ESSAY

HIDING THE BALL

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> When you are criticizing the philosophy of an epoch, do not chiefly direct your attention to those intellectual positions which its exponents feel it necessary explicitly to defend. There will be some fundamental assumptions which adherents of all the variant systems within the epoch unconsciously presuppose. Such assumptions appear so obvious that people do not know what they are assuming because no other way of putting things has ever occurred to them. With these assumptions a certain limited number of types of philosophic systems are possible, and this group of systems constitutes the philosophy of the epoch.[1]

Lawyers, judges, law teachers, and law students are forever telling each other what the law is. Whether they are issuing briefs, opinions, or law review articles, they are forever staking out legal positions. And when they stake out these legal positions, they are always ascribing them to some ostensibly authoritative legal source. Hence, it is that legal actors and legal thinkers say things like, "The Constitution requires . . . ," "The doctrine of worthier title provides . . . ," "The parol evidence rule states that . . . ," "18 U.S.C. 1503 prohibits . . . ." And so on.

If one examines the multitude of meanings ascribed to the authoritative legal sources, it becomes apparent just how capacious these sources can be. Indeed, they serve as hosts for a great number of (often conflicting) cognizable legal meanings. As an example, consider the Constitution. For some, the Constitution is fixed. For others, it is changing. For still others, it is both fixed and changing. For many people, the Constitution is a mythic symbol—a repository of hope and a statement of aspiration. For other people, it's just law—like other law.

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[1] Alfred North Whitehead, Science and the Modern World 48 (1925).

Then too, for some, the Constitution is what it *is*, whereas for others, it is what it *ought* to be. Indeed, there is a great deal of disagreement about how the "is" and the "ought" of the Constitution are related. Consider some of the professionally respectable possibilities:

> what the Constitution ought to be is of no bearing on what it is;[2]
> what the Constitution ought to be ought to have no bearing on what it is;[3]
> what the Constitution ought to be is of some bearing on what it is;[4]
> what the Constitution ought to be is determinative of what it is;[5]
> the Constitution is always already becoming what it ought to be;[6]
> the Constitution is something that can never become what it ought to be.[7]

One could go on like this for quite some time. What is more, one could repeat this exercise in the plurality of legal meaning with just about any interesting piece of common or statutory law.

It is amidst this generous plurality of legal meaning that legal thinkers and actors ply their trade and affirm (usually with great confidence and conviction) that theirs is the one true and correct legal meaning. At times, the confidence and conviction become quite intense—as when, for instance, Supreme Court Justices remonstrate with each other for their apparently inexplicable reciprocal failures to heed what "the law" so obviously requires. At times, the confidence and conviction seem incredible—as when, for instance, an appellate advocate asserts: "Clearly, opposing counsel has no argument . . . ." Such claims are very often implausible. Indeed, if a lawyer finds himself in the middle of an appellate proceeding, it is often precisely because opposing counsel *does have* an argument—and often a pretty good one at that.

But for those who are engaged in "*doing law*," it is important to maintain at least the appearance of confidence and conviction, the trappings of belief.[8] Those, by contrast, who are interested in the

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[2] See Henry P. Monaghan, Our Perfect Constitution, 56 N.Y.U. L. Rev. 353, 396 (1981).

[3] See Robert H. Bork, The Tempting of America: The Political Seduction of the Law 176 (1989).

[4] See Richard H. Fallon, Jr., A Constructivist Coherence Theory of Constitutional Interpretation, 100 Harv. L. Rev. 1189, 1231-37 (1987).

[5] See Lawrence G. Sager, Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law, 88 Nw. U. L. Rev. 410, 435 (1993).

[6] See Ronald Dworkin, Law's Empire 413 (1986).

[7] See Jacques Derrida, Force of Law: The "Mystical Foundation of Authority," 11 Cardozo L. Rev. 919, 947 (1990).

[8] For elaboration, see Pierre Schlag, This Could Be Your Culture—Junk Speech in a Time of Decadence, 109 Harv. L. Rev. 1801, 1815 (1996) (reviewing Ronald K.L. Collins & David M. Skover, The Death of Discourse (1996)).

study of law do not have to maintain *this* facade of confidence and conviction. In fact, for anyone interested in a serious study of law, dissolving the trappings of belief may well be a sine qua non.[9]

In any event, once the facade is dropped, the bewildering array of possible legal meanings can prompt an interesting question: Just what are these authoritative legal sources that can serve as hosts to such a wide assortment of conflicting legal meanings? Just *what* are they?

Now, in truth, this question about the identity of the authoritative legal sources—this ontological question—is rarely posed. It is one that resists inquiry. If we are to answer this ontological question, we must first try to understand the nature of the resistance that the inquiry confronts. If the question confronts resistance, it is because legal actors and legal thinkers have been trained to refrain from pursuing such inquiries. And they have been trained in the best way possible: They have been trained to believe that the question does not matter and that the answer is already clear. This is what "hiding the ball" is all about.

HIDING THE BALL

In the law school Socratic method, the teacher conducts the class by questioning students on the subject matter of their assigned case readings. This method can incite sundry emotions in the law student—everything from feverish exhilaration through mortal dread to terminal boredom. Socratic questioning often begins innocently enough. At first, the student may feel that the questions are quite flattering. The student may be asked for his views as to what some eminent court should do. He may be asked for his views as to how social policy should be set. But along with this flattering inflation of the student's status, any number of unpleasant things can happen. The professor intones:

> Mr. Jones, can you please tell us the facts in the case of . . . ? Mr. Jones, what was the issue confronting the court in the case of . . . ? Now, Mr. Jones, do you think the court was correct in finding that . . . ? I see. Well, Mr. Jones, what would you have the court do instead? But Mr. Jones, now I am confused. You are telling us that .... Whereas, a few moments ago, you told us that .... Which is it, Mr. Jones . . . ? What do you mean you're not sure, Mr. Jones? Not sure about what? Well then, let me change the facts a bit for you, Mr. Jones . . . .

There are a number of variations on this procedure. But in the *true* law school Socratic method, it does not matter what resolution the

[9] But see Paul D. Carrington, Of Law and the River, 34 J. Legal Educ. 222, 227 (1984).

student offers: In the true law school Socratic method, the student is always wrong. The resolution always founders on a new fact scenario, or some previously unnoticed implication, or some unforeseen consequence. And there is always another question, one that is carefully tailored to expose the inadequacy of the student's previous answer. In a perfect display of the Socratic method, the questions would never stop; the class would never end.

Law students have a name for this procedure. Actually, they have several names for this procedure, but the one that matters here is the one that endures across generations. They call it "hiding the ball." The problem, as law students see it, is that the Socratic teacher never stops the interrogation long enough to allow the students to get a good look at the ball. And given that the students have no idea what the ball looks like, it is not surprising that they have difficulty grasping it as they try to play the game. The law professor has an unfair advantage. As the law student sees it, this is a condition that can only be remedied by doing what should have been done in the first place—namely, bring the ball out of hiding for everyone to see.

Sometimes the law teacher will insist that he is not hiding anything. He may insist that no one has ever given a good account of the ball or that indeed there is no ball at all. Sometimes, perhaps even often, he believes this. But it does not matter: he will not be believed. His epistemic skepticism (the ball is not knowable) and his ontological nihilism (there is no ball) are quite simply unbelievable to the law student: How could there be no ball—when everyone, the judges, the lawyers, the students, the professor himself are all always making references to the ball, invoking the ball, saying what the ball means, and doing things with it? How then could there be no ball? The idea is simply too preposterous to be entertained.

The short of it is, as the student sees it, *there must be a ball.* And since there must be a ball, the problem can only be that the professor is hiding it.

In following this reasoning, the law student is quite literally turned around. What started out in the student as doubt directed toward the character of law (what is it?) has turned into a pious faith in the ontological and epistemic character of law. Because the ball is hidden, it must be there: ontological confidence. And because the adept can do things with it, the ball must be knowable: epistemic confidence.

The ironic significance of the "hiding the ball" metaphor is that far from cultivating a critical attitude in the law student, it seduces the law student into comforting ontological and epistemic presumptions. The metaphor turns attention away from fundamental ontological and

epistemic inquiry into law. The image reprieves the student from ever having to consider the disturbing possibility that in law there is no ball or that, if there is one, no one has a really good account of what it looks like. On the contrary, the metaphor invites the student to believe that there is a ball and that its identity is known. And it is easy for the law student to believe this for he is surrounded by persons—lawyers, judges, professors, and other students—who keep saying very serious, very consequential, and very meaningful things about the ball.

Whatever doubts the law student may experience about the existence or the identity of the ball are thus defused. And the anxiety of the first-year law student at his incomprehension of the law—what it is and how it can be known—is redirected at the forces that deny access to the ball, namely, the law professors and their Socratic technique.

This derailment of ontological and epistemic inquiry is a pattern that is repeated over and over again in American law. Indeed, American law is organized in a rhetorical hierarchy that channels inquiry away from the ontological to the epistemic, away from the epistemic to the normative, and away from the normative to the technical. The law is thus organized in a hierarchy of default rules. Put simply:

1. *Do not confront an ontological question if it can be handled as an epistemic question.*
2. *Do not confront an epistemic question if it can be handled as a normative question.*
3. *Do not confront a normative question if it can be handled as a technical question.*

We will return to this pattern. For now, however, what is important is to focus on the ball. What the student has learned unconsciously through the relentless Socratic examination of case after case is that there is a ball and it is knowable. What will never be given to the student—and, indeed, this is the gist of the law student's complaint—is any strong account of what the ball *is* (legal ontology) or how it can be *known* (legal epistemics). The first topic, legal ontology, is virtually never addressed. The second topic is addressed but very indirectly—most often in the form of implications to be derived from negatives. Indeed, "the Law" is identified for what it is mostly by reference to what it is not. Law, the student will be told, is not just rules, not just principles, not just materials, not just a way of thinking, not just anything, but many of these things—though not in any way that could actually be reduced to a recipe.

