzsche's aphorism: "Man is a rope stretched between the animal and the Superman — a rope over an abyss." F. NIETZSCHE, THUS SPAKE ZARATHUSTRA 9 (T. Common trans. 2d ed. 1911).

[124] More's Utopia, *see* T. MORE, UTOPIA (London 1516), has no edge because it is not, in

The transformation of interpretation into legal meaning begins when someone accepts the demands of interpretation and, through the personal act of commitment, affirms the position taken.[125] Such affirmation entails a commitment to projecting the understanding of the norm at work in our reality through all possible worlds unto the teleological vision that the interpretation implies. From the Amish perspective, for example, the interpretation of the principle of separation of church and state begins with the affirmation that the Amish community will do whatever is necessary to maintain its first century Christian insularity. And the meaning of this affirmation must include the projection of the understanding of the primitive Church into the unrealized worlds that loom.

Creating legal meaning, however, requires not only the movement of dedication and commitment, but also the objectification of that to which one is committed. The community posits a law, external to itself, that it is committed to obeying and that it does obey in dedication to its understanding of that law. Objectification is crucial to the language games that can be played with the law and to the meanings that can be created out of it. If the Amish lived as they do because it was fun to do so, they might still fight for their insularity. They would not, however, be disobedient to any articulable principle were they to capitulate. And they could not hold someone blameworthy — lawless — were he to give in.

Creation of legal meaning entails, then, subjective commitment to an objectified understanding of a demand. It entails the disengagement of the self from the "object" of law, and at the same time requires an engagement to that object as a faithful "other." The metaphor of separation permits the allegory of dedication. This objectification of the norms to which one is committed frequently, perhaps always, entails a narrative — a story of how the law, now object, came to be, and more importantly, how it came to be one's own. Narrative is the literary genre for the objectification of value.

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context, a call to action. The Christian commonwealth of Calvin, on the other hand, is fraught with action. *See* 2 Q. SKINNER, *supra* note 7, at 230–38.

[125] I do not mean that valid interpretation always entails a present and unconditional commitment to the course of conduct posited by the interpretive act. I am not articulating an ethic for enthusiasts. Nonetheless, the difference between speculation and practical interpretation — of which legal interpretation is one form — is that practical interpretation entails commitment, however contingent or attenuated that commitment may be. The position I assert here is simply a weak perversion of Heidegger's far more general proposition about interpretation:

> As understanding, Dasein projects its Being upon possibilities. This *Being-towards-possibilities* which understands is itself a potentiality-for-Being, and it is so because of the way these possibilities, as disclosed, exert their counter-thrust [Rückschlag] upon Dasein. The projecting of the understanding has its own possibility — that of developing itself [sich auszubilden]. This development of the understanding we call "interpretation." . . . Nor is interpretation the acquiring of information about what is understood; it is rather the working-out of possibilities projected in understanding.

M. HEIDEGGER, BEING AND TIME 188–89 (J. Macquarrie & E. Robinson trans. 1962).

The range of meaning that may be given to every norm — the norm's interpretability — is defined, therefore, both by a legal text, which objectifies the demand, and by the multiplicity of implicit and explicit commitments that go with it. Some interpretations are writ in blood and run with a warranty of blood as part of their validating force. Other interpretations carry more conventional limits to what will be hazarded on their behalf. The narratives that any particular group associates with the law bespeak the range of the group's commitments. Those narratives also provide resources for justification, condemnation, and argument by actors within the group, who must struggle to live their law.

To know the law — and certainly to live the law — is to know not only the objectified dimension of validation, but also the commitments that warrant interpretations.

A. Unofficial Interpretation

In Part II, I wrote of the proliferation of legal meaning — the impossibility and undesirability of suppressing the jurisgenerative principle, the legal DNA. I have suggested that the proliferation of legal meaning is at odds, however, with the effort of every state to exercise strict superintendence over the articulation of law as a means of social control. Commitment, as a constitutive element of legal meaning, creates inevitable conflict between the state and the processes of jurisgenesis. I turn now to the problem of unofficial interpretation — the elaboration of norms by committed groups standing against the state.

1. The Special Case of Civil Disobedience. — The decision to act in accord with an understanding of the law validated by the actor's own community but repudiated by the officialdom of the state, including its judges, is commonly understood as a decision to engage in justifiable disobedience. Even commentators whose general perspective on law is largely statist have argued that disobedience premised upon an interpretation of the law should have a special status.[126] This concession is said to depend upon the "plausible" character of the interpretation — plausible in terms of the precedents and activities of courts.[127] According to such a theory, the "disobedient" actor must take into account the pronouncements of courts because "no one can make a reasonable effort to follow the law unless he grants the courts the general power to alter it by their decisions."[128]

From its own point of view, however, the community that has created and proposed to live by its own, divergent understanding of law makes a claim not of justifiable disobedience, but rather of radical

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[126] *See* R. DWORKIN, *supra* note 44, at 206–22.

[127] *See id.* at 215.

[128] *Id.* at 214.

reinterpretation. If one addresses the status of "civil disobedients" from the perspective of the state's courts, one can hardly avoid framing the jurisprudential question as one of the individual's obligation to the state's law. From a general jurisprudential perspective, however, to concede so central a role to the courts (in any sense other than as a sociological datum — that is, a recognition that courts in the United States do wield the heaviest stick and, as a result, are often the voice most carefully attended to) is to deny to the jurisgenerative community out of which legal meaning arises the integrity of a law of its own.

Consider the case of the civil rights sit-in movement from 1961 until 1964. The movement's community affirmed that the Constitution of the United States has a valid moral claim to obedience from the members of the community. Yet the community also affirmed an understanding that the Constitution's guarantee of equal protection includes a right to be served in places of public accommodation without regard to race. In the face of official interpretations of the Constitution that permitted continued discriminatory practices in public accommodations, the movement had this choice: it could conform its public behavior to the official "law" while protesting that the law was "wrong," or it could conform its public behavior to its own interpretation of the Constitution. There is both "disobedience" and "obedience" in either case. But only obedience to the movement's own interpretation of the Constitution was fidelity to the understanding of law by which the movement's members would live uncoerced. Thus, in acting out their own, "free" interpretation of the Constitution, protesters say, "We *do* mean this in the medium of blood" (or in the medium of time in jail); "our lives constitute the bridges between the reality of present official declarations of law and the vision of our law triumphant" (a vision that may, of course, never come to fruition).

By provoking the response of the state's courts, the act of civil disobedience changes the meaning of the law articulated by officialdom. For the courts, too, may or may not speak in blood. To be sure, judges characteristically do not have to use their own blood to create meaning; like most power wielders, they usually write their bloodier texts in the bodies of the inmates of the penal colony. But the fact that all judges are in some way people of violence does not mean they rejoice in that quality or write their texts lightly.

A community that acquiesces in the injustice of official law has created no law of its own. It is not sui juris. The community that writes law review articles has created a law — a law under which officialdom may maintain its interpretation merely by suffering the protest of the articles. The community that disobeys the criminal law upon the authority of its own constitutional interpretation, however, forces the judge to choose between affirming his interpretation of the official law through violence against the protesters and permitting the

polynomia of legal meaning to extend to the domain of social practice and control. The judge's commitment is tested as he is asked what he intends to be the meaning of his law and whether his hand will be part of the bridge that links the official vision of the Constitution with the reality of people in jail.[129]

2. Commitment and the Problem of Violence. — Justice Brandeis grasped the problem. Writing his own, rather slanted narrative of the founding fathers' commitment to free speech, he asserted: "Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form."[130] Brandeis recognized that the coercive dimension of law is itself destructive of the possibility of interpretation. If we think of interpretation, unrealistically, as the mere offering of disembodied doctrine, the coercion of silence of which Brandeis wrote would rest on a claim that courts ought to possess the unique and exclusive power to offer interpretations. This is "the argument of force in its worst form," illegitimate as interpretative method.

