
ESSAY

LAW AND HUMANITIES: TWO ATTEMPTS

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These two lectures were first presented as part of Boston University School of Law's Distinguished Lecture Series on September 10 and 11, 2012. Here, with minimal modifications, they appear as an Essay in two interrelated parts, discussing distinct ideas but bound together by a common theme of how our understanding of and approach to law may be inflected by lessons drawn from the study of literature.

I. WHAT TO SAY ABOUT A CASE

My title here derives, somewhat awkwardly, from an essay of 1962 by William Wimsatt – whom you would call a “new critic,” though more interested in the theory of reading than most of them – called *What to Say About a Poem*.¹ It is a pedagogical essay that leads its reader step by step through the kinds of statements that one might want to make in talking about a poem in an intelligent and communicable sort of way. I do not take it as directly applicable to what one might say about a legal opinion, but it might offer us a useful template for kinds of questions one might wish to consider when discussing a case from the point of view of a reader not interested merely in its outcome, in the doctrine and rule it formulates, but as well in how it gets to those.

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¹ W.K. WIMSATT, *What to Say About a Poem*, in *HATEFUL CONTRARIES* 215 (1965).

It is my premise (and maybe at this point I will lose most of my audience) that reading the law with the kind of attentiveness that Wimsatt or any other “new critic” brought to a poem is worthwhile, even necessary. It is my experience in teaching law students that part of their “learning to think like a lawyer,” as they are told from day one they must do, is a kind of reading I would describe as plum-pudding reading (from Little Jack Horner, who sat in a corner, eating his Christmas pie)²: you stick in your thumb and pull out a plum. (The casebooks from which much legal teaching is done in fact offer the plums with the pudding removed.) That plum is the legal doctrine or rule the case provides, its statement or restatement of a past conclusion of the court, a precedent enshrined by *stare decisis*, though perhaps with a subtle variation that it is important to register. Finding the law in a case is very difficult for those without legal training – it is as if one lacked the right lens to detect and discriminate what falls within the purview of the law and what does not. Thinking like a lawyer is a matter of sorting out the relevant from everything else, which is a kind of smokescreen for the unwary.

I do not contest that the kind of reading lens that enables one to make legal sense of the issues presented by a case is a necessary acquisition. But I would at least like to entertain the notion, during the course of these lectures, that it is not the only lens relevant to reading the law, and that there is indeed a loss as well as a gain in its exclusive application. What the plum-pudding method of reading neglects is everything that we might classify under the ancient and honorable name of rhetoric.³ Rhetoric as I understand it is a system of communication and persuasion, everything we do with words in order to make an argument, win a case, convince a listener. It is, broadly conceived, the whole of the discursive medium between speaker and listener, language not as grammar but in the situation of its use. Rhetoric was in fact, as I probably do not need to tell you, what you learned in order to make your case in a law court in ancient Athens.⁴ The art of rhetoric was what you needed to be an effective advocate, orator, statesman. I want to some degree to make a pitch for a return to rhetoric in legal studies, though I want to exorcise from that return the common sense of rhetoric as hot air, or what President Warren Harding dubbed “bloviating” (“I like to bloviate to the American people,” he was reputed to have said).⁵ Paul de Man once argued that literary studies should be taught first

² *Little Jack Horner*, in *MOTHER GOOSE* 42 (Eulalie Osgood Grover ed., P.F. Volland Co. 1921) (c. 1765).

³ Though there are doubtless moments in teaching, for example in the subject of torts, when – as Kenneth Abraham pointed out to me at the University of Virginia School of Law workshop – the language of the cases do indeed engage teacher and students in the kind of rhetorical analysis I am promoting.

⁴ See STEVEN JOHNSTONE, *DISPUTES AND DEMOCRACY: THE CONSEQUENCES OF LITIGATION IN ANCIENT ATHENS* 33 (1999).

⁵ See FRANCIS RUSSELL, *THE SHADOW OF BLOOMING GROVE: WARREN G. HARDING IN HIS TIMES* 52 n.4 (1968).

as “a rhetoric and a poetics prior to being taught as a hermeneutics and a history.”⁶ By that, I think he meant that we ought to pay attention to the formal structures of meaning – how meaning is made – before interpreting specific meanings and how they are linked in history. That recommendation is fully consonant with what Wimsatt says in *What to Say About a Poem*.

Wimsatt proposes that in reading a poem, we need to think about its theme or argument, about the way the argument moves – its plot – and about the kind of act of speech it is, which implicates its audience, to whom it is addressed, in what kind of a situation, and with what kind of an appeal or call.⁷ Following these initial considerations, one needs to think about the type of utterance it is, the genre it seems to belong to, the tradition that it refers to and activates.⁸ I hope it is clear that these all have important cognates in confronting a legal text. Wimsatt goes on to detect three operations one needs to perform: what he calls “explanation” of the text (elucidating its obscurities and difficulties), then “description” (what it is like, as a phenomenon), and finally “explication,” which he glosses as “explicitation”; making salient what is in the text but not necessarily explicit.⁹ He directs us here to what he calls “the power of the pattern” – in poetry, such as meter and rhyme and assonance, but no organized text is without pattern – and the relevance of implicit meanings.¹⁰ He is interested in what I.A. Richards (the fountainhead of much modern criticism) called “the interanimation of words”: how together they denote and imply and create.¹¹ His text of reference in the essay is William Blake’s *London*, published in 1794 in his *Songs of Experience*¹²:

I wander thro’ each charter’d street
Near where the charter’d Thames does flow,
And mark in every face I meet
Marks of weakness, marks of woe.

In every cry of every Man,
In every infan’t’s cry of fear,
In every voice, in every ban,
The mind-forg’d manacles I hear.

⁶ Paul de Man, *The Return to Philology*, 4158 TIMES LITERARY SUPPLEMENT 1355, 1356 (1982).

⁷ WIMSATT, *supra* note 1, at 216.

⁸ *Id.* at 217.

⁹ *Id.* at 226, 230.

¹⁰ *Id.* at 226.

¹¹ I.A. RICHARDS, *THE PHILOSOPHY OF RHETORIC* 47-68 (1936).

¹² WILLIAM BLAKE, *SONGS OF EXPERIENCE* (Dover Publications 1984) (1794).

How the Chimney-sweeper's cry
Every black'ning Church Appalls;
And the hapless Soldier's sigh
Runs in blood down Palace walls.

But most thro' midnight streets I hear
How the youthful Harlot's curse
Blasts the new born Infant's tear,
And blights with plagues the Marriage hearse.¹³

Wimsatt dwells for some time on the word “chartered,” which implies streets laid out by royal charter (as they often were in London), but when applied to the River Thames, takes on more sinister implications: a “chartered” river appears to be confined and regimented in unnatural ways – ways echoed in “ban” and “mind-forg’d manacles.”¹⁴ The royal charters of London begin to appear an oppression. The repeated “marks” – first a verb, “mark in every face I meet,” then, almost as a result, a substantive: “marks of weakness, marks of woe” – take on ever more morbid force, for instance when Blake uses “appalls” as a verb to describe the effect of the chimney sweeper’s call (and of course the chimney sweepers were mostly children: by Act of Parliament in 1788, an attempt was made to prevent anyone under eight years old from working at the trade).¹⁵ I will not continue in a detailed explication of the poem, but notice how when we reach the very end, the appalling image of the “marriage hearse” – a violent conjunction of supposed opposites – does its work, because it has been prepared, because it has been earned, one might say. Wimsatt calls a poem “a cunning and precise shape of words,”¹⁶ and with due allowance, so is a legal opinion.

To look at a legal opinion with this kind of attention is not merely (as Richard Posner contends)¹⁷ in order to teach judges to write better prose. It is, I think, to say something about the law itself. There are legal opinions that show the same attention to both text and context, that seem intent to ask the question, what needs to be said about the text at contest (a statutory clause, a prior opinion, some part of the Constitution) that not only gives an interpretation but attempts to show that interpretation against the background of “poetics and rhetoric,” that is, as part of a larger sense-making system. An example would

¹³ *Id.* at 37; *see also* WIMSATT, *supra* note 1, at 230.

¹⁴ WIMSATT, *supra* note 1, at 231-33.

¹⁵ Regulation of Chimney Sweepers Act, 1788, 28 Geo. 3, c. 48 (Eng.).

¹⁶ WIMSATT, *supra* note 1, at 229.

¹⁷ RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 269-316 (1988).

be Justice Breyer's dissent in *Eldred v. Ashcroft*,¹⁸ the 2003 copyright extension case, which I shall come back to. But let me now turn to a case where the majority opinion unfolds rather as a series of philological coups d'état, claims about meaning that have little in common with Wimsatt's patient teasing-out of meanings.

I choose *District of Columbia v. Heller*,¹⁹ which overturned the D.C. gun control laws, in part because it deals with a crucial interpretative issue in the Bill of Rights, and also because Justice Scalia – who writes for the majority – has presented himself as a theoretician of interpretation. In his major statement on the subject, in the book *A Matter of Interpretation* (more vigorously polemical than his recent *Reading Law*²⁰), he laments that courts have “no intelligible, generally accepted, and consistently applied theory of statutory interpretation.”²¹ He wants to promote strict canons of interpretation, to rule out any consideration of legislative history, the crutch usually relied on by courts when the “plain meaning” of a statute isn't so plain, in favor of a close attention to the text itself. The interpreter should restrict his or her attention to “the intent that a reasonable person would gather from the text of the law.”²² When he comes to constitutional interpretation, he argues that one should not search for the intent of the Framers – which would be a pre-textualist approach – but rather seek out the “original understanding” of the text, how it was first interpreted, consulting *The Federalist*, for instance, and views of delegates to the Constitutional Convention.²³ This is the notion that now goes under the label “original meaning” – though that phrase seems to me to beg the very question that needs answering, whereas the more modest “original understanding” at least points toward where one is to look for an answer. Original meaning is glossed in his new book, *Reading Law*, as follows: “In their full context, words mean what they conveyed to reasonable people at the time they were written – with the understanding that general terms may embrace later technological innovations.”²⁴

¹⁸ 537 U.S. 186, 242-67 (2003) (Breyer, J., dissenting).