For the student, this is the beginning of a kind of divided consciousness. On the one hand, the law student comes to believe that there is a ball and that it can be known. On the other hand, he is

given no strong account of what the ball is or how it can be known. The law student thus comes to internalize a contradictory picture of law. The law is there just like a ball—stable, solid, uncontroversial. And it is knowable. Yet at the same time, this ball cannot be specified or articulated in any definitive manner.

Having internalized this contradictory picture of "the Law," the student comes to suspend disbelief. And having come to suspend disbelief, the student learns the various games of law.

CRUCIAL LESSONS

Certain crucial lessons are thus imparted and internalized. These lessons are absolutely essential to the successful practice of law by judges and lawyers.

The first lesson, as already suggested, is that *law is ontologically and epistemically secure*: There really is a ball and it is knowable (even if no one can give a very good or very complete account of it).

The second lesson is that *performance is everything*: The game of law can be played (and won) even if one doesn't know what the ball looks like. One can present the appearance of knowing what the ball looks like. Indeed, since no one has a very good account of the ball, the one thing that can be counted upon is that no one engaged in "*doing law*" will dare raise seriously the question of what the ball looks like.

And this is the third important lesson: *Some things must never be asked*. To raise questions about whether there is a ball and what it looks like is bad form. It would show a lack of "good judgment." The question about the ontological identity of the law is not an appropriate move in the game. The fourth lesson is that *in saying what the law is, or what it requires, the legal actor must always maintain the aura of authenticity, even if it means faking it*.[10] The student must become comfortable in pretending that he knows what he is talking about—even when in fact he has very little or even no idea. This is one of the reasons that lawyers have the reputation of being "know-it-alls": They have been trained to pretend that they know what they are saying even when they have not the foggiest notion.

All of these lessons must be internalized, for they are crucial to the belief in and the practice of law. The student's informal "hiding the ball" metaphor is ironically quite conducive to learning these lessons.

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[10] Or as Sam Goldwyn reportedly said, "The most important thing in acting is honesty. Once you learn to fake that, you're in."

At the same time, the metaphor also contributes mightily to the law student's self-mystification: the student comes to believe that law has an ontological identity that is solid, stable, and uncontroversial (just like that of a ball). He comes to believe that in law there is a *there* there—that in cases, in statutes, in doctrines, in rules, in principles, in values, in law itself there is *some stabilized preinterpretive something* that exists prior to and independently of the meaning-making activity of any author or reader. He comes to believe that to understand law is a question of working hard, of thinking harder, of using reason, of developing "good judgment"—in sum, of acquiring "a legal mind."

And, almost always, it is supposed that the identity of such canonical referents is unproblematic. Almost always, it is supposed that when someone says that "the Constitution provides . . ." or "10(b)(5) requires . . . ," the identity of the referent, namely, the Constitution or 10(b)(5), is clear and unproblematic. In this gesture, it is presumed that the identity and existence of the referent are stabilized, uncontroversial, tacitly known, in need of no further elaboration, sufficient onto the day—in short, just like a ball. It cannot surprise that lawyers, legal thinkers, and judges should act, speak, and write on such a presumption: It is precisely what they have learned in law school—to pretend that there is a ball, to pretend that they know what the ball looks like, and to pretend to move it in the appropriate and approved ways around the court.

We are now in a position to *begin* to bring "the ball" out of hiding. As a first cut, consider that "the ball" is a metaphor for precisely that *stabilized preinterpretive something*, about which very little of any definitive character can be said but to which all manner of legal meanings can be attached. Now, this "ball"—*this stabilized preinterpretive something*—can be any number of things. It can be a rule, a doctrine, a principle, a value, a case, a statute, the Constitution, or even "the Law" itself—indeed *any object* of a legal conversation. The importance of "the ball" is that it enables "*the gesture*"—the gesture of very seriously ascribing legal meaning to entities such as doctrines, rules, principles, statutes, and cases, whose identities are at once tacitly presumed and yet ineffable. *This is one of the crucial and recursive aspects of American law: the tacit positing into existence of whatever ontological identities (whatever balls) are necessary to play the game of ascription (the gesture). The ball may change in identity and character, but it is always posited into existence so as to enable the gesture.*

By way of illustration, consider the Constitution. In the following section it is the Constitution that features as "the ball"—*the stabilized preinterpretive something* to which legal meaning is attached.

IN SEARCH OF THE CONSTITUTION

The Constitution is the locus of much political and rhetorical contestation. Some of the disputes concerning the legal significance of the Constitution are very old and very patterned. Amongst the most enduring of disputes is the familiar debate between so-called strict constructionists and loose constructionists. For the strict constructionists, the very constitutive character of the Constitution means that it must be read cautiously, conservatively, and narrowly. (It was, after all, Justice Marshall who said, "We must never forget that it is *a constitution* we are expounding."[11]) For the loose constructionists, the very constitutive character of the Constitution means that it must be read expansively and generously. (It was, after all, Justice Marshall who said, "We must never forget that it is *a constitution* we are expounding."[12])

There is an almost Sisyphean aspect to these debates. The proponents of strict construction and loose construction presume that they are having meaningful arguments. But in point of fact, the arguments are not meaningful. For indeed, the question of whether the Constitution is to be read conservatively or expansively is of no moment, of no significance whatsoever, until one has determined what "it" is. Everything turns upon the identity of "it"—what "it" is always and already presumed to be.[13]

And of course the question of the identity of "it" is extremely difficult to argue about. It is extremely difficult to argue about for many reasons, of which I will mention only two.

First, it is difficult to argue about because "it" is always already presupposed prior to any argumentation. "It" is always already understood prior to any conscious or deliberate choice about how to read "it." Second, any conscious or deliberate choice about what "it" is is always at least potentially unstable. That is, any conscious or deliberate choice about what "it" (the Constitution) is can very well prompt a reassessment of "its" identity—such that "it" becomes something else.

EARNEST READINGS

To illustrate these two points, consider the plight of a federal judge at once intelligent and earnest in her commitment to read the Constitution for what it means. The judge starts with a commitment

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[11] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

[12] Id.

[13] See Thomas C. Grey, The Constitution as Scripture, 37 Stan. L. Rev. 1, 1 (1984).

to reading the Constitution in terms of the "plain meaning" of the text.

She reads through Article I (which seems to delineate the powers of a legislative branch) and Article II (which seems to establish the powers of an executive branch) and Article III (which seems to set forth the powers of a judicial branch).

Upon finishing Article III of the Constitution, the judge begins to recognize that she must revise her interpretive commitments. For one thing, her "plain meaning" approach has yielded what it was supposed to yield, namely a plain meaning—one which reveals that there is a certain coherent structure to the Constitution that seems to describe three different branches of the federal government.

The judge must decide what importance to give to this structural feature. On the one hand, it is conceivable that this structural feature of the Constitution is simply a matter of presentation, of style—one that portends no more than a helpful and orderly presentation of the individual clauses. On the other hand, it might be said that this aspect of form has significance—that it reflects the primordial importance of the division of powers among a legislative, an executive, and a judicial branch.

Viewed in this latter way, the Constitution is no longer merely a continuous, homogeneous list of various powers, limitations, and entitlements, but also a hierarchically structured charter of government. In turn, identifying the Constitution as a charter has implications for the manner in which it will be read. Hence, if it is a charter, it must be interpreted in light of its structural organization. From this perspective, the "plain meaning" of the text is no longer the plain meaning of words or sentences but rather the plain meaning that the words and sentences must have in their capacity as discrete aspects of a government charter. This kind of structural interpretation is championed variously by such eminent Constitutionalists as Charles Black, John Hart Ely, and, more recently, Akhil Amar.[14]

The judge decides to reread the document. This time she has abandoned a naive "plain meaning" approach in favor of reading the document as a charter of government. Again she breezes through Article I and Article II. Article III is now of paramount interest—for indeed it is the article in the charter that most directly concerns *her* powers, *her* role, *her* function. What she notices is that the charter

[14] See generally Charles L. Black, Jr., Structure and Relationship in Constitutional Law (1969); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980); Akhil Reed Amar & Neal K. Katyal, Executive Privileges and Immunities: The Nixon and Clinton Cases, 108 Harv. L. Rev. 701 (1995).

extends judicial power only so far as "cases and controversies"[15] are concerned. It is at this point that it dawns on the judge that her interest in the Constitution is not a generalizable interest in the Constitution's meaning, but rather a particular interest in what the Constitution means for purposes of the judicial task of hearing "cases and controversies." The judge understands that she must now fashion some understanding of what her appropriate and legitimate role must be relative to the other branches of government and the states. Hers is an already contextualized interest in the meaning of the Constitution—an interest specified and established by Article III.

Notice that the identity of the Constitution has once again changed. Whereas at first it was a text and then a charter, now it appears that it is something else—something whose meaning and identity vary in accordance with the identity of the agents who are charged with its enforcement, interpretation, elaboration (or whatever). For judges, the constitutional charter requires some sort of determination as to the appropriate scope and limits of the power that the judiciary can claim from the Constitution. What is required of judges when they "read" the Constitution is an appreciation and understanding of their role as interpreters and addressees of the Constitution. Their reading of the Constitution must be constrained by the limits of the judicial function. In a word, they are to read that part of the Constitution that is "law." This is the sort of insight that leads some legal thinkers to claim that the Constitution requires the development and articulation of a "theory" of adjudication—the sort of "theory" developed variously by such eminent legal thinkers as Herbert Wechsler, Robert Bork, and Ronald Dworkin.[16]

Once again the judge resumes her earnest reading—this time with meticulous attention to the limits and obligations of the judicial function. Things go well until the judge reaches the Bill of Rights and the Fourteenth Amendment. As she makes her way through these amendments, she trips up on phrases such as "due process of law," "liberty," "privileges and immunities," and "equal protection." These are grand but nebulous words. They are juridical in cast and seemingly addressed to the judiciary; yet they are vague, capacious, underspecified. Viewing these words from the perspective of the judicial function, the judge may feel a need to turn to various "external" sources—to history, to what is known of the framers' intent, to natural

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[15] U.S. Const. art. III, § 2.