Brandeis' constitutional thought represents a valiant effort to solve the inherent difficulty presented by the violence of the state's law acting upon the free interpretive process. He would have attacked the problem of the law's violence by constitutionalizing the principles of an uncoerced politics, a free public space, which would generate a law legitimated even in its coercive dimensions by its uncoerced origins. Free speech was to be the linchpin of this legitimation — free speech conceived of as all the components of deliberative public life.[131] Brandeis combined this enshrinement of free speech with a strong decentralizing tendency in the structural dimension of his constitutionalism, and he thereby attempted to safeguard the practical preconditions for the exercise of the participatory rights guaranteed by his first amendment jurisprudence.[132]

Brandeis' approach, however, is not entirely successful. The statist appeal to the "free" conditions of political life seems strongly influenced by a somewhat romantic view of the Greek (or Athenian) polis. And although Brandeis' federalism responded to an acknowledged need for participation in a common life, by the mid-twentieth century

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[129] For an extraordinary instance of the failure of judicial commitment to the statist interpretation, see Hamm v. City of Rock Hill, 379 U.S. 306 (1964).

[130] Whitney v. California, 274 U.S. 357, 375–76 (Brandeis, J., concurring). The quotation and its place within Brandeis' thought are discussed in Cover, *The Left, the Right, and the First Amendment: 1918–1928*, 40 MD. L. REV. 349, 385–87 (1981).

[131] *See* Cover, *supra* note 130, at 376–80.

[132] On Brandeis' federalism, see, for example, New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 116 (1970) (describing Brandeis as the prophet of a movement toward decentralization). An excellent analysis of Brandeis' federalism is to be found in a student paper, E. Steiner, A Progressive Creed: The Experimental Federalism of Mr. Justice Brandeis (unpublished manuscript on file in Harvard Law School Library).

the states had long since lost their character as political communities. Whether this loss is primarily attributable to scale or to more intractable problems of reconciling the community of meaning with the exercise of territorial domination based on violence, I do not know. In any event, American political life no longer occurs within a public space dominated by common mythologies and rites and occupied by neighbors and kin. Other bases are necessary to support the common life that generates legal traditions.

The creation of legal meaning cannot take place in silence. But neither can it take place without the committed action that distinguishes law from literature. Brandeis' enduring legacy is his realization that it is particularly problematic to coerce silence, for such coercion destroys the element of reason that interpretation entails. Yet it is also problematic, even if less so, to coerce the abandonment of actions that arise from common life in a dedicated space within the normative world. The effect of this latter form of coercion is to destroy the experience and interpersonal faith that, as much as "reason," are constitutive of our understanding of normative worlds. Those who would offer a law different from that of the state will not be satisfied with a rule that permits them to speak without living their law.

Whenever a community resists a rule of silence or some other law of the state, it necessarily enters into a secondary hermeneutic — the interpretation of the texts of resistance. For a group to live its law in the face of the predictable employment of violence against it requires a new elaboration of "law" — the development of an understanding of what is right and just in the violent contexts that the group will encounter. The group must understand the normative implications of struggle and the meaning of suffering and must accept responsibility for the results of the confrontations that will ensue.[133]

One of the texts of resistance asserts that "all . . . are endowed by their creator with certain unalienable Rights." But this text goes on to concede to the dictates of prudence that we must "suffer, while evils are sufferable" and to recognize that "a decent respect to the opinions of mankind" imposes upon us an obligation carefully to recount the reasons that led to the decision to resist.[134] The obliga-

[133] This "understanding" may include acceptance of responsibility for shedding blood or for others' shedding of it. Consider Judaism's elaboration of a law governing the conduct of the victim of oppressive violence, *see* D. DAUBE, COLLABORATION WITH TYRANNY IN RABBINIC LAW (1965), and the narrative explication of the law of martyrdom in S. SPEIGEL, THE LAST TRIAL (J. Goldin trans. 1967). The Gandhian tradition of nonviolence is also a law governing the resistant "victim."

[134] The Declaration of Independence (U.S. 1776). On the Declaration of Independence as a revolutionary document, see G. WILLS, *supra* note 66, at 3–90. For both Jefferson's original text and that of the Congress, see *id.* at 374–79; *see also* C. BECKER, THE DECLARATION OF INDEPENDENCE (1922) (analyzing the Declaration of Independence by focusing upon the document itself and the manner in which it expresses a motivating idea).

tions to engage in a prudential calculus of suffering and to justify resistance before a common humanity are among the norms generated by interpreting the natural rights texts in a context of commitment to the course of resistance. Bentham could criticize natural rights phraseology as "nonsense upon stilts";[135] he could assert its tendency to "impel a man, by that force of conscience, to rise up in arms against any law whatever that he happens not to like,"[136] because, in characteristic fashion, Bentham failed to recognize that texts of resistance, like all texts, are always subject to an interpretative process that limits the situations in which resistance is a legitimate response. Any understanding of the texts is qualified when they are projected onto the future.

In interpreting a text of resistance, any community must come to grips with violence. It must think through the implications of living as a victim or perpetrator of violence in the contexts in which violence is likely to arise.[137] Violence — as a technique either to achieve or to suppress interpretations or the living of them — may be said to put a high price on those interpretations. But an "economic" approach here is misleading. For the understanding of law is the projection not only of what we would in fact do under different circumstances, but also of what we ought to do. And we commonly believe situations of violent interaction to be dominated by special principles and values. The invocation of these special principles, values, and even myths is a part of the hermeneutic of the texts of resistance.

Religious communities have a special jurisprudence of exile and

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[135] J. BENTHAM, *A Critical Examination of the Declaration of Rights*, in BENTHAM'S POLITICAL THOUGHT 257, 269 (B. Parekh ed. 1973).

[136] J. BENTHAM, A FRAGMENT ON GOVERNMENT 149 (London 1776).

[137] Some theories of revolution idealize violence. Such theories should be distinguished from a theory of radical autonomy of juridical meaning such as the one I am proposing. Jurisgenesis is a process that takes place in communities that already have an identity. Their members are, in Sartre's terms, already bound by a "pledge" (*le serment*), *see* J. SARTRE, CRITIQUE OF DIALECTICAL REASON 419 (J. Rée ed. 1976), though such a vocabulary suggests too much in the way of contractarian processes and too little in the way of stable cultural understanding. The complexity of the mutual understandings at work in the community is, I believe, revealed and transmitted in the narratives of the group.

Theorists of revolution frequently concern themselves with the formation of group bonds — the development of "consciousness" or solidarity. Violence may well be a particularly powerful catalyst — arguably a necessary one — in the chemistry by which a collection of hitherto unrelated individuals becomes a self-conscious revolutionary force. And in many instances, such a group will ultimately offer rich contributions to legal meaning.

But such collective realizations of identity are not my concern here, however much they may interest theorists of revolution. The persistent effort to live a law other than that of the state's officials presupposes a community already self-conscious and lawful by its own lights — not a mass inarticulately seeking realization in the face of the brute fact of domination. The argument that violence is a necessary part of revolution does not apply to the interpretation of texts of resistance by an extant community living its law. But although resistant groups affirming their own laws need not realize themselves in violence, they always live in the shadow of the violence backing the state's claim to social control.

martyrdom; revolutionary cadres evolve special principles governing life in prison or on the barricades. Most impressively, some persistently antistatist but quintessentially lawful groups have evolved a jurisprudence of nonviolence to govern interactions in the minefields of active resistance to the violence of the state. This is what the Amish promise in the event that their interpretation of religious liberty fails to converge with that of the state:

> [T]he Amish answer to forms of legal harassment, which would force them to violate their religion, has been to sell their farms and to remove . . . . [I]t would, if this Court sustains this prosecution, sound the death knell, in this country, for an old, distinctive and innocent culture.[138]

But not every divergent understanding of law is sufficient to withstand the coercive power of the state. Bob Jones University once interpreted its controlling biblical texts to require that no unmarried black person be admitted to the school; but after the power of the state was invoked to deny the University favorable tax status, that interpretation was withdrawn.[139] I do not know the extent to which the state's coercive action caused the interpretive change, but I suspect that the change was at least partly attributable to weakness of commitment in the original interpretive act. That commitment was sufficient to support the violence of racial exclusion only as long as the price of such violence was not hostile treatment by the IRS. The absence of commitment to the action dictated by an interpretation often produces a change in the interpretation itself.