¹⁹ 554 U.S. 570 (2008).

²⁰ See generally ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012).

²¹ Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION* 3, 14 (Amy Gutmann ed., 1997). Justice Scalia is quoting here from HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS* 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). Some of my thinking about textualism has been inspired by John Harrison's *Rules and Words* presented to the University of Virginia School of Law Workshop. John Harrison, *Rules and Words* (Spring 2004) (unpublished manuscript) (on file with author).

²² Scalia, *supra* note 21, at 17.

²³ *Id.* at 38.

²⁴ SCALIA & GARNER, *supra* note 20, at 16.

The “reasonable person” reading statutory texts is eclipsed, when we come to the Constitution, by a reasonable 1787er: only meanings conveyed to readers of the founding generation are acceptable. Justice Scalia explicitly rejects the notion that the “current meaning” of the text has any relevance at all, since he believes that constitutions are designed precisely to *prevent* change.²⁵ Justice Scalia would like to get rid of layers of constitutional interpretation that have accreted over the ages and go back to what the text first meant, though he accepts, as “an exception to textualism . . . born not of logic but of necessity,” the requirements of *stare decisis*.²⁶ In constitutional interpretation, his textualism is bounded by originalism: he cannot let us read beyond the lexicon and semantics of what words “conveyed . . . at the time they were written” – all past tense.²⁷

Justice Scalia concludes that in constitutional interpretation, the “originalist at least knows what he is looking for: the original meaning of the text.”²⁸ I think that the “what” of “what he is looking for” is far more problematic than Justice Scalia allows. It would bear close reading in the light of the kind of delicate evocation of historical context that Wimsatt gives us in reading Blake, the weighing of what such a word as “chartered” meant in 1794 and to us now: meanings that, Wimsatt would claim, tincture one another and cannot be held wholly separate by the modern reader. As moderns, we cannot wholly renounce what we have learned since the eighteenth century. Justice Scalia’s textual originalism might benefit from some consideration of what we call “reception aesthetics,”²⁹ which tracks the evolving horizon of the reading of texts, showing that they inevitably change over time. I doubt that we wholly can reinvent the reading, or the psychology, of a 1787er even if we think it is a useful exercise. Justice Scalia’s “original understanding” of the Constitution has to depend on an act of historical reconstruction that is itself the interpretive act of an interpreter.³⁰

In *Heller* everything appears to turn on the “original understanding” of the Second Amendment.³¹ Even Justice Stevens in dissent seems to play on that same terrain.³² The object of interpretive scrutiny here is of course the famously vexing language of the Second Amendment: “A well regulated Militia, being necessary to the security of a free State, the right of the people to

²⁵ Scalia, *supra* note 21, at 40.

²⁶ SCALIA & GARNER, *supra* note 20, at 414.

²⁷ *Id.* at 16.

²⁸ Scalia, *supra* note 21, at 45.

²⁹ See HANS ROBERT JAUSS, TOWARD AN AESTHETIC OF RECEPTION (Timothy Bahti trans., 1982).

³⁰ See *infra* pp. 1447-50 for continued discussion of Justice Scalia’s interpretative style as well as an evaluation of “new originalism” or “new textualism.”

³¹ *District of Columbia v. Heller*, 554 U.S. 570, 625 (2008).

³² See *id.* at 637 (Stevens, J., dissenting).

keep and bear Arms, shall not be infringed.”³³ The long-standing debate here concerns the linkage of the different propositions in this sentence. After a brief recitation of the facts of the case, Justice Scalia begins his opinion: “We turn first to the meaning of the Second Amendment.”³⁴ Note that he does not speak of the “interpretation” of the Amendment, or of its “possible meanings,” or of the reconstruction of the context of its reading and understanding, or anything of the sort that would recognize that he is embarked on an interpretive enterprise. He offers us rather “the meaning” of the Amendment, which turns out to be an individual right to keep and bear arms for self-defense – a right that seems to fit better into twenty-first- than eighteenth-century controversies.³⁵ After taking apart the various elements of the Amendment, he claims that its meaning is patent from “[p]utting all these textual elements together.”³⁶ Some assembly required, then, but apparently no tools needed.

The most enigmatic of “textual elements” in the Amendment has always been the relation of the first phrase, on the well-regulated militia, being necessary to the Security of a free State, to the second, on the right to bear arms – an enigma enhanced by the strange eighteenth-century punctuation of the sentence. Justice Scalia briskly solves the problem by calling the first phrase a “prefatory clause” (it is not in fact grammatically a clause but an adverbial phrase) whereas the rest of the sentence becomes “the operative clause” – which essentially allows him to discount any limiting effect of part one of the sentence on part two.³⁷ Later, he recharacterizes part one as a “prologue,” trivializing it still further.³⁸ Note that “prefatory” and “prologue” are his words, not those of the Amendment.

Now, Justice Scalia is clearly aware of an amicus brief in this case – he cites it, but then ignores its argument, though one senses a covert polemic with it in his opinion – that was filed on behalf of a group of “Professors of Linguistics and English,” in “an effort to assist the Court in understanding eighteenth-century grammar and the historical meaning of the language used in the Second Amendment.”³⁹ That sounds exactly like something an “original

³³ U.S. CONST. amend. II.

³⁴ *Heller*, 554 U.S. at 576.

³⁵ This point has been made by Reva Siegel, among others, who shows that the controversies that define the context of Justice Scalia’s “originalist” reading of the Second Amendment in fact derive from twenty-first-century political controversies over gun use/gun control. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 194 (2008).

³⁶ *Heller*, 554 U.S. at 592.

³⁷ *Id.* at 577.

³⁸ *Id.* at 578 n.4.

³⁹ Brief for Professors of Linguistics and English Dennis E. Baron, Ph.D., Richard W. Bailey, Ph.D. and Jeffrey P. Kaplan, Ph.D. in Support of Petitioners at 2, *Heller*, 554 U.S. 570 (No. 07-290). The professors note in passing that we should not worry about the punctuation of the Amendment, since eighteenth-century usage regarded commas more as breathing marks than logical breaks. *Id.* at 5 n.2.

understanding” jurist should welcome. The brief is in fact of the greatest interest to anyone concerned with reconstructing past contexts for interpretation. The professors argue that “[u]nder longstanding linguistic principles that were well understood and recognized at the time the Second Amendment was adopted,” the “well regulated Militia” phrase provides the reason for the “keep and bear Arms” clause.⁴⁰ Part one of the Amendment, “A well regulated Militia, being necessary to the security of a free State,” is a Latinate construction, an English version of what in Latin is called an “ablative absolute.” If you studied Latin, you will recall that this construction in the ablative case does not agree grammatically with any noun in the main part of the sentence but rather modifies it all, representing a condition of cause, or manner, or temporal context. We do not on the whole use absolute constructions today, except in stock phrases such as “that being the case,” “all things being equal,” and “weather permitting” – they smack too much of the dangling modifier. We would today find such a construction grammatically faulty, but it was utterly commonplace in eighteenth-century English, where most literate people were trained in Latin translation and composition, and indeed derived their stylistic models from Latin. Reading and writing, for those who were in a position to postulate the “original understanding” of the Constitution, was essentially a matter of mastering Latin grammar and rhetoric. The professors cite a number of ablative absolutes from James Madison’s pen, for instance, including his first draft of the Second Amendment, which inserts the absolute phrase on the militia in the middle of the sentence.⁴¹

A standard textbook, *Essentials of Latin for Beginners*, tells us: “In translating an ablative absolute, one must use judgment in selecting a translation that is consistent with the meaning of the main verb.”⁴² The Amendment should be construed to mean: “*Because* a well-regulated militia is necessary to the security of a free state” If that is the case, the right to bear arms is clearly tied to service in a militia, it is its logical entailment – as Justice Stevens argues in his dissent (though he does not take what is in my view the logical next step, which is to decide that with the demise of state and local militias, the Second Amendment simply has no application today). Justice Scalia does not dispute the “Because” translation – but he then does not truly seek consistency between the “prefatory clause” and the rest of the sentence. (If he recognized it as a phrase rather than a clause, he might be obligated to see a tighter fit between them.) Instead, he drives a deeper wedge between the two principal parts of the sentence, then patches them together with connectives of his own making. He derives from the Amendment a “right of the people” to self-defense that denies any force to the militias clause.⁴³ While dismissing Justice Stevens’ interpretations as “grotesque” and “worthy of the

⁴⁰ *Id.* at 2-3.

⁴¹ *Id.* at 12-13 & n.9.

⁴² HENRY CARR PEARSON, *ESSENTIALS OF LATIN FOR BEGINNERS* 152 (1912).

⁴³ *Heller*, 554 U.S. at 579-81.

mad hatter,” he arrives, after a number of twists and spins, at this rhetorical dodge: “The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting.”⁴⁴ Watch out for “undoubtedly’s” – along with the reiteration of “unambiguously refer” and the like, which return insistently in the opinion.⁴⁵ Justice Scalia’s claim to originalism here parts company with the text itself.