[16] See generally Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959); Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971); Dworkin, supra note 6.

law, to political philosophy, in short, to anything that might serve to accord the words some delimited and suitably specific content.

But, in turning to such sources, the judge experiences a gestalt shift. Rather than seeing these external sources as vehicles by which to specify the meaning of constitutional rights, the judge comes to understand that the Constitution is itself an amalgamation of these various sources. The Constitution is not so much a text or a structure or a charter, but rather a combination of various modes of legal argument. What is to be interpreted and given effect is not words or clauses or even structures, but rather the self-referential practices of constitutional meaning. This is the kind of approach developed variously by Philip Bobbitt, who describes various modalities of constitutional argument, and Paul Kahn, who describes the Constitution as a tradition of dialogue that literally talks (or writes) the Constitution into existence.[17]

Once again the Constitution has changed identities. Its identity is now quite difficult to describe, for the Constitution is now composed of historical practices, philosophical elaborations, directive intentions, sundry traditions, and so on. It is not just that the Constitution must be interpreted in light of or by reference to such sources. Rather, now the Constitution *is* itself a specific amalgamation of such sources. And indeed, at this point the identities of the Constitution multiply rapidly. It can be seen as a bridge to the past, a prophecy for the future, an iconic symbol, a sacred artifact. The identity of the Constitution becomes any number of things that have at various times been held to be the embodiment, the expression, of a political community.

Notice here that in reading the Constitution in all earnestness, we have begun with a plain meaning and ended up with a whole variety of ways of reading the Constitution. Which of these gets to the heart of the Constitution? What does "it" *really* mean?

This is a very difficult question. One difficulty is that "it" is always already presupposed prior to any argumentation. "It" is always already understood prior to any conscious or deliberate choice about how to read "it." Moreover, as we have just seen, any conscious or deliberate choice about how "it" is to be read is always at least potentially unstable. That is, any conscious or deliberate choice about how to read "it" (the Constitution) can very well prompt the adoption of a different mode of reading.

And again it is important to understand that this condition is not peculiar to the Constitution. On the contrary, the possibility of ascrib-

[17] See generally Philip Bobbitt, Constitutional Interpretation (1991); Paul W. Kahn, Legitimacy and History: Self-Government in American Constitutional Theory (1992).

ing multiple and conflicting meanings seems to be a generalized condition of any authoritative legal source in late twentieth-century America. In late twentieth-century America, virtually any interesting authoritative legal source is constituted as a rich assortment of conflicting and possibly incompatible meanings. Indeed, in late twentieth-century American law, ascribing legal meaning to an authoritative legal source is at once extremely easy and extremely difficult. It is extremely easy in the sense that virtually everything is permitted: It is almost as if any meaning is allowed and none can be definitively refuted.[18] In another sense, ascribing legal meaning is extremely difficult: No meaning can be authoritatively established, nothing can be conclusively demonstrated, and every legal meaning can be controverted.[19]

THE STORY OF THE SIX BLIND MEN AND THE CONSTITUTION

The conjunction of the perennial legal habit to refer to an authoritative legal source and the capacity to ascribe many contradictory meanings to that source yields certain tensions. On the one hand, it seems that the practice of law consists of repeatedly tracing a legal position back to an authoritative legal source. On the other hand, the authoritative legal source seems capable of meaning a great many things.

All of this prompts a question: What *are* these authoritative legal sources that must be observed and respected, yet seem so protean in terms of their identities and meanings? Understandably the unsettling, not to say vertiginous, "interpretive" possibilities produce a certain angst among the legally trained. On the one side, there is the fear that the Constitution might be made to mean just about anything. On the other side, there is the fear that the Constitution doesn't mean anything at all.

It is at this point that the search for the elusive Constitution becomes threatening. The specter is raised (as it is raised in any serious intellectual endeavor) that the search may well not produce anything. More disturbing still, there is the looming possibility that there may in fact be nothing to search for.

Confronted with these anxieties, contemporary legal thinkers flinch. They pull back. The search for the elusive Constitution is

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[18] As Robert Nagel aptly puts it: "[W]hole libraries of modern constitutional interpretations can be reduced to this sentence: Anything can be forbidden or permitted if there is sufficiently good justification." Robert F. Nagel, The Thomas Hearings: Watching Ourselves, 63 U. Colo. L. Rev. 945, 951 (1992).

[19] See Pierre J. Schlag, Normativity and the Politics of Form, 137 U. Pa. L. Rev. 801, 876-80 (1991).

called off. They invoke one last gambit—the weak perspectivalism gambit.[20] This gambit is perhaps best recounted—as it is in fact sometimes recounted in class and in the literature—through the story of the six blind men and the elephant. This story has become increasingly popular in legal circles. The reason will soon be apparent.

In this story, six blind men come upon an elephant. One blind man who grasps the elephant's knee reports that an elephant is like a tree. Another blind man who touches the elephant's ear reports that an elephant is very much like a fan. Yet another blind man who grabs the elephant's tail says that an elephant is very much like a rope.[21]

The story of the six blind men and the elephant is often presented as a cautionary tale about the perspectival aspects of knowledge. It is understood to be a demonstration of the dependence of perception on the identity and positionality of the observer.

As a cautionary tale, it is nonetheless a soothing one: Even though the perception of each of the blind men is partial, still each has something to contribute to the understanding of elephants. We, as spectators, know this because we can see the elephant for ourselves. As audience members who have been privileged to see the whole elephant, we can appreciate that each of the blind men is at least in part right.

It is not difficult to see why the story of the six blind men and the elephant should have so much appeal in legal academic circles today. Today, all sorts of different and even contradictory claims are made about American law. It is in response to this recognition that legal thinkers find the story of the six blind men so comforting. The story allays a certain fear that might otherwise arise. This is the fear that the many different conflicting accounts of the Constitution are perhaps attributable to a fatal defect in the master referent. It might be, in other words, that the variety of conflicting accounts of "the Constitution" or "the Law" or "the doctrine" or "the . . ." is the result of certain ontological deficits in such master referents. Perhaps, if so many conflicting accounts can be attributed to such master referents, they do not have much in the way of a *there* there—not much staying power, not much substance, not much form, not much of anything.

For many, this is a frightening prospect. The reason is simple: For virtually all legal actors and thinkers, law is what might be called "a dedicated discipline." Law has to yield (or be made to yield)

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[20] For an elaboration of the "weak perspectivalism" gambit, see generally Pierre Schlag, Beyond Authority (1996) (unpublished manuscript on file with the *New York University Law Review*).

[21] For a rendition, see John Godfrey Saxe, The Blind Men and the Elephant: A Hindoo Fable, in The Poetical Works of John Godfrey Saxe 111 (1892).

normatively acceptable, practically efficacious, authoritative results. Given this rather strong outcome orientation, any insight that would render the achievement of the desired results illusory becomes rather frightening: Any such insight effectively puts the discipline of law and the professional status of its practitioners in question.

The possibility that the master referents are ontologically deficient is precisely the sort of insight that can put the discipline of law in question. It is one thing to confront the possibility that the Constitution is too many things at once. It is quite another to suggest that it isn't much of anything at all.

One can imagine legal actors and thinkers responding to the prospect that the Constitution is so full of meaning that this meaning needs to be whittled down, reduced, integrated in some manageable (hopefully univocal) form. But what precisely is one to do if the canonical authority, the source of law, is empty or nearly so? It is one thing to sort through an overabundant assortment of legal meanings and, in the popular jargon of the day, "re-construct" or "re-think" these meanings. It is quite another to confront an absence, a lack, a dearth, an emptiness in the ostensibly authoritative source.

Once one understands this point, it becomes immediately clear why disagreements in American law are virtually never framed as ontological questions but instead as technical, normative, or epistemic questions. The reason is simple: *If there is going to be any deficit in American law, then the deficit had better be in the work to be done with the authoritative materials rather than in the authoritative materials themselves*. If the deficit is technical, normative, or even epistemic, then there is some possibility of remedying that deficit. It is conceivable that harder work, better research, or improved theory can remedy the deficit. If, however, the deficit lies in the authoritative sources themselves, then there is not much that can be done.[22] For instance, if the Constitution is itself silly or implausible or bereft of meaning, then there is not much that can be done to remedy that problem.

This point can be illustrated with an analogy to religion. Among the faithful, it is a grievous matter if the church turns out to be wrong or corrupt. But serious as such shortcomings may be, they are not nearly so serious as if God turns out to be wrong or corrupt. If the church is wrong or corrupt, it is nothing that a change in policy or even personnel cannot remedy. If God, however, turns out to be

[22] See Schlag, supra note 20, at 31.

wrong or corrupt, then . . . then, what? Then, that would be, for the believers, an irremediable deficit.[23]

It is not surprising then to find that various human institutions are structured to avoid such challenges to their fundamental ontology. American law is organized in similar ways. American law is organized to shuttle doubts and challenges away from the ontology of law, preferably to technical questions, very often to normative ones, if necessary to epistemic inquiries, but always away from ontological inquiry.

And indeed, true to form, when American legal thinkers have confronted the possibility that there may be a fatal defect to the master referent—to the "the Constitution" or "the Law" or "the doctrine" or "the . . ."—they have done so in accordance with the hierarchy of default rules. Rather than confronting the possibility that the master referent may not have much in the way of a *there* there, they have almost always posed the problem as one of whittling down, reducing, and integrating law into some manageable form. The assumption, in short, has been that there is a *there* there (a "ball") and that the only problem is how to order its multiple meanings.