Violence at the hands of the state escalates the stakes of the interpretive enterprise, but so does the violence of any nonstate community in defining its bounds or implementing its redemptive program.[140] The army of the Mormons at Nauvoo imposed a "law" upon

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[138] Brief for Respondents at 26, Wisconsin v. Yoder, 406 U.S. 205 (1972) (No. 70-110).

[139] Bob Jones Univ. v. United States, 103 S. Ct. 2017, 2023 (1983). The Court stated that Bob Jones University had changed its policies in response to the Fourth Circuit decision in McCrary v. Runyon, 515 F.2d 1082 (4th Cir. 1975), *aff'd*, 427 U.S. 160 (1976), which had held that racially motivated exclusion of blacks by private schools is proscribed by 42 U.S.C. § 1981 (1976). It must also be noted that on April 16, 1975, the IRS had notified Bob Jones University of the proposed revocation of tax-exempt status effective December 1, 1970, the date on which the school received general notification of the change in the IRS interpretation of I.R.C. § 501(c)(3) (1976). The change in the school's admissions policies took place on May 29, 1975, six weeks after both the IRS notification and the Fourth Circuit decision. *See Bob Jones Univ.*, 103 S. Ct. at 2023.

[140] If the state treats the apostolic ministry or the enlistment of cadres for the revolution as a breach of the peace or criminal syndicalism, the groups involved must be prepared to generate their norms in the shadow of the potential violence of the criminal law. If officialdom chooses to understand with these groups that the apostolic ministry or recruitment of cadres is constitutionally protected, there is a convergence of hermeneutics.

The effect of the state on the autonomous community's jurisgenerative process is completely symmetrical with that of the community on the elaboration of statist legal meaning. A judge

the faithful that brooked neither exit nor effective dissent.[141] Violence within the community and an armed stance looking out, no less than the incarceration and murder of Joseph Smith, set the scene for the later constitutional history of Mormonism — a history in which a common hermeneutic between insular community and state always seemed impossible. The culmination, in *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*,[142] was officialdom justifying its repression to itself. The long process leading to Utah's statehood was, from the Mormon perspective, an exploration of the degree of resistance demanded by religious obligation and the realities of power.[143]

Certain efforts to interpret the texts of resistance have a strange, almost doomed character. The state's claims over legal meaning are, at bottom, so closely tied to the state's imperfect monopoly over the domain of violence that the claim of a community to an autonomous meaning must be linked to the community's willingness to live out its meaning in defiance. Outright defiance, guerrilla warfare, and terrorism are, of course, the most direct responses. They are responses, however, that may — as in the United States — be unjustifiable and doomed to failure.

Our overriding temptation in the absence of substantial, direct, and immediate violent resistance to official law is to concede the state's principal claim to interpretation and to relegate the jurisgenerative processes of associations, communities, and movements to a delegated, secondary, or interstitial status. For those unwilling to conceive of law in such a state-bound framework, however, the law-creating processes of the Quakers, Amish, and other groups that have made their relation to the violence of the state a central normative question assume a special significance. This significance lies in the group's creation of a jurisprudence that orders the forms and occasions of confrontation, a jurisprudence of resistance that is necessarily also one of accommodation.[144]

One may choose to characterize the accommodations and capitu-

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may often stand upon an understanding of the law that becomes increasingly problematic if actively resisted by groups in society. The reaction of the state to the Amish affects the law of the religious community in precisely the same way that the reaction of the Amish to the state affects the state's law. (Of course, this may be a bit like saying that the mass of my bean bag and the mass of the earth play an identical role in the formula determining how the bodies will behave with respect to each other.)

[141] *See* D. OAKS & M. HILL, CARTHAGE CONSPIRACY: THE TRIAL OF THE ACCUSED ASSASSINS OF JOSEPH SMITH 6–23 (1975).

[142] 136 U.S. 1 (1890), *modified*, 140 U.S. 665 (1891).

[143] *See* C. WEISBROD, *supra* note 86, at 16–33 (citing sources).

[144] *See, e.g.*, A. WASKOW, FROM RACE RIOT TO SIT-IN 219–54 (1966). For a fascinating, extended study of the evolution of sectarian doctrine concerning abstention from war and war-related obligations of the state, see R. MACMASTER, S. HORST & R. ULLE, CONSCIENCE IN CRISIS: MENNONITE AND OTHER PEACE CHURCHES IN AMERICA, 1739–1789 (Studies in Anabaptist and Mennonite History No. 20, 1979).

lations of persons and communities under threat of the various nasty things the state might do as themselves integral parts of the normative world. Just as living in the economic world entails an understanding of price, so living in the normative world entails an understanding of the measures of commitment to norms in the face of contrary commitments of others. Such a view of the normative import of coercion avoids privileging the violence or the interpretations of the state. If there is a state and if it backs the interpretations of its courts with violence, those of us who participate in extrastate jurisgenesis must consider the question of resistance and must count the state's violence as part of our reality. But this is the sum of what the state has added. First, the state influences interpretation: for better or worse, most communities will avoid outright conflict with a judge's interpretations, at least when he will likely back them with violence. Second, when state and community offer conflicting interpretations, the community must elaborate the hermeneutics of resistance or of withdrawal — the justificatory enterprises of institutional stances chosen by or forced upon those who would make a *nomos* other than that of the state.

B. The Act of Commitment from the Point of View of the Judges: Jurisdiction as the Secondary Text

Judges are people of violence. Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest.

But judges are also people of peace. Among warring sects, each of which wraps itself in the mantle of a law of its own, they assert a regulative function that permits a life of law rather than violence. The range of the violence they could command (but generally do not) measures the range of the peace and law they constitute.

The resistance of a community to the law of the judge, the community's insistence upon living its own law or realizing its law within the larger social world, raises the question of the judge's commitment to the violence of his office.[145] A community's acquiescence in or accommodation to the judge's interpretation reinforces the hermeneutic process offered by the judge and extends, in one way or another, its social range. Confrontation, on the other hand, challenges the judge's implicit claim to authoritative interpretation.[146]

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[145] *See supra* pp. 47–48. For a discussion of judges who persevered in performing acts that they themselves found morally unpalatable and even, at times, illegal or unconstitutional if judged against a "free" interpretation — acts that they nevertheless believed were constitutionally required by the authoritative interpretations of superior tribunals within the judicial hierarchy — see R. COVER, *supra* note 4.

[146] In this respect, Abraham Lincoln's famous remarks on the *Dred Scott* decision, Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), made during the Lincoln-Douglas debates, repay study.

In the face of challenge, the judge — armed with no inherently superior interpretive insight, no necessarily better law — must separate the exercise of violence from his own person. The only way in which the employment of force is not revealed as a naked jurispathic act is through the judge's elaboration of the institutional privilege of force — that is, jurisdiction. Just as those who would live by the law of their community are led to the texts of resistance, the judge who would kill that law resorts to the texts of jurisdiction. The most basic of the texts of jurisdiction are the apologies for the state itself and for its violence — the ideology of social contract or the rationalizations of the welfare state.[147] The judge, however, rarely concedes that

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Lincoln's position strongly denies any obligation to treat the Court's interpretation as a privileged or binding one. Because jurisdiction is entirely case-specific, the only deference due the Court's authority is to refrain from direct resistance to its specific edicts. We are under no obligation, according to Lincoln, to relate our understanding of the law, and our projection of that understanding, to the Court's interpretation. Our future actions are to be governed by *our own* understanding, not the Court's:

> I do not resist [*Dred Scott*]. If I wanted to take Dred Scott from his master, I would be interfering with property. . . . But I am doing no such thing as that, but all that I am doing is refusing to obey it as a political rule. If I were in Congress, and a vote should come up on a question whether slavery should be prohibited in a new territory, in spite of that Dred Scott decision, I would vote that it should.