Justice Scalia sweeps the argument of the amicus brief aside with the claim: “Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.”⁴⁶ It is hard to credit his good faith here. His declaration sounds democratic, even populist, but he must know that “ordinary citizens” in the founding generation who could read and write would not have found Latinate constructions “secret or technical,” but on the contrary the stuff of everyday public oratory and writing. Justice Scalia’s opinion in fact unfolds, as I suggested, in a series of interpretations that are more philological decrees than attempts at textual explanation, description, or explicitation. He pulls out of other constitutional clauses the inference that the right involved in the Second Amendment is “unambiguously” individual, not collective.⁴⁷ A few pages later, it becomes “the individual right to possess and carry weapons in case of confrontation.”⁴⁸ (Wherever did the notion of “confrontation” come from? I fail to find any textual basis for it.) Then a few pages after that, “individual self-defense” has become, in italics, “the *central component* of the right itself.”⁴⁹ This is really a personal obsession posing as a textual reading; I see no justification for it in the text or context of the Amendment. At the last, to Justice Scalia the right guaranteed by the Second Amendment comes to be about “the inherent right to self-defense.”⁵⁰ This is beginning to sound more like some Hobbesian version of natural law rather than textual interpretation. Finally, in Justice Scalia’s interpretation the Second Amendment is to be read as a constitutional bar to the prohibition of “handguns held and used for self-defense in the home.”⁵¹ It appears that the interpretation of constitutional language has been effaced, usurped by some appeal to natural law or perhaps sociobiology. Wimsatt would no doubt have given a poor grade to an interpretation that sites itself so little in the text itself.

I do not claim to be the first to criticize Justice Scalia’s interpretive reasoning in *Heller*. In particular, former allies in the conservative camp have

⁴⁴ *Id.* at 587, 589, 599.

⁴⁵ *See, e.g., id.* at 579-80, 584, 599, 617.

⁴⁶ *Id.* at 576-77.

⁴⁷ *Id.* at 579-80.

⁴⁸ *Id.* at 592.

⁴⁹ *Id.* at 599.

⁵⁰ *Id.* at 628.

⁵¹ *Id.* at 636.

been harsh. J. Harvie Wilkinson asserts that the Constitution says no more about rules for handgun ownership than it does about trimesters of pregnancy – conflating *Heller* with *Roe*, in the ultimate conservative gesture of rejection.⁵² Richard Posner refers to Justice Scalia’s opinion as “faux originalism.”⁵³ A year following *Heller*, Judge Frank Easterbrook, in turning back the NRA’s challenge to Chicago gun control laws, asserted: “The way to evaluate the relation between guns and crime is in scholarly journals and the political process, rather than invocation of ambiguous texts that long precede the contemporary debate.”⁵⁴ That is, I think, a good sentence to set against Justice Scalia’s “We turn first to the meaning of the Second Amendment.”⁵⁵ And it suggests that textual originalism has inherent limits.

The point I wish to stress is this: if you are going to base a major decision (overturning the act of a legislature, for example) on acts of linguistic interpretation, you need to know what you are doing. You live and die by your interpretive mastery. You need more than declarations of what “original meaning” consists of; you also need principles and methods of interpretation, and when you are dealing with texts from over two centuries ago, you need to have philological understanding as well. The professors of linguistics at least have principles for their interpretation, and at least they understand that they are engaged in an act of interpretation, of construal: that the meaning of the sentence needs to be constructed, not simply read off. Justice Scalia’s act of reading finally appears to be not so much authoritative as authoritarian – like Humpty Dumpty’s claim to Alice, in *Through the Looking Glass*, that words mean what he commands them to mean:

“There’s glory for you!”

“I don’t know what you mean by ‘glory,’” Alice said.

Humpty Dumpty smiled contemptuously. “Of course you don’t – till I tell you. I meant ‘there’s a nice knock-down argument for you!’”

“But ‘glory’ doesn’t mean a ‘nice knock-down argument,’” Alice objected.

“When *I* use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean – neither more nor less.”

“The question is,” said Alice, “whether you *can* make words mean so many different things.”

⁵² J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 273 (2009).

⁵³ Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, August 27, 2008, at 32, 33.

⁵⁴ Nat’l Rifle Ass’n v. City of Chicago, 567 F.3d. 856, 860 (7th Cir. 2009).

⁵⁵ *Heller*, 554 U.S. at 576.

“The question is,” said Humpty Dumpty, “which is to be master – that’s all.”⁵⁶

When legal interpretation comes out on the mere assertion of mastery, perhaps it is time to bring in the professors of literature. They at least understand that the act of interpretation is an act of translation, of mediation. The act of historical interpretation always has an archaeological dimension: the reconstruction of context from remains that may be fragmentary. And reconstruction always involves the hypothetical construction of the missing portion. History itself never simply gives us the answer: it must itself be used, in an interpretive act – as *Heller* surely demonstrates.

As the dialogue of Alice and Humpty Dumpty suggests, the unethical reading lies in the failure to read – to read in the sense of a fine, deliberative attention to words and their interanimation. I think Justice Scalia in *Heller* offers a simulacrum of reading, one in which meaning is predetermined by what one sets out to find. You see a stark and bitter example of such a simulacrum of reading in the “torture memos,” largely attributed to John Yoo, that were prepared in the Office of Legal Counsel of the Department of Justice to justify so-called “enhanced interrogation” methods on suspected terrorists – memos that so clearly distort and twist the work of reading that even the Bush Administration eventually repudiated them.⁵⁷ I do not want to enter into detailed discussion of the torture memos here (I have done so elsewhere),⁵⁸ but they show how an intelligent and ingenious interpreter can use the canons of statutory interpretation, cross-references in the U.S. Code, and dictionaries (several of them) to produce interpretations that lose touch with any ethical grounding. Disciplined reading, reading that tests itself against text and relevant context, is itself at heart an ethical enterprise. If you stick to it – rather than letting ideology or political favors take its place – you are unlikely to produce interpretations that are absurd or immoral. I would contend that the ethics of reading depends mainly on not letting anything else get in the way of reading – not sacrificing your undivided attention to the text to some other belief system that wants your reading to have certain prescribed results – wants, we might say with Blake, to have meanings “chartered.”

To read is inevitably to interpret. Messages have senders and receivers, codes and contexts, and channels of communication, the ensemble rarely activated in wholly unproblematic ways. An interpreter is etymologically – and still today – a go-between, an ambassador of meanings, someone who carries understandings from one camp to the other, and who stands between a text and

⁵⁶ LEWIS CARROLL, *THROUGH THE LOOKING GLASS AND WHAT ALICE FOUND THERE* 123-24 (Macmillan Co. 1938) (1898).

⁵⁷ See generally Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641 (2005).

⁵⁸ Peter Brooks, *The Plain Meaning of Torture?*, SLATE (Feb. 9, 2005, 5:07 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2005/02/the_plain_meaning_of_torture.html.

its meaning. That there is a need to interpret – that meanings do not simply announce themselves – implies that there is a certain opacity in the communicative situation. Therein lies the need for interpretive integrity: the go-between has to be trustworthy, we have to be able to rely on his or her version of what texts mean when subject to new demands on them.

I am not urging – no literary scholar possibly could – that attentive and ethical reading need lead to a single, unambiguous meaning. In fact, I find Justice Scalia’s strategy of stating “[w]e turn first to the meaning of the Second Amendment”⁵⁹ in and of itself dishonest. There can be honest and probative disagreement about what should result from equally careful readings of the same text. Take *Eldred v. Ashcroft*, which I mentioned earlier, the case in which the Supreme Court had to determine whether or not the Copyright Term Extension Act of 1998 (CTEA) (sometimes called the Mickey Mouse Protection Act) passed constitutional scrutiny.⁶⁰ The main argument is enacted between two Justices who are more often on the same side, Justice Ginsburg for the majority and Justice Breyer for the dissent. The essential text is from Article I, Section 8 of the Constitution, which grants Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁶¹ Justice Ginsburg says in essence that since the Constitution grants Congress the right to set the time period of copyrights – and Congress indeed defined and redefined the time periods in 1790, 1831, 1909, and 1976⁶² – there is nothing in the CTEA that can be called unconstitutional. Writes Justice Ginsburg:

As we read the Framers’ instruction, the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the Clause. Beneath the facade of their inventive constitutional interpretation, petitioners forcefully urge that Congress pursued very bad policy in prescribing the CTEA’s long terms. The wisdom of Congress’ action, however, is not within our province to second guess. Satisfied that the legislation before us remains inside the domain the Constitution assigns to the First Branch, we affirm the judgment of the Court of Appeals.⁶³

In Justice Breyer’s version, however, that “inventive constitutional interpretation”⁶⁴ reposes on an equally sober attempt to read the Copyright Clause in the context of the Constitution, and particularly in relation to the First Amendment’s command that “Congress shall make no law” abridging

⁵⁹ *Heller*, 554 U.S. at 576.

⁶⁰ *Eldred v. Ashcroft*, 537 U.S. 186, 193 (2003).

⁶¹ U.S. CONST. art. I, § 8, cl. 8.

⁶² See *Eldred*, 537 U.S. at 194.

⁶³ *Id.* at 222 (citation omitted).

⁶⁴ *Id.*

freedom of speech.⁶⁵ To Justice Breyer, the “limited times” for which copyrights are to be granted states a substantive limitation on what James Madison called “monopolies.”⁶⁶ The value of copyrights is to be set in the context of the promotion of the progress of science (read: all human knowledge) and the useful arts, and hence “limited” is to be read, not as a relative and elastic term that can be stretched from fourteen years (the original grant of copyright) to ninety-five (as in CTEA), but as a definitional term. Justice Breyer here cites Samuel Johnson’s *Dictionary of the English Language* in its 1773 edition, on “limited” as meaning “restrain[ed],” “circumscribe[d],” and “not [left] at large.”⁶⁷ His telling analogical example is: “a limited monarch.”⁶⁸ To say, as the majority does, that any limit set by Congress is a “limit” – no matter the number of years, no matter how long the author or inventor may be dead – is surely true in some sense: like fourteen years, twenty-eight years, fifty-six years, death-plus-fifty years, death-plus-seventy years (these examples derived from various moments of copyright legislation) are all limits.⁶⁹ Yet I find Justice Breyer’s argument the more persuasive because it goes beyond the commonsense understanding of limit to urge an interpretation that is indeed “inventive,” to use Justice Ginsburg’s chiding term, but in a way that seems consonant with what I take to be the Constitution’s overall emphasis on the maximal avoidance of hindrances to useful speech. This is distinctly not Humpty Dumpty at work, but rather an interpreter who shares Wimsatt’s concern with the interanimation of words.

