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Law and Mystery: Calling the Letter to Life Through the Spirit of the Law of State Constitutions

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LAW AND MYSTERY: CALLING THE LETTER TO LIFE THROUGH THE SPIRIT OF THE LAW OF STATE CONSTITUTIONS

*Emily Fowler Hartigan**

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I. PRELUDE

If law is anything today, it is dispirited. It lacks life, vitality, enchantment, vision. Neither law nor its practitioners sing—or even hum. My students tell me that they know this but want to hope for more. This article tries to suggest something more, which is already present in America's state constitutions if we can dare turn to hear it.

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Deep thanks to those who have been willing to treat this text as friendly, and have helped call me to change it, including Ruth Colker, Richard Harnsberger, Roger Kirst, Stewart Maccauley, Carol Ochs, Ramona Paetzold, Michael Perry, Tom Shaffer, and John Snowden. The remaining intransigence is mine.

It is the voice of the spirit of the laws of the land. It sings of a vision, and this article is an attempt to tell enough of the story of that vision so that you, too, may hear "an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law."¹

To listen for the spirit, we can best attend to (in addition to the language of law texts) language of the spirit, language in which humankind has lived in hopes of relating to Ultimate Reality for millennia. The spirit we hope to tap is not necessarily theistic, but there is some correspondence among ideas of spirit, consciousness and God.² As with the best of such language, we must speak not only of belief but also of doubt and mystery beyond necessary reason.

This essay examines a strain of constitutional law, anchored by actual judicial language about the spirit of the law, which participates in the discourse identified in two key law review articles, Suzanna Sherry's "The Founders' Unwritten Constitution" and Thomas Grey's "Origins of the Unwritten Constitution".³ The essay also uses nonjudicial language of the spirit within the law, from authors of several spiritual traditions.

Grey's classic article argues that constitutions are not exhausted by their written incarnations, but have a fullness and depth as the binding corpus of foundational law which the words of the text cannot contain. Both Sherry and Grey identify the sources of the fundamental law underlying and complementing our written constitution, and indicate why these foundational sources, recorded and unrecorded, are not reducible in content or use to mere individual subjectivity, mere judges' whim. Sherry and Grey write about colonial era cases and establish the *existence* of the sources of unwritten law. This piece deals with the content, the nature, of a key voice of the unwritten law, through the language and spirit which nineteenth century state constitutional judicial writing brings to light. This voice is local, traditional, participatory, democratic, rooted in spirit, in the People and in "the law of the land."

Although state constitutional law is enjoying a renaissance, that rebirth is seen mainly in the light of its relationship to federal constitutional law.⁴ In contrast, this piece stresses an entire conversation

1. O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 170 (1920).

2. S. MOORE, LET THIS MIND BE IN YOU (1985), (esp. Ch. 10' and 11).

3. Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 852 (1978).

4. See, e.g., *Symposium: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959 (1985).

concerning constitutive law which took place at the local level during the last century, a kind of American judicial discourse which the federal Supreme Court suppressed in its own opinions. This discourse is probably best described as a form of naturalism, although in the past it would have been called natural law; the distinction is an attempt to dissociate the "higher law" at issue here from what the positivists viewed as moralistic, punitive and inherently conservative.⁵ My agenda is not conservative in either the political or the philosophical sense, although I share with commentators like George Will and Alan Bloom a call to move beyond the stasis of relativism or pure skepticism. The focus on state law is one positive, reconstructive path open to potentially redistributive legal scholars.⁶

Along with the turn towards a decentralized view of American jurisprudence, the discourse calls for something akin to a leap of faith—something which would call relentlessly analytic thinkers like Thomas Nagel toward a stance from which I believe they could sense the Nowhere, the Objective view point which they seek but resist.⁷ That leap requires an appreciation of uncertainty, of mystery, in the context of reflection. At core, the piece tells a story about being someone, somewhere, interpreting and advocating law, without being reduced to mere, hopeless subjectivity or to dry, lifeless detachment.

This call paradoxically claims that the correct form of bringing spirit to the law requires a greater personal inwardness which grounds in and makes more likely, a greater perception of interpersonal generality. It acknowledges that both distinctiveness and universality are present in that greater inwardness, but that the closest approach to true universality (human nature) must be made by an authentic attitude of attention which involves looking inward. And this is a problem within the article itself. How can I write something which tries to speak within a dominant culture of "reasonable" white males, claiming all the while that I can only speak authentically, personally as a woman—yet that mysteriously I also speak as fully human? How can I tell you how important it is for me to be different, yet invite those of you who are in the extant predominant voice, not only to listen but to hope to hear me?

This is a version of the problem discussed recently by Alisdair

5. For a discussion of naturalism, see M. PERRY, *MORALITY, POLITICS AND LAW* (1988).

6. Collins & Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 216 (1988).

7. T. NAGEL, *THE VIEW FROM NOWHERE* (1986).

MacIntyre, Clifford Geertz, and Michael Walzer, of different worlds among speakers and listeners.⁸ If language depends on culture (and gender), and cultures are plural, then how can one language translate into another? If to make sense, a person must speak from within a tradition and the listeners must share that tradition to know what is being said, how can one from a different culture (or gender) address you? An elegant analytical answer to that occurs in David Tracy's *Plurality and Ambiguity*.⁹ He reminds us that within a tradition, there is always a plurality of views, of world perspectives, of life experiences. The notion of a unitary tradition is at best partial. There are always subscripts, splinter groups, heretics, new hybrids. These are, even in their opposition, part of the tradition. We already debate within traditions over the identity of the tradition. The meanings within a culture are always, to varying degrees, up for grabs. And the history of a culture is rich with undercurrents which contemporaries claim represent the "true" tradition.

An example of that tension between the individual and her tradition, for me, is the Catholic church. I do not experience it as the Church which the Pope apparently experiences; he and I disagree on a number of vital issues about authority, hierarchy, gender, ministry, and theology. He and I agree that the Church is the Mystical Body (though I think it tacitly enfolds all humankind), and its very nature and unity are a matter of experienced but unknowable gift. Like most people, part of me believes that deep down he really knows the truth; I further think the truth is something which can never be fully spoken, yet participates in reality. I know that beyond my tendency to equate truth with "what agrees with me," both the Pope and I know that truth and mystery interwine. Despite many things in the dominant Catholic tradition which I find outrageous, I believe that it also contains greater truth than I have yet been able to recollect. I have medieval mystics (Hildegard of Bingen, Julian of Norwich, Meister Eckhart) to back me up; I can cite (and, more importantly, learn from) contemporaries like Thomas Merton, Teilhard de Chardin, Helen Luke and Sebastian Moore. I have gospel passages and scripture from the Hebrew bible. But the wide resources of the tradition will never guarantee agreement. Still, the Pope and I hope to share a common language.

I have found teaching law and theology at a secular law college

8. A. MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988); M. WALZER, *INTERPRETATION AND SOCIAL CRITICISM* (1987); C. GEERTZ, *WORKS AND LIVES* (1988).

9. D. TRACY, *PLURALITY AND AMBIGUITY* (1987).

that not everyone agrees with me—conservative Catholics, those of *my* tradition, often least of all—and no one agrees with me completely. But I have also found that students and I are very interested in talking about law and spirit, and that the talk is not just to convince. They doubt a common language or shared values, but they are open to being found by them. We meet in good faith dialogue—something happens. We leave the class changed; I warn them that is the risk they (and I) take.

And so I have changed this essay. After several male readers' responses, I have added a voice directed toward the dominant tradition. My voice alone was perceived as "bright and unpredictable," and chancy stuff for law reviews. I have tried to move it towards the conventions of the journals. I want to enter the discourse about law which involves *all* those hoping to be of good faith who want to pursue justice and who care about the goodness of the law. The law cannot be valuable without the spirit; it cannot be real without the letter. How the two combine is a matter of reason and heart—and mystery. This essay is an attempt to ground a discussion of the spirit of the law, of law's inwardness, in the discourse of the American state courts as they continued for a century to do what the federal courts tried to avoid—to talk openly about the spirit of the law, the higher law, the unwritten law, even the natural law. I want to speak in their vocabulary, and then to point to their discourse to suggest that to discern the spirit of the law, to move beyond the fear of hopeless fragmented, subjectivity, we can consider trusting spiritual writers, those within all our available traditions who have most wisely thought, lived and written about spirit and prayer.

I go to someone from the Jewish tradition, Abraham Joshua Heschel, to talk about spirit and prayer, because I claim to recognize truth in what he says. The form of authentic inwardness *in relation to* text (because law always has some text, be it constitution, statute, regulation, contract or case law) which Heschel says prayer represents, describes an attitude of mind and heart which I present for the reader's evaluation, as trustworthy. It is not raw, unbounded subjectivity, but a form of attention to the *words* of a people's tradition (of a polity's code) which represents both a disciplined inwardness and a fidelity to the direction which the outward, public writing suggests.

It is not that prayer by itself is a sufficient hermeneutic, but that a hermeneutic which stops short of prayer will always be deficient. The prayerfulness includes both a reflective aspect (bringing the text into the heart, the mind into the heart) and an acknowledgement of the

limits of rational reflection. There is an element of mystery, in addition to, not in place of, reflection.

The interplay between reflection and mystery, between what can be written and what remains unwritten, avoids the worst flaws of what Nancy Rosenblum calls "the law of the heart" alone.¹⁰ She portrays an anarchic, romantic individualism which reduces the fully inward to idiosyncratic willfulness. Her argument is that the fully romantic does not presume universality of inwardness, but *only* uniqueness.¹¹ My thesis is that the individual contains *both* the unique and the universal. The anarchic rebel will, like G.K. Chatterton's *Man Who Was Thursday*, find in her antinomian depths that she is with the rest of us, all "outsiders" yet connected. In our current cultural situation, we need to claim some way of speaking among ourselves which involves a trust of sameness yet a respect for difference. Further, in the Judeo-Christian (and other) traditions, the heart is not the feelings, but the center of the person. At the center, our whole being is the meeting of the unique with the universal image of God, or the postmodern self, or of the essence of being. Subjective and objective, same and different, converge.

I point in this essay towards the prevailing sense of sameness, but much of the essay is done differently. It is not solely in abstract, discursive, linear style. It is in narrative, imagery, personal story, and maybe even poetry. There is a story behind that.

The story starts with my eight and a half years between law school and teaching. During that time, in order to remain sane while practicing and clerking, I began to read theology and mysticism. When I began to re-enter the discourse of the academic journals, I found that less had changed than I might have hoped. There were still (but more) versions of why liberalism was incoherent, there were orthodox counterattacks, and there still was no overt vision. It began to occur to me that I had gone to the world's sacred writings for vision, all those years.

Just as I left the academy, Arthur Leff had argued that we needed someone "like unto the Lord", Roberto Unger had called on God to speak, and the level of academic irritability had gotten relatively high.¹² In the next few years, law and politics got reconnected, from law review articles through tenure decisions, and still without

10. N. ROSENBLUM, *ANOTHER LIBERALISM* (1988).

11. *See, e.g.*, one attempt at this pure particularism, R. RORTY, *CONTINGENCY, IRONY AND SOLIDARITY* (1989).

12. R. UNGER, *PASSION* (1984).

vision. Robert Cover suggested that law was integral to a community's vision of itself. He began to write about Messianic Law, saw a vision of a universal Torah, and then died.¹³ Something like acknowledged visions began to be suggested. Mark Tushnet accused himself of mushy utopianism, but suggested decentralization.¹⁴ Liberals reconstructed philosophical liberalism and tried to acknowledge it as a full belief system.¹⁵ People came out in favor of tradition, natural law, and virtue.¹⁶ Michael Sandel suggested the foundations of communitarianism.¹⁷ Republicanism was resurrected, reconstituted, revised. Commentators moved between re-vision and tradition. Visions of some substance had begun to appear.

Something else happened in those years. Women began to write more openly about their different voices, their different ears, their different selves. Women began to make explicit ways in which the female was fundamentally different from the male. They said that the personal was the political. Carol Gilligan said that a relational ethic, a morality of care rather than rules, was intrinsic to women, and that the more abstract and analytical morality of post-Enlightenment thinking relegated this different form of moral action to an inferior status.¹⁸ Women scholars feared it was too dangerous to acknowledge differences, because once again women would find that to be other than male was to be less than "human." But they also began to claim the value of their own way of speaking and writing.¹⁹

This sense of difference extended to modes of expression. Women were less likely to use linear, discursive "reasoning" in writing about an issue; feminist jurisprudence claimed that this different, more intuitive style was no less valid, and that in its absence, discourse was fatally flawed.²⁰ Much of the feminist writing on this sub-

13. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); *Messianic Law* in NOMOS XXX: LAW RELIGION AND MORALITY (Chapman and Pennock eds. 1988); Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J. LAW & RELIG. 65 (1988).