Speech by Abraham Lincoln at Chicago, Illinois (July 10, 1858), *reprinted in* 2 A. LINCOLN, THE COLLECTED WORKS OF ABRAHAM LINCOLN 484, 495 (R. Basler ed. 1953). Lincoln's position is an attempt to separate completely the projection of understanding from the decree that is the direct exercise of power. Such separation allows one to "acquiesce" by refraining from resistance while simultaneously refusing to extend the social range of the Court's hermeneutic. But Lincoln's solution is at best a limited one. Some decrees project consequences of interpretive processes into the future in ways that are far less circumscribed than the decision in *Dred Scott*. The injunction, with its prospective remedial ambitions, is the most obvious such decree. The future-oriented regulation of social life according to a controverted projection of a controverted understanding of the law is likely to raise the choice of acquiescence or resistance. See A. BICKEL, THE LEAST DANGEROUS BRANCH 254–72 (1962). Bickel correctly assimilates Lincoln's position to that of groups that resisted the ruling of Brown v. Board of Educ., 347 U.S. 483 (1954). Resistance, however, is not evil per se; its merits depend upon what is resisted and upon the quality of the rebel's hermeneutic of resistance. *See supra* pp. 49–53. For a sensitive treatment of the "therapeutic" promise of resistance, see Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. (forthcoming 1984).

[147] Nowhere is the connection clearer than in T. HOBBES, LEVIATHAN (W. Smith ed. 1909) (1st ed. London 1651). When the claim made for the state is as all-encompassing as it is for Hobbes, the role of jurisdiction is simply ancillary to the authority of the sovereign and derivative from the very concept of sovereignty:

> And therefore the Interpretation of all Lawes dependeth on the Authority Soveraign; and the Interpreters can be none but those, which the Soveraign, (to whom only the Subject oweth obedience) shall appoint. For else, by the craft of an Interpreter, the Law may be made to beare a sense, contrary to that of the Soveraign; by which means the Interpreter becomes the Legislator.

Id. ch. XXVI, at 211–12. Hobbes thus directly connects the privileged character he accords official judicial interpretation with *Leviathan's* larger enterprise of justifying the sovereignty of the state.

Yet although the texts of jurisdiction justify and excuse the violence of the state, they may also act as a constraint upon it. Indeed, the legitimation of institutional privilege through law may itself have a constraining effect on the state. *See, e.g.*, E. GENOVESE, ROLL, JORDAN,

these underlying questions are even at issue. Judicial consideration of the texts of jurisdiction starts with the justification for courts — in general or in particular.

The significance of the jurisdictional principles through which courts exercise violence is that they separate the exercise of the judge's authority or violence from the primary hermeneutic act that that exercise realizes. All such principles obscure the nature of the commitment entailed in adjudication. The commitment of the resister is seldom so clouded. For example, the jurisdictional rule of *Walker v. City of Birmingham*[148] — that an injunction is to be obeyed (that is, will be enforced through violence) even though found to be incorrect by an appellate court or on collateral review — justifies official violence by the very act of resistance to it. The court ultimately responsible for the interpretation need never commit itself separately to the proposition that the particular interpretation warrants violence. It is the regime of obedience — of state superiority — that warrants the violence.

Walker may also be said to stand for a strong view of equity. The court's authority derives ultimately from a conception of the equity judge as guarantor of the social order, who must have nearly absolute authority to put a stop to the "disorders" of collective action guided by law or interests other than those of the state.[149] *Walker* relies heavily on the reasoning of *Howat v. Kansas*,[150] a case that stands squarely within the philosophy of the Taft Court, which enshrined the labor injunction as a constitutionally required prop of public order.

The rule of *Walker v. City of Birmingham* subordinates the creation of legal meaning to the interest in public order. It is the rule of the judge, the insider, looking out. It speaks to the judge as agent of state violence and employer of that violence against the "private" disorder of movements, communities, unions, parties, "people," "mobs." When the judge, aligned with the state, looks out upon the committed acts of those whose law is other than the state's, *Walker* tells him that the court's authority is greater than its warrant in interpretation of the Constitution or the law. Even when wrong, the judge is to act and is entitled to be obeyed. The signal *Walker* sends the judge is to be aggressive in confronting private resistance, because his authority will be vindicated even if in error. *Walker* tells the resister, moreover, that authority counts for so much and legal mean-

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ROLL 25–49 (1974) (discussing "the hegemonic function of the law"); E. THOMPSON, WHIGS AND HUNTERS 258–69 (1975).

[148] 388 U.S. 307 (1967).

[149] From the 1880's through the 1920's, this view of equity was central to the conservative case for the labor injunction. The twin high points of this conservative doctrinal elaboration were *In re* Debs, 158 U.S. 564 (1895), and Truax v. Corrigan, 257 U.S. 312 (1921), which seemed to constitutionalize the labor injunction.

[150] 258 U.S. 181 (1921).

ing for so little that even were he to convince the judge that his interpretation was correct, he would still be punished for his persistent and active commitment to it.

Just as the *Walker* doctrine places a court's orders beyond their intrinsic support in substantive legal interpretation, *Rizzo v. Goode*,[151] *Younger v. Harris*,[152] and *City of Los Angeles v. Lyons*[153] invoke a weak conception of equity and, in the name of principles of deference that emerge from ideas of federalism or separation of powers, place the violence of administration beyond the reach of "law" — even court law. The rules of *Rizzo*, *Younger*, and *Lyons* are the rules of judges as potential outsiders looking in at state violence. When the question is whether judicial interpretations that *circumscribe* the authority of the wielders of state violence will be given full effect, jurisdictional principles require that the judges' interpretations be given *less than* their intrinsic authority. Even if the judge is considered to have been correct in holding that a police practice violated the constitutional rights of its victims[154] or that a prosecution poses a present threat to the exercise of constitutional rights,[155] some principle of deference — whether to states, administrators, or legislative majorities — requires that equity, the only effective remedy, stay its hand.

Thus, equity is "strong" when the court is aligned with state violence and "weak" when the court is a counterweight to that violence. The result in all cases is deference to the authoritarian application of violence, whether it originates in court orders or in systems of administration. Law, even constitutional law, succumbs to the hermeneutic of jurisdiction. The jurisgenerative impulse that led a judge to find the chokehold practices of the Los Angeles Police Department unconstitutional,[156] the jurisgenerative impulse that compels the creation of law by forcing the court to grapple with substantive issues, is silenced. The apologetic and statist orientation of current jurisdictional understandings prevents courts from ever reaching the threatening questions.[157]

Contemporary federal equity doctrines, which legitimate judicial and administrative coercion without regard to its support in legal principle, are strongly linked to the general Thayerite principle of

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[151] 423 U.S. 362 (1976).

[152] 401 U.S. 37 (1971).

[153] 103 S. Ct. 1660 (1983).

[154] *Cf.* Rizzo v. Goode, 423 U.S. 362 (1976) (denying injunctive relief against practices of the Philadelphia police).

[155] *Cf.* Younger v. Harris, 401 U.S. 37 (1971) (refusing to enjoin prosecution under allegedly unconstitutional state statute).

[156] *See* Lyons v. City of Los Angeles, 656 F.2d 417 (9th Cir. 1981) (upholding injunction against use of chokehold by Los Angeles police), *rev'd*, 103 S. Ct. 1660 (1983).