It is true that “new originalism,” or “new textualism,” might offer a more richly nuanced and less constricted reading of constitutional language, one more compatible with progressive political theory. Yet I am not sure that these revisions of conservative originalism – revisions associated, for instance, with the work of Jack Balkin and Akhil Amar⁷⁰ – really solve the problem of trying to wring meaning from what Judge Easterbrook called “ambiguous texts that long precede the contemporary debate.”⁷¹ James Ryan, in a useful and approving recent article on “new textualism,” criticizes David Strauss and Cass Sunstein for rejecting the originalist argument, claiming that “they are inevitably buttressing the conservative claim that the text of the Constitution, if embraced faithfully, is more in line with conservative rather than progressive values.”⁷² I find that “embraced faithfully” raises more problems than it solves,

⁶⁵ *Id.* at 264 (Breyer, J., dissenting); *see also* U.S. CONST. amend. I.

⁶⁶ *Eldred*, 537 U.S. at 256, 260 (Breyer, J., dissenting).

⁶⁷ *Id.* at 248 (alterations in original) (quoting 2 S. JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 151 (4th rev. ed. 1773)).

⁶⁸ *Id.* (emphasis omitted).

⁶⁹ *See id.* at 194-96 (majority opinion).

⁷⁰ *See* AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION (2012); JACK M. BALKIN, LIVING ORIGINALISM (2011).

⁷¹ *Nat’l Rifle Ass’n v. Chicago*, 567 F.3d 856, 860 (7th Cir. 2009).

⁷² James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97

especially in the context of Ryan's repeated references to "what the Constitution actually means."⁷³ What Ryan elsewhere appears to be saying is that progressives as well as conservatives need to argue from constitutional text – which is a far lesser and more acceptable claim.⁷⁴ The parsing of constitutional text may be necessary but cannot be sufficient to understanding what constitutional principles "mean." They are the starting point of any interpretive gesture, but not where such a gesture ends up.

What I miss even in newer and more progressive versions of originalism is an acknowledgement that texts do not and indeed *cannot* mean the same thing over time. We can hypothetically reconstruct the "meaning" of Flaubert's *Madame Bovary*⁷⁵ to readers when it was published in 1857: we have contemporaneous book reviews, comments in letters and journals, and even, in that case, a public trial for the novel's alleged "outrage . . . to morality"⁷⁶ that give us a fair sense of the range of readerly reactions it elicited. But to reconstruct those 1857 readings is not to say what it means to readers in 2012. For one thing, we have had a century and a half of the legal and social emancipation of women since then – and yet perhaps also reinforcement of many of the stereotypes that hem in Emma Bovary. I can attest from often teaching the novel that it remains astonishingly fresh, even radical, to readers today, precisely because they read it through the lens of everything that has happened – and failed to happen – since 1857. We can lead those students to consider more closely what the novel may have meant in 1857, and if we want them to be scholars of French literature we should. But that by no means tells us what the novel means now – it cannot, it should not, and in any event it is a retrospective historical reconstruction that is subject to various uncertainties of its own. To paraphrase T.S. Eliot, we know more than the great poets of the past – because we know them.⁷⁷ To discard our acquired contemporary knowledge in favor of some putative return to past understandings has all the authenticity of a Club Med reconstruction of prelapsarian paradise.

Recall the argument advanced by Paul de Man, that literature needs to be taught as a poetics and a rhetoric prior to being taught as a hermeneutics and a history.⁷⁸ I take that, no doubt in a simplification that de Man would not have approved, as an admonition that prior to the interpretive act we need to think through the grounds on which it takes place. Too often, I sense in legal

V.A. L. REV. 1523, 1559 (2011).

⁷³ See, e.g., *id.* at 1524, 1526, 1561. But I think Ryan's "what the Constitution actually means" does not do justice to Jack Balkin's more subtle argument about "framework originalism." See BALKIN, *supra* note 70, *passim*.

⁷⁴ See Ryan, *supra* note 72, at 1525.

⁷⁵ GUSTAVE FLAUBERT, *MADAME BOVARY* (Paris, Michel Lévy Frères 1857).

⁷⁶ See DOMINICK LACAPRA, *MADAME BOVARY ON TRIAL* 7 (1982).

⁷⁷ T.S. ELIOT, *Tradition and the Individual Talent*, in *THE SACRED WOOD: ESSAYS ON POETRY AND CRITICISM* 42 (1921).

⁷⁸ See *supra* note 6 and accompanying text.

interpretation, even at the highest appellate levels, that the grounds go relatively unexamined. When we do encounter a claim to a coherent theory of interpretation, as in Justice Scalia's *A Matter of Interpretation and Reading Law*, it seems disappointingly to beg the questions we most want to ask. And when we encounter the most extensive attempt so far to consider legal interpretation in relation to practices of literary interpretation, Richard Posner's *Law and Literature: A Misunderstood Relation*,⁷⁹ we find mainly an effort to cordon off legal hermeneutics as a field that has its own rules. You can be a "new critic" in reading literature, says Posner, but you need to be an "intentionalist" in reading the law.⁸⁰ This is Humpty Dumptyism again: decreeing that law shall not be contaminated by literary reading assumes that legal language can and will maintain a stability that other language lacks. If that stability is a matter of decree, it cannot hold: the language of everyday life as lived today will inevitably creep into legal discussion, and it should. Law has its terms of art, of course, but it is not an enterprise hermetically sealed from ordinary usage and its evolution.

Before closing, I want to put before you one further example, which will lead into my next talk. There is a case from 1997, *Old Chief v. United States*, which is striking to a literary scholar who has often been concerned with narrative because it contains a reflection by Justice Souter on what he calls "narrative integrity."⁸¹ In *Old Chief*, the question at issue is whether a defendant with a prior conviction on his record should be allowed to "stipulate" to the prior conviction, thus disallowing the prosecution from presenting the facts of the earlier felony in making the case against him for his new alleged crime.⁸² Defendant Johnny Lynn Old Chief knew he had to admit to a prior crime and conviction – on an assault charge – but did not want the prosecutor to be able to detail the prior crime, for fear that it would aggravate his sentence on the new crime (which in fact was quite similar to the prior one).⁸³ The prosecutor refused to accept the stipulation, and the district court judge ruled in his favor: the full story of the prior crime and conviction was offered as evidence.⁸⁴ Old Chief was found guilty on all counts of the new charges of assault, possession, and violence with a firearm.⁸⁵ He appealed. His conviction was upheld by the Ninth Circuit, which essentially restated the traditional position that the prosecution is free to make its case as it sees fit.⁸⁶

⁷⁹ POSNER, *supra* note 17.

⁸⁰ *Id.* at 220-46.

⁸¹ *Old Chief v. United States*, 519 U.S. 172, 183 (1997).

⁸² *Id.* at 175.

⁸³ *Id.*

⁸⁴ *Id.* at 177.

⁸⁵ *Id.* at 174, 177.

⁸⁶ *Id.* at 177 (citing *United States v. Old Chief*, No. 94-30277, 1995 WL 325745, at *1 (9th Cir. 1995)).

When the case reached the Supreme Court, Justice O'Connor in a dissenting opinion endorsed the traditional position.⁸⁷

That position was rejected by the majority in an opinion in which Justice Souter argues that introduction of the full story of the past crime could be unfairly prejudicial; it could lead the jury to convict on grounds of the defendant's "bad character," rather than on the specific facts of the new crime.⁸⁸ The story of the past crime might "lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."⁸⁹ The story of the past crime must be excluded, not because it is irrelevant, but because it may appear over-relevant: "it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."⁹⁰ The story of Old Chief's past crime must be excluded because it risks creating too many narrative connections between past and present. It risks establishing a powerful perspective that ends up creating that inference – one we regularly derive from narratives – that goes under the name "character," hence authorizing the jury to convict on the basis of identifying Old Chief as a "bad character" rather than the specifics of the present story.

Justice Souter in this manner orders the exclusion of the past story, reverses Old Chief's conviction, and remands the case for further proceedings.⁹¹ But the most interesting moment of his opinion comes in his discussion of the dissenters' point of view, their argument that the prosecution needs to be able to present all the evidence, including the story of past crime and conviction, in its specificity. He concedes the need for "evidentiary richness and narrative integrity in presenting a case."⁹² He goes on to say that "making a case with testimony and tangible things . . . tells a colorful story with descriptive richness."⁹³ He adds: "A syllogism is not a story, and a naked proposition in a courtroom may be no match for the robust evidence that would be used to prove it."⁹⁴ Here, Justice Souter turns back to the case of Old Chief, to argue that the prosecution's claim of the need to tell the story of the earlier crime is unwarranted because it is *another* story; it is "entirely outside the natural sequence of what the defendant is charged with thinking and doing to commit the current offense."⁹⁵ Old Chief's stipulation does not result in a "gap" in the story; it does not displace "a chapter from a continuous sequence."⁹⁶ Justice

⁸⁷ *Id.* at 192-201 (O'Connor, J., dissenting).

⁸⁸ *Id.* at 185 (majority opinion).

⁸⁹ *Id.* at 180.

⁹⁰ *Id.* at 181 (quoting *Michelson v. United States*, 335 U.S. 469, 476 (1948)).

⁹¹ *Id.* at 192.

⁹² *Id.* at 183.

⁹³ *Id.* at 187.

⁹⁴ *Id.* at 189.

⁹⁵ *Id.* at 191.

⁹⁶ *Id.*

Souter hence rules out the prosecution's longer, fuller narrative as the wrong story, something that should not be part of the present narrative sequence.

"Narrative integrity" seems to me a very useful and powerful concept, though so far as I can tell it has not become a legal concept: you do not find Souter's riff on narrative cited in subsequent Supreme Court cases (although it has appeared in a number of court of appeals opinions).⁹⁷ But I want to take note of the fact that Justice Souter recognizes the idea that narratives need integrity, that gaps and rearrangements and temporal and causal disjunctions point to flaws that cause misinterpretation. If "a syllogism is not a story," both syllogisms and stories are rule bound, and we need to read in an attention to when the rules are being violated. Justice Souter's summons to think about "narrative integrity," for instance, could introduce a new conceptual apparatus into the law, one that derives explicitly from literary study's concern with rhetoric, with the organization and communicative effects of acts of speech. I want to pursue that issue next lecture, in talking about "Constitutional narratives."