14. Note 38 *infra*.

15. See, e.g., B. ACKERMAN, SOCIAL JUSTICE AND THE LIBERAL STATE (1980); A. GUTMANN, LIBERAL EQUALITY (1980).

16. E.g., Teachout, *The Soul of the Fugue: An Essay on Reading Fuller*, 70 MINN. L. REV. 1073 (1986).

17. M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1985).

18. C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

19. Card, *Women's Voices and Ethical Ideals: Must We Mean What We Say?* ETHICS 125 (Oct. 1988); CRITICAL INQUIRY, Volume 8 No. 2: *Writing and Sexual Difference* (1981); M.F. BELENKY, B.M. CLINCHY, N.R. GOLDBERGER, AND J.M. TARULE, WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE AND MIND (1986).

20. Scales, *The Emergence of a Feminist Jurisprudence*, 95 YALE L.J. 1373 (1986).

ject is convincing to me; I recognize that the ways in which truth is revealed, even momentarily and partially, are much more varied than masculine discourse suggests. To some extent, male and female write in both modes, as the 19th century state cases by all male justices in this piece demonstrate. Thus the first version of this essay was deliberately not in the dominant analytic mode in which I had done all my previous academic writing, but it has changed.

The first version was much more allusive and poetic. It had a more distinctive texture, and fewer "road signs." It was organized less explicitly, and relied more on implication and image. I was asked if I knew what I was saying (I did). Now I have tried to make it more directly accessible, but it risks having lost some of its mystery, in trying to make explicit some things which, as the cases themselves suggest, cannot be made fully explicit.

Ironically, it is the mystery which is the greatest source of freedom and growth, of my being able both to believe and to be open to changing that belief. The mystery allows a return to belief, from a new place: "a true description of what one believed earlier has in it the seeds of reconciliation with what he believes now."²¹ The earlier version of this essay had the seeds of this version, but only my readers' response let the seeds take root. Joseph Vining claims that it is this very move—from belief to new belief—which frightens lawyers about belief. But it is this very move which is the invitation to life, because it promises that belief is not a trap. Belief in words makes them live, but *with belief come doubt and dialogue*, and thus a process fostering growth and change.

This prelude, and the similar passage at the end, as well as some stanzas along the way, are revisions and invitations. They are attempts to speak initially in the terms of discourse of the legal academy, footnotes and all, in order to attempt some translation of what the rest is saying. But the invitation is genuinely to enter the world of the Other, mysterious voice, to let go of the analytic handholds from time to time, and to risk beginning to glimpse what my discourse arises from—the beginnings of a song of vision, a vision both old and new, a spiritual vision—of the spirit of the law of the land.

* * *

II. ONE VOICE OF THE LAW OF THE LAND

My computer ate the first two partial drafts of this essay; those

21. J. VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* 596 (1986).

mechanical meals were providential editing. As an assistant professor, by definition I lacked the humor and perspective necessary for self-correction or good rationalizations; intervention was necessary. Perhaps my subconscious was wiser than my tenure-seeking persona. Wandering numbly through my apartment, betrayed by my PC, I found my 20 year old copy of Walter Lippmann's *The Public Philosophy*²² and Abraham Joshua Heschel's *Quest for God*.²³ From Heschel, I recognized that what my earlier draft thoughts on our interpretive relationship to text were missing, was prayer. From Lippmann I recalled his early insight that we have been "missing" in the public sphere, for decades.

First a little on prayer, then public philosophy, because prayer is the touchier subject. As Harold Berman notes, to talk about such things is to risk being attacked for "overstepping the bounds of public discourse."²⁴ The relationships among interpretation, hermeneutics, and prayer should not be surprising, however, given how much theology centers around scripture. Hermeneutics was a stranger to law reviews fifteen years ago when it was a long familiar discipline in seminaries and divinity schools. The texts over which the greatest disputes in our culture had raged, aside from perhaps over Shakespeare and Plato, were the documents contributing to the Book—predominately the so-called "Old" and "New" Testaments (or the Hebrew and Christian Bibles). Scripture was to illuminate the truth. The primary use of Scripture, however, by those who took it seriously (and reverently) was for worship, for prayer, for speaking to God, for invoking God's presence. Whether transcendent, immanent, communal or contemplative, the words of scripture come alive in relationship. "Conversation occurs if, and only if, we risk ourselves by allowing the questions of the text."²⁵ They were words given, words received, words to be attended to and lived—words of prayer.

The words of Scripture aroused disputes, passions, institutions, enclaves, perhaps even wars . . . as have the words of constitutions.²⁶ Neither our national scripture nor traditional Judeo-Christian scripture is self-interpreting or self-inspiring. For a constitution to live, it must be taken seriously, attended to, pondered in the heart, discussed,

22. W. LIPPMANN, *THE PUBLIC PHILOSOPHY* (1955).

23. A.J. HESCHEL, *QUEST FOR GOD* (1954).

24. Berman, "Religious Freedom and the Challenge of the Modern State", Williamsburg Charter Nat'l Symposium on Religion Liberty Clauses in American Public Life, at 107 (1988).

25. Tracy, *supra* note 9, at 20.

26. Grey, *The Constitution as Scripture*, 37 *STAN. L. REV.* 7 (1984).

interpreted, and, finally, in the presence of the best of the spirit of our community of the United States within the world, it must be, carefully, prayed.

This is the uncomfortable part—embarrassing even. God language (even Ultimate Reality language) is not polite talk in academia. I hear the historian who, at the very mention of an unwritten constitution underlying Magna Carta, the Declaration of Independence, state constitutions, and the U.S. Constitution, said “Talk like that scares me—it smacks of mysticism.” I hear my years of agnosticism muttering “How can you give credence to such irrational, sectarian stuff?” I recall the journal which almost rejected my solicited review of Bruce Ackerman’s book on social justice, because “she makes it obvious she believes in God.” I hear the rustling, the dismissal, the attrition that words like “God” and “love” and “truth” and “justice” create in polite legal academic company. I hear a mentor telling me of the several inquiries about my resume’ (which includes a piece titled “God and Mammon and [Novak’s] Democratic Capitalism”²⁷): “Is she some sort of a religious nut?”

To unsettle that last question I want to tell you about Brother Juniper, just briefly. I will try to signal when in this essay the mystical stuff is coming, but by next time I will hope to have suggested why it, in tandem with what we easily recognize as rational, is irresistibly helpful to understanding law.

Brother Juniper, who joined the Order of St. Francis about 1210, was famous (or notorious) for “his outrageous antics, his patience and his deep desire to imitate Christ.”²⁸ Murray Bodo created a sketch of Juniper based upon the 14th century stories about him and his friend Brother Tendalbene, whom he asked: “Tendalbene, didn’t you always say that the trouble with being too reasonable was that we would forget the mystery of things?”²⁹

For Juniper, God found fools and sages alike:

What matters in the end, I guess, is that we try to live the mystery, foolishly or wisely; that we realize wisdom or foolishness is never an answer. In fact wisdom and foolishness might be the same thing: a way to God who has found us in both wisdom and foolishness before we went looking for him.³⁰

Juniper applauded those called to reflect, to study Scripture, but not

27. 62 TEX. L. REV. 949 (1984).

28. M. BODO, JUNIPER: FRIEND OF FRANCIS, FOOL OF GOD (1983).

29. *Id.* at 69.

30. *Id.* at 70.

when their seriousness extinguished the mystery, the play, of life. "It is magic that has gone out of our lives . . . Everything is reasonable now, my brother, and the brothers are holy in a reasonable sort of way."³¹ How did the brothers become reasonably holy?

. . . the only thing that can kill magic is ridicule. And when mockery came catapulting into our enchanted world, we became reasonable and defended our world with logic. When we did that, the magic died and we began leading predictable, defensible lives.³²

From Juniper's folly, I glean this request to the reader: do not mock this text, please. That is a nearly irresistible reaction by clever readers; even someone as impressive as Peter Teachout succumbed when faced with Milner Ball's risking uncomfortable topics like God and Law.³³ It does not become the commentator. If there is something of wisdom to be contributed from reflections on the millennia of spiritual writers, it will not translate well through defensiveness. Thus, I trust the reader to treat my narrative with respect, or to skip on to another article.

Let me also repeat a plea for mystery. Not for magic, or raw superstition or simple anti-rationalism—but for something like intuition, which allows our busy minds *after* all their genuinely necessary machinations, to be found by truth which yields insights but never stays. This is a call echoed in William Brennan's herald to reunite head and heart.³⁴ Even the courts below talk directly about what is "undefined, and perhaps undefinable" by the general codes. They return to "ancient" and "sacred" rights and the "living spirit" which is the "force" of "the body politic." These references are to the idea of the "vitality" of the "genius of our government," and specifically to "the law of the land."

There are long histories of "the law of the land," Magna Carta's *legem terrae*, and yet it is ultimately mysterious.³⁵ It is in these state

31. *Id.* at 87.

32. *Id.* at 88.

33. A. Simpleman (a.k.a P.R. Teachout), *Sentimental Metaphors*, review of M.S. BALL, LYING DOWN TOGETHER: LAW, METAPHOR AND THEOLOGY, 34 UCLA L. REV. 537 (1986).

34. W.J. Brennan, Jr., *Reason, Passion, And 'The Progress Of The Law'*, 42#8 REC ABNYC 948 (1988); also see H. NOUWEN, LIFESIGNS: INTIMACY, FECUNDITY AND ECSTASY IN CHRISTIAN PERSPECTIVE (1986); S. MOORE, LET THIS MIND BE IN YOU (1985); Scales, *The Emergence of a Feminist Jurisprudence*, 95 YALE L.J. 1373 (1986); Fraser, *What's Love Got To Do With It? CLS, Feminist Discourse, and an Ethic of Solidarity*, 11 HARV. WOMEN'S L.J. 53 (1988); Cornell, *Post-Structuralism, the Ethical Relation, and the Law*, 9 CARDOZO L. REV. 1587 (1988).

35. See Jurrow, *Untimely Thoughts*, XIX AMERICAN JOURNAL OF LEGAL HISTORY 265 (1975); Berger, *Law of the Land Reconsidered*, 74 NW. U.L. REV. 1 (1979); *Law of the Land*, 3

courts' accounts, a living, creative spirit that gives life to the polity, yet it is both written and unwritable. Like Robert Cover's *nomos*, it sits in the is and stretches towards the ought.³⁶ It is the Heraclitean stuff of becoming. The spirit gives life to the letter.

None of this makes it nonsense. But the side of the paradox of the written and unwritten law of the land which is never fully transcribed, is what reminds us to be humble, even to the point of prayerfulness. The attitude of the reader of a constitution must ultimately be faithful, not merely to self, but to text and *nomos*. The result is not automatic. The wonderful labyrinth of belief/creed, sacred/secular, law/religion is explored profoundly by Sanford Levinson in *Constitutional Faith*, but even he must leave us unresolved.³⁷ He tells us he will sign and endorse the United States Constitution, but it takes an entire book of weighty (and witty) reflection to tell us one person's story of what that means. We can tell stories and attend to the text, but even the black-robed state justices know that the story is never finished; the definitive text is never written; mystery remains, and each person must bring life to it.

The texture of this discussion of the letter and spirit of the law is from state constitutional decisions. The core is eight cases from seven different states, from the 19th century. The language on which this discussion of state cases centers, emerges as more common in nineteenth century judicial discussion than in today's. The article proposes that this somewhat unfamiliar language from the states' pasts, points us to the future throughout the republic. It offers both a rejuvenation of the *nomos* of the law of this land and a focus for the decentralization called for by critics from Supreme Court dissenters and Richard Epstein, to Mark Tushnet.³⁸

It would be strange if we could conceive of a reconstructed vision of American law without touching the times and texts in which the old faith was honored. These old stories and the ease with which they incorporated the sacred in the law, provide us with echoes of a spirit of the law that is at once incarnated in time and transcending it. The sentiments of the older cases remind us of something that they invoked at the same time they attempted to embody it. We cannot give

ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1130; C. REMBAR, *THE LAW OF THE LAND* (1980).