Hence, in contemporary legal thought, James Boyd White calls for the "integration" of legal meaning.[24] Ronald Dworkin calls for various kinds of integration under rubrics such as "integrity," "coherence," and "fit."[25] Owen Fiss calls for the domestication of legal meaning by means of "disciplining rules."[26] Indeed, the entire enterprise of what is called "legal theory" is generally aimed at a reductionist, integrative essentialization of law. Most of the more successful or popular interdisciplinary work (economics and analytical philosophy) is aimed in the same direction. The American Law Institute Restatements, the codification movements of the nineteenth century, the foundational Langdellian reduction of common law into "certain principles and doctrines" are all aimed at whittling down legal meaning.[27]

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[23] It would be precisely the kind of deficit that might lead wrongly (or rightly) to the practice of idolatry. And as Steven Smith argues, idolatry is a fairly good description of the character of contemporary constitutional interpretation. See Steven D. Smith, Idolatry in Constitutional Interpretation, in Paul F. Campos, Pierre Schlag & Steven D. Smith, Against the Law 157, 178-90 (1996) [hereinafter Against the Law].

[24] See James Boyd White, Intellectual Integration, 82 Nw. U. L. Rev. 1, 15-16 (1987).

[25] See Dworkin, supra note 6, at 19-20, 95-96.

[26] See Owen M. Fiss, Objectivity and Interpretation, 34 Stan. L. Rev. 739, 744-46 (1982). Interestingly, Owen Fiss is aware that his defense of objectivity in interpretation only works to counter "the nihilism that claims the Constitution means everything," not the nihilism that claims "the Constitution has no meaning." Id. at 762-63. What is interesting from my perspective is that Fiss feels absolutely no obligation to confront this latter claim.

[27] Christopher Columbus Langdell, A Selection of Cases on the Law of Contracts at viii (2d ed., Boston, Little, Brown & Co. 1879).

What legal thinkers have not confronted forthrightly is the possibility that the Constitution (or indeed, any other "ball") might well be ontologically lacking. Given the claims of American legal thinkers, particularly elite legal thinkers, to intellectual seriousness, it is somewhat surprising that these questions have not been asked. But if American law is indeed organized in the hierarchy of default rules, then none of this is surprising. On the contrary, it is true to form: it is to be expected that among the believers in American law attention is focused as far away as possible from the ontological.

The story of the six blind men is simply one more chapter in this ongoing shielding of the law from fundamental ontological inquiry. The story serves to shield law from the destabilizing implications of a more radical perspectivalism. It serves to dispel the disenchanting questions and dispiriting doubts about the ontology of American law. The story helps explain the disturbing dissonance among the varying accounts of the blind men. There *really* is an elephant there: it is just that the perspectival limitations of the six blind men preclude each of them from accurately perceiving the whole thing. The analogy to the Constitution is deceptively simple: there *really* is a Constitution (a "ball") there; it's just that no one can see the whole thing.

The story of the six blind men establishes a distinction between ontology (the elephant) and epistemics (the partial vision of the six blind men). With this distinction in place, ontological security is preserved: the elephant *really is* there. In turn, all discord or dissonance in the accounts of the elephant is attributed to the realm of epistemics. The story of the six blind men and the elephant is a kind of H.L.A. Hart for postmoderns. Hart wrote:

> A legal rule forbids you to take a vehicle into the public park. Plainly this forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called "vehicles" for the purpose of the rule or not? If we are to communicate with each other at all, . . . then the general words we use . . . must have some standard instance in which no doubts are felt about its application. *There must be a core of settled meaning, but there will be, as well, a penumbra of debatable cases* in which words are neither obviously applicable nor obviously ruled out.[28]

It is H.L.A. Hart's core/penumbra distinction all over again—where *the core of certainty = ontology = elephant* and *the penumbra of doubt = epistemics = six blind men.*

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[28] H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 607 (1958) (emphasis added).

Is There an Elephant in This Class? A Constitution?

But how is it that the story of the six blind men works? Why does its moral seem so persuasive? The short answer is the elephant. It is the manifest and undeniable presence of the elephant that enables the audience to understand that the blind men's accounts are all partial, incomplete. Indeed, it would become a completely different story without the elephant. It is the undeniable presence of the elephant that enables us to tell the story of the six blind men as opposed to the story of six blind schizophrenics.

But what about the Constitution? Is it there too—in the same way? The story of the six blind men, when it is told in law school classrooms and legal scholarship, encourages its audience to think of the Constitution (or more broadly, "the ball") as if it were an elephant.

The problem is that if one thinks about it, *the Constitution is not an elephant. Indeed, the Constitution is not even remotely like an elephant.* Not at all—except for one thing: just about all legal academics, lawyers, and judges tend to treat the Constitution as if it were like an elephant. Indeed, legal actors and legal thinkers seem to be perfectly willing to play the part of the six blind men—regardless of whether they are in the presence of an elephant or not.

So once again: is the Constitution like an elephant? Or to put it more pointedly, is the Constitution like an elephant if those who invoke its name (the lawyers, the judges, the legal academics) treat it as being like an elephant?

Many legal actors and thinkers do not notice the difficulties posed by this question. In part, that is because they are engaged in "*doing law*." That is, they are actively engaged in the attempt to ascribe legal meaning to the Constitution or to other instantiations of "the ball." They are, in short, engaged in performing "*the gesture*." And for those who are engaged in such enterprises, the ontological underpinning of their enterprise is not something that matters to them. They are interested in performing the gesture, not in uncovering the grounds or the lack of grounds that enable the gesture to take place.

But for us, the proliferation of often conflicting and incompatible meanings ascribed canonically, with confidence and conviction, to the Constitution is the occasion for an uncanny sort of inquiry. It is an uncanny kind of inquiry because it is an extremely simple, basic, indeed obvious kind of question and yet it is almost never asked. The question is this: When legal thinkers ascribe meaning or conse-

quences to authoritative legal sources like the Constitution, *just what are they talking about? What is it that they are ascribing meaning to?*[29]

In this case the answer seems simple: the Constitution. That, however, is not an answer but rather the name of the answer. So here is the question again: Is there any *there* there and if so, what? This is the question of *ontological identity*. And it is a question appropriately asked not simply of the Constitution but indeed of a great number of fundamental legal referents such as "rules," "doctrines," "principles," "values," "cases," and "statutes." What is the *there* there of these referents?

As will be seen, the question of *ontological identity* begets another one: Is the *there* there of these referents (whatever they may be) adequate to discharge the function, the role ascribed to them in the law? This is the question of *ontological adequacy*. For law to be plausible, it is not only necessary that its referents have some ascertainable ontological identity, but also that this identity be capable of discharging the functions that are ascribed to it.[30] One cannot, for instance, argue that the ontological identity of the Constitution is nothing more than a bunch of words (or sentences) and then in the next breath assert that the Constitution is a binding legal authority worthy of respectful assent.[31] The ontological identity of such referents must be commensurate with the roles or functions that they are required to play.

These uncanny questions about ontological identity and ontological adequacy arrive here rather late in the day. And because they arrive so late, there is something profoundly disturbing about these questions. It is easy to see why: So much of American law and American legal thought has proceeded so confidently on the assumption that everyone knows the identity of such common referents as "the Constitution" or "the law" or "rights" which mark and map the path-

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[29] For an exploration of this question in the context of "rights," see generally Pierre Schlag, Rights in the Postmodern Condition, in Legal Rights: Historical and Philosophical Foundations of Rights 263 (Austin Sarat & Thomas R. Kearns eds., 1996) [hereinafter Schlag, Rights]. In the context of "values," see generally Pierre Schlag, Values, 6 Yale J.L. & Human. 219 (1994).

[30] Steven Smith argues that the ontological identity the Constitution must have if it is to discharge the functions ascribed to it is quite simply not there. Constitutional interpretation is thus a kind of idolatry. See generally Smith, supra note 23. Paul Campos suggests that the Constitution (as it is treated by American legal thinkers) is not a text but rather a kind of sacred writing legal thinkers invoke to dignify and propagate their cultural or political aspirations. See Paul F. Campos, Against Constitutional Theory, in Against the Law, supra note 23, at 116. I argue that the plausibility of various schools of jurisprudence at once depends upon and establishes rather fantastic assumptions about the ontological identities of self, reason, discourse, and law itself. See Schlag, supra note 19.

[31] See generally Smith, supra note 23.

ways of legal thought and legal argument. But now, uncannily, it turns out that all of this may be in question.

For now, consider the uncanny question: just what is it that all these legal thinkers are talking about when they talk about the Constitution or indeed any of the other authoritative artifacts of American law? They do seem to be talking about something. Indeed they seem very earnest. Consider what leading legal thinkers have said about what the Constitution requires:

> The courts have both the title and the duty when a case is properly before them to . . . [render a constitutional decision that] rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.[32]

> Constitutional law needs no grand theoretical foundation. . . . Instead, legal pragmatism is a sufficient basis for constitutional law. Legal pragmatism—which essentially means solving legal problems using every tool that comes to hand, including precedent, tradition, legal text, and social policy—renounces the entire project of providing a theoretical foundation for constitutional law.[33]

> As we confront the multiple language-meanings permitted by many of the open-textured provisions of the Constitution, the only apparent standard we can bring to bear in evaluating competing arguments for one or another interpretative methodology . . . is the extent to which they promote a good and just society.[34]

> Society consents to be ruled undemocratically within defined areas by certain enduring principles believed to be stated in, and placed beyond the reach of majorities by, the Constitution.
>
> But this resolution of the dilemma imposes severe requirements upon the Court. For it follows that the Court's power is legitimate only if it has . . . a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom. If it does not have such a theory but merely imposes its own value choices, . . . the Court violates the postulates of the Madisonian model that alone justifies its power.[35]

> As I conceive it, the Constitutional text is a symbol of the aspirations of the political tradition . . . and, as such, constrains in the way and to the extent that aspirations of the tradition constrain. There is no question that the aspirations of a tradition constrain. . . .

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32 Wechsler, supra note 16, at 19.