II. CONSTITUTIONAL NARRATIVES

In my last lecture, I was trying to suggest some of the virtues of studying law in conjunction with the kind of interpretive close reading that characterizes the study of literature at its best. This is a reading, as I tried to show in my use

⁹⁷ Several dozen appellate court cases make use of Justice Souter's excursus on narrative to varying degrees of seriousness. One of the more important is *United States v. Crowder (Crowder II)*, 141 F.3d 1202 (D.C. Cir. 1998) (en banc). This was a case heard en banc by the D.C. Circuit, granted certiorari by the Supreme Court, and then vacated and remanded in light of *Old Chief*. See *United States v. Crowder (Crowder I)*, 87 F.3d 1405 (D.C. Cir. 1996), vacated 519 U.S. 1087 (1997), *aff'd Crowder II*, 141 F.3d 1202. It concerned the limits to a stipulation that would have excluded "propensity" evidence. See *Crowder II*, 141 U.S. at 1205. Upon rehearing, the court abandoned the argument of *Crowder I*, that "bad acts" evidence needed to be excluded as well because of the stipulation, reaching the conclusion that these previous "bad acts" did in fact fit logically into the Government's case. *Id.* at 1207. The force of Justice Souter's discussion of narrative is not very clear, either in the majority opinion or in the dissent by Judge Tatel. See David Robinson, Jr., *Old Chief, Crowder, and Trials by Stipulation*, 6 WM. & MARY BILL RTS. J. 311 (1998).

The appellate courts have often ruled in favor of allowing a prosecutor latitude for the sake of "narrative integrity" in cases involving child pornography. The courts have ruled on several occasions that pornographic images can be displayed in court as evidence (even if a defendant has already offered to stipulate to having had those images in his possession) as the images serve a purpose in the narrative the prosecution is attempting to create. See, e.g., *United States v. Caldwell*, 586 F.3d 338, 342-43 (5th Cir. 2009); *United States v. Becht*, 267 F.3d 767, 771-72 (8th Cir. 2001); *United States v. Campos*, 221 F.3d 1143, 1148-49 (9th Cir. 2000). For cases in which the courts have ruled that the government has failed to demonstrate the narrative value of evidence, see, for example, *United States v. Ferguson*, 676 F.3d 260, 274-75 (2d Cir. 2011), and *United States vs. Al-Moayad*, 545 F.3d 139, 160-61 (2d Cir. 2008).

of William Wimsatt's essay, *What to Say About a Poem*,⁹⁸ in slow motion, attentive not only to what is overtly stated in a text but also to how it is stated, to the interanimation of words in the context of their use, the nuances, modifications, complications, even contradictions brought by the way language is deployed. I was making a claim for the importance of that knowledge that stands under the ancient rubric of *rhetoric*: the art of persuasion and, beyond that, the whole communicative medium set up between speaker and listener, writer and reader.⁹⁹ We know that language is not a transparent and unproblematic naming of the world, but a system that pre-exists the individual speaker, in which the speaker's very intentions are shaped by what the language permits and enables, and by all the uses of language that have come before this new speech act.

I mentioned also that important branch of rhetoric – one so important we now tend to consider it on its own – we call narrative.¹⁰⁰ Justice Souter in *Old Chief v. United States* argues the importance of what he calls “narrative integrity” in the presentation of a case at trial – the importance of a jury's hearing a narrative that is entire, without gaps and elided chapters.¹⁰¹ “A syllogism is not a story,” writes Justice Souter, suggesting his awareness that narrative is a different mode of organization of reality from the syllogism, or other forms of logical argument.¹⁰² Justice Souter's discussion of “narrative integrity” in *Old Chief* seems to me so interesting and important in part because it is a subject largely silenced in legal opinions. I do not mean to say that the law is unaware that stories play a large role in its life, from those presented by opposing advocates in the courtroom to those retold in cert petitions and appellate briefs, on up to the sweeping constitutional narratives spun by the Supreme Court. But story is not generally a category that the law wishes to recognize; in fact, when the law does acknowledge story, it is most often to treat it with suspicion, as an emotional presentation of reality that is to be kept in its place in the courtroom – a view echoed by such legal theorists as Richard Posner.¹⁰³ Courtroom procedures are in fact designed in part to break the back of storytelling: to control it through direct examination, to fragment it through cross-examination. Appellate courts then very often have to consider whether the rules of storytelling were properly followed at trial. For instance, in a famous rape case from Baltimore that I have worked on with my students, *Rusk v. State*, we have (since it was reviewed by two appellate courts, with majority and dissenting opinions in each) four retellings of the same incident –

⁹⁸ WIMSATT, *supra* note 1.

⁹⁹ See *supra* Part I.

¹⁰⁰ See *supra* notes 81-97 and accompanying text.

¹⁰¹ *Old Chief*, 519 U.S. at 189.

¹⁰² *Id.*

¹⁰³ See Richard Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737, 738 (1997) (reviewing LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW (Peter Brooks & Paul Gewirtz eds., 1996)).

of what happened between a man and a woman one night – that are recognizably the same yet different in crucial details.¹⁰⁴ It takes an analysis of narrative form, of the choice of incidents and the sequence and emphasis in which they are recounted, the narrative “glue” holding incidents together, to see where the differences lie, and indeed to see one version of the story as more persuasive than the others. The case seems to cry out for a recognition that what is at stake in the way it will be decided is how “the facts” – and none of them is in dispute – are made into story. Or rather, since our thought processes rarely work that way, what narratives are called upon by the various judges to make the facts align to a certain outcome, called “consensual sex” on the one hand or “rape” on the other. As psychologist Jerome Bruner has persuasively argued, in an essay entitled *The Narrative Construction of Reality*, the emphasis of cognitive psychology for too long fell on the child as “little scientist,” constructing the world through deduction and induction, whereas it is more commonly and basically through narrative, putting stories together, with beginnings, middles, and ends, that children begin to make sense of the world.¹⁰⁵ And this continues to be true throughout life. So far as the law is concerned, Bruner urges in *Minding the Law*, co-authored with Anthony Amsterdam, that the traditional notion that adjudication proceeds by “examining free-standing factual data selected on grounds of their logical pertinency,” must give way to the realization “that both the questions and the answers in such matters of ‘fact’ depend largely upon one’s choice (considered or unconsidered) of some overall narrative as best describing *what happened* or *how the world works*.”¹⁰⁶ Certainly jury consultants understand that jurors reach decisions largely on the basis of narrative plausibilities: conviction results from the convincing story.¹⁰⁷

It is strange to me, then, that appellate opinions never seem to make conscious and explicit reference to the art of storytelling, or to the analysis of narrative, especially since this is a discipline, “narratology,” that has engaged the attention of scholars and critics outside the law since the 1960s. Justice Souter’s opinion in *Old Chief* is the only instance I am aware of that recognizes narrative as a category of which the law needs to be cognizant, and which deserves its analytic attention. And as I mentioned, that aspect of Justice Souter’s opinion has not been cited subsequently, and has not sparked a legal “narratology.”¹⁰⁸ You instead have Posner arguing that law has nothing to learn from “narratology.” The view urged by Amsterdam and Bruner, which

¹⁰⁴ See *Rusk v. State*, 406 A.2d 624 (Md. Ct. Spec. App. 1979) (overturning the Criminal Court of Baltimore’s conviction for rape), *rev’d* 424 A.2d 720 (Md. 1981).

¹⁰⁵ Jerome Bruner, *The Narrative Construction of Reality*, 18 *CRITICAL INQUIRY* 1, 4 (1991); see also ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000).

¹⁰⁶ AMSTERDAM & BRUNER, *supra* note 105, at 111.

¹⁰⁷ See, e.g., Phillip H. Miller, *Storytelling: A Technique for Juror Persuasion*, 26 *AM. J. TRIAL ADVOC.* 489, 489 (2003).

¹⁰⁸ See *supra* note 97 and accompanying text.

seems completely unexceptional to the literary commentator, and which certainly describes the differing opinions in *Rusk v. State*, remains heresy in the legal world.

So let me – after too long a warm-up – turn to an area in which narrative is both crucial to the law, yet rarely stated as such, and where I hope to show that making the narrative construction of reality perspicuous can be illuminating. What I have in mind are the narratives of the Constitution and its pertinence to the question at issue that is almost a part of many Supreme Court decisions.

The common law tradition that the United States shares with Britain derives current legal decisions from precedent, fitting the present case to analogous cases that have come before. In constitutional adjudication, the precedents derive from and lead back to the written document that is considered the supreme law of the land. That does not usually entail “originalist” readings of the type we saw in *Heller*¹⁰⁹: normally the chain of precedents deserves respect in itself, and ought not to be disregarded in a putative claim to original understandings. Even Justice Scalia reluctantly accepts precedent as a kind of necessary evil in the effort to reach “original meaning.”¹¹⁰ He ought, I think, to recognize that any originary and lawgiving text will, like the Bible, accumulate scolia over the years, marginal annotations that adhere to the text and cannot entirely be detached from our interpretive optics on the text. The respect for precedent is enshrined in the doctrine of *stare decisis*: the rule that one does not change the decisions made in the past, but builds upon them. One of the best expositions of what this means and how it works comes from Justices O’Connor, Souter, and Kennedy, authors of the “joint opinion” in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the 1992 case that reaffirmed (with some modifications) the right to abortion first secured in *Roe v. Wade* in 1973.¹¹¹ It is an effort to explain why it is that even if the Court would not rule as it did in *Roe* if the case were coming to it afresh, it is important to reaffirm its ruling close to a generation later. Beyond that, it is an effort to explain the source of the Court’s authority to write the constitutional narrative.