36. Cover, *supra* note 13.

37. S. LEVINSON, *CONSTITUTIONAL FAITH* (1988).

38. Tushnet, *Federalism and the Traditions of American Political Theory*, 19 GA. L. REV. 981 (1985); Epstein, *Self-Interest and the Constitution*, J. LEGAL ED. (1986); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985) (Powell, J., dissenting).

substance to exactly the same spirit or vitality, but the deeper reality that the cases invoke promises to begin to bridge toward the perpetually unattained "ought" of the law. From one vantage, we see the warm Heraclitean flux forming patterns in the spirit's tracings; from another, we see the Platonic form of the Good glimpsed in its crystalline unity. The "point of intersection of the timeless with time" is both momentary and eternal, both essential and practical, and the interaction of seeming opposites makes the deepest sense yet none at all.³⁹ Our discourse is T.S. Eliot's "raid on the inarticulate with shabby equipment always deteriorating,"⁴⁰ but it is an attempt at liberation from mordant legalism.⁴¹ The oldest of the specifically Christian sacred texts (and much of Jewish holy literature) and of major world religions combine in pointing to a turn of mind and heart from the trap of mere letter.⁴² This "post-modern" cast of thought is also echoed in feminist writings, both theist and ostensibly secular. If the theologians and feminists are correct that human nature is potentially more expansive than humanity has yet owned, this new turn is a full, fertile sphere. It moves first away from current rational conventional thinking, and then moves back, enriched by its journey. It undergoes, in the image of theologian John Dunne, the transformation created by passing over and return.⁴³ It is both exodus and regathering, both leaving and claiming. It is, in Eliot's words, returning to where we started but knowing the place for the first time.⁴⁴ It is a dance of alternation, of letting go, reclaiming, leaving, coming back, re forging, and knowing that time to let go will come again.

The observers of the law are not unaware of this time to turn. Arthur Leff, dry, witty, never before affirming, proclaimed the time soon before his death.⁴⁵ Robert Cover became doctrinally and poetically prophetic, announcing the law as Word and Deed, as Violence, as born (and dying) in *nomos*.⁴⁶ The turning has begun: this article is

39. See discussions of "paradoxical logic" in J. BENJAMIN, *BONDS OF LOVE* (1988); S. MOORE, *LET THIS MIND BE IN YOU* (1985); P. RICOEUR, E.G., *HISTORY AND TRUTH* 21-81 (1965).

40. T.S. Eliot, "The Dry Salvages" V, "East Coker" V, from *The Four Quartets*, *COLLECTED POEMS 1909-1962* 198, 189 (1963).

41. L. FULLER, *THE LAW IN QUEST OF ITSELF* 77-84 (1940); J. VINING, *THE AUTHORITY AND THE AUTHORITARIAN* 187 (1986); J. SHKLAR, *LEGALISM: LAW, MORALS AND POLITICAL TRIALS* (1964).

42. R.S. CHOPP, *THE PRAXIS OF SUFFERING* (1986); M. ELLIS, *TOWARD A JEWISH THEOLOGY OF LIBERATION* (1987); C.S. LEWIS, *THE ABOLITION OF MAN* (1947).

43. J. DUNNE, *THE HOUSE OF WISDOM* (1986).

44. Eliot, *supra* note 40, at 209.

45. Leff, *Unspeakable Ethics, Unnatural Law*, 79 *DUKE L.J.* 1229 (1979).

46. Cover, *The Bonds of Constitutional Interpretation of the Word, the Deed, and the Role,*

intended as one more song of change. The words of the chorus to the song of change are familiar yet demanding: the spirit in (and not abolishing) the letter, the meaning in (and not abandoning) the text, the sacred in the technical, the living soul of constitution in the literal reading, the power of the people in the document's words, the authority emanating from the people rather than mere political theory, the habits of life of the people rather than unguarded words, the power of those things too plain to be written over the tyranny of text, the living and breathing spirit of a land and its fundamental law, over the lifeless skeleton of mere express words of a written constitution. The words of this version of the chorus come directly from state constitutional decisions spanning a sixty year period before the post-Warren-Court squabbles over theories of interpretation.

The reader may not agree with the voice identified in this chorus about the law of the land; I claim only to remind the reader of the voice, and to let the song sing in the reader's mind. It is not the only chorus during those sixty years, but I do claim that *it may be the most potent voice that can now call us to life as a people*. It is grounded in the people, close to them as only their state commonwealths could be, and it is as ancient as the voice that existed before but burst forth dramatically in Magna Carta. It is the law of the land singing in her people, even from the pens of the white male aristocrats of the nascent American meritocracy. Its colonial singers did not live the full extent of its truth, did not conceive of human nature being *human* rather than Anglo masculine, but it is still a song of promising integrity. It contains the seeds of reconciliation with the song as it will sing today. It is an invitation to us now, as we consider, in our rapidly mutating federal system in a North-South world, what we can say about human rights and the rule of law, to begin the reconstitution of the law of the land, at the level at which that law first started—state constitutions.

III. THE STATE CASES

When the United States Constitution was drafted, the states already had constitutions, many of considerable eloquence. For reasons which may defy dry historical analysis, the state constitutions initially grounded their most basic rights on deference to "the law of the land," rather than "due process."⁴⁷ The federal document had no ini-

20 GA. L. REV. 815 (1986); Cover, *Violence and the Word*, 95 YALE. L.J. 1601 (1986), Cover, *Forward: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

47. Berger, *supra* note 35, at 1; McIlwain, *Due Process of Law in Magna Carta*, 14

tial mention of this notion, and the amendment which gave it eventual life chose the "other" version of this grounding concept, due process of law. This choice for the "process" phrase, which still spread the core notion beyond criminal law, created a dangerous ally for dry proceduralism.⁴⁸

Although early in English jurisprudence, Sir Edward Coke made a statement that seemed to run "the law of the land" together with "due process of law,"⁴⁹ the two are not the same (or their sameness obscures the substantive nature of Coke's and Magna Carta's "due process"). This is true in history and on the face of things, in the ordinary meaning of the words—something that my State Constitutional Law students insisted upon strongly enough to get my attention. I would argue, with all due disclaimers about knowing absolutes, that it is also true in the reality of the law. "The law of the land" refers to something fundamental, something inexhaustible, something almost pre-moral, something ancient, sacred and ultimately ineffable, about the law of this country.⁵⁰ Ultimately, it also points to our first mother country, her progenitors, and, I would argue, all of humankind (but that part of the journey can only be mentioned here).

What can be traced is the continued narrative of the rights that traveled to the new world and gave birth to states and eventually to a Union. The search of the early Americans was for "a more perfect Union." They strove to come together in a country, after they had more basically succeeded in coming together as individual states. The greatest growth of that country came through and after the greatest civil disunion among the states. The legacy of American law suggests that in our current new Federalism is a call for hope in the face of a deep struggle that promises a deeper union. The tension, as in theologies, is between the one and the many. This article's song will be from the voices of the many, hoping to discern the chorus which makes us one. It claims that we have the wisdom for community in us already. We have said it, but forgotten it. We can expect to relearn it only by

COLUM. L. REV. 24 (1914); Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 460 (1911).

48. See Rogge, *Concept of Ordered Liberty*, 47 CALIF. L. REV. 238 (1959); A. HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* (1968).

49. Berger, *supra* note 35; Rogge, *supra* note 48.

50. *Supra* note 35; R. MOTT, *DUE PROCESS OF LAW* (1926); C.H. MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* (1958); J.G.A. POCOCKE, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW* (1957).

returning to the places we left—the state communities and commonwealths—and knowing them anew.

Of the eight basic state cases, two spawned same-state companions during the course of the research, and the latecomers were never driven off, so that the total is ten. Each (but two) is before the highest state court (the Tennessee case involves a special court, the personnel of which included a supreme court justice, as the substance of the case notes). In the Michigan case, *People v. Hurlbut* (1871),⁵¹ some of the most striking language is by Justice Cooley, but the other judges are not remarkably well-known even within their own states. The eloquence of the opinions comes more from the strength of the vision itself to which they give words, than from the peculiar endowments of the sitting judge.

All cases arose in the nineteenth century. From *Bank of the State v. Cooper*,⁵² an 1831 case, to the cases in the last decade of the century, they span seventy years, and straddle the Civil War. Four including *Bank v. Cooper* predate the tearing of the country: *Saco v. Wentworth* (1853),⁵³ *Regents of the University of Maryland v. Williams* (1838),⁵⁴ and *Billings v. Hall* (1856).⁵⁵

Hurlbut, and the remaining four followed the conflict between the states by at least a few years: *State v. Doherty* (1872),⁵⁶ *Atchison & Nebraska R.R. Co. v. Baty* (1877),⁵⁷ *Rathbone v. Wirth* (1896),⁵⁸ and *State v. Moores* (1898).⁵⁹ The temporal spread of the cases is important because of the enactment of the fourteenth amendment to the United States Constitution, July 9, 1868, containing the most important use of the language of "due process" in American jurisprudence.

The dates of the cases are also well beyond the period canvassed by Professor Sherry in her work on constitutional interpretation,⁶⁰ and Thomas Grey's survey of pre-1789 legal work.⁶¹ Sherry's analysis focused on the early jurisprudence of the United States Supreme Court and of state courts, demonstrating that at the time of the foun-

51. 24 Mich. 44.

52. 10 Tenn (2 Yer.) 599.

53. 37 Me. 171.

54. 9 G & J 365.

55. 7 Cal 1.

56. 60 Me. 509.

57. 6 Neb. 37.

58. 150 N.Y. 459.

59. 55 Neb. 480.

60. Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

61. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 852 (1978).

ders the conception of law included multiple sources of fundamental law, of which a written constitution was only one. The eighteenth century state courts uniformly refused to confine their constitutions to "express constitutional provision" but, as Sherry notes,

. . . there is no case during this period in which the courts have upheld an act contrary to natural law on the ground that the law was not in conflict with any constitutional provision.⁶²

Sherry concludes that the fundamental law at the time of the United States Constitution consisted of a "a mixture of custom, natural law, religious law, enacted law, and reason."⁶³

This tradition of a more generous idea of fundamental law continued in the state courts even after the period in which the United States Supreme Court backed away from overt natural law or fundamental law language. Marshall moved from an explicitly natural or eternal law grounding to language supposedly confining his authority to parsing the express language of the written constitution, during the cases between 1810 and 1819. Even David Currie, who argues that natural law played almost no role in United States judicial thought, acknowledges that Marshall in *Fletcher v. Peck* (1810),⁶⁴ relied on "unwritten limitations" to legislative power.⁶⁵ But subsequent cases saw a cleansing of such references to the unwritten, higher law at the national court level. Not so at the state level, which continued to operate in a richer soil, less dictated by the dry doctrinal winds that drove Marshall to supposedly pure textualism.

As Sherry notes, the adherence to textualism by the United States Court has continued even when to link decisions to specific clauses "stretches the language to the limits of credibility."⁶⁶ The apparent need to appear to rest decisions on positive law has not restricted the free play of judicial politics; proponents of all political positions and judicial philosophies have found some set of cases repugnant despite their interpretive basis, since positivism captured the vocabulary of the Court.⁶⁷ Debates about indeterminacy continue, and a look at the periodical indices shows the ingenuity with which scholars and judges have attempted to provide a theory of interpreta-

62. Sherry, *supra* note 60, at 1167.

63. *Id.* at 1129.

64. 10 US (6 Cranch) 87.

65. Currie, *The Constitution in the Supreme Court: State and Congressional Power, 1801-1835*, 49 U. CHI. L. REV. 887, 892-894 (1982).

66. Sherry, *supra* note 60, at 1176.

67. See Note, *The Partisan Battle Over the Constitution: Meese's Jurisprudence of Original Intention, and Brennan's Theory of Contemporary Ratification*, 70 MARQ. L. REV. 389 (1987).

tion to refute, to urge, or to transcend textual indeterminacy. Supreme Court decisions have become too often a morass of footnotes, shattered stare decisis, unintelligible technicalities and dialogic gridlock.

Although there are two main clusters of subject matter among the state cases (appointment of "local officials" and takings of property) they also treat topics such as state corporations, wandering livestock, and the selling of spirituous liquors. The variety of subject matter indicates the pervasiveness of the notion of law of the land in state courts. The cases sometimes cite one another, and sometimes refer to the same learned treatises, but rarely refer to federal courts, lower or Supreme.

Three of the cases deal with local government. In *State v. Moores*, the Nebraska legislature's act of 1897 regulating the government of metropolitan cities was attacked. The category of "metropolitan class" cities was exhausted by the city of Omaha, at a time when the partisan politics between the state legislature and big-city Omaha underlay a good deal of the controversy. The legislation provided, among other things, that the governor was to appoint police and fire commissioners for Omaha. The mayor and a majority of the city council of Omaha proceeded to assume control of the police and fire departments, ignoring the governor's appointed commissioners, and bringing a *quo warranto* action in the state supreme court. The Nebraska constitution held no express provisions delegating to local units of government the power to select their officers or manage their own affairs. The court noted that there was also no express prohibition against the governor's appointment of officials to control "purely local affairs."⁶⁸

Any such prohibition against the governor in Lincoln running Omaha arose because a law allowing him or her to do so "is repugnant to some right retained by the people at the time of the adoption of the organic law."⁶⁹ The court found that retained right. The *Moores* court found that local government was at the center of the American idea of government, and that "the mind revolts" at the denial of the people's right to self-government which such an "undemocratic" scheme would violate.⁷⁰

The case most extensively cited by the *Moores* court was *People v.*

68. *Moores*, 55 Neb. at 489.