33 Daniel A. Farber, Legal Pragmatism and the Constitution, 72 Minn. L. Rev. 1331, 1332 (1988).

34 Larry Simon, The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation, 58 S. Cal. L. Rev. 603, 613-14 (1985).

35 Bork, supra note 16, at 3.

> In the American political tradition, one of the most important resources of which is its self-critical aspect, we use our tradition to revise, to reform and re-present, our tradition.[36]
>
> It is a dynamic process . . . .
>
> . . . We must never stop debating these questions, but we must also not lose our humility in the process. If we stop, and if we insist definitely on the ultimate "rightness" of our views, then we surely pose the greatest threat to our Constitutional order.[37]

And so on . . . .

For those who are professionally engaged in these disputes over the meaning of the Constitution, this is a fairly orthodox assembly of plausible positions. But put such engagements aside for the moment and consider just what is it that all these legal thinkers are referring to?

When Michael Perry says that the Constitution is a tradition that constrains, just *what* Constitution is he is talking about? And how is it that the Constitution became a tradition—as opposed to say, a text, a mode of thought, a set of institutions, a political philosophy, a form of political argument? When Robert Bork describes the countermajoritarian difficulty as the crucial dilemma at the heart of constitutional law, just what Constitution is it he is referring to and what happened to all the other stuff commonly associated with the Constitution? Similarly, when Simon enshrines morality as the ultimate arbiter of constitutional interpretive method, which Constitution is it that authorized him to make that move?

We could go on in this way.

Let's not. Consider instead the uncanny question again: Just what are they talking about? And is there any chance that they could actually be talking about the same thing?

Consider the possibilities.

Same Thing. Perhaps the most widespread assumption among legal actors and thinkers is that when they are speaking of the Constitution (or more broadly, "the ball") they are all referring to the same thing. The unreflective assumption among legal thinkers is that while constitutional interpretation is bedeviled by extremely difficult interpretive, epistemological, normative, and technical controversies, the actual ontological identity of the Constitution itself is not in dispute. The Constitution is like an elephant, and the problem is that legal thinkers and legal actors are like the six blind men. There is, after all,

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[36] Michael Perry, The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation," 58 S. Cal. L. Rev. 551, 565 (1985).

[37] Geoffrey R. Stone, Precedent, the Amendment Process, and Evolution in Constitutional Doctrine, 11 Harv. J.L. & Pub. Pol'y 67, 72-73 (1988).

only one Constitution in force, and the only questions are of an interpretive, epistemic, normative, or technical order: what does it mean, what does it require, what should it mean, and so on. This naive belief in the existence of a single unproblematic master referent—"*the* Constitution," "*the* doctrine," "*the* ball"—is extremely widespread among legal thinkers.[38]

This naive belief has nothing going for it except just that: it is a naive belief and, as a naive belief, it is sufficient onto the day. For those caught in the grips of this naive belief, the ontological identity of the Constitution is simply beyond question. And indeed, for those who believe that the Constitution exists like an elephant, there is ample confirmation in the convergence and consonance of the various reports of the blind men. While their accounts of the Constitution differ, the gestalt of the elephant shows that they are all speaking of one thing. The converse implication of this observation is that the more legal actors and legal thinkers are perceived to ascribe discordant beliefs to "the Constitution" or "the doctrine" or "the ball," the more difficult it becomes to believe that the Constitution exists in the same way that an elephant exists.

For those who take a critical perspective on this naive belief, it quickly collapses. After all, there is no particular reason to extend the mode of being of elephants—aspects of physical nature—to the being of discursive or ideational or social or political formations such as "the Constitution" or "the doctrine" or "the ball."[39] Moreover, from a critical perspective, there is something fatally tendentious in the supposition that the realm of ontology is neatly segmented from the realm of epistemics and normativity such that there is no controversy that attends ontology, and all disputes arise on the epistemic and normative side of the divide. This is just too convenient.

Juridical Solipsism. Consider a second possibility: legal actors and thinkers are all referring to their own private Constitutions. They are all referring, wittingly or not, to that apocryphal text, "What the Constitution Means to Me." Now the appeal, if any, of this account is that it is consonant with the remarkable variety of views among those who have made it their business to say what the Constitution means. Moreover, this account is also consonant with the rather obvious wish-fulfillment aspect of so much of constitutional jurisprudence—the in-

[38] We see this naive belief repeated with the concept of rights. Legal thinkers will say all sorts of things about "rights," confident that when they speak about "rights" they are all referring to the same thing. See Schlag, Rights, supra note 29, at 263, 265.

[39] Sure: both elephants and Constitutions are to *some* degree and in *some* ways socially constructed. But it does not follow therefore that their social constructedness determines the modality of their being in the same way and to the same extent.

vesting of the Constitution with political hopes or fears of a manifestly extrajuridical (not to say, personal) character. But the great failing of this view—even apart from the considerable philosophical objections—lies in its inability to account for the significant commonalities in the statements of those who say what the Constitution is. Moreover, from the perspective of those who believe in the Constitution, this account is of no help whatsoever. Indeed, from their perspective, the account is ontologically inadequate. It is itself a denial of the very possibility of the Constitution.

The Aggregative Account. A third possibility is that when these constitutional interpreters are invoking the Constitution, they are all referring to what all the other interpreters are referring to (as the Constitution). On this account, the Constitution would be understood as an aggregation of all that is said about it by other constitutional interpreters.

Very quickly it becomes apparent that this account has to be modified: Saving qualifications must be introduced. Hence, the Constitution becomes not what is said about it, but what is *properly* said about it—and not just by "interpreters" but by *authorized* interpreters. Thus, the appealing simplicity of this account disintegrates into a series of necessary, but increasingly messy, complications.

Even apart from the messiness occasioned by such modifications, this account is still not possible. It is not possible because most of what constitutional interpreters have to say about the Constitution almost always contradicts what some other constitutional interpreters have to say about the Constitution. If we attempted to aggregate all these proper and authorized but often contradictory views, it is not clear what we would end up with. One possibility is that we would simply exclude from our understanding of the Constitution anything that was contradicted by proper and authorized views. The problem with this procedure is that very little would be left of the master referent. A second possibility is that we would end up with a master referent—namely, the Constitution—composed of contradictory and conflicting attributes. It is fixed but it is evolving. It is normatively closed, but it is normatively open. It is the paramount law, but it is to be understood in light of our traditions. And so on. Now, if we attempted to assemble all the proper and authorized views, we would end up with a pervasively and possibly deeply conflicted master referent, namely, the Constitution. This is certainly possible. But again, for those who believe in the Constitution, this account is ontologically inadequate: this is most emphatically not the legal ontology that they desired.

The Thin Social Constructionist Account. It is often said that constitutional interpretation is "a practice"—that the Constitution is "a construction" of the community or communities that interpret it. Now, as social observation or as a prelude to sociological inquiry, this kind of observation is certainly helpful. And for those who believe in the Constitution, this account seems to provide some security. The reason is simple. To call constitutional interpretation "a practice" or, even better, "a social practice" seems to lend it some security, some integrity. At the very least, such an account seems to rescue the Constitution from the bleak solipsism of a radical individual subjectivism.

But the sense of solidity or integrity imparted by such social constructionist accounts is ultimately an illusion. It is the illusion produced by solid-sounding words like "practice" and "social construction." And again this account is ontologically inadequate. It doesn't give the believers what they want. Indeed, there is a bootstrap quality to such thin social constructionist accounts. Imagine coming upon a crowd of persons pointing and asking one of them, "What are you pointing at?" He answers politely and patiently, "Well, I am pointing at the same thing that everybody else is pointing at." You say back to him, "Well, yes, of course, I can see, you are all pointing in the same direction, but what is it that you are pointing at?" And the man answers, somewhat annoyed, "Well, I'm pointing at the same thing that everybody else is pointing at."

At this point, the conversation takes a decidedly philosophical turn as you say, "But now look here, there has to be a point to your pointing. If there isn't a point, then whatever practice you are engaged in (if it is a practice at all) is not the practice of pointing but some other practice. One simply cannot be engaged in the practice of pointing without pointing at something." He answers back, "Look, you don't get it. I, like all these other people here, have been socially constructed to point. That is what we do. What we do is point. If you had been socially constructed like us, you would point too. Really. There is nothing else."

The point here is that there is no reason why entire communities cannot be engaged in collective exercises of pointing at entities that do not exist—or at least that do not exist in the ways in which they are believed to exist. On the contrary, history seems to provide a rich repertoire of such entities: witches, angels, kobolds, and other such apparitions.[40]

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[40] For elaboration, see Pierre Schlag, Law as the Continuation of God by Other Means, 85 Cal. L. Rev. (forthcoming Mar. 1997).

And while there is nothing objectionable about this account as far as it goes, it is a somewhat unsatisfying account at least for those members of the legal community who are accustomed to pointing to the Constitution confident that there is something there. For them (and this would be the vast majority of the legal community) this thin social constructionist account ultimately cannot satisfy.

What we would be saying here is that the Constitution is the thing which the crowd, the community of constitutional interpreters, is pointing at: it is the socially constructed "ball" with which the game of constitutional interpretation is played. But this answer cannot suffice. It cannot suffice because it does not deliver the kind of answer that the legal community seeks. To say that we have a practice of constitutional interpretation cannot deliver to us the identity of the object (the Constitution) around which the practice is ostensibly organized.

Whatever the merits of the thin social constructionist understanding as a general matter, as a question of ontological identity, it cannot be of any ultimate use to those who believe in the Constitution and who seek to deliver its meaning. To say that a bunch of people are pointing at the Constitution doesn't say very much about what they are pointing at. And, of course, they do need to deliver the object of their pointing—and not just to redeem the authenticity and rationality of their gesture, but perhaps most important, to redeem its authority.

The short of it is: the accounts we have considered above fail the requirement of ontological adequacy. These accounts may also seem a bit vacant, but their crucial failure is in their inability to deliver up an ontology adequate to discharge the functions demanded of "the Constitution," "the Law," or "the . . . ."

As for "the ball," it is still not completely out of hiding. It remains that *preinterpretive something*, that jurisprudential *je ne sais quoi*, about which we know very little but invoke all the time. It remains the crucial presupposition that enables the performance of the gesture—the ascription and affirmation of legal meaning.