The very concept of the rule of law, write Justices O’Connor, Souter, and Kennedy, requires continuity over time, so that citizens may rely upon the law.¹¹² Thus, though one might rule differently were the issue at hand coming to adjudication for the first time, the fact it was once ruled upon in a certain way, and that people have come to rely on that ruling, alters the second adjudication, giving a heavy burden of proof to those who would reverse course. As the joint opinion puts it, to both those who approve, and those who disapprove but struggle to respect a constitutional ruling, “the Court implicitly

¹⁰⁹ See *supra* notes 19-59 and accompanying text.

¹¹⁰ Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861 (1989).

¹¹¹ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); see also *Roe v. Wade*, 410 U.S. 113 (1973).

¹¹² *Casey*, 505 U.S. at 854.

undertakes to remain steadfast.”¹¹³ Steadfastness is indeed not only pragmatic – assuring a uniform law that can be relied upon – but also moral: “Like the character of an individual, the legitimacy of the Court must be earned over time.”¹¹⁴ Note the “over time”: earned legitimacy depends on a history, a narrative of consistency, written by several hands but in the same spirit and purpose. The moral Court, like the moral individual, must be true to itself.

There are times when the Court can and must overrule itself. For example, the joint opinion points to the overturning of the laissez-faire economics of *Lochner v. New York* by *West Coast Hotel Co. v. Parrish*,¹¹⁵ and – the most famous reversal – the overruling of *Plessy v. Ferguson* by *Brown v. Board of Education*¹¹⁶: two striking rejections of stare decisis which the Court here describes as “applications of constitutional principle to facts as they had not been seen by the Court before.”¹¹⁷ Such reversals must be rare if the Court is to maintain its moral authority to speak in ways that will be accepted and complied with. As the joint opinion explains:

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.¹¹⁸

Sequence and consecution in the constitutional narrative must not be random; what is new must be logically entailed by precedent. The most apt words in the lines quoted may be “sufficiently plausible,” a phrase that alerts us to the *rhetoric* deployed by the Court. What is “sufficiently plausible” is that which persuades its readership, its audiences, which assures narrative conviction in its narratees. “Sufficiently plausible” is tautological – but in a way that any public argument must be: it judges the effectiveness of persuasion by its capacity to persuade in fact. The logic of the joint opinion is necessarily circular: it claims that rulings by the Court will be accepted if and when they appear to fit seamlessly with the master narrative, which in turn means that their acceptance creates the seamless narrative, the perception that the law is “steadfast.” What “suffices” for the “sufficiently plausible” is . . . what suffices.

¹¹³ *Id.* at 868.

¹¹⁴ *Id.*

¹¹⁵ *Lochner v. New York*, 198 U.S. 45 (1905), *overruled by West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

¹¹⁶ *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 48 (1954).

¹¹⁷ *Casey*, 505 U.S. at 864. I note that this analysis suggests the truth of Amsterdam and Bruner’s contention that facts become visible only through the narrative they are chosen to figure in.

¹¹⁸ *Id.* at 865-66.

Raising the moral stakes, in conclusion to its discussion of *stare decisis* the joint opinion states:

Our Constitution is a covenant running from the first generation of Americans to us, and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty.¹¹⁹

By casting the Constitution as a "covenant," and arguing that it offers a "coherent succession" from generation to generation, the Court images itself as the author of covenantal narratives, stories that claim the sacrality of generational solidarity, and of the present (and future) as realization of that which lay latent within the past. The "promise of liberty" will unfold as foretold by the covenant, as realization of a prophecy, as completion of that promise.

The Court's logic in defense of its covenantal narrative is to a large degree the logic of narrative itself. It offers an example of what the French narrative theorist Gérard Genette calls "the determination of means by ends . . . of *causes by effects*."¹²⁰ Genette writes:

It is this paradoxical logic of fiction which requires us to define every element, every unit of the narrative by its functional character, in other words among other things by its correlation with another unit, and to account for what comes first (in the order of narrative temporality) by means of what comes second, and so forth – hence it follows that what comes last is what controls all the others, and nothing controls it¹²¹

The way events are enchainé is determined by the reasoning of a discoverer standing at the *end* of the process, then laid out as a plot leading from beginning to discovery. Earlier events or actions make sense only as their meaning becomes clear through subsequent events, in what Genette calls a "paradoxical logic."¹²² Or, as Roland Barthes suggests, narrative is built on a generalization of the philosophical error of *post hoc, ergo propter hoc*: narrative plotting makes it seem that if *B* follows *A* it is because *B* is logically entailed by *A*, whereas in fact *A* becomes causal only in terms of *B*.¹²³ This

¹¹⁹ *Id.* at 901.

¹²⁰ GÉRARD GENETTE, *Vraisemblance et motivation* [*Likelihood and Motivation*], in FIGURES II, at 94 (1969), translated in Gérard Genette, *Vraisemblance and Motivation*, 9 NARRATIVE 239, 252 (David Gorman trans., 2001).

¹²¹ *Id.*

¹²² *Id.*

¹²³ Roland Barthes, *Introduction à l'analyse structurale des récits* [*Introduction to the Structural Analysis of Narratives*], 8 COMMUNICATIONS 1 (1966), translated in A BARTHES

narrative logic may to some degree cover over a tension between what is called for in order to create the seamless plot and the other paths – other claims to justice – that were not taken.

The eloquent defense of stare decisis in *Casey* suggests that the narrative of constitutional interpretation depends on the retrospective interpretation of the prior narrative in light of the new episode the Court is adding to it. This must be the case, since dissenters can and commonly do argue that the new decision precisely misinterprets prior history, which would be better served – given a more plausible plot line – by the opposite ruling. The form taken by all constitutional interpretation indeed follows this model: the proposed interpretation realizes the true meaning of the constitutional narrative better than the alternatives. It provides the better ending, defined in terms of the ending that makes better sense of the plot leading up to it. If the present is constrained by the past, as in Ronald Dworkin’s famous analogy of the “chain novel” with different authors furthering its plot, more strikingly the past is hostage to the present, which redefines its meaning.¹²⁴

It falls within this same logic that constitutional narratives often claim they are based on a return to the beginning – to the text and context of the Constitution itself – in order to track forward the development of text and idea. This is especially true when the Court is aware it is propounding what will appear to be a radically new interpretation, one that will not be accepted without resistance. Thus, for instance, in the landmark case *Miranda v. Arizona* – which extended the Fifth Amendment protection against self-incrimination to police interrogation of criminal suspects – Chief Justice Warren asserts: “The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence”¹²⁵ He says also: “We start here . . . with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized” and “an explication of basic rights that are enshrined in our Constitution These precious rights were fixed in our Constitution only after centuries of persecution and struggle.”¹²⁶ The ruling in *Miranda*, Chief Justice Warren claims, is simply the emergence into the light of day of what was all along entailed by the Fifth Amendment privilege against self-incrimination. *Miranda* makes good on a long history; it realizes that narrative’s latent meaning. It is as if constitutional law had always contained within itself the seed that now matures into *Miranda* doctrine.

Inevitably, the dissenters in *Miranda* claim that Chief Justice Warren has the story wrong. To Chief Justice Warren’s assertion that the majority’s ruling is “not an innovation,” Justice White ripostes that “the Court has not discovered

READER 251, 251-95 (Susan Sontag ed., Richard Howard trans., 1982).

¹²⁴ See the exposition of this model of interpretation in RONALD DWORKIN, *LAW’S EMPIRE* 228-38 (1986).

¹²⁵ *Miranda v. Arizona*, 384 U.S. 436, 439 (1966).

¹²⁶ *Id.* at 442.

or found the law . . . what it has done is to make new law.”¹²⁷ Another dissent by Justice Harlan refers to “the Court’s new constitutional code of rules for confessions.”¹²⁸ Justice Harlan sets out to mark the point at which the Court “jumped the rails”¹²⁹ – the point at which it deviated, with dire results, from the correct narrative line. He, too, reaches back to origins, to claim that the majority’s reliance on the Fifth Amendment is “a *trompe l’oeil*,”¹³⁰ a deceptive reality effect that it has taken for reality itself. Justice Harlan brands the majority’s ruling as a wholly implausible narrative: “One is entitled to feel astonished that the Constitution can be read to produce this result.”¹³¹ And in his peroration, Justice Harlan declares, citing the words of a bygone Justice, Robert Jackson: ““This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added.””¹³² There seems to be an interesting, if unintended, pun here, on stories as features of houses and stories as narrative. In both senses of the word “story” Justice Harlan implies that the new narrative episode written in *Miranda* brings the collapse of the whole narrative. It makes it the wrong story.

For all their discourse of origins, then, both majority and dissent in *Miranda* implicitly rely on the notion that the outcome of the story, the ending written (however provisionally) by the current ruling, determines the meaning of the story’s earlier episodes: the present rewrites the past.¹³³ They discover here – though without explicit awareness – the logic of narrative itself. As a number of commentators on narrative, myself included, have argued, narrative is retrospective.¹³⁴ It begins from the end, which confers meaning on beginning and middle, which indeed allows us to understand what can be identified as beginning and middle. When we read a narrative, we read toward the end, not in knowledge of what it will bring, but in anticipation that it will bring retrospective illumination to the plot leading to it. In one of the best expositions of this point, Sartre’s fictional spokesman Roquentin, in *La Nausée* (*Nausea*), argues that when you tell a story – as opposed to living it – you only appear to begin at the beginning, since in reality “the end is there, transforming

¹²⁷ *Id.* at 531 (White, J., dissenting).

¹²⁸ *Id.* at 504 (Harlan, J., dissenting).

¹²⁹ *Id.* at 508.

¹³⁰ *Id.* at 510.

¹³¹ *Id.* at 518.

¹³² *Id.* at 526 (quoting *Douglas v. City of Jeannette*, 319 U.S. 157, 181 (1943) (Jackson, J., concurring)).

¹³³ Stanley Fish makes a similar point in his critique of Ronald Dworkin. STANLEY FISH, *Working on the Chain Gang: Interpretation in Law and Literature*, in *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 87 (1989).