[157] On the Supreme Court's use of jurisdictional concepts to insulate the decisions of state authorities from review, see, for example, Fiss, *Dombrowski*, 86 YALE L.J. 1103 (1977).

deference to the "majoritarian" branches. I do not mean to belittle the fundamental conundrum at the heart of the countermajoritarian difficulty. Admittedly, insofar as administration has a secure base in the legitimating factor of popular government, the veto exercised on the basis of constitutional principle by an unelected judge presents an insoluble confrontation between principle and process. But it is difficult to ignore the fact that the tie between administration and coercive violence is always present, while the relation between administration and popular politics may vary between close identity and the most attenuated of delegations.[158]

The jurisdictional principles of deference are problematic precisely because, as currently articulated by the Supreme Court, they align the interpretive acts of judges with the acts and interests of those who control the means of violence. The more that judges use their interpretive acts to oppose the violence of the governors, the more nearly do they approximate a "least dangerous branch" with neither sword nor purse, and the less clearly are they bound up in the violent suppression of law. Indeed, the quality of their interpretive acts and the justifications for their special role — that is, the hermeneutics of jurisdiction — are all that judges have to play against the violence of administration. When they oppose the violence and coercion of the

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[158] Even proponents of judicial deference acknowledge that administrative action may bear only an attenuated relation to majoritarian values. *See* A. BICKEL, *supra* note 145, at 202. The countermajoritarian difficulty has been one of the primary subjects of debate in American constitutional law, at least since James Thayer's criticism of judicial review, *see* Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893), and Holmes' attack on substantive due process in his *Lochner* dissent, Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting). The triumph of Thayerism in 1937 did not put an end to the debate but did transform its terms. For an historical and doctrinal treatment of the transformation, see Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982). The doctrinal implications of a moderate defense of a limited judicial review shaped by the countermajoritarian difficulty itself — a defense that might be called the "footnote four solution" because of its derivation from United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) — are best elaborated in L. LUSKY, BY WHAT RIGHT? (1975), and more recently in J. ELY, DEMOCRACY AND DISTRUST (1980). The strongest claim for majoritarianism and the minimalist position on judicial review have been very ably presented, first by Learned Hand, *see* L. HAND, THE BILL OF RIGHTS (1958), then by Herbert Wechsler, *see* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), and Alexander Bickel, *see* A. BICKEL, *supra* note 146, and most recently by Jesse Choper, *see* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980). The most eloquent defenders of the privileged position of judges as articulators of fundamental values have been Michael Perry, *see* M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982), and Owen Fiss, *see* Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979). Although I advocate aggressive, articulate judicial review, my position differs fundamentally from the positions of Fiss and Perry in that I accord no privileged character to the work of the judges. I would have judges act on the basis of a committed constitutionalism in a world in which each of many communities acts out its own *nomos* and is prepared to resist the work of the judges in many instances.

other organs of the state, judges begin to look more like the other jurisgenerative communities of the world.[159]

It is not only "equity" and deference to "political branches" that entail the substitution of the hermeneutic of jurisdiction for the hermeneutic of the text. Consider, for example, the lower court judge supposedly constrained by superior authority to apply a rule that he believes to be wrong — not simply morally wrong, but wrong in law as well. In such a case, the lower court affirms a hierarchical principle in place of his interpretive convictions and thereby directly affirms his commitment to the triumph of the hierarchical order over meaning.[160] The extraordinary capacity of small shifts in membership of the Supreme Court to transform not only the decisional law of that Court, but also the strategic significance of the entire federal judiciary, is testimony to the commitment of judges to the hierarchical ordering of authority first, and to interpretive integrity only later.[161] The judge's commitments characteristically are supposed to be to the structure of authority. Absent this jurisdictional canon, the judge would have to measure the violence in each case against his own commitment to the meaning vindicated by it.

The logic of the judge's practice of justifying his violence through a commitment not to the end that the violence serves in the particular case, but to the structure of jurisdiction need not have the largely state-serving implications it generally has today. It is possible to conceive of a natural law of jurisdiction that might supplant the positivist version I have described. In elaborating such a law of jurisdiction, a judge might appeal to narratives of judicial resistance — Lord Coke's resistance to King James,[162] Taney's resistance to

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[159] Bickel's brief defense of the Court's dismissal of the appeal in Naim v. Naim, 350 U.S. 985 (1956) (per curiam), a case that presented the issue of the constitutionality of the Virginia miscegenation statute, raises the specter of a Court stripped of the authority that distinguishes its legal interpretations from those of other norm-generating communities:

> Actually a judgment legitimating such statutes would have been unthinkable . . . . But would it have been wise, at a time when the Court had just pronounced its new integration principle, when it was subject to scurrilous attack by men who predicted that integration of the schools would lead directly to "mongrelization of the race" . . . would it have been wise, just then, in the first case of its sort, on an issue that the Negro community as a whole can hardly be said to be pressing hard at the moment, to declare that the states may not prohibit racial intermarriage?

A. BICKEL, *supra* note 146, at 174.

[160] *See* R. COVER, *supra* note 4, at 252–56 (describing state court's refusal to use habeas corpus to free from federal custody aiders of fugitive slaves).

[161] Of course, the notion that a 5–4 majority of the Supreme Court should bind the interpretive activity of all judges may superficially be said to have all the strengths and weaknesses of arguments for majority rule. The majority is certainly not always right, but it would surely make no more sense to have interpretation governed by a 4–5 minority. What is important, however, is not the justifiability of the jurisdictional structure, but simply its existence.

[162] Prohibitions del Roy, 12 Co. 63, 77 Eng. Rep. 1342 (K.B. 1655). For a somewhat debunking discussion of the case, see C. BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE 303–06 (1956).

Lincoln,[163] or the incredibly courageous resistance of several Ghanaian judges to the perpetrators of a military coup.[164] He might thus defend his own authority to sit in judgment over those who exercise extralegal violence in the name of the state. In a truly violent, authoritarian situation, nothing is more revolutionary than the insistence of a judge that he exercises such a "jurisdiction" — but only if that jurisdiction implies the articulation of legal principle according to an independent hermeneutic. The commitment to a jurisgenerative process that does not defer to the violence of administration is the judge's only hope of partially extricating himself from the violence of the state.[165]

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[163] *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861); *see* C. SWISHER, THE TANEY PERIOD, 1836–64, at 844–53 (Oliver Wendell Holmes Devise History of the Supreme Court of the United States No. 5, 1974); 3 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 90–96 (1924).

[164] On June 4, 1979, one military government in Ghana succeeded another in a military coup. The new rulers, the Armed Forces Revolutionary Council (AFRC), promised a swift return to civilian government. The promise was, in a sense, fulfilled three months later with a formal return to civilian government under a new constitution. The Constitution of 1979 contained several special provisions, including article 15 of what are known as the transitional clauses — clauses designed to preclude, in effect, review of all acts perpetrated by the AFRC. In interpreting these clauses, several Ghanaian judges asserted a residual power of inquiry, whether upon petition for writ of habeas corpus or upon other writs seeking review. The judges varied in the degree to which they enunciated their manipulation of the constitutional denial of jurisdiction. Contrast the highly articulate, self-conscious appeal to English legal history in the opinion of Judge Taylor in *Ex parte* Forson (Accra High Ct. May 19, 1980) (opinion on file in Harvard Law School Library) with the somewhat more disingenuous approach of Judge Koranteng-Addow in *Ex parte* Shackleford (Accra High Ct. Aug. 8, 1980) (opinion on file in Harvard Law School Library). The Supreme Court of Ghana did not support the actions of Judges Taylor and Koranteng-Addow: in *Kwakye v. Attorney-General*, six justices denied relief; only Justice Taylor dissented. *See* Kwakye v. Attorney-General (Ghana Sup. Ct., Super. Ct. of Judicature Nov. 10, 1981) (opinions of Apaloo, Sowah, Archer, Crabbe, and Taylor, JJ., on file in Harvard Law School Library).