SUPER-FULL OBJECTS

Over time, as the gesture is performed over and over again, the ball becomes a composite endowed with different defining features. Through the repetition of the gesture, "the Constitution," "the Law," "the doctrine," "the . . . ," it becomes the locus for the linkage, the association, of a great number of specific legal meanings. The ball becomes what might be called a *super-full object*. It is a *super-full* object in that it is a composite of a variety of attributes, many of which

are contradictory or mutually repellent. What we have is a whole constituted of so many disparate parts that one would expect it to burst.

Now this might seem like a surprising claim. It is surprising because just a few pages back the claim was that these master referents were ontologically deficient—tending towards vacancy. The claim that the master referents of American law are ontologically deficient and yet also super-full thus seems contradictory. How can something that is ontologically vacant or nearly so be a super-full object?

The short answer is: There is no contradiction. It is precisely because the master referents (the various balls) suffer from ontological deficits that they become super-full objects. It is precisely because there is so little *there* there—so little in the way of a robust ontological identity to these master referents—that they come to host such a wide array of different legal meanings. The sometimes confident, often desperate, but always ongoing performance of the gesture—of the ascription of legal meaning—is prompted precisely by the ontological vacancy of the ball.

Indeed, as I have argued elsewhere: *[D]eficits in ontological condition will prompt epistemological and normative endeavors as compensation for those ontological deficits, and simultaneously render these normative and epistemological endeavors entirely ineffectual in correcting these ontological deficits.*[41] The lines of force thus run both ways: Deficits in the ontology prompt an excited epistemic and normative activity as compensation. And because this professional activity never consciously moves beyond the epistemic and normative level, the legal ontology becomes increasingly impoverished.

The point has been made in the context of rights. In the past decade, a tremendous amount of thought has been devoted to the value or lack of value of rights and rights-talk. But amidst all the very intense and very passionate disputes about rights, the emptiness of the master referent seems to have gone largely unnoticed. In part, of course, it is the relative emptiness of the master referent (i.e., "rights") that prompts all manner of passionate normative and political conversation about rights in the first place. But more than that, the relative emptiness of the master referent is also what allows this conversation to proliferate virtually without any intellectual checks.

> Insofar as the presumption eclipses the need for any of the participants to actually articulate the ontological identity of rights, there are no serious intellectual restraints on what might be said for, against, or about rights. There is quite literally nothing of any intellectual character that claims for, against, or about rights can run up

41 See Pierre Schlag, Clerks in the Maze, 91 Mich. L. Rev. 2053, 2073 (1993).

> against. The only serious restraints on rights claims tend to be nonintellectual ones—restraints that issue from the nodding heads of disciplinary authority who point to the ostensible sources of their own authority and either nod approvingly ("Yes, this is what we mean by 'rights'") or disapprovingly ("No, this is not what we mean by 'rights'").[42]

Given such a vulnerable internal structure, what then holds such super-full objects together? "The Constitution," "the Law," "the doctrine," or "the . . . " is held together—made into an object, into a ball—through a specific deployment of the gesture. What keeps the Constitution together, what gives it the appearance of a ball, is that one of its defining attributes is used to encompass all the others. In this way, the super-fullness of the Constitution is either reduced to or integrated by one of its defining attributes.

This process by which a part is used to integrate or reduce and thus in some sense *constitute* a whole is routine in American law. Indeed, it is so routine that it is seldom noticed. Thus, for instance, when American legal actors or thinkers refer to the Constitution as if it were an unproblematic referent, it is very likely because they have reduced *the Constitution* to a certain *text* and in turn reduced this text to a certain *document*—the one that begins with the markings, "We the People of the United States . . . ."[43]

Indeed, this construction of the whole in terms of the concept of text and, in turn, the construction of the text in terms of identifiable markings is so commonplace in American law that the equation is routine. It is in fact so routine that it is difficult for most legal actors or thinkers to escape the presumption that *law = text = document.*

The process by which the part comes to constitute or rule over the whole can be pictured as a kind of abstraction. One of the parts is

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[42] Schlag, Rights, supra note 29, at 266; see also Pierre Schlag, Law and Phrenology, 110 Harv. L. Rev. (forthcoming 1997).

[43] U.S. Const. pmbl. Thomas Grey explains the jurisprudential desires that animate this reductive equation:

> The existence of a legal document means that someone has taken the trouble to put the sense of some agreement or set of instructions in writing. The normal point of doing this—and here legal practice builds on presuppositions taken from ordinary life in a literate culture—is to make relatively definite and explicit what otherwise would be relatively indefinite and tacit. This presumption of literality is itself an essential part of the context of the drafting and the interpretation of every legal document.

Grey, supra note 13, at 14. Whether this desire for "literality" is coherent or whether it is realizable are different questions. For discussion of the incoherence of such desires, see Campos, supra note 30, at 119-20; Paul Campos, That Obscure Object of Desire: Hermeneutics and the Autonomous Legal Text, 77 Minn. L. Rev. 1065, 1091 (1993); Walter Benn Michaels, Against Formalism: The Autonomous Text in Legal and Literary Interpretation, 1 Poetics Today 23 (1979).

abstracted from the composite and is used to subsume all the others. The subordinated parts thus come to reflect—both in their form and in their substance—the character of the privileged part. The whole ("the ball") emerges out of a composite as it comes to be defined (through "the gesture") by one of its parts. This is a process that is repeated over and over in constitutional jurisprudence (and indeed throughout American law). In rhetoric, this process is known by the names of metonymy and synecdoche.

METONYMY AND SYNECDOCHE AS A WAY OF LAW

In metonymy, the name of a part of something is substituted for the name of the whole. Hence, for instance, a car is called "wheels." The rhetorical action of metonymy is thus reductionist: put most simply, a whole is reduced to one of its parts.[44] The reductive effect can be seen most clearly in the case of metonymic insults: the description of men and women, for instance, in terms of various parts of their anatomies.

While this account of metonymy is helpful as far as it goes, it is nonetheless too simplistic. To appreciate fully the rhetorical effect of metonymy, a more complicated account is required—one that describes the action of metonymy from a position prior to the naming of the whole and the parts. Hayden White provides a wonderful example. Of the experience of thunder, we typically say "the thunder roars." In this statement, the experience is divided into two phenomena (thunder and roar), and the former is made the agent of the act or the cause of the effect. The experience is thus subdivided into two parts (the thunder and the roar) thus enabling one (the roar) to be reduced to the other (the thunder) by way of causation or agency.[45] But there is a trick here. And the trick, if one thinks about it (as Nietzsche did) is that the thunder *is* the roar.[46]

Metonymy thus does not merely reduce a preexisting whole to its parts. Perhaps more important is its prior action of subdividing the world into part-part relations. Metonymy subdivides the world into parts such that it becomes possible to treat one part as a manifestation

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[44] See Hayden White, Metahistory: The Historical Imagination in Nineteenth-Century Europe 34-36 (1973).

[45] See id. at 35.

[46] See Friedrich Nietzsche, The Will to Power (Walter Kaufman ed. & Walter Kaufman & R.J. Hollingdale trans., 1967). Nietzsche observed:

> Our bad habit of taking a mnemonic, an abbreviative formula, to be an entity, finally as a cause, e.g., to say of lightning "it flashes." Or the little word "I." To make a kind of perspective in seeing the cause of seeing: that was what happened in the invention of the "subject," the I!

Id. § 548, at 294.

or expression of another part (representative of the whole). Thus, it is that "the roar" becomes an expression, a manifestation, an effect, an action of "the thunder." The effect of this subdivision of the world into part-part relations is to populate the world (as Vico, Hegel, and Nietzsche argued) with agents, agencies, spirits, and moving principles that are presumed to exist behind and prior to the phenomenal world.[47] Ironically, this metaphysical prefiguration of the world is a creation of language itself—specifically, of the trope of metonymy.

Synecdoche is closely related to metonymy (and is, by some, regarded as a kind of metonymy). What distinguishes synecdoche from metonymy is that the latter reduces the whole to the part whereas the former merely attributes to the whole a *quality* of the part. Hence, if we were to read the expression "He is all heart" as a metonym, it would produce the nonsense supposition that he is composed entirely of heart. Read as synecdoche, however, the expression means that all of him is to be understood in terms of certain qualities associated with "heart"—namely, goodness, compassion, and the like. The key distinguishing effect is that metonymy is reductionist (reducing a whole to one of its parts) while synecdoche is integrative (unifying the various parts into a whole by way of the quality of one of the parts).

In law, it is often difficult to decide whether some particular legal argument or claim is an instance of metonymy or synecdoche. Hence consider, for instance, the claim that the United States Constitution is a "written constitution." From that particular claim it is possible to produce both a synecdochal integration and a metonymic reduction.

Consider a synecdoche first. In *Marbury v. Madison*,[48] Justice Marshall used the writtenness of the Constitution as a basis for arguing that it was meant to endure over the ages and that it could not be changed by ordinary (legislative) means.[49] In this argument, Justice Marshall is engaged in a synecdoche—claiming that one of the characteristic qualities of the Constitution (its writtenness) has implications for its whole.

More than a century and a half later, in the celebrated right of privacy case *Griswold v. Connecticut*,[50] Justice Stewart makes something quite different out of the writtenness of the Constitution. In that case, his opinion makes a point of stating repeatedly that, search as he may, he "can find no such general right of privacy" in the Constitution or in any of its parts.[51] What he cannot find (if his argument is to be

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47 See White, supra note 44, at 35.
48 5 U.S. (1 Cranch) 137 (1803).
49 See id. at 176-78.
50 381 U.S. 479 (1965).
51 Id. at 530 (Stewart, J., dissenting).

convincing) is the markings "r-i-g-h-t o-f p-r-i-v-a-c-y" in the document. In this claim, he is assuredly correct. The validity of this argument, however, depends on Justice Stewart's reduction of the Constitution itself to one of its parts—its writtenness.