¹³⁴ See, e.g., Peter Brooks, “*Inevitable Discovery*” – *Law, Narrative, Retrospectivity*, 15 *YALE J.L. & HUMAN.* 71, 93 (2003); GENETTE, *supra* note 120, at 252.

everything.”¹³⁵ That is, the knowledge that an end lies ahead confers intention and meaning on the actions recounted. This is what he means by “adventure,” which in its Latin root, *ad-venire*, refers us to what is to come. Roquentin says further: “[W]e feel that the hero has lived all the details of this night as annunciations, as promises, or even that he lived only those that were promises, blind and deaf to all that did not herald adventure. We forget that the future wasn’t yet there”¹³⁶ It is in the peculiar nature of narrative as a sense-making system that clues are revealing, that prior events are prior, and causes are causal only retrospectively, in a reading back from the end.

Historian Carlo Ginzburg has speculated that narrative originated in a society of hunters, in the tracing of signs pointing to the passage of quarry.¹³⁷ Learning to put those clues together in a narrative chain that would lead to the quarry offers a form of reasoning that is not – properly speaking – either deductive or inductive, but precisely narrative: the creation of meaningful sequences. Ginzburg compares this “hunter’s paradigm” to ancient Mesopotamian law, which worked through discussions of concrete examples rather than the collection of statutes – similar in this respect to Anglo-American “caselaw” – and to Mesopotamian divination, based on the minute investigation of seemingly trivial details: “animals’ innards, drops of oil on the water, stars, involuntary movements of the body.”¹³⁸ The same paradigm is found in the divinatory and jurisprudential texts, with this difference: the former are directed to the future, the latter to the past. Generalizing further, Ginzburg suggests that all narrative modes of knowing (such as archaeology, paleontology, geology) make what he calls “retrospective prophecies”¹³⁹: prophecies that work backward from outcome to that which announces and calls for the outcome.

The notion of “retrospective prophecy” perfectly characterizes the constitutional narratives written by the Supreme Court, and perhaps indeed most legal narrative. It is a prophetic narrative cast in the backward mode,

¹³⁵ JEAN-PAUL SARTRE, *LA NAUSÉE* [NAUSEA] 59-60 (1947) (author’s own translation). For an analogous argument about how legal precedent is important in terms of its future viability, see Jan G. Deutsch, *Procedure and Adjudication*, 83 *YALE L.J.* 1553, 1584 (1974), who argues, for instance: “[A]s we *create* precedent, by the choice among theoretically possible grounds of decision, we must attempt to anticipate future relevance.” I am grateful to my friend Michael Seidman, Professor at Georgetown Law Center, for bringing Deutsch’s essay to my attention.

¹³⁶ SARTRE, *supra* note 135, at 60 (author’s own translation).

¹³⁷ CARLO GINZBURG, *Spie. Radici di un paradigma indizario*, in *MITI EMBLEMI SPIE* 158 (1986), translated in CARLO GINZBURG, *Clues: Roots of an Evidential Paradigm*, in *MYTHS, EMBLEMS, CLUES* 96 (John Tedeschi & Anne C. Tedeschi trans., 1990). In the text I have modified the Tedeschi translation in places in order to give a more literal rendition, and in subsequent footnotes I have noted page references to both the Italian original and the translation.

¹³⁸ *Id.* at 158-59 (Tedeschi translation at 103).

¹³⁹ *Id.* at 183 (Tedeschi translation at 117).

implicitly arguing that the ruling in the case at hand is the fulfillment of what was called for at the beginning – somewhat in the manner that medieval Christian theologians argued that the Gospels offered a fulfillment of the prophetic narratives of the Hebrew Bible, as figure and fulfillment. For Augustine, for instance, Moses is a *figura Christi*, a figure of Christ, Noah's Ark a *praefiguratio ecclesiae*, a prefiguration of the Church.¹⁴⁰ Past history is seen as realized, as fulfilled, in the present. It is as if the past were pregnant with the present, waiting to be delivered of the wisdom which the Court reveals in its ruling. Recall *Casey*'s use of the word "covenant" to describe the Constitution, precisely in its historical relation to the citizenry. Each new ruling by the Supreme Court is an episode in the unfolding narrative of that covenant.

The argument from origins that you get in a case such as *Miranda* is doubtless sincere, and necessary, in its desire to make origins entail a certain outcome, to argue: this is not an innovation in our jurisprudence, but the present application of longstanding principle and precedent, part of that "coherent succession."¹⁴¹ Nonetheless, we can recognize in it the structure of the retrospective prophecy, in its arguing that the stipulated outcome is the only way to realize the history of constitutional interpretation, to deliver on its immanent meaning. Narrative always has Genette's "paradoxical logic," telling its story from the beginning but structuring it in terms of the end that makes sense of that beginning. It is like the structure of trauma in many of Freud's case histories, where a later event will retrospectively sexualize and thus confer traumatic force on an earlier event.¹⁴²

Judicial opinions are full of a rhetoric of constraint: the judge cannot rule otherwise than he is doing because he is constrained by precedent. Whatever his personal preferences in the case, the outcome is imposed upon him by the history leading up to it. Furthermore, it often seems that the more the Court's ruling might be interpreted as an innovation – a break with the past – the more the rhetoric of the opinion asserts the seamless continuity of its ruling with the past, its simple and necessary entailment.¹⁴³ The rhetoric of *stare decisis* may in this manner be something of a "cover-up," a claim that the weight of the past narrative dictates this outcome – whereas the dissent, as in *Miranda*, will claim that the Court has "jumped the rails," lost the proper design and intention

¹⁴⁰ See ERICH AUERBACH, "Figura," in SCENES FROM THE DRAMA OF EUROPEAN LITERATURE 38 (1959).

¹⁴¹ See *supra* notes 119, 125-26 and accompanying text.

¹⁴² See PETER BROOKS, *Fictions of the Wolf Man: Freud and Narrative Understanding*, in READING FOR THE PLOT: DESIGN AND INTENTION IN NARRATIVE (1984).

¹⁴³ See the similar view argued by Joseph Halpern in regard to *Miranda*: "In contrast to the dissents, the majority opinion employs a comfortable rhetoric that denies and masks change." Joseph Halpern, *Judicious Discretion: Miranda and Legal Change*, 2 YALE J. CRITICISM 1, 53 (1987). Halpern's perceptive essay as a whole confirms my views of the rhetoric of *Miranda*.

of the narrative, given the wrong plot, betrayed the “covenant.” To say this is not to argue that the narrative traced from origin to endpoint is useless or false. The conclusion to the narrative will be acceptable to its audiences only if the construction of the narrative has been “sufficiently plausible,” to use *Casey*’s words again. As Dr. Watson says to Sherlock Holmes at the end of one of their cases, “‘You reasoned it out beautifully,’ I exclaimed in unfeigned admiration. ‘It is so long a chain, and yet every link rings true.’”¹⁴⁴ The chain composed of true links is perspicuous as a chain only at the end. The detective story is in this an exemplary form of narrative because it shows so well how this chain is constructed.

“*It is so ordered,*” the Supreme Court opinion typically ends. The Court has managed to make its orders, its outcomes, stick with remarkable consistency. Presidents, legislators, police, citizens accept the order however much they may disagree with it, however fervent their protests may be. Even such a paltry and embarrassing decision as *Bush v. Gore*¹⁴⁵ in 2000 – devoid of legal reasoning, patently jury-rigged for the occasion – managed to make itself obeyed. There are very few moments in American history when the Court’s narrative has seemed so implausible and so unacceptable to parts of the country that the issue has created civil unrest. The most notable was probably *Dred Scott v. Sanford*,¹⁴⁶ which provided a decision so contentious and unsatisfactory – and a narrative of American citizenship so starkly exclusionary – that its issues could only be decided by the Civil War. Closer to our own time, the Court’s decisions in *Brown v. Board of Education*¹⁴⁷ provoked various degrees of resistance, most notably and violently the refusal of the executive branch of the State of Arkansas, in the person of Governor Orval Faubus, to execute the Court’s orders. In fact, Faubus used the power that ought to have been brought to the execution of the law to its infraction, refusing entry by African American students to Little Rock Central High School, and mobilizing the Arkansas National Guard to bar the doors.¹⁴⁸ This was followed by President Eisenhower’s sending units of the 101st Airborne Division to Little Rock to force the students’ entry.¹⁴⁹

This crisis in resistance to the Court’s order – unprecedented in U.S. history, before or since – spurred the Court to assemble in special session, in September 1958, and to issue its ruling in *Cooper v. Aaron*, affirming the Eighth Circuit Court of Appeals’ reversal of the Arkansas District Court’s

¹⁴⁴ ARTHUR CONAN DOYLE, *The Red-Headed League*, in *THE ADVENTURE OF THE SPECKLED BAND AND OTHER STORIES OF SHERLOCK HOLMES* 83 (Signet 1965) (1892).

¹⁴⁵ 531 U.S. 98 (2000).

¹⁴⁶ 60 U.S. 393 (1856).

¹⁴⁷ (*Brown I*) 347 U.S. 483 (1954); (*Brown II*) 349 U.S. 294 (1955).

¹⁴⁸ See Tony A. Freyer, *Enforcing Brown in the Little Rock Crisis*, 6 J. APP. PRAC. & PROCESS 67, 68 (2004).

¹⁴⁹ See *id.*

grant of a stay of integration in Little Rock.¹⁵⁰ *Cooper* has the distinction of offering not simply the unanimous opinion of the Court, but as well the names of all nine justices spelled out at the outset of the opinion.¹⁵¹ Here, the Court reaches back to the very genesis of its power of judicial review in *Marbury v. Madison*:

In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as “the fundamental and paramount law of the nation,” declared in the notable case of *Marbury v. Madison* that “It is emphatically the province and duty of the judicial department to say what the law is.” This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land¹⁵²

Like Antaeus touching ground to regain strength,¹⁵³ the Court here touches its very beginnings as a branch of American governmental power. Note the Court’s use of “it follows that”: not only the Constitution, but the interpretive narratives spun from it are the supreme law.