69. *Id.* at 489.

70. *Id.* at 521.

Hurlbut,⁷¹ including sitting Justice Cooley's original commentary. *Hurlbut* centered around a provision of the Michigan constitution that "Officers of cities and villages shall be elected at such times and in such manner as the legislature may direct."⁷² In Michigan, the first water, police and fire commissioners were appointed by the legislature of the state. However, in 1871, after the initial seventeen years of the state constitution, the Detroit water and sewer commissioners were served with writs calling them to show by what authority they continued to exercise their offices. The struggle over Detroit's local governance came to a head with the 1871 act which provided for the state legislature's appointment of permanent officers within the city government of Detroit. Cooley replied that this blow "aimed at the foundation of our structure of liberty," compelled the court's defense of the "plainest and most primary axioms of free government"⁷³ because the direction of the history of constitutional struggles against tyranny, was "toward popularizing authority".⁷⁴ The state could not run the major city directly, but could only direct how local elections were to be conducted.

In New York the legislature tried to control a city closer to home—Albany. The control was more indirect. The legislature passed an act which set out in excruciating detail how the police commissioners were to be elected, including provisions that not more than two of the four commissioners were to be of the same political party, that the council should meet at eight o'clock on a first Monday, that the quorum would be those who attend, that the council should not transact any other business until the commissioner were elected, and more.⁷⁵ The main attack on the act was the restriction on partisan composition, but the court used a broader principle in rejecting the entire scheme as violating the right of local self-government, which was both fundamental and necessary for its educational and formative effect upon the citizen.⁷⁶ The dissent said that the majority should have picked and chosen among the provisions of the act in order to preserve its constitutionality, arguing that the key eligibility provision (the appointee must belong to the party have the first or second highest number of representatives on the council) could be jettisoned leaving the rest of the act acceptable. The majority concluded that the

71. *Hurlbut*, *supra* note 51.

72. *Id.* at 47.

73. *Id.* at 109.

74. *Id.* at 110.

75. *Rathbone*, 150 N.Y. at 460.

76. *Id.* at 467.

legislature had no business setting partisan or detailed restrictions on local procedures.

Aside from the local government cases and the property cases treated below, the bulk of the ten cases covered a range of issues. The two Maine cases were matters of small-gauge procedure; the Tennessee case was a special court composed for defaulters on loans from the state bank; the Maryland case was a complicated discussion of corporate charters. Two key cases, *Taylor v. Porter* and *Billings v. Hall* concerned property rights.

The *Billings* case is representative of the treatment of property in the core and secondary analysis of all the cases. It found property to be an inalienable right, but one co-existing with unchangeable ideas of natural justice which were founded in and definitive of community (see Section IV below). In March, 1856, the California legislature passed "an Act for the protection of actual settlers, and to quiet land-titles in this State." Under that version of a succession of bills dealing with who owned land in the territory which moved from Mexican possession to American with many disputes about when and if pre-incorporation title or post-incorporation possession prevailed, an owner who successfully ejected an occupant, owed the occupant the value of any improvements. The California Court at first found all suits by nonoccupant title claimants illegal. After the U.S. Supreme Court reversed that tactic, the Court knew such suits were still very unpopular. The plaintiff, *Billings*, claimed that he had title from John A. Sutter, who was granted the land by the Mexican government. This grant was decreed confirmed by the Board of U.S. Land Commissioners. Although the ejected *Hall* prevailed under the Act, the California court overturned that directed verdict. It concluded that the law imposed, as a condition of the recovery of property, payment for improvements (without recovery of rent) for the five years of adverse possession; such an imposition was a taking without just compensation. The court noted that much of the prejudice against ejectments came from widespread fraud, but that this case had no such fraud. Thus the court could not allow taking from "early pioneers the honest acquisition of toil and danger to enrich needy adventurers, upon the shallow pretext of policy, and under the false assumption of legislative omnipotence."⁷⁷

77. *Billings*, 7 Cal. at 16.

IV. THE CASES' SONG: BEYOND WORDS, IN THE PEOPLE

The state benches in the 19th century are not intimidated by the federalized legal discourse soon to eclipse much state court thought.⁷⁸ They speak with a clarity that the United States Supreme Court has lost in its decades of convoluted internecine and political twists of doctrine. They evince a simplicity that is not unsophisticated, and are unafraid to return to the roots of constitutional thought. They employ a directness that ties their reasoning to the people from whom they recall that their power emerges and that remains comprehensible to those people.

Within the opinions, there are revolutionary thoughts. Usually cautious justices range beyond cramped legal language. Cooley asks ". . . but what is constitutional freedom?" and answers with a striking rejection of defensive, negative liberties:

Constitutional freedom certainly does not consist in exemption from governmental interference in the citizen's private affairs; in his being unmolested in his family, suffered to buy, sell, and enjoy property, and generally to seek happiness in his own way. All might be permitted by the most arbitrary ruler . . .⁷⁹

Rather than confining constitutional freedom to the right to be left alone, he finds that there is something about constitutional freedom, which we find "in usages, customs, maxims" which "have sprung from the habits of life, modes of thought," which also generates "revolutions which have overturned tyrannies." This something is the constitution's "living spirit, that which gives it force and attraction, which makes it valuable" and which creates the allegiance of the people, the foundation of the legitimacy of the state.⁸⁰

The "living spirit" is, finally, beyond expression. The contrast that the cases make with the "mere words" and the letter of the law, is the ineffable, that which cannot be said. It is like the apophatic notion of God, the *via negativa*, the path to the Ultimate by way of what God is not. The spirit taps a fountain of fundamental law that is written on the human heart, or at least, according to Lon Fuller, found in the customs, agreements, reason and coercive power of human society.⁸¹ This fundamental law is the "Higher Law" of

78. Douglas, *Federalism and State Constitutions*, 13 VT. L. REV. 128, 131-35 (1988); State v. Jewett, 146 Vt. 221, 500 A.2d 233, at 235 (1985).

79. *Hurlbut*, 24 Mich. at 106.

80. *Id.* at 107.

81. Fuller, *supra* note 41, at 79.

Corwin,⁸² the “unwritten constitution” of Sherry and Grey, and probably the birthplace of penumbras. (The translation of this living spirit into present law is, of course, a fallible process. Not all poetry is good poetry, or true.) Long before Justice Douglas and the controversy over the right of privacy, Cooley found that there was an emergent right to local government, “some system of localized authority emanating from the people.”⁸³

The fundamental law exists in the people, but needs the medium of judicial interpretation, to bring it to words. The reason that such power of self-governance must emanate from the unwritten is that “[s]ome things are too plain to be written.”⁸⁴ More fundamentally yet, such basic threads of society are natural and inherent, and elude definition. Inherent rights cannot be given away, nor claimed by society, yet these immutable political realities are “undefined and perhaps undefinable by any general code.”⁸⁵ New York had no bill of rights in its constitution: “The enumeration was designedly omitted, because unnecessary and tended to weaken, if not endanger, those unnoticed.”⁸⁶ Cooley remarked that the reason that the lack of grounding in an express written provision was far from fatal, was that such a mechanic of interpretation and drafting would make it necessary to point out to “the protesting people” how they gave away what they thought they retained, “to point out to them where and by what unguarded words the power had been conferred.”⁸⁷ Rather than affirming a model of constitutional drafting that made such an enterprise an inherently dangerous activity, a game in which if the people’s representatives forgot to say (or failed to imagine) the correct incantation, their unguarded words gave away rights, Cooley acknowledged the realm of the power of the unspoken. He sang praise of constitutional command that went beyond and underlay the written instrument:

Some things are too plain to be written. If this charter of state government, which we call a constitution, were all there was of constitutional command; if the usages, the customs, the maxims, that have sprung from the habits of life, modes of thought, methods of trying facts by the neighborhood, and mutual responsibility in neighborhood interests, the precepts which have come from the

82. Corwin, *Higher Law*, 42 HARV. L. REV. 149, 365 (1928).

83. *Hurlbut*, 24 Mich. at 90.

84. *Id.* at 107.

85. *Moore*, 55 Neb. at 489.

86. *Id.* at 493, quoting *People v. Morris*, 13 Wend. (N.Y.) 325.

87. *Hurlbut*, 24 Mich. at 106-07.

revolutions which overturned tyrannies, the sentiments of [manly] independence and self control which impelled our ancestors to summon the local communities to redress local evils, instead of relying upon king or legislature to do so—if a recognition of all these were to be stricken from the body of our constitutional law, a lifeless skeleton might remain, but the living spirit, that which gives it force and attraction, which makes it valuable and draws to it the affections of the people. . . .⁸⁸

He concludes that without this spirit, our constitutions would be no better than the “numberless constitutions so called which in Europe had arisen and failed,” despite their seeming “equally fair and to possess equal promise with ours”.⁸⁹ They failed; our notion of constitution succeeds because ours is “not wanting in the support and vitality which these [usages, customs, maxims, living spirit] alone can give—this living and breathing spirit, which supplies the interpretation of the words of the written charter. . . .”⁹⁰

This spirit, inherent in the people, precedes and expands beyond the legitimate state. It stretches past the stable times, and finds voice in “the precepts which have come from the revolutions” overthrowing tyrannies. The constitution, in this image, is pre-political. It grows, in any single version, from a living ground on which any polity rests; the ground is both dynamic and final. It throws up maxims in different times and circumstances, but it also stays the same, the silent source of the underlying harmonies of the people of the land. The constitution, “Instead of being the source of our laws and liberties [is] . . . no more than a recognition and re-enactment of an accepted system . . . of ancient rights”, Chief Justice Campbell observes in *Hurlbut*.⁹¹ The “accepted system” is no single state, no single nation. It is something which is accepted, known—yet never known and always in dispute. The basis, the ground of the fundamental law cannot be captured or exhausted in words.

The origins and story of “*per legem terrae*,” of “the law of the land,” first used prominently in Magna Carta, show that it intends beyond the law of any single tradition despite its obvious talismanic role in English history. Hamilton, in arguing in *Ruthers v. Waddington*, a 1784 New York case,⁹² ran together “the law of the land,” “the law of nations,” and “Universal Society.” The basic law to which

88. *Id.* at 107.

89. *Id.*

90. *Id.*

91. *Id.* at 87.

92. Goebel, *Law and Practice* at 289, cited in Sherry.

Hamilton referred was that of (right) reason, of human nature, of all lands, in his discussion. The painful fact that human nature really referred to white landowning Anglo-Saxon males, was not a governing fact in Hamilton's consciousness. This lofty aspect of founding spirit, not its inherent finitude, is the source of the law of the land. Despite its universal and transcendent aim, its only life on earth occurs through individual minds even as they may engage in communal dialogue and occasional documents,⁹³ in real societies. It is an ideal as both ground and aim, never fully brought into reality, always sensed as existing but seen only through a glass partially. It does not matter whether it is a Platonic form or a nominalist vanishing point—never attained, always desired, it is in the realm of ideals of justice, which persists and is reborn in human imagination. Whether absolute, utopian or merely transformative, it is a spirit of law which jurists regularly identified as existing even before Magna Carta, existing always and increasingly closely approximated in human constitutions.⁹⁴ The contemporary need for a jurisprudence, a political theory, a theology of law, justice and human nature combined, is evident in the books and commentary on law. From John Rawls' *A Theory of Justice*⁹⁵ in the early 1970's to the present, commentary has expanded from narrow discourse within the tradition of philosophical liberalism, to include feminist, Marxist, socialist, traditional conservative, libertarian, anarchist and communitarian visions, as well as elaborations and new justifications for philosophical liberalism. The increase in scope has accompanied an increase in depth of reflection. Beyond deconstruction, attempts at reconstruction have begun. Not surprisingly, reconstruction centers first on the individual; the edited *Reconstructing Individualism*⁹⁶ contains a remarkable display of individual calls to move beyond skepticism, from Stanley Cavell's elegant conclusion that one must take responsibility to mean, or not to mean, through Martha Nussbaum's dangerously personal love-and-virtue narrative, to the internally Christian monologue of Paolo Valesio. Roberto Unger's *Passion*⁹⁷ is an attempt to portray the personal as prelude to the political, although Michael Perry is disappointed at Unger's failure to be truly personal. Perry calls for us to risk "elaborating and defending a substantial and concrete vision of what it

93. See Joel Handler, "Dependent People, the State and the Modern/Postmodern Search for the Dialogic Community," Institute for Legal Studies (Madison, WI) (SPR-19).