The difference between metonymy and synecdoche turns on whether the part is used to produce a reduction or the part is used to produce an integration. Justice Marshall uses the writtenness of the Constitution to give it a unified (though not homogeneous) identity. Justice Stewart, by contrast, uses the writtenness of the Constitution to reduce its identity to the totalization of a written document and nothing more.

It is also possible for both metonymy and synecdoche to operate at the same time—that is, in the same argument, the same approach, the same theory. Hence, a part of the whole may be used simultaneously to reduce the whole to that part *for some purposes* and to integrate the whole *for other purposes*.

In constitutional law, one can see these metonymic and synecdochal effects in sundry corners. Indeed, the "Earnest Readings" of the Constitution above were produced through a sequential substitution of different synecdoches. First, the Constitution was equated to a text meant to be read for its plain meaning. *Constitution = text*. Reading for a plain meaning, however, led to the recognition of a horizontal and vertical division of powers—indicating that the identity of the Constitution and its various parts are defined by this structural character. *Constitution = structure*. But reading the Constitution as structure, the judge comes to recognize that the Constitution itself allocates specific and limited institutional roles to its various addressees: the executive, the legislative, the judiciary, and so on. Now the Constitution is identified with another of its parts—the identity of the institutional addressees. *Constitution = institutional role*. Reading the Constitution from within the institutional role she is allocated, the judge comes to understand that her institutional role requires that she make sense of grand phrases such as "due process" by reference to those external matters referenced by such grand phrases. *Constitution = external sources referenced*. And so on.

What is to be noticed here is a common and recursive rhetorical strategy. Legal actors and thinkers fasten upon some aspect implicit in what is already taken to be the Constitution (e.g., its textuality, its writtenness) and then exalt that aspect so that it becomes equated to or regulative of the identity of the Constitution. Once this metonymic or synecdochal effect is produced, the legal actor need only trace out the implications and consequences of his particular metonymic reduction or synecdochal integration.

Hence, it is that the mysterious referent known as "the Constitution" is by turns reduced to or integrated by any one of its constitutive parts. Hence, it is (we are told) that:

> The Constitution does not "partake of the prolixity of a legal code . . . . Its nature, therefore, requires, that only its great outlines should be marked."[52]
>
> But, a constitutional "interpretation is legitimate . . . only insofar as it purports to interpret some language of the document and only insofar as the interpretation is within the boundaries at least suggested by that language."[53]
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> Of course, "[b]ehind the words of the Constitutional provisions are postulates which limit and control."[54]
>
> Still again, "although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words."[55]
>
> Then too, "nothing is more common than to use words in a figurative sense."[56]
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> In sum, the Court must "demonstrate in reasoned opinions that it has a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom."[57]
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> Indeed, what is required is "a fusion of constitutional law and moral theory, a connection that, incredibly, has yet to take place."[58]
>
> And such a fusion is a sine qua non, for "[t]he judge is entitled to exercise power only after he has participated in a dialogue about the meaning of the public values. . . . The obligation to justify a decision has given rise to never-ending debates as to the proper sources of judicial decisions."[59]
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> Truly, then, "it is *a constitution* we are expounding."[60]

The jurisprudential role of these metonymic reductions or synecdochal integrations lies precisely in stabilizing and identifying the character of the referent in such a way that the legal actor or thinker can "derive" therefrom through "interpretation" his or her preferred legal meaning. For the purpose of deriving some determinate legal meaning, virtually any metonymic reduction or synecdochal integration will do. The specific content of the metonymic reduction

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52 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819).

53 Frederick Schauer, Easy Cases, 58 S. Cal. L. Rev. 399, 431 (1985).

54 Monaco v. Mississippi, 292 U.S. 313, 322 (1933).

55 Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 202 (1819).

56 *McCulloch*, 17 U.S. (4 Wheat.) at 414.

57 Bork, supra note 16, at 3.

58 Ronald Dworkin, Taking Rights Seriously 149 (1977).

59 Owen M. Fiss, The Supreme Court 1978 Term—Foreword: The Forms of Justice, 93 Harv. L. Rev. 1, 13 (1979).

60 *McCulloch*, 17 U.S. (4 Wheat.) at 407.

or the synecdochal integration is what enables the legal actor or thinker to "derive" his or her desired meaning.

The plausibility of these rhetorical strategies lies precisely in the fact that the exalted part in question is undeniably a part of the Constitution. Hence, it would be difficult to deny that the Constitution is written, a text, philosophical in its language, structured, and so on. In part, it is undoubtedly each of these things.

The vulnerability of the synecdochal and metonymic strategies lies precisely in the lack of any consensus as to the appropriate metonym or synecdoche for the Constitution. Given a rich assortment of professionally and politically recognized metonyms and synecdoches for the Constitution, the elevation of one part of the Constitution to a superordinate role becomes quite questionable.

For those with an analytical bent, the question will always be "Why should this aspect predominate?" In short, what justification can be given for allowing any particular aspect of the Constitution to stand for and regulate the whole? For those with a deconstructive bent, it will be all too obvious that any particular attempt at the metonymic reduction or the synecdochal integration of the Constitution always already depends upon and affirms a contradictory construction.

PRETTY VACANT—THE ONTOLOGICAL EMPTINESS OF LAW

For anyone who has followed the argument thus far, the denouement is decidedly ironic. Debates about the meaning of "the Constitution," "the Law," "the doctrine," and "the . . ." are bizarre conflicts between competing metonymic reductions or synecdochal integrations. Many of these conflicts become extremely involved and very refined, leaving behind sundry mazes of excruciating intricacy.

For those who get caught up intellectually in these intricate legal mazes, it is easy to believe that there is something there—something enduring, important, valuable. Indeed, such a conclusion is almost irresistible: How could anything so complex, so intricate, as the law not be enduring, important, valuable?[61]

Yet ironically, for all the displays of intricacy, for all the sophisticated exercises of "thrust and parry," all our passionate legal argumentation rests in the end on ungrounded, unthought, and untheorized metonymic reductions or synecdochal integrations. All these legal arguments—*all this "law"*—about what the Constitution (or the ball) "means," "requires," "provides," "contains," "includes," "covers," and so on rest ultimately on ungrounded rhetorical gestures.

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61 For one answer, see Schlag, supra note 42.

There is, of course, nothing wrong with that—nothing, that is, unless, one wants to claim (as indeed virtually all legal actors and thinkers want to claim) that legal argument and law are rational. If that is the demand, then it cannot be met. And the result is that a great deal of legal argument and its residue—what is usually called "law"—is thus not what it is claimed to be.

This should not surprise. Consider what it means, in practical terms, that legal disputes so often turn upon which competing metonymic reduction or synecdochal integration is adopted. What it means is that the issue in many legal cases boils down to this: *Given something whose essence is to be two or more things at once, which one of the two or more things is it?*[62] Now, you will notice that, in rational terms, this is not an answerable question.[63]

Consider an example of such an issue, one which the Supreme Court faced in the famous case of *Griswold v. Connecticut*. In that case, which involved a Connecticut statute prohibiting the use of contraceptive devices, including use by married couples in the home, the Court faced the question of whether the Constitution provides (or contains) a right of privacy.

Justice Goldberg thought so. He thought the Due Process Clause of the Constitution, understood in light of the Ninth Amendment, and in accordance with "'the traditions and conscience of our people,'" provided such a right.[64] In viewing the Constitution as an organic tradition, Justice Goldberg thought it provided a right of privacy.

Justice Stewart, however, disagreed. He looked at the Bill of Rights, the various amendments cited by his colleagues and concluded: "With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court."[65]

So which is it? Does the Constitution provide a right of privacy or not? Well, that depends on whether the Constitution is understood to be an organic tradition or a written document. If the Constitution

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[62] With apologies to Thomas Reed Powell, who is reputed to have said, "If you have a mind that can think about something that is inextricably connected with something else, without thinking about the something else, then you have The Legal Mind." Kenneth L. Karst, The Pursuit of Manhood and the Desegregation of the Armed Forces, 38 UCLA L. Rev. 499, 563 (1991) (quoting Powell's unpublished aphorism).

[63] As Paul Campos puts it, "[I]n the contemporary American legal system, arguments about legal interpretation are processed routinely within a meta-context in which a multiplicity of constitutive contexts are treated as the singular constitutive context of the activity." Paul F. Campos, The Chaotic Pseudotext, 94 Mich. L. Rev. 2178, 2200 (1996).

[64] Griswold v. Connecticut, 381 U.S. 479, 487 (1965) (Goldberg, J., concurring) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1933)).

[65] Id. at 530 (Stewart, J., dissenting).

is to be understood as an organic tradition that protects fundamental rights, then it's a pretty good bet that the right of marital privacy is covered. By contrast, if the Constitution is a document, then it's a pretty good bet that the marks "r-i-g-h-t o-f p-r-i-v-a-c-y" are nowhere to be found in the document.

So which is it? In pertinent part (or whole) here, is the Constitution an organic tradition or a written document? This is an impossible question, since very obviously the Constitution is both organic tradition and written document (and indeed many more things). To ask, "Which is it?" is thus to ask an impossible question.

Nonetheless, that is precisely the question that the Justices in *Griswold* faced: Which is it? All of the Justices proceeded to answer this question by articulating their understandings of the identity of the Constitution and its pertinent parts. And not one of them was able to provide a sound rejoinder to the arguments of the others.

Thus, while Justice Stewart's view of the Constitution might be considered churlish, perhaps lacking in imagination, there is not one bit of argument that defeats his position. He is well within the norms of constitutional argument. Similarly, while one might find Justice Goldberg's or even Justice Douglas's disquisitions to be sloppy craftsmanship—given to an intolerable judicial activism—there is again not one bit of argument that defeats their positions.