When the AFRC is watching over the shoulder of the deciding judge, both the direct and the disingenuous approaches to the maintenance of jurisdiction in the face of power may be fatal. On December 31, 1981, the AFRC again took control of the government of Ghana. In June 1982, Judge Koranteng-Addow disappeared and was later found dead. Two other judges have been killed. A commission of inquiry has been appointed but has not reported.

I am indebted to Ms. Anne-Marie Ofori for bringing these events to my attention and for providing me with copies of the judgments of the Ghanaian courts in the above-mentioned cases. In her unpublished paper, A. Ofori, Continuity and Change in the Ghanaian Legal System: The Coup D'etat and After (1983) (on file in Harvard Law School Library), Ms. Ofori describes the courage of several Ghanaian judges in insisting upon the availability of habeas corpus; her account raises important jurisprudential questions for reigning positivist ideologies of law.

[165] Consider, for example, the Court's decisions in Korematsu v. United States, 323 U.S. 214 (1944), and *Ex parte* Endo, 323 U.S. 283 (1944). Unlike *Ex parte* Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861), these cases involved no explicit suspension of the writ of habeas corpus. Rather, the Court faced a situation similar to the one that the transition clauses presented to the Ghanaian judges. *See supra* note 164. The Court had jurisdiction, but the Executive argued for a virtually automatic ratification of actions effected through the application of patently unjust

Such a hermeneutic of jurisdiction, however, is risky. It entails commitment to a struggle, the outcome of which — moral and physical — is always uncertain. It is easier by far to pursue the positivist hermeneutic of jurisdiction. Judges are surely right that the issue of power will rarely be in doubt if they pursue the office of jurisdictional helplessness before the violence of officials. The meaning judges thus give to the law, however, is not privileged, not necessarily worth any more than that of the resister they put in jail. In giving the law *that* meaning, they destroy the worlds that might be built upon the law of the communities that defer to the superior violence of the state, and they escalate the commitments of those who remain to resist.

IV. THE IMPERIAL VIRTUES

In Part II of this Foreword, I quoted Rabbi Simeon ben Gamaliel's aphorism that the world persists on the bases of justice, truth, and peace. These imperial characteristics are indeed, in some sense, jurispathic in contrast to the paideia of Torah that Simeon the Just described. But the Temple *has* been destroyed — meaning *is* no longer unitary; any hermeneutic implies another. Keeping the peace is no simple or neutral task. For in the normative worlds created around us, not all interpretive trajectories are insular. The worlds of law we create are all, in part, redemptive. With respect to a world of redemptive constitutionalism, the Court must either deny the redemptionists the power of the state (and thereby either truncate the growth of their law or force them into resistance) or share their interpretation. The court will often employ the secondary hermeneutic of jurisdiction to deny the redemptionist vision. Ultimately, however, it is precisely the structure of jurisdiction that locates responsibility for constitutional vision with the courts.[166] The courts may well rely upon the jurisdictional screen and rules of toleration to avoid killing the law of the insular communities that dot our normative landscape. But they cannot avoid responsibility for applying or refusing to apply power to fulfill a redemptionist vision.

The problem is exemplified in the Supreme Court's treatment of competing claims concerning the education of children and youth. The claims of both insular and redemptionist visions have particular force: the bond between group and individual is by definition paideic,

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criteria in time of crisis. The value of Taney's courageous insistence upon jurisdiction in *Merryman* is vitiated by the kind of deference shown crisis authority in *Korematsu*. Indeed, *Ex Parte* McCardle, 74 U.S. (7 Wall.) 506 (1869), which upheld a congressional restriction of Supreme Court jurisdiction, may also be understood to qualify the import of the rule in *Merryman*.

[166] This is a question of statist positive law. There are many forms other than ours for apportioning specialized state functions of interpreting law. *See, e.g.*, M. SHAPIRO, COURTS ch. 5 (1981) (discussing absence of appeal in Islamic law).

and disputes over educational issues raise the question of the character of the paideia that will constitute the child's world. The American constitutional treatment of schooling has responded by assuming a twofold form. Certain decisions have acknowledged the dangerous tendencies of a statist paideia and marked its boundaries through formal specification of the limits of public meaning. *West Virginia v. Barnette*,[167] *Epperson v. Arkansas*,[168] and the *School Prayer Cases*[169] are the landmarks, though all proceed, in one sense, from *Meyer v. Nebraska*.[170] Although these decisions suggest that the state's specification of meaning is most dangerous when religion and politics are concerned, the issues in these cases are presented by every public curriculum.[171] No sharp line between the problems of *Epperson* and those of a typical history curriculum can be drawn. Similarly, the confessional or sacramental character of the utterances in *Barnette* and the *School Prayer Cases* distinguish them only in degree from the confessional character of all claims of truth and meaning.[172]

That the public curriculum is itself the core problem of which *Barnette* and *Epperson* mark the outer ring may be perceived in another way. The weakness of the state's claim to authority for its formal umpiring between visions of the good is evidenced by the state's willingness to abdicate the project of elaborating meaning. The public curriculum is an embarrassment, for it stands the state at the heart of the paideic enterprise and creates a statist basis for the meaning as well as for the stipulations of law. The recognition of this dilemma has led to the second dimension of constitutional precedent regarding schooling — a breathtaking acknowledgment of the privilege of insular autonomy for all sorts of groups and associations. The principle of *Pierce v. Society of Sisters*[173] was always grounded on a substantive due process that protected not only religious education, but also private education in general, and it has proved the single, solid survivor from the era of substantive due process. *Wisconsin v. Yoder*[174] recognized an even broader autonomy for religious community. The state's extended recognition of associational autonomy in education is the natural result of the understanding of the problematic character

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[167] 319 U.S. 624 (1943).

[168] 393 U.S. 97 (1968).

[169] School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

[170] 262 U.S. 390 (1923). Although *Meyer* rests on the substantive due process rights of teachers, it nonetheless presupposes a constitutional determination that the curricular judgments that led to the exclusion of German language courses from the schools' curriculum were unjustified.

[171] *See* Hirschoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused From Objectionable Instruction?*, 50 S. CAL. L. REV. 871, 955 (1977).

[172] For the element of personal commitment entailed in the assertion of truth, see M. POLANYI, *supra* note 10.

[173] 268 U.S. 510 (1925).

[174] 406 U.S. 205 (1972).

of the state's paideic role. There must, in sum, be limits to the state's prerogative to provide interpretive meaning when it exercises its educative function. But the exercise is itself troublesome; thus, the private, insular alternative is specially protected. Any alternative to these limits would invite a total crushing of the jurisgenerative character. The state might become committed to its own meaning and destroy the personal and educative bond that is the germ of meanings alternative to those of the power wielders.

The school's central place in the paideic order connects the liberty of educational association to the jurisgenerative impulse itself. To this principle Bob Jones University appealed in its attempt to establish itself as a normative community entitled to protection against statist encroachment:

> It is both a religious and educational institution. Its teachers are required to be devout Christians, and all courses at the University are taught according to the Bible. Entering students are screened as to their religious beliefs, and their public and private conduct is strictly regulated by standards promulgated by University authorities.[175]

The University's interpretations of scripture held interracial dating and marriage to be forbidden. Black persons were excluded from admission to Bob Jones University until 1971. From 1971 until 1975, the University accepted no applications from unmarried blacks. Since May 29, 1975, the University has admitted students without regard to race, but has forbidden, on pain of expulsion, interracial dating, interracial marriage, the espousal of violation of these prohibitions, and membership in groups that advocate interracial marriage.[176]

The University, in effect, claimed for itself a nomic insularity that would protect it from general public law prohibiting racial discrimination. Implicitly, it claimed immunity from the effects of 42 U.S.C. § 1981,[177] held by the Court in *Runyon v. McCrary*[178] to prohibit racial discrimination in private education. The Court in *Runyon* explicitly avoided deciding whether its rule applied to religious schools.[179] The protection that Bob Jones University claimed is, as we have seen, well located in the manifold narratives of insularity. Bob Jones University was backed by (among others) the Amish, the Mennonites, and some Baptist and Jewish organizations, because the typology that its claim triggers is that of the paideic autonomy of the religious community in the education of the young.[180]

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[175] Bob Jones Univ. v. United States, 103 S. Ct. 2017, 2022 (1983).