94. Sherry, *supra* note 60, at 1137-38.

95. J. RAWLS, *A THEORY OF JUSTICE* (1971).

96. Heller, Sosna and Wellbery eds. (1986).

97. *Supra* note 12.

means to be human."⁹⁸ Perry says that such questions as what it means to be authentically human are much too determinative of one's politics to be privatized, as secular leftists have done. Perry echoes Alasdair MacIntyre's call for a politics of virtue, a call heard on the left from commentators like Stanley Hauerwas.⁹⁹ The at-least-one bright spot for the otherwise dim vista of political-moral thought, Perry concludes, comes from feminist thought.¹⁰⁰ This theme, the feminine as illuminating the human, and the human as crucial to the political (and thus legal), is to continuing concern of this essay.

Key to the image of the human in these cases are two insistent themes, the ascendancy of the spirit of the law and the genesis of power (of spirit) in the people prior to their political institutions. The image of the prepolitical people who are not extinguished by the advent of the state, is not the Hobbesian state of nature but the Lockean. One case gives the actual discourse from Locke. The California supreme court, in *Billings v. Hall* (1857) discusses theories of legislative power, and decides for "the plainest principles of morality and justice" and the spirit as well as the letter of the constitution, in affirming Locke's stance on the public good and the inability of a person to give that away. That is, no one can transfer to another more power than she has in herself, and nobody has an absolute, arbitrary power over himself or any other. Locke's reasoning, adopted in *Billings*, is that there is no such power in any legitimate form, but only power that has the end of preservation; there is no such right as a right "to destroy, enslave, or designedly to impoverish the subject".¹⁰¹ There are thus rights that are inalienable because they are the very rights that one left the state of nature to ensure, and rights that are inalienable because they were never "rights" at all.

Michael Sandel has suggested, consistent with Locke's notion of the self as property, that some rights are inalienable because they constitute part of the core being of the person.¹⁰² Those core values and beliefs are embedded in the person, and are lived through the spirit. The 19th century cases assume that somehow those constitutive beliefs are part of the human nature, of spirit in each and in all.

For both negative and positive rights, "the law of nature stands

98. 81 NW. U.L. REV. 589, 590 (1987).

99. S. HAUERWAS, *A COMMUNITY OF CHARACTER* (1981); A. MACINTYRE, *AFTER VIRTUE* (1981).

100. Perry, *supra* note 5, at 591.

101. *Billings*, 7 Cal. at 12.

102. Michael Sandel, "The Crisis of Liberal Political Theory," *Williamsburg Charter*, *supra* note 24, at 36-41 (1988).

as an eternal rule to all."¹⁰³ Negative, destructive rights cannot belong to the sovereign for there are no such rights; affirmative rights remain with the people, because in entering society to protect those rights, the people do not make a self-negating or spirit-destroying compact but a compact for the social good. The prepolitical rights are visible through and in the institutions of legitimate government. The "principles of natural justice" stand above the sovereignty of the legislature.¹⁰⁴

The necessarily static court opinions recognize sovereignty in the people. Under our form of government, they observe, the Legislature is not supreme. It is only one of the "organs of that absolute sovereignty which resides in the whole body of the people . . ."¹⁰⁵ The fundamental shape of our polity is inherent in this law-within-the-people. *Billings* resounds with choruses of "law and reason" and "natural justice"¹⁰⁶ and ties "inalienable rights" to both "the plainest principles of justice and morality" and to Magna Carta. These natural law ideas are among "those fundamental principles of enlightened government, lying at "the foundation of every constitutional government and . . . necessary to the existence of civil liberty and free institutions."

The depth of fundamental law tapped in *Billings* is thus as deep as human nature and as long ago as before Magna Carta.

According to the 17th-century myth, a myth later fully embraced by the American Whigs, the origins of these fundamental unwritten laws themselves were buried beyond recovery in the Saxon past.¹⁰⁷

The history and the home of the law of the land is in the people. It shines in "the genius and spirit of all our institutions".¹⁰⁸

The power of the fundamental law does not lie leaden in the people. The "absolute sovereignty which resides in the whole body of the people"¹⁰⁹ is a generative force which comes to words at different times in history, emerging in different voices attuned to the times. The "pre-existing rule of conduct" that "law of the land" and "due process" denote, arises into written form as a constitution, as "no

103. *Billings*, 7 Cal. at 12 (quoting John Locke).

104. *Id.* at 13.

105. *Billings*, 7 Cal. at 14.

106. *Id.* at 8-15.

107. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 852 (1978).

108. *Regents of the University of Maryland v. Williams*, 9 G & J 365, 412 (1838).

109. *Baty*, 6 Neb. at 43.

more than a recognition and reenactment"¹¹⁰ of "ancient rights" already known. The Nebraska court in 1877 taps the "ancient law" and "sacred shield" which is a "fundamental principle lying beneath and behind all edicts, constitutions, and statutory law."¹¹¹ The *Baty* court specifically rejects the notion that the constitution is the "origin of rights, [or] the fountain of law"; rather, it is the framework of government, "necessarily based upon the pre-existing condition of laws, rights, habits and modes of thought."¹¹² It affirms Webster's statement that "written constitutions sanctify and confirm great principles, but the latter are prior in existence to the former."¹¹³ If a legislative provision conflicts with this underlying set of laws, rights, habits and thoughts, then it is not the law of the land, and is void.¹¹⁴

The "fundamental principle of right and justice" that is "inherent in the nature and spirit of the social compact" and the causes and purposes of the genius of our government, "rises above" the power of legislation, according to the Court of Appeals in *Regents v. Williams* (1838). That fundamental basis of justice and right is "independent of [the United States Constitution] and of any express restrictions in the constitution of the state."¹¹⁵ The ground of fundamental justice is outside time, independent of time and place, both coming before and rising above. It is the truth that is "recognition and re-enactment" when given words, but that finally rests in the unspeakable. The fundamental law follows the rhythms of history, alternating silence and voice, calling for naming yet always eluding it. This basic law always offers freedom, openness to new life for the law as lived and applied in the courts. Like Eliot's moment in and out of time, when the fundamental law is summoned, "history is now and England"¹¹⁶ (or even Nebraska). It is immediate and elusive, said but never fully spoken.

Such a portrait of the law of the land may evoke the fear that scripture about God's Spirit may raise in those who consider themselves practical and pragmatic. If the Spirit blows where it listeth, do we want a constitutional jurisprudence that is likewise unfettered? What is to stop anarchic antinomianism, pure idiosyncratic subjectivity? Yet undefined judgment, done in good faith, is what commentators like Philip Soper suggest that is all we can ask of legislators

110. *Hurlbut*, 24 Mich. at 87.

111. *Baty*, 6 Neb. at 41.

112. *Id.*, citing *Cooley. Con. Lim.*, 37.

113. *Id.* at 41.

114. *Cooper*, 10 Tenn (2 Yer) at 614.

115. *Regents of the University of Maryland v. Williams*, 9 G & J 365, 408 (1838).

116. Eliot, *supra* note 40, at 208.

anyway.¹¹⁷ What assurances, what predictability, what sense of order can we ask of the law? Is it to be permanent revolution, perpetual plasticity, or is there a value in stability or comprehensibility that must be honored?¹¹⁸

Recall that the promise in Judeo-Christian scripture is not that the Spirit will absorb the letter; the invitation is to look for the best story, the best account of the Law, in following what is ultimately beyond expression through its illumination of the known and given. Judges have texts, statutes and precedents as given letter. The letter is not inherently dead; it is dead if it is wielded without the spirit. The letter is given, the spirit is present. The combination is what gives life to the Law through a paradoxical dynamic, an inspiriting of what is otherwise inert or instrumental, and violent. The cases talk not about letter as void, but about what joins letter and spirit as valid; the rejection is of "mere letter", of arid literalism, of "mere forms" or "empty forms" of law.¹¹⁹ Mere words are lifeless, and dead words are deadly. This spectre of the "dead letter" is not a false conjuring. As sophisticated a commentator as political theorist Don Herzog defends classical liberalism on the basis that, contrary to CLS views, liberals knew they were "brandishing" otherwise implausible claims as "political weapons." Herzog (who is not alone in his fatalism) shows how a deep cynicism about words can degenerate into a law used but not inhabited by a people.¹²⁰

Neither the cases nor the idea of an unwritten constitution suggest that the level of meaning always beyond reach should run rampant without deference to what has managed to find itself in text. Sherry and Grey portray multiple sources of fundamental law, without denigrating the seemingly most public, the written constitutional text. The state cases make clear their reluctance to move beyond patent textual handholds except for the most rooted values. Scripture says that the law is written in our hearts, inscribed rather than only

117. P. SOPER, *A THEORY OF LAW* (1986).

118. See 3 R. UNGER, *POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY* (1988).

119. *State vs Doherty*, 60 Me. 504, 511, (1872). This is not restricted in import to the Judeo-Christian tradition. As commentators like Ruth Colker and Paul Savoy discuss, other traditions have a similar notion of legalism. Savoy quotes a Zen commentator: "Koans appear bewildering to people who cherish the letter above the spirit." (at 811). Ruth Colker, Review of Catherine MacKinnon's *Feminism Unmodified*, 68 B.U.L. REV. 217 (1988) and Savoy, *The Spiritual Nature of Equality: Natural Principles of Constitutional Law*, 28 HOW. L.J. 809 (1985).

120. Herzog, *As Many As Six Impossible Things Before Breakfast*, 75 CALIF. L. REV. 609 esp. 625-630 (1987).

self-transcribing; it says that the law was not to be destroyed but fulfilled, to the last jot and tittle.

One crux of the relationship between letter and spirit is in the nature of law. When the state courts talk about this question, they do not define the term "law" as different from an enacted bill or constitution, yet they juxtapose legislative action with "law" in the sense of "true law" or, in their terms, "law of the land." Jurisprudes debate whether a bad law is no law at all; the state courts find that a law which is not part of or not consistent with "the law of the land," is void. In *Doherty*, the Maine court asks, along with a Pennsylvania case, what the governing law might be. It concludes that it is "a pre-existing rule of conduct;" "the law of the land" they note "does not mean an act of the legislature."¹²¹

If the law is not just any act of the legislature, it is something more than legislation. Thus, "where it is clear that the legislature has transcended its authority, it is imperatively required of the courts to maintain the paramount authority of law."¹²² In *Baty*, the court combined the resistance to legislative supremacy with the foundation of the civil compact that contained "general permanent law" that was the law of the land "within the sense of the constitution; general rules governed society, and "everything which may pass under the form of an enactment is not therefore to be considered as the law of the land . . ."¹²³ The "pre-existing rule of conduct" that is signaled by both "due process of law" and "the law of the land" is to contain every branch of the government,¹²⁴ so the rule does not represent mere judicial supremacy.

The origins of the social compact identify the limits on legislative power; if the "sacred and inviolable" rights for the protection of which we enter society could be invaded, then such legislation

. . . would be at war with the purposes for which the social compact was entered into; and the nature and ends of *legislative* power, would furnish no limit to the exercise of it, as it was intended they should do.¹²⁵

This higher law is the basis for the power of judicial review, limiting that power at the same time. The legislature, the *Williams* court

121. *Id.* at 510.

122. *Baty*, 6 Neb. at 47.

123. *Id.* at 43.

124. *Id.* at 42.

125. *Regents of the University of Maryland v. Williams*, 9 G & J 365, 409 (1838).

notes, cannot exercise both judicial and legislative powers. Delicately, the court then declines to assign tyrannical intent:

It is not to be presumed that the legislature can ever have a wish, or would intentionally abuse or exceed its just powers. But it may (as it sometimes has done) incautiously and unadvisedly step beyond the strict limits of its authority;¹²⁶

Both court and legislature (as well as executive) can act tyrannically.

The animation of the spirit of the law of the land arose from natural law and a sense of social compact at odds with raw text. The compact was sometimes conceived to be between person and community, but it was not mere contract in part because its final law was in the body politic. That body was constituted by laws "immutable as those of nature," laws of "natural justice".¹²⁷ In an anticipation of Rawls' original fairness, the *Billings* court notes that a constitution is a "solemn compact" entered by a whole people limiting themselves and their majorities, entered when people "are more free from passion and prejudice—when no one can foresee whether he will fall with the majority or with the minority—where there is no interest to subserve, but equal and exact justice" under "fundamental and external principles."¹²⁸ Then the citizen's rights are protected not by simple physical force, but "by the law of the land, and the force of the body politic."¹²⁹ The sovereignty "resides in the whole body of the people".¹³⁰ However, this mystical body discomfited the *Billings* dissent. Justice Terry finds natural justice "dangerous." He cites Blackstone's sober denunciation of Locke's notion that final power remains in the people, because "however just this conclusion may be in theory, we cannot practically adopt it." "This devolution of power to the people at large" would be too "desperate," Blackstone concludes, so the power of the legislature "is absolute and without control."¹³¹

Terry's refuge in absolute legislative supremacy is overcome with legalistic safeguards. It shrinks "the law of the land" to mere cant. The California constitution's Article 1, section 1, which uses language akin to the Preamble of the Declaration of Independence ("All men [sic] are by nature free and independent, and have certain inalienable rights")¹³² is equated with "a mere reiteration of a truism which is as

126. *Id.* at 410.