Indeed, none of the arguments offered by the Justices meet the others' arguments at all. And the reason is simple: they are all arguing about different Constitutions while at the same time claiming that they are not. The vexing implication is that for all their rhetorical ardor, it is hardly evident that they are having a "real" argument. What the various Justices do offer are competing metonymic reductions or synecdochal integrations of the Constitution. And there is not the slightest bit of rational argument that would help us choose between them. And so the question remains: Which is it?

Law students, law teachers, lawyers, and judges are often asked to answer such questions. And they are often goaded into doing so by invitations to use their "good judgment" or "common sense" or "practical reason." The negative implication is almost always that the failure to produce an answer—usually, the one desired by the interlocutor—is a sure sign of professional or intellectual deficiency. But this supposition is nonsense, a kind of rhetorical bullying. By its terms, the question does not permit an answer.

Now, of course, if it were the routine amongst lawyers, judges, law teachers, and law students to ask impossible questions in the starkly intractable form presented above, law would hardly seem like a plausible enterprise. Simply imagine that every legal issue came

down to the intractable question: *Given something whose essence is to be two or more things at once, which of the two or more things is it?* If legal issues were routinely presented in this way, it would be very difficult to sustain belief or interest. And so they are not.

Instead, various rhetorical strategies are brought into play that make the intractable question appear more sensible. It would be difficult to provide a complete account of these rhetorical strategies here—as these comprise the bulk of what is known in law school as "the case law" or, more briefly, "the law." Still, it is possible to give some illustration. Consider then, two of the strategies by which the intractable question is reformulated so that it seems more rational. These strategies might be called "comparative assessment" and "normative idealization."

Comparative Assessment

This strategy lies in transforming the judgment required from an absolute either/or classification into a kind of comparative assessment. For instance, rather than asking whether the Constitution is either an organic tradition or a written document, one asks instead whether it is more like an organic tradition or more like a written document.

Hence, in the legal literature, legal actors and thinkers confronted with the choice between binary oppositions will ask questions such as: *Given something that is defined to be two or more things at once,*

Which thing predominates?
Which thing is primary?
Which thing is it closest to?
Which thing is more directly implicated?
Which thing is more essential?
Which thing is more important?
Which thing is the closer nexus?
And so on.

Once the question is reformulated in such comparative quantitative terms—terms of more or less—it becomes plausible to appeal to faculties such as "good judgment" or "practical reason" to resolve the issue. That is because good judgment and practical reason *seem* so readily appropriate to decide questions of degree.

Thus, when one asks, in the context of *Griswold v. Connecticut*, whether the Constitution is predominantly a written document or predominantly an organic tradition, it seems as if good judgment and practical reason are precisely the kinds of faculties appropriate for resolution.

But they are not. And ironically, to the extent they seem so, it is because of another metonymic reduction. If the reformulated question seems like one of degree, that is because *in part*, it is. But only in part. What has been eclipsed by this quantification is the question of frame. We are asking: "The Constitution is predominantly a written document or predominantly an organic tradition by reference to what? By reference to what frame (and indeed, what Constitution)?"

The point is that in answering the question "Which aspect predominates?" there is more involved than simply the comparative quantitative judgment of degree. There is also the question of the frame and the specification of the crucial terms ("written document," "organic tradition," "predominantly," and "in this context"). Deciding how to understand these crucial terms calls for something more than simply the invocation of the juridical mantras such as "good judgment," "common sense," and "practical reason."

NORMATIVE IDEALIZATION

Another strategy to reformulate the intractable question entails a shift to the normative plane. Particularly in late twentieth-century American law, legal actors and thinkers have brought the "should" and the "ought" of the law to the foreground. In a sense, this change in emphasis from the "is" of the law to its "ought" enables legal actors and thinkers to avoid troublesome questions about the law's identity. Instead of having to ask of a thing defined to be two or more things at once "Which thing is it?" the normative idealization strategy enables legal actors and thinkers to ask instead "Which thing should it be?" or even "Which thing should we treat it as being?"

Reformulating the question in such normative terms allows for the separation and differentiation of form and function, of identity and role. The function and role of the Constitution can be ascribed from the outside as it were. The basic idea is simple: We may not be able to determine whether the Constitution *is* more like a written document or more like an organic tradition, but we can "give reasons" as to whether it *should be* treated as a written document or as an organic tradition. To the extent that the legal actor or thinker can supply a function or a role for the Constitution, the reformulated question seems sensible, seems like it might actually beget an answer.

This normative gloss appears to work precisely because it seems that the question "Which thing should the Constitution be?" is independent of its identity. But this is not right. If one were truly without any view of what the Constitution is, it would be impossible to begin, let alone finish, any argument about what it should or should

not be. Form may be different from function, and identity may be different from role, but there must always be some connection for a normative argument to follow. The normative reasons for treating something as being this or that must have to do with the fact that this something is *this* kind of thing as opposed to *any* kind of thing.[66]

And indeed, that is what makes the argument above so interesting—for after all, it is not unintelligible. Nor is it unusual. On the contrary, most members of the legal community and the lay public would understand what it means to say that the Constitution *should* be this or that even though of present it is not. But if the argument is intelligible, it is precisely because an understanding (and a fairly rich one) of the Constitution's identity is already at work. Very likely that understanding includes such notions as the supremacy of the Constitution, its foundational character, its resistance to legislative change, and the like.

The short of it is, if you have something whose identity is to be two or more things at once, the question "Which should it be?" is not obviously easier to answer in rational terms than the question "Which is it?" What, then, does all this get us?

THE RISE OF "SUFFICIENTLY PLAUSIBLE" JURISPRUDENCE

Amidst the dreary bureaucratic drone of the plurality opinion in the case of *Planned Parenthood v. Casey*,[67] there is one stunning moment. The plurality opinion states:

> 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.[68]

Beginning with an affirmation of "principle," the plurality opinion collapses to the point where all that is required is that the principled character of an opinion be "sufficiently plausible" to be accepted by the nation. For those who pay attention to these things, this is not exactly a demanding threshold.

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[66] This is an abstract echo of an argument once advanced by William Van Alstyne, Interpreting *This* Constitution: The Unhelpful Contributions of Special Theories of Judicial Review, 35 U. Fla. L. Rev. 209, 227-35 (1983).

[67] 505 U.S. 833 (1992).

[68] Id. at 865-66 (emphasis added).

And yet as law-weary as the plurality's statement seems to be, it nonetheless captures an important truth. Indeed, if the task of law lies in making something constituted as two or more things at once appear to be only one of those things, then how could one reasonably demand anything more than *sufficient plausibility*? Isn't that already asking quite a lot? In fact, isn't it asking for about as much as one could possibly get?

And so, at this point in the history of American law, what we get is sufficiently plausible jurisprudence. The hallmark of such a jurisprudence lies in advancing arguments that sound plausible, that are not obviously wrong, and in affirming with whatever authority can be mustered (through wit, charm, institutional affiliation, threat-advantage, bluster, pandering, or sheer doggedness) that the arguments are true, right, or good.

In terms of law, sufficiently plausible jurisprudence yields a kind of genial mushiness: not too much, not too little, a reasonable amount. Sufficiently plausible jurisprudence is recognizable by its measured and moderate tone, its dramatic lowering of the intellectual expectations for law and its general pandering to legal common sense. It is, as its name indicates, sufficiently plausible. It tells members of the legal community what they already know, and more important, that what they already know is already good enough. Or as Cass Sunstein puts it: "We may thus offer an epistemological point: People can know that X is true without entirely knowing why X is true. Very often this is so for particular conclusions about law."[69] Indeed. This is the sort of thing that Nietzsche's last men would have liked: "We have discovered sufficiently plausible jurisprudence," they say. (And they blink.)

Is That All There Is?

H.L.A. Hart was really on to something when he claimed that the meaning of law is generally clear, certain, and stable at its core, but less so at its penumbra.[70] What he was on to is what American legal actors and thinkers typically believe about the *semantic meaning* of a rule. In this respect, Hart seems to be correct: if it is *semantic meaning* that we are talking about, then the core is indeed clear, certain, and settled and the penumbra less so.

In what may be a more fundamental *ontological* sense, Hart's image of a settled core and a penumbra of doubt is inappropriate. If what I have argued here is right, then there is a fundamental ontologi-

[69] Cass R. Sunstein, Legal Reasoning and Political Conflict 7 (1996).

[70] See supra text accompanying note 28.

cal emptiness, not at the penumbra, but at the very core (or cores) of American law. The ontological identity or identities of American law remain in a profound sense unknown, underspecified. It is the penumbra that we have named, that we know, that we can debate in relatively articulate terms. The ontological core (or cores) seems to be a remainder created by the jurisprudential action on the penumbra. The irony is that it is the core or cores that are supposed to regulate and ground the penumbra. And these remain mysterious, radically underinvestigated.

This means, of course, that so far there is not a great deal to say about the ontology of American law. That in itself, however, may be saying quite a lot—particularly given the unbounded confidence that legal actors and legal thinkers display about the status,.the power, and the promise of their "knowledge." Still there are some things that can be said here about the ontology of American law.

First, American law is ontologically structured in a *presumption* that its ontological identity or identities are already secure, already known, indeed, too obvious for words, sufficient onto the day.

Second, the ontological structure of American law is organized in a *hierarchy of default rules* that leads legal inquiries, disputes, or doubts away from the ontological to the epistemic, away from the epistemic to the normative, and away from the normative to the technical. One result of this *hierarchy of default rules* is to effectuate and reinforce the *presumption* that the ontological identity of American law is secure, already known, indeed, too obvious for words. The backgrounding of ontological inquiry is itself a crucial aspect of the ontology of American law. To put it bluntly: *American law is ontologically grounded in the forgetting of its own ontological structure.*

Third, American law posits into existence whatever "balls" (whatever ontological entities) are necessary to perform the "gesture" (the ascription of legal meaning). Hence, it is that legal thinkers will presume into existence whatever ontological entities are required to sustain their epistemology and whatever epistemology is necessary to sustain their normative commitments. To put it simply: In American law, normativity rules epistemology. Epistemology rules ontology. That is the ontological structure.

CONCLUSION

There is none.