[176] *Id.* at 2022–23.

[177] 42 U.S.C. § 1981 (1976).

[178] 427 U.S. 160 (1976).

[179] *Id.* at 167.

[180] Among the amicus briefs supporting Bob Jones University were those of the General Conference of the Mennonite Church, the National Association of Evangelicals, the National

One's interpretive stance toward such a case may change drastically, however, when one fits the competing considerations involved into a narrative of constitutional redemption. In this respect, contrasting the treatment of claims to insularity in *NLRB v. Catholic Bishop*[181] and in *Bob Jones University*[182] is instructive.

In both *Catholic Bishop* and *Bob Jones University*, an administrative agency had interpreted very general statutory language to limit the nomic autonomy of a religious school. In *Catholic Bishop*, the NLRB had held lay teachers in a parochial seminary and high school to be within the National Labor Relations Act's[183] jurisdiction and had thereby authorized procedures to establish a bargaining unit and triggered the requirement that the employer, the Catholic Bishop of Chicago, bargain in good faith. The Supreme Court recognized the religious school's interest in autonomy by holding that the agency should not have chosen an interpretation of the Act that so implicated values protected by the first amendment, unless a contrary interpretation was foreclosed by text or clear legislative history.[184] The majority found no strong redemptive narrative in which to locate the NLRB's assertion of jurisdiction. The central thrust of the redemptive story of the struggle for protection of labor's rights of organization and bargaining seemed to the Court to involve a religious school only marginally, whereas the Court perceived the norms of educational autonomy to be centrally related to the narratives of free exercise.

Bob Jones University formally parallels *Catholic Bishop*. The IRS had interpreted very broad statutory language that long antedated the particular public controversies at issue. It had ruled that section 501(c)(3) of the Internal Revenue Code,[185] which gives tax-exempt status to certain charitable organizations including qualifying religious and educational institutions, and section 170,[186] which permits taxpayers to deduct contributions to section 501(c)(3) organizations, must be interpreted to exclude from such preferential treatment schools that do not have a "racially nondiscriminatory policy as to students."[187] Neither the text of the Code nor the legislative history before the IRS'

Committee for Amish Religious Freedom, the American Baptist Churches, and the National Jewish Commission on Law and Public Affairs. *See* Briefs Amicus Curiae for Petitioner, *Bob Jones Univ.* (No. 81-3). The American Jewish Committee and the Anti-Defamation League of B'nai B'rith, however, filed briefs in support of the United States. *See* Briefs Amicus Curiae for Respondent, Goldsboro Christian Schools, Inc. v. United States, 103 S. Ct. 2017 (1983) (No. 81-1).

[181] 440 U.S. 490 (1979).

[182] *See* 103 S. Ct. at 2034–35.

[183] 29 U.S.C. §§ 151–169 (1976 & Supp. V 1981).

[184] 440 U.S. at 507.

[185] 26 U.S.C. § 501(c)(3) (1976).

[186] 26 U.S.C. § 170 (1976 & Supp. V 1981).

[187] Rev. Rul. 71-447, 1971-2 C.B. 230, *clarified in* Rev. Proc. 72-54, 1972-2 C.B. 834, *and superseded by* Rev. Proc. 75-50, 1975-2 C.B. 587.

1970 ruling seemed to compel such an interpretation.[188] Thus, as in *Catholic Bishop*, the agency interpreted general language in a way that created a basis for substantial interference in the nomian insularity of a religious educational institution. (The original IRS ruling was not confined to religious schools, but the Service refused to exempt them from its general interpretation.)[189]

There are several possible bases for distinguishing the two cases. *Catholic Bishop* may be said to entail the imposition of direct federal regulation, whereas *Bob Jones University* entails "only" the denial of a tax subsidy. The Court's analysis of tax subsidization last Term in *Regan v. Taxation with Representation*[190] suggests that such a distinction might be important. This argument is uncompelling, however, and is not the tack taken by the Court.[191] Rather, the Court

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[188] The only support in legislative history for the *Bob Jones University* result was Congress' behavior after the IRS' 1970 ruling. *See Bob Jones Univ.*, 103 S. Ct. at 2032–34. The Court's reliance on congressional inaction is quite interesting in light of the Court's nearly simultaneous invalidation of the legislative veto. *See* Immigration & Naturalization Serv. v. Chadha, 103 S. Ct. 2764 (1983). *Chadha* seems to suggest that congressional behavior that manifests dissatisfaction with regulatory action cannot have the force of law unless it has the formal characteristics of legislation under article I of the Constitution. It is difficult, then, to see why congressional "acquiescence" in a regulatory move of the sort recounted in *Bob Jones University*, *see* 103 S. Ct. at 2033, can have any legal force. Depending on the circumstances, congressional acquiescence in an administrative interpretation may be more or less probative evidence of what congressional intent was at the time the statute in question was passed. Given that § 501(c)(3) was enacted decades before the IRS' 1970 ruling and without consideration of the issues raised by that ruling, Congress' acquiescence in the ruling hardly demonstrates the *enacting* legislature's intent. Although I am not opposed to considering the interpretations and intentions of the current Congress in our reading of the law, I find it difficult to see why the conduct of a Congress that enacts nothing under article I formalities can have normative force in *Bob Jones University* but cannot have such force in the case of a legislative veto.

[189] *See Bob Jones Univ.*, 103 S. Ct. at 2021–25.

[190] 103 S. Ct. 1997 (1983). "We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe that right, and thus is not subject to strict scrutiny." *Id.* at 2003 (citing Harris v. McRae, 448 U.S. 297 (1980); Maher v. Roe, 432 U.S. 464 (1977); and Buckley v. Valeo, 424 U.S. 1 (1976)); *see id.* at 2001 (discussing Cammarano v. United States, 358 U.S. 498 (1959)). Another generalization in the Court's opinion in *Taxation with Representation* suggests the distinction the Court sees between direct regulation and denial of tax subsidies: "Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes." *Id.* at 2002.

[191] It is difficult to maintain the distinction between a regulatory measure with primarily civil sanctions and the denial of a tax benefit to a taxpayer that has failed to conform its conduct to a regulatory condition. To be sure, *some* regulation — for example, safety standards for consumer products or the workplace — is intended to convey society's outright unwillingness to tolerate particular conduct, whereas the conditioning of preferred tax treatment on conformity to a rule of conduct indicates the legal system's willingness to permit nonconforming conduct — for a price. But this distinction dissolves if one conceptualizes a regulatory sanction as a price set upon the forbidden conduct. Holmes' theory of contract breach is the best-known instance of this approach, which also pervades the entire methodology of the economic analysis of law. For Holmes' thesis and a critique of it, see G. GILMORE, THE DEATH OF CONTRACT 14 (1974).