127. *Billings*, 7 Cal. at 15.

128. *Id.* at 16.

129. *Id.*

130. *Id.* at 13.

131. *Id.* at 20.

132. *Id.* at 18. Quoting California constitution.

old as constitutional government."¹³³ This language appears in most states' constitutions, Terry notes, but is no limitation on the power of government. If the provision were given credence, it would be "of dangerous consequence,"¹³⁴ leaving the laws and constitution at the mercy of "no fixed rules" but relying instead on "considerations of policy and public advantage."¹³⁵ Absent "safe and solid" enumeration of prohibitions, the judiciary cannot be left free to exercised "undefined" power under ideas of natural justice that are "regulated by no fixed standard."¹³⁶ Terry concludes that "the ablest and purest" persons have differed on what natural justice might be,¹³⁷ so that the legislature's decision that the law did not violate fundamental law, must stand. This interpretivist justice endorses a conclusion in tension with some of his contemporary kin—the state may take private property for private purposes, so long as the common good is served—but his need for rules and clarity is his basis for decision. The letter is defined, fixed, undangerous, secure.

This security cannot be put at risk, Terry implies. Government close to the land is very risky. Although Sherry concludes that the strength of the unwritten constitution is historically greatest in individual rights cases, that is not true in state constitutional law in the 19th century.¹³⁸ Perhaps the most emphatic and authoritative assertions of the law of the land arise not in the *Billings* sort of property rights cases, but around issues of local government.

The *Hurlbut* case is a microcosm of the theory of participatory democracy which forms a consistent motif in American political theory. Beginning with English history and moving to Tocqueville and Jefferson, Cooley chronicles the definitive, generative role of local government in the states. Local governments "universally, in this country, were either simultaneous with, or preceded, the more central authority."¹³⁹ Not only did a system of local government exist "from the very earliest settlement of the country, never for a moment suspended or displaced" but also it has been "assumed" and "generally been supposed" that this system would continue, as the "liberties of the people . . . spring from . . . and [are] dependent upon that sys-

133. *Id.* at 19.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 23.

138. Sherry, *supra* note 60.

139. *Hurlbut*, 24 Mich. at 100.

tem."¹⁴⁰ In contrast to the French centralization, our "constitutional freedom" has, by Tocqueville's lights, depended on localism. Decentralized government is "self-government," which "means everything for the people and by the people, considered as the totality of organic institutions, constantly evolving in their character as all organic life is . . ."¹⁴¹

That local control is a "fundamental principle" of "our general framework of government," appears to Cooley as "too plain for serious controversy."¹⁴² From the resistance to the Stuarts in England to the colonial histories of New England, what Jefferson called "these little republics" were to be "the main strength of the great one. We owe to them the vigor given to our revolution, in its commencement."¹⁴³ In a passage reminiscent of Revolutionary rhetoric, Cooley recalls Bacon's comparison of a centrally-imposed (monetary) burden to the same burden arising from local authority: "it may be all one to the purse, but it worketh diversely on the courage!"¹⁴⁴ Neither letter nor coin "trumps" spirit, which is locally rooted. In Massachusetts, Cooley crescendos, "it was even insisted by the people's deputies that, to surrender local government was contrary to the sixth commandment, for, said they, '[persons] may not destroy their political any more than their natural lives'"¹⁴⁵ The spirit gives life, and it is through local government that the people live the law of the land.

In *Rathbone*, the New York court at the turn of the century explores the dynamics of local government even more closely. Local government is a part of "our popular form of government" and of majority rule, even though majority rule itself is not expressly outlined in New York's constitution (as it is not in our national document).¹⁴⁶ The basis for local government's seminal place is its republican placement at the center of citizen participation:

The principle [local government] is one which it takes but little reflection to convince the mind of being fundamental in our governmental system and as contributing strength to the national life, in its educational and formative effect upon the citizen.¹⁴⁷

The distribution of the opinions in *Rathbone* reflects the complexity of

140. *Id.* at 98.

141. *Id.* at 98-99 (citing Lieber, *Civil Liberties & Self-Government*, Chapter 21).

142. *Id.* at 98.

143. *Id.* at 102.

144. *Id.* at 102.

145. *Id.* 101-102.

146. *Rathbone*, 150 N.Y. at 475.

147. *Id.* at 467.

the possible stances on the issues of local government, unwritten constitutional authority, and interpretation of the substantive legislation under examination. The two majority justices, Gray and O'Brien, disagree on whether there is a written provision of the state constitution which provides for the sanctity of local government; so do the two dissenters. One champion of the letter finds that the document clearly gives literal defense to local control and so is in the majority. One finds that, lacking any such specific constitutional prohibition, the challenged law must stand as valid; he dissents. One proponent of the spirit beyond the mere words perceives that the legislature has violated the hallowed right to self-determination at the decentralized level, while the other champion of the meaning beyond the word finds that the legislation is not a violation of the principle of self-government, but is a carrying out of the court's bi-partisan policy, as one of the controlling provisions of the law at issue required a certain party mixture at the local level.¹⁴⁸ Thus the majority is argued by one letter advocate and one for the spirit; the same is true on dissent. Given such a crosscutting set of four opinions, this article can hardly suggest that stance on the basic issue of the spirit of the law predictably determines outcome. The focus on spirit in more than one local government case, however, suggests that the lack of logically necessary connection between spirit and localism is not a lack of connection altogether.

The relationship among the more abstract themes noted above (localism, legalism) and the extant political circumstances, must remain complex. However, it is important to note that the courts are not ignorant of the role of partisan politics among the more remote canons of interpretation. Not only does the dissent in *Rathbone* tap support for the legislation despite strong affirmation of the spirit of the law; in the *Moore*s case, decided in 1898 in Nebraska, the court explicitly addresses this political subtheme:

It has been asserted, and probably not without foundation, that the section of the law there under consideration was adopted to give the party then in power in the state a supposed partisan advantage in the government of the affairs of the city of Omaha, and it may be the same motive influenced the adoption of the provision of the law of 1897 under review.¹⁴⁹

Instead of using a questionable case precedent, the court calls the par-

148. *Id.* at 506.

149. *Moore*s, 55 Neb. at 520.

tisan debate by its true name, and proceeds to claim decision upon its stated rationale:

The denial to the people of the right to govern themselves is undemocratic, and if such doctrine is enforced, we could no longer boast of a 'government of the people, for the people, and by the people.'¹⁵⁰

Certainly the incantation of Lincoln's Gettysberg language is not intended as constitutional justification in the textual sense; it qualifies as part of the textual canon in Levinson's "Catholic" version of constitutional faith, which believes in continuing revelation, in the accretion of the text through the years.¹⁵¹ In that interpretive cast, Lincoln had put into words more of the inchoate level of law, drawing into words and voicing into tradition, wisdom from the underlying (or overarching) fund of human pre-knowledge. This is the idea of constitutional "from time immemorial," of fundamental law that was known in the human heart before Magna Carta and before, which we are ever struggling to bring into being. It is Cover's notion of Torah, with a mythic center which creates the bonds of solidarity. Even the provisions which do make it into words are only one expression of something more elusive:

The provisions of our Constitution on these subjects, which it is claimed have been violated . . . are, as is well known, but the expression, in brief and comprehensive language, of general principles, of remote origin, the development and recognition of which required centuries of discussion and civil strife before they were adopted here as the fundamental law.¹⁵²

The *Rathbone* court through O'Brien notes that when meaning and interpretation of the Constitution comes into play, this evolutionary history of the written document permits a very wide range of discussion of history, "by means of which principles are traced to their source and origin, and their progress and application marked, from time to time, until finally embodied, as they have been, in our written Constitution."¹⁵³

This writing is not the death of the underlying life of the provisions, not a fixity that sets it in time never to be reinterpreted. Such basic aspects of the constitution are part of its "political tendency," which is "*not always to be found expressed in words, but is to be de-*

150. *Id.* at 521.

151. Levinson, *supra* note 37, at 27ff.

152. *Rathbone*, 150 N.Y. at 480.

153. *Id.* at 481.

rived from acknowledged principles of government that existed long before its adoption and are to be implied . . . [my emphasis]."¹⁵⁴ This implication comes from a number of things, including the circumstances and historical events which led to the enactment of a particular provision "as part of the organic law."

A written Constitution must be interpreted as the paramount law of the land according to its spirit and intent of its framers, as indicated by its terms.¹⁵⁵

In the case at hand, O'Brien concludes that the legislative act "is in conflict with the letter and spirit of the constitutional provisions referred to and with the fundamental principles of free government."¹⁵⁶

O'Brien is not entirely consistent, as several of the other writers are not, in the style of the justice who says in effect "this is covered by the words but let me explain just in case why, if you disagree about the words, either you should have interpreted the words differently because of the context or you should realize that we don't need the words to know what everyone knows or we have other words which resonate enough even though they aren't in the constitution." However, the fact that he overdetermines his interpretation does not erase the power of his basic grounding of the decision in the soil of the localities whose right to govern he is defending. The key to his insistence that it is not necessary to show that the rejection of a law "falls appropriately within some express written prohibition contained in the Constitution"¹⁵⁷ lies with his resistance to the attempts "by the central authority" to threaten local self-government and "to undermine and destroy the spirit of civic freedom,"¹⁵⁸ which can only be nurtured in the loam of the local:

. . . local self-government, which has always been regarded as fundamental in our political institutions, and to be the very essence of every republican form of government. The local government, even in the smallest division of the state, is the preparatory school in which the citizen acquires the rudiments of self-government, and hence these institutions have been justly regarded as the nurseries of civil liberty.¹⁵⁹

This is about participation. In American thought, participation has stood for the dynamic principle of the public philosophy, for the pro-

154. *Id.*

155. *Id.* at 484.

156. *Id.* at 485.

157. *Id.* at 483.

158. *Id.* at 490.

159. *Id.* at 487.

cess of governance that both empowers the individual and enriches the state.¹⁶⁰

The rich potential of the "sense and reality" of local community in America is narrated for one community (and tied to others through connected literature) in Carol J. Greenhouse's *Praying for Justice*.¹⁶¹ She begins with a notion of Tocqueville's description of the American dream as a society built not on obedience but on participation¹⁶² and concludes by having found what she identified at the outset as Wittgensteinian view: to see society's heart in its mind.¹⁶³ In this story, the community of Hopewell lives very much by a culture of what should be done, a set of values known and meant to be honored, an ought which motivates positively rather than threatens by punishment. If Greenhouse and others with her vision are right, the birthplace of legitimacy, and of the spirit of the law, is local. The justice which emerges from this local community's reality is not through understanding ideas of justice, but by "opening hearts" to the truth. Religious doctrine is not primarily credal, either, and the tenor and texture of the lives and hearts and minds of Hopewell's Southern Baptists are not predictable by the stereotype "fundamentalist". The law that is seen to prevail in Hopewell is that which is written in the heart.

V. THE SPIRIT IN PUBLIC PHILOSOPHY

Writing in the heart has no definitive text. That is not an arcane religious obscurantism, but an idea of law eloquently elaborated by Walter Lippmann over 35 years ago. In *The Public Philosophy*, Lippmann presaged the current "public philosophy debate" by decades, with an analysis touching on the classics of Western civilization (though not necessarily bounded by it). Despite a disconcerting elitism, Lippmann's analysis is radical.¹⁶⁴ He went directly to Thomas Aquinas for the idea of a sovereign law of nature "imprinted in the heart and nature" of the human person.¹⁶⁵ This law was "spoken

160. See B. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (1984). One recent rendition of this theme has come, somewhat unexpectedly, from the American Catholic bishops in their pastoral on the economy, *Economic Justice for All: Pastoral Letter on Catholic Social Teaching and the U.S. Economy* (1986), Chap. 1.

161. C. GREENHOUSE, *PRAYING FOR JUSTICE: FAITH, ORDER AND COMMUNITY IN AN AMERICAN TOWN* (1986).

162. *Id.* at 25.

163. *Id.* at 31.

164. Lippman, *supra* note 22. For the limits on that radicalism, see Wilson Carey McWilliams' discussion of Lippman as philosophical liberal in *THE IDEA OF FRATERNITY IN AMERICA* (1973).