Appended to the unanimous opinion in *Cooper* is a concurring opinion by Justice Frankfurter – a narcissistic move on his part that somewhat disfigures the impressive unity of the Court’s self-presentation in the case, but a document that takes us to the heart of the matter. It is a tense, eloquent, strained piece of judicial rhetoric in reaction to the “profoundly subversive” use of state executive power to thwart rather than carry out the law, and a reaffirmation of “this Court’s adamant decisions in the *Brown* case”¹⁵⁴ – decisions, the adjective implies, set in stone. Justice Frankfurter reaches back even further than *Marbury*, to quote John Adams on the need for “a government of laws and not of men.”¹⁵⁵ Justice Frankfurter then goes on to quote from his own concurring opinion in *United States v. United Mine Workers*¹⁵⁶:

The conception of a government by laws dominated the thoughts of those who founded this Nation and designed its Constitution, although they knew as well as the belittlers of the conception that laws have to be made,

¹⁵⁰ *Cooper v. Aaron*, 358 U.S. 1, 4 (1958).

¹⁵¹ *Id.*

¹⁵² *Id.* at 18 (citation omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

¹⁵³ See 1 *DICTIONARY OF GREEK AND ROMAN BIOGRAPHY AND MYTHOLOGY* 181 (William Smith ed., Taylor and Walton 1844).

¹⁵⁴ *Cooper*, 358 U.S. at 22, 26 (Frankfurter, J., concurring).

¹⁵⁵ *Id.* at 23 (quoting MASS. CONST. pt. 1, art. XXX).

¹⁵⁶ 330 U.S. 258 (1947).

interpreted and enforced by men. To that end, they set apart a body of men, who were to be the depositories of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be ‘as free, impartial, and independent as the lot of humanity will admit.’ So strongly were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with extraordinary safeguards and prestige.¹⁵⁷

So here it is that the priestly caste of the Supreme Court Justices emerges from the shadows to stand in full view, its certification to interpret the law of the land reaffirmed. These interpreters are not like any others. They are “depositories of law.” They are set aside in the temple to contemplate and to expound the law – which here sounds very much like the Law, capital L. Justice Frankfurter has sensed that a subversive threat of disobedience to the constitutional narrative declared by the Court needs to be met with a rhetoric that at the last foregrounds the very status of the Court itself, the solemn context of its speech acts.

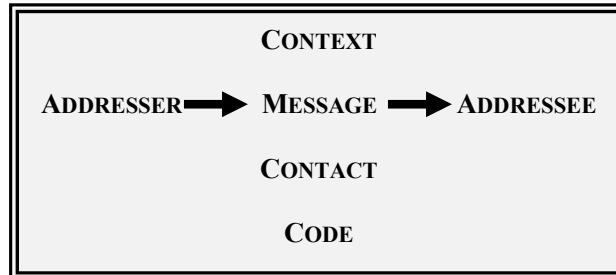
“*It is so ordered*”: the outcome so proposed writes the past history of interpretation in a rhetoric that touches back to origins and foregrounds its own constraints in reaching this end. The Court offers an arche-teleological discourse that stresses origin and constraint in order to achieve ends. Such a narrative of the covenant is no doubt simply necessary – covenantal discourse, one might say, is like that. The structure of prophecy and fulfillment is doubtless a requisite of any claim to a master narrative that governs societies. If the discourse of American constitutional interpretation turns out to be remarkably biblical, that should not come as a surprise, since it is difficult to imagine a society without some sort of providential discourse underlying it. If the Constitution is our myth of origins, we must expect it to generate mythic narrative consequences. And I imagine that we accept those narratives, even when they appear to us to get the story wrong (as in *Bush v. Gore* and *Heller*)¹⁵⁸ because even the secular among us need to confer a certain sacrality on the society and the nation in which we live. We do not necessarily want to desacralize, but perhaps the narratives spun by our legal priesthood should be subjected to a more acute awareness of its narrative logic. Here is where *reading* – of the attentive sort practiced by literary scholars at their best – might sharpen the legal caste’s interpretive enterprise. The critique offered by those outside the law – those who generally stand within the “law and literature” or “law and humanities” movement – is not necessarily to be rejected as trivial.

As I claimed in the last lecture, to read is necessarily to interpret, whether it be a question of grammatical clauses or narrative connections or simply the

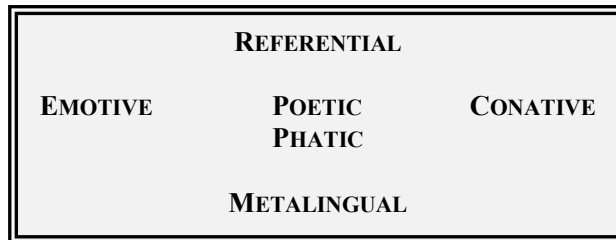
¹⁵⁷ *Cooper*, 358 U.S. at 23-24 (Frankfurter, J., concurring) (quoting *United Mine Workers*, 330 U.S. at 308 (Frankfurter, J., concurring)).

¹⁵⁸ For a discussion of these decisions, see *supra* notes 19-59, 145 and accompanying text.

meanings of words in their relevant contexts.¹⁵⁹ The great linguist Roman Jakobson provided an analysis of the different functions of language that are activated whenever a message is sent¹⁶⁰:



Messages have senders and receivers (addresser and addressee, in this diagram), codes and contexts and channels of communication, the ensemble rarely activated in wholly unproblematic ways. They activate the expressive ends of the speaker (the emotive function) but also act on the listener (the conative); they refer to their channels of communication (“can you hear me?”) and the codes they use (“what do you mean when you say *X*?”), or to the texture of the message itself (the “poetic”). So that the diagram above gives these types of language use¹⁶¹:



Some attention to what functions are activated in any given message can be analytically helpful. Legal messages include all the functions, of course, but may be tilted toward the referential, the phatic, the metalingual – or the poetic, in emphasis on the “lawspeak” involved. Legal messages also tend to be highly performative (to shift from Jakobson to the teachings of J.L. Austin),¹⁶² requiring or indeed simply enacting the law in their utterance: *We find the defendant guilty; I sentence you to life without parole; It is so ordered.* The language of the law is so highly functional and so codified that the place of the

¹⁵⁹ See *supra* p. 1447.

¹⁶⁰ Roman Jakobson, *Closing Statement: Linguistics and Poetics*, in *STYLE IN LANGUAGE* 350, 353 fig. (Thomas Sebeok ed., 1960).

¹⁶¹ *Id.* at 357 fig.

¹⁶² See J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962).

interpreter often is hard to find, yet clearly it also is crucial since performance depends upon prior acts of definition.

An interpreter, I mentioned earlier, is etymologically – and still today – a go-between, an ambassador of meanings, someone who carries understandings from one camp to the other, and who stands between a text and its meaning.¹⁶³ One can certainly ask why we need interpretation, why we cannot have language that is self-interpreting, perhaps even self-executing. We accept that a musical score requires interpretation – though I am sure there are now computer programs that can convert musical symbols into notes – and we are quite ready to judge the quality of interpretation according to several categories: fidelity to the score, expressiveness (which implies a decision about what there might be to express), overall structure or architecture of the interpretation, and so on. Textual language requires analogous moves. That this should be so, that interpretation is inevitably part of the reading process, implies a certain opacity or indeterminacy in any communication system. I do not read this as an invitation to “deconstructive” practices of reading – though those can be pedagogically useful – but rather as an admonition that the more we can learn about how reading and interpretation work, the better off we will be. What I at times find distressing in legal texts is the assumption that interpretation is itself unproblematic. In the recent Supreme Court decision on the Patient Protection and Affordable Care Act, Justice Ginsburg refers to the “Chief Justice’s crabbed reading of the commerce clause.”¹⁶⁴ The word “crabbed” arrested me. It means, I think, “cramped” and “hard to decipher” (as of handwriting), but also suggests, according to the dictionary, “perverse, contrary, obstinate,” also “churlish.”¹⁶⁵ It seems to come into English usage in the late fourteenth century, when it metaphorically evokes the oblique motion of the crab.¹⁶⁶ One could – in the spirit of William Wimsatt’s meditations on the word “chartered” in Blake’s poem¹⁶⁷ – find “crabbed” a remarkably evocative modifier in its context, one that might lead us not only into the Chief Justice’s styles of reading and writing, but into a clash of constitutional interpretive theory that might be more productive than debates about originalism, textualism, and the living Constitution. Crabbish interpretation on the one hand, dolphinism on the other?

I had thought at this point of introducing some of the moments when the Court has had to read non-verbal symbols that are freighted with cultural messages – a crèche in a public park in Pawtucket, Rhode Island,¹⁶⁸ a burning

¹⁶³ See *supra* p. 1447.

¹⁶⁴ Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2609 (2012) (Ginsburg, J., concurring in part and dissenting in part).

¹⁶⁵ See, e.g., THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 468 (Stuart Berg Flexner & Leonore Crary Hauck Eds., 2d ed. 1987).

¹⁶⁶ *Id.*

¹⁶⁷ See *supra* notes 13-14.

¹⁶⁸ Lynch v. Donnelly, 465 U.S. 668 (1984).

cross in a Virginia backyard¹⁶⁹ – and has stumbled in trying to find the interpretive tools. But the hour is late, and a discussion of how we interpret symbols needs to await another occasion. At present, I will simply end by urging that law – and here I mean especially legal education – should pay more attention to the issues of narrative and rhetoric that I have briefly evoked in these lectures. The rhetoric and the poetics of law (to return to that prescription for a better teaching of literature) are extraordinarily interesting, and I can imagine a first-year course that would teach just that. It might give us legal actors better able to decipher the narrative and rhetorical constructions of reality.

¹⁶⁹ *Virginia v. Black*, 538 U.S. 343 (2003).