The special character of the tax benefit at stake in *Bob Jones University* makes the distinction

met the argument of protected insularity by asserting a compelling governmental interest "in eradicating racial discrimination in education."[192] Chief Justice Burger appealed to a variety of executive, legislative, and judicial efforts to eliminate such discrimination, and finally compressed them into a précis of the narrative:

> Given the stress and anguish of the history of efforts to escape from the shackles of the "separate but equal" doctrine . . . it cannot be said that educational institutions that, for whatever reasons, practice racial discrimination, are institutions exercising "beneficial and stabilizing influences in community life" . . . or should be encouraged by having all taxpayers share in their support by way of special tax status.[193]

Thus, the Chief Justice countered the claim of insularity with a narrative of redemption. Whereas the Court did not consider the treatment of teachers at Chicago Catholic schools to contradict the central redemptive message of the NLRA, the Court found that discrimination against blacks in an otherwise tax-exempt religious school contradicted the central redemptive narrative of the struggle for racial equality and for desegregation of the nation's schools. One could write a history in which the redemptive ideology of labor organization played a larger role. One *could* rewrite *Catholic Bishop*; given the outcome in that case, however, the critical factor explaining the decision in *Bob Jones*

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between regulation and denial of tax benefits particularly problematic. Denial of § 501(c)(3) status to a charitable organization may lead donors who are accordingly denied § 170 deductions to stop making gifts altogether rather than simply to reduce gifts to the point at which the after-tax cost of the donation remains constant. For the same price, a donor can give 1/(1–(marginal tax rate)) times as much to an institution exempt under § 501(c)(3) as to a nonexempt organization. Assuming that the donor's satisfaction depends on the amount received by the donee rather than the cost of the gift, an additional gift dollar should thus be given to a nonexempt organization only if the marginal satisfaction obtained from a unit of gift to the nonexempt organization is 1/(1–(marginal tax rate)) times as great as the satisfaction obtained from a unit of gift to an exempt organization. Thus, the denial of § 501(c)(3) treatment may effectively cut off all donations from less loyal givers; for some organizations, the result may be the end of virtually all support. Admittedly, though, it is also possible that the loyalty of donors to an institution like Bob Jones University may be such that gift behavior is not particularly sensitive to price.

[192] *Bob Jones Univ.*, 103 S. Ct. at 2035.

[193] *Id.* at 2030. Significantly, Chief Justice Burger wrote of the "stress and anguish" of the attempt to escape from the "'separate but equal' doctrine." It seems to me a peculiarly court-centered characterization of the turmoil of the post-*Brown* era to write of that doctrine rather than the practices of racism and apartheid. The Court's stress and anguish may have been related to the shadow of Plessy v. Ferguson, 163 U.S. 537 (1896), and to the need to reconcile Brown v. Board of Educ., 347 U.S. 483 (1954), and post-*Brown* actions with customary principles of judicial neutrality, deference, and self-restraint. But for the true moving force, the civil rights movement, the stress and anguish have been and remain most acute when the movement must consider the "lawfulness" of disobedient and possibly violent tactics in the struggle to maintain a living law of equality in the face of state-sponsored violence or indifference.

University is the power of a redemptive constitutionalism that stakes its own claim to reform the life of the schools.

Precisely because the school is the point of entry to the paideic and the locus of its creation, the school must be the target of any redemptive constitutional ideology. Through education, the social bonds form that give rise to autonomy, to the jurisgenerative process. In education are the origins of the processes in which "law" is given meaning. Were there a single, statist corpus, a state school, a state understanding — Spartan *eunomia* — we might imagine a rather simple participation-protecting rule to guarantee universal access to the process. In our own complex *nomos*, however, it is the manifold, equally dignified communal bases of legal meaning that constitute the array of commitments, realities, and visions extant at any given time. The judge must resolve the competing claims of the redemptive constitutionalism of an excluded race, on one hand, and of insularity, the protection of association, on the other.

Nonetheless, the force of the Court's interpretation in *Bob Jones University* is very weak. It is weak not because of the form of argument, but because of the failure of the Court's commitment — a failure that manifests itself in the designation of authority for the decision. The Court assumes a position that places nothing at risk and from which the Court makes no interpretive gesture at all, save the quintessential gesture to the jurisdictional canons: the statement that an exercise of political authority was not unconstitutional. The grand national travail against discrimination is given no normative status in the Court's opinion, save that it means the IRS was not wrong. The insular communities, the Mennonites and Amish, are rightly left to question the scope of the Court's decision: are we at the mercy of each public policy decision that is not wrong? If the public policy here has a special status, what is it? Can Congress change the policy? If not, there is of course a powerful response to the insular claim — the counterclaim of constitutional redemption. Such a redemptive claim would pose no general threat to the insular community, no threat that rests on anything save the kind of commitment that goes with the articulation of the constitutional mandate.

This claim the Court did not make. Indeed, the Court explicitly avoided the question whether Congress could constitutionally grant tax exemption to a school that discriminates on the basis of race.[194] The Amish, the Mennonites, and all insular communities, whatever their stand on race, are right to be dissatisfied with *Bob Jones University v. United States*. It is a case that gives too much to the statist determination of the normative world by contributing too little to the statist understanding of the Constitution. It is a case in which authority is vindicated without the expression of judicial commitment to

[194] 103 S. Ct. at 2032 n.24.

principle that is embodied in constitutional decision. In the impoverished commitment of Chief Justice Burger's opinion, the constitutional question was not unnecessary, but the Court avoided it by simply throwing the claim of protected insularity to the mercy of public policy. The insular communities deserved better — they deserved a constitutional hedge against mere administration. And the minority community deserved more — it deserved a constitutional commitment to avoiding public subsidization of racism.[195]

Judges are like the rest of us. They interpret and they make law. They do so in a niche, and they have expectations about their own behavior in the future and about the behavior of others. It may be that the whole show in *Bob Jones University* was built on shoddy commitments, fake interpretations. Bob Jones University seemed uncommitted and lackadaisical in its racist interpretation — unwilling to put much on the line. The IRS ruling was left shamefully undefended by an administration unwilling to put *anything* on the line for the redemptive principle. The Justices responded in kind: they were unwilling to venture commitment of themselves, to make a firm promise and to project their understanding of the law onto the future. *Bob Jones University* is a play for 1983 — wary and cautious actors, some eloquence, but no commitment.

The statist impasse in constitutional creation must soon come to an end. When the end comes, it is unlikely to arrive via the Justices, accustomed as they are to casting their cautious eyes about, ferreting out jurisdictional excuses to avoid disrupting the orderly deployment of state power and privilege. It will likely come in some unruly moment — some undisciplined jurisgenerative impulse, some move-

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[195] Such a commitment would necessarily have invited a host of problems. But that is as it should be. The invasion of the *nomos* of the insular community ought to be based on more than the passing will of the state. It ought to be grounded on an interpretive commitment that is as fundamental as that of the insular community. And any such commitment would entail massive potential change. In *Bob Jones University*, the Court would have challenged all public subsidization of private racist conduct. Such subsidization is not confined to the potential operation of § 501(c)(1) for the benefit of discriminatory charitable organizations. If the Constitution were read to mandate the result in *Bob Jones University*, we would soon be asking whether it also mandates the denial of investment tax credits or accelerated cost recovery to otherwise qualifying taxpayers who discriminate in employment or other business practices. Would discrimination in home real estate transactions disqualify a taxpayer from taking advantage of the home mortgage interest deduction? Would public tax subsidization of private discrimination based on gender, religion, national origin, or alienage similarly be subject to constitutional proscription?

There are answers to these questions — distinctions that can plausibly be drawn among the various cases I have put and the hundreds of others that might be put. The Court could not and would not have had to decide all those cases now, but a constitutional commitment to the *Bob Jones University* decision would certainly have invited an early encounter with them. Without such a commitment, we are left with no principled law at all, but only administrative fiat to govern the relation between public subsidy and permissible private discrimination.

ment prepared to hold a vision in the face of the indifference or opposition of the state. Perhaps such a resistance — redemptive or insular — will reach not only those of us prepared to see law grow, but the courts as well. The stories the resisters tell, the lives they live, the law they make in such a movement may force the judges, too, to face the commitments entailed in their judicial office and their law. It is not the romance of rebellion that should lead us to look to the law evolved by social movements and communities. Quite the opposite. Just as it is our distrust for and recognition of the state as reality that leads us to be constitutionalists with regard to the state, so it ought to be our recognition of and distrust for the reality of the power of social movements that leads us to examine the nomian worlds they create. And just as constitutionalism is part of what may legitimize the state, so constitutionalism may legitimize, within a different framework, communities and movements. Legal meaning is a challenging enrichment of social life, a potential restraint on arbitrary power and violence. We ought to stop circumscribing the *nomos*; we ought to invite new worlds.