165. Lippman at 77.

through the mouth of Locke” and other traditions, ideas of philosophers and publicists, ideas which “at times of great stress were committed to writing, as in the Magna Carta and the Declaration of Independence.”¹⁶⁶ The same basic voice of the law was heard in the Bill of Rights of 1689 and the United States Bill of Rights.

The largest part of the public philosophy was never explicitly stated. Being the wisdom of a great society over the generations, it can never be stated in any single document.¹⁶⁷

Lippmann cried that the public philosophy had died, relegated to the private, submerged in a false accommodation among disagreeing factions. It was precisely the cordoning off of human beings’ most fundamental beliefs from the public sphere that eroded the public structure of ideas and beliefs without which a society cannot endure as a democracy.

Lippmann never footnoted state constitutional law, or the citations from Webster or Cooley or even a law review. He had read neither Bork nor Brennan on interpretation. But he knew with graceful assurance that the law and the republic were in desperate need of reconnection with The Ultimate.

. . . philosophy and theology are the ultimate and decisive studies in which we engage. In them are defined the main characteristics of the images of man [sic] which will be acted upon . . .¹⁶⁸ He scolds philosophers for keeping us from religion and from the public philosophy, by their requirement of “the mastery of human nature in the raw by an acquired rational second nature.”¹⁶⁹ They have told us that religious experience is purely psychological. They have robbed us of what Henri Nouwen calls “our first love.” They have failed to hope to find Reality, forgetting that we can never hold Reality still, never capture it. They have dispirited the public philosophy. This theme has been rejuvenated across the political spectrum by Richard John Neuhaus in *The Naked Public Square*, Robert Bellah *et al.* in *Habits of the Heart*, and George Will in *Statecraft as Soulcraft*.¹⁷⁰

Would Lippmann or Will or Bellah have recognized Brother Juniper? They would have recognized the basic insight that order, law, public formation, cannot merely be imposed. Juniper mourns: Somehow . . . the Order was suddenly imposed from without,

166. *Id.* at 77, quoting Ernest Barker.

167. *Id.* at 78.

168. *Id.* at 136.

169. *Id.* at 136.

170. R.J. NEUHAUS, *THE NAKED PUBLIC SQUARE* (1981); R. BELLAH ET AL., *HABITS OF THE HEART* (1985); G. WILL, *STATECRAFT AS SOULCRAFT* (1983).

whereas before it grew from within, from who we were. Our lives told us who we were; and then when Francis died, those in authority began to tell us who we were.¹⁷¹

It is not that rules are impossible or totally wrong, or that a public philosophy is, because it can never be documented or captured in text, incoherent.

Francis . . . took our way of life to Rome to become a rule. Because he was simple and foolish he got a Rule that remained a way of life.¹⁷²

As Wittgenstein reminds us, to imagine a language means to imagine a form of life.¹⁷³ This is more than a statement of grammar (though Wittgenstein knows grammar to be theology, and essence);¹⁷⁴ it is a tale of the death of mere signs.

There is a gulf between an order and its execution. It has to be filled by the act of understanding. Only in the act of understanding is it meant that we are to do *this*. The order—why, that is nothing but sounds, inkmarks.—¹⁷⁵

Every sign *by itself* seems dead. *What* gives it life?—In use it is *alive*. Is life breathed into it there?— Or is the *use* its life?¹⁷⁶

How do sentences do it?—Don't you know? For nothing is hidden.¹⁷⁷

Yet it is hidden to the postmodern consciousness. We cannot comprehend the reality of spirit. The breath of life is the spirit,¹⁷⁸ and it is most visible in the soul, the soul that is of the essence of the human being. Yet it is not hidden, this soul stuff: "The human body is the best picture of the human soul."¹⁷⁹ Where do we find the center of the soul, the home of the spirit of the body—Wittgenstein suggests it is in the heart.¹⁸⁰ The heart is where the law is written.

What is the body of the word without soul or spirit? It is the corporate body politic devitalized, according to Lippmann.¹⁸¹ His analysis suggests that the public can become "incandescent" on major issues for the nation, but that for all other purposes the government

171. Bodo, *supra* note 28, at 13.

172. *Id.* at 15.

173. ¶19, PHILOSOPHICAL INVESTIGATIONS (2nd ed. 1958).

174. *Id.* ¶371, 373.

175. *Id.* ¶431.

176. *Id.* ¶432.

177. *Id.* ¶435.

178. G. MAY, SPIRIT & WILL (1983).

179. PHILOSOPHICAL INVESTIGATIONS (2nd ed., 1958), Part II, iv.

180. *Id.* Part II, iv.

181. Lippmann, *supra* note 22, at 29, 34.

has become the servant of ill-informed public opinion, and has become disjointed from the real flow of events in the world.¹⁸² Further, the modern notion that truth is not something dependent upon facts largely outside human control, has created an intoxication of power which in Bertrand Russell's words contributes to an increasing danger of "vast social disaster."¹⁸³ Lippmann calls for the humility that modern philosophy has banished, as we turn to face "the mandate of heaven," and to claim the belief necessary to give life to the public realm. If the body politic is dormant, if inwardness does not connect the heart to the outer world, how can the law's public words be *used* with integrity, following and infusing spirit, inspiring truth from text?

VI. PRAYER AND INTERPRETATION

There is only "lifeless skeleton" when the "living spirit, that which gives . . . force and attraction," "vitality", the "living and breathing spirit which supplies the interpretation of the words" is missing.¹⁸⁴ That living spirit has been identified centuries ago as that which *gives interpretation*, mediating between gods and humans, taking the prayers of people to the gods and commands of the gods to the people. Diotema of Mantinea, the wise woman who was Socrates' instructress in love (which is at the center of all wisdom and goodness, for Socrates), told her pupil about the "great spirit (daimon) . . . intermediate between the divine and the mortal", who "interprets" between the world and the divine, who "spans the chasm which divides them."¹⁸⁵ This spirit, this most fundamental interpreter, is Love.

If it is love that interprets, how do we focus love upon our constitutions? What is the relationship between word, text, and spirit?

We must recover from our spiritual tradition the models and methods of knowing as an act of love.¹⁸⁶ Words of prayer are repositories of the spirit. It is only after we kindle a light in the words that we are able to behold the riches they contain. It is only after we arrive within a word that we become aware of the riches our own souls contain.¹⁸⁷

We pray our constitutions in order to impart spirit into words. We

182. *Id.* at 23-32.

183. *Id.* at 135.

184. *Hurlbut*, 24 Mich. at 107.

185. THE SYMPOSIUM 202 (Jowett translation, Stephanus edition).

186. P. PALMER, TO KNOW AS WE ARE KNOWN/A SPIRITUALITY OF EDUCATION 9 (1983).

187. Heschel, *supra* note 23, at 25.

participate faithfully in the constitution, embodying and enspiriting it, in order to give life to the law. Reading is relational, not abstract or disengaged. Either the patina of disinterest simply reaffirms the status quo, mindlessly, soullessly, or the interest engages the reader in a good faith journey through the reality of the words, a journey that yields true interpretation and must change the reader.

. . . it is the spiritual power of the praying [person] that makes manifest what is dormant in the text. The character of the act of prayer depends on the reciprocal relation between the person and the word.¹⁸⁸

What Heschel reminds us of is the fact that we do pray texts; that is what the movement of the mind and soul attending fully to the words of our community's covenant is—prayer. “Prayer . . . is an event that comes to pass between the soul . . . and the word.”¹⁸⁹ Interpretation, rightly done, is prayer.

There are more determinate things to say about interpretation as prayer. There are also other ways to approach the inwardness of the act of interpretation as engaging moral goodness. J. Hillis Miller, longtime leader of the Yale deconstructionists, talks about the “ethical moment” of attentive reading, which is compelling but under a law which is not a “written ascertainable law.”¹⁹⁰ Miller's contemporary literary theory is deeply spiritual. However, Heschel is both deeply and *directly* so, and resides in the tradition of a “community, of memory”¹⁹¹ of an actual people. Heschel is drawing on a tradition rich in both the intricacies of law and the depth of unspeakable covenant. He talks about the polarity of prayer, the way of knowing that the apparent contradictions of “fixed times, fixed ways, fixed texts”¹⁹² and “worship of the heart, the outpouring of the soul.”¹⁹³ Although he finally accords primacy to inwardness (paradoxically, an inwardness finally determined by the community of the covenant), he knows that polarity is an essential trait of all things in reality, and that in Jewish faith the relationship between *halacha* (law) and *agada* (inwardness) is one of polarity.¹⁹⁴ “Taken abstractly they seem to be mutually exclusive, yet in actual living they involve each other.”¹⁹⁵

188. *Id.* at 127.

189. *Id.* at 27.

190. J. HILLIS MILLER, *THE ETHICS OF READING* 127 (1987).

191. *See* Hauerwas, *supra* note 99.

192. *Id.* at 64.

193. *Id.* at 64.

194. *Id.* at 65.

195. *Id.* at 65.

We must remember that judges actually live through their decision-making, at their best, rather than just going through the motions. If they do their jobs mechanically they risk that the pole of the static law overcomes the spirit.

. . . Jewish prayer is guided by two opposite principles: order and outburst, regularity and spontaneity, uniformity and individuality, law and freedom, a duty and a prerogative, empathy and self-expression, insight and sensitivity, creed and faith, the word and that which is beyond words.¹⁹⁶

The mechanical is mere letter, mere uniformity, mere regularity, mere creed, mere word. It is the lifeless skeleton of state constitutions. The force of the mere routine word is strong, as Roberto Unger argues imaginatively in his latest trilogy on politics.¹⁹⁷ Heschel agrees:

. . . the pole of regularity usually proves to be stronger than the pole of spontaneity, and, as a result, there is a perpetual danger of prayer becoming a mere habit, a mechanical performance, an exercise in repetitiousness. The fixed pattern and regularity of our services tends to stifle the spontaneity of devotion.¹⁹⁸

Prayer can become *keva*, a fixed thing, without *agada* (inwardness). The text of the prayer is from tradition, existing over time. The life of the prayer comes from *kavanah*, the inward "creation of a single moment."¹⁹⁹ And without *kavanah* (inwardness), Maimonides concludes, prayer is no prayer at all. Without the spirit of the law of the land, a law is no law at all. If words are not the law of the land, even if they are the result of the procedures of the legislature they are not law.

Neither law nor prayer is illusion, so long as the reality is provided by the living in the words, the inwardness of their invocation. Letter is present, and reason has participated in the fashioning of the letter, but the final verity comes from an attitude of the heart. We are under law's direction, we are under obligation to *mitzvah*; "a *mitzvah* is an act that ought to be done."²⁰⁰ But how our actions are animated makes all the difference. Inwardness concerning the law-directed task is not, finally, a matter of reason.

196. *Id.* at 65.

197. R. UNGER, *POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY* (Social Theory; False Necessity; Plasticity Into Power) (1988).

198. *Id.* at 65.

199. *Id.* at 66.

200. *Id.* at 136; Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J. LAW & RELIG. 65 (1988).

Kavanah is awareness of the will of God rather than awareness of the reason of a *mitzvah*. Awareness of symbolic meaning is awareness of a specific idea; *kavanah* is awareness of an ineffable situation. It does not try to appropriate what is part of the divine mystery.²⁰¹

VII. WORDS AND COMMITMENTS IN THE DARK

Heschel's invocations may be more familiar to the practitioner and judge than the legal academic, because practice touches on an attitude to text that is not typical of scholarly word-masters—humility. Someone who has sent a 14-year-old to a hardened urban correctional center, who has given a child to one parent rather than another, who has faced the agonized family of a prisoner at sentencing, is more likely to know the limitations of mere words in directing the heart, than someone who has only reflected on all of this. The scholar may know humility because of life, and words in relationships. She may have discovered Heschel's insight by living:

... we discover the vital truth that speech has power, that words are commitments.²⁰²

But this truth is less likely to have taken residence in the scholar's heart if he does not know what commitments are, and if he does not know the reality of mystery, he cannot know commitment.

Commitments are covenants made in the face of mystery.²⁰³ Commitments are what we need in order to establish binding obligation, so that the answer to "why should I obey the law?" includes bond, covenant, *mitzvah*. Commitments are not solely matters of reason. Here the feminine turn of mind is an advantage. A more telling argument for this last statement than the literature on women and mystery, is a query: "What does a single woman in New York do to get rid of cockroaches?" and its parabolic reply: "She asks them for a commitment."

Sociologists tell us elaborately what we know if we go to church or temple in the United States. Places of worship are filled with women. Women know how to pray. They know the values of the heart. They know how to live text. Yet it is men who have had the heart to venture into the world of public text, of text and power, text and violence. To learn to interpret, we as a society will have to learn Di-

201. *Id.* at 137.

202. *Id.* at 25.

203. C. OCHS, AN ASCENT TO JOY: TRANSFORMING DEADNESS OF SPIRIT (1986).

otema's insight. We will have to learn to love, to know feminine wisdom, to bring *sophia* into hermeneutics, into the public law. We do not need or want to banish the letter, but we must learn to relinquish its overweening power. If we do not, the words will do what they have begun to do in federal constitutional jurisprudence. "[W]ords when abused take vengeance on the abusers."²⁰⁴ Words become autonomous, and when they act without spirit, they are deadly.

Words set loose without having been lived, without inwardness, destroy. Helen Luke illuminates this through the poetical narrative of Charles Williams, one of the circle (including Dorothy Sayers and C. S. Lewis, as well as T.S. Eliot) dubbed the Inklings, about the dangers of autonomy of coins and words.²⁰⁵ In one of the poems of his Arthurian cycle, Williams portrayed the goodness of simple mutuality in exchange; the coming of coins was to stand for this goodness. In "Bors to Elayne: The King's Coins", Bors knows coins to be necessary (even politically good), but is disturbed by the threat that the coins' taking on a life of their own creates. Taliessin, the poet to the king, shakes when he touches the coins, each with a little dragon on one side and the king's head on the other. "I am afraid of the little loosed dragons. When the means are autonomous, they are deadly; when words escape from verse they hurry to rape souls; when sensation slips from intellect, expect the tyrant."²⁰⁶ As Luke notes, Bors is disturbed that compact is becoming contract, and knows that the coins must be prayed for. The evil is not in the coins themselves but in the loss in the person of "the link to the feeling values of exchange."

A compact is, literally, an agreement based on feeling values; it means a coming together in peace, *cum pace*. A contract is a legal or financial agreement which binds outwardly, regardless of the human feelings involved. So when compact becomes contract within us, [people] begin to earn without paying or pay without earning, and money is divorced from the meaning of exchange. 'When the means are autonomous they are deadly.' When words escape from poetry, when the mint emerges from the Temple, then souls are raped; speech becomes jargon, paying becomes bribing, earning becomes joyless necessity, and the acts of exchange which are the glory of humanity become mere bargains. (*It would be hard to say whether words or coins are ahead nowadays*

204. Heschel, *supra* note 23, at 25.

205. H. LUKE, *WOMAN: EARTH AND SPIRIT* 80-92 (1986).

206. *Id.* at 80-81.

in the race to destroy souls.) (emphasis in original)²⁰⁷

Luke has correctly described what contract has become in our society. It is no longer truly about the meeting of minds (or hearts), but about words gone astray, holding power within themselves, disconnected from spirit. The warning Cooley gives against unguarded words somehow giving away that which is inalienable, ungiveable, intrinsic to the person, is a warning against letter unmodified. Words are ahead in the academy, in the race to destroy souls. In the practice of law, the lawyer is in the more dangerous territory of both coins and words used without care, words and coins cut off from feeling values, moving like unguided automatons through the sensitive tissue of human relatedness, sundering bodies and destroying souls.

Words gain autonomy because we want more certainty than life can hold. We want to be able to predict, control, evaluate. Parker Palmer reminds us that we have wanted control, assurances, but that "in the quest to free knowledge from the tangles of subjectivity, we have broken the knower free from the web of life itself."²⁰⁸ We want an agreement on social issues that are never fully resolvable, and we hope to reach it by the light of reason. What this omits is truth by the dark of mystery. It fails to honor the holy dark, to know that the desert experiences are necessary to life. It denies the fecundity of the dark soil, of the unlit womb, of the interaction of opposites, light *and* dark.

Virginia Mollenkott recalls that as a Protestant, she was by her upbringing, robbed of mystery.²⁰⁹ Rather than reminding her that in the desert images of the Bible, God was always present as Other, her tradition gave her linear logic and a god of perfection (who was, paradoxically, Other because he was white, male, rich, able-bodied and heterosexual). God was light, white, pure. Woman was dark, heavy, seductive. God was spirit; woman was body. Matter was to be transcended, analyzed, refined out. Through interpretation into thoughts about things, we avoid transcendence *through* immanence and go straight to transcendence, producing bloodless words with no grounding. Mollenkott calls for "a new materialism, a new appreciation for the surfaces and embodiment of things."²¹⁰ In the Bible she finds the darkness which is "the matrix of all creation and in constant and nec-

207. *Id.* at 82.

208. P. PALMER, *TO KNOW AS WE ARE KNOWN* 26 (1983).

209. Luke, *supra* note 205, at 64.

210. *Id.* at 65.

essary alternation with light. . . ."²¹¹

In a discussion of technology and commitment, John Staudenmaier chronicles the transition "from favoring light to absolutizing it" following the advent of industrial capitalism.²¹² We have become, he concludes, a culture that has lost the night. We are afraid of the dark (dark-skinned, dark-sexed) because we have no reverence for the holy dark, which requires "acceptance of uncertainty as a virtue to complement clarity." He does not advocate wallowing in the dark, being caught in the stasis of nihilism, but rather sustaining a creative tension between light and dark.²¹³ Without a sense of the ultimate mystery, however, we will fall into a therapeutic individualism that erodes our capacity for commitment. "No culture can long survive if the binding energies of committed relationships unravel in a tangle of short-term liaisons."²¹⁴ We only want to be committed to what we know for sure, rather than grounding commitment in the deeper soil of ultimate being. His call is, of course, a call to take back the night. To do that we must risk what we do not know to enter mystery with courage.

Ironically, the function of mystery is both to give strength to what binds us, and to give freedom in the laws that bind. Mystery allows us to know that we should follow commitments more than we have, rather than making calculated self-interest our talisman, yet the mystery of the spirit is that it comes to give the energy to live in freedom from law which has lost its soul. With the freedom of letter and spirit created by love, we lose easy justification and false certitude; we will be wrong. "Sin is necessary, but all will be well and all manner of thing will be well."²¹⁵

We have always been in the dark as well as in the light, but we now know ourselves as living in both. The dark is not terminal nihilism or insuperable cynicism about law. We have begun to recognize that from the dark, the greatest light emerges. Scientific insight from "happenstance", Jesus resurrected from the tomb, poetry from chaos, creation out of the ashes. Jacob wrestles with the Other in the dark, and only when it is time does the struggle result in blessing. The blessing, the gift of the abiding in darkness, is incommensurable:

211. *Id.* at 67.

212. "United States Technology and Adult Commitment," *Studies in the Spirituality of Jesuits*, January 1987, at 1, 20-21.

213. *Id.* at 23.

214. *Id.* at 23.

215. Dame Julian of Norwich, *SHOWINGS*, Chapter XIII.

That night, that year
 Of now done darkness I wretch lay wrestling
 with (my God!) my God.²¹⁶

Gerard Manley Hopkins shows the journey of it, the realization that can only come as exclamation (the "aha" experience) in the midst of flow.

Why should we trust the dark? Well, it is unavoidable. And there are things that our souls know, which we do not always let ourselves know we know.

In solitude . . . we recognize a bond with each other that does not depend on words, gestures, or actions, a good much deeper than our own efforts can create . . . we become aware that we were together before we came together and that community life is not a creation of our will but an obedient response to the reality of our own being united . . . we witness to a love that transcends our interpersonal communications and proclaims that we love each other because we have been loved first.²¹⁷

This relationship with the dark is an acknowledgement of what we know in our hearts. We find in deepest inwardness that we are bonded with all, that there is covenant.

This is not yet fully a matter of public knowledge; we do not know how to say it. In April of 1988, I was in Wisconsin right before the Democratic primary; I read in Madison's *Capital Times* a clip from an interviewer with a blue collar Jackson voter. Bemused but alive, the worker exclaimed: "I'm gonna vote for that nigger; I like him!" That painful paradox is a birthing cry, as Christin Lore Weber observes: "The Black Goddess is rising in the soul of the world."²¹⁸ Even Darth Vadar has turned. His sequel is a holy baby girl, protected by Willow the tenderhearted dwarf. We are still confused in our visions, but the visions have begun again.

All of this is, of course, politics. What I am writing is political; what is my agenda? What do I hope the text will do? I am trying to abide in uncertainty. I am searching for the good in the law. I am advocating hope for the law. I am hoping for the claiming and integration of feminine wisdom, and spirit, and mystery.²¹⁹ These are risky.

216. POEMS AND PROSE OF GERARD MANLEY HOPKINS 61 (W.H. Gardner ed. 1953).

217. H. NOUWEN, CLOWNING IN ROME 14 (1979).

218. C. LORE WEBER, WOMANCHRIST 54 (1987).

219. See, e.g., A. CARR, TRANSFORMING GRACE (1989); S. MCFAGUE, MODELS OF GOD (1987); R. Colker, "Feminism, Theology and Abortion: Towards Love, Compassion and Wisdom" (forthcoming).

I hope to make room for aspiration as well as duty.²²⁰ I am hoping that the people will participate in the interpretation of the text, and that is risky. That does include challenge to the false certitude of apologetics for the status quo, but it does not guarantee by any means that the status quo will not be what prevails. Let me tell you a story about the spirit of the law, the state constitutions, and Emeline Baty's hogs.

If any creatures are particularly close to the earth, pigs are. When pigs and railroads mix, who is likely to come out the better? The Nebraska Supreme Court in 1877 was entrusted with the fate of a law that said that if a train killed a farm animal and the railroad didn't settle reasonably within 30 days, the farmer eventually got double damages. The Court was moved to cite the spirit. It sang Hurlbut; it chanted Doherty, it rejected "empty form." It grounded itself in a "just regard of the public welfare" which overrode property rights. It condemned favoritism, and stood for "one rule for the rich and poor, for the favorite at court and the countryman at plough." It rang clear for fundamental principles of individual rights, the maxims of the common law and the law of the land.²²¹ The law of the land was a pre-existing rule of conduct, and property was subject to the rights of the community.²²² The Court concluded that if Emeline Baty could get more than the value of her pig, she could in principle be given the entire railroad, and thus the law was no law because it was not the law of the land. Justice could only come pig by pig, and the railroads could continue to hold out 'til the cows came home (or didn't).

The ways of the spirit of the law are mysterious, but invoking them does not guarantee that my politics will win. Such an invocation does, however, render promise greater authenticity a little harder to resist.

VIII. CALLING THE LAW OF THE LAND TO LIFE

One attraction of the law of the land is that it recalls us to a lost heritage. "Without vision, without mystery, all of our fine intellectual understanding and its great values turn to dust."²²³ Or smog, or acid rain. In the motif of Robert Frost, we have withheld ourselves from our land and its law:

220. L. FULLER, *THE MORALITY OF LAW* 40-43, 184-86 (1969).

221. *Baty*, 6 Neb. at 46.

222. *Id.* at 42.

223. Luke, *supra* note 205, at 69.

The land was ours before we were the land's
 Something we were withholding made us weak
 Until we found out that it was ourselves
 We were withholding from our land of living,
 And forthwith found salvation in surrender.
 Such as we were we gave ourselves outright
 To the land.²²⁴

Frost tells us that that land was only "vaguely realizing westward" when we first gave ourselves to her; she was "still unstoried . . . such as she was, such as she would become." She is now so thickly storied that she has again become chaotic, perishing for lack of a new story. She is so poorly protected by law that her ecology is mortally endangered. The stories she has, our High Court cannot hear, or has complicated beyond retelling.

To find the story of our land we must find salvation in surrender. We are who and where we are. We must start our stories near to home. We must hear the warning cries of our polluted rivers and air, of our nascent nuclear suicide. We must live, and choose the life which we do not yet recognize, despite its mystery. We are now enfranchised light and dark, male and female. If we continue to withhold ourselves, we will continue in unacknowledged and so infertile dark. The spirit is indeterminate; the text is indeterminate; the future is indeterminate. For the law to be good, it must be the law of the land. We must reconnect spirit without losing word. We must live with spirit in the law, rather than under the law.²²⁵ To do that, we must risk walking in the dark from time to time. Law is not, as Holmes argued, only to make life predictable. It is to make life just and good. It is to ensure a more perfect Union and to establish justice.

Why, again, should we trust? We recall that Michelangelo saw in an opaque, geometric block of marble, the living form of his statue, which he had only to liberate. The vision is not only in the viewer—the marble, the rock, the land, holds the vision for us as we wait to be found in that vision. We will find truth and living law only by giving ourselves to the land and all her people, only by "The Gift Outright." If somehow in giving and love there is no goodness or justice, we are losing nothing of real value by giving and loving. Even in giving and love, there are no guarantees.

We can trust because we are blessed. Reflecting on law in *Psalm*

224. R. Frost, *The Gift Outright* in COLLECTED POEMS 348.

225. D. BONHOFFER, *MEDITATING ON THE WORD* (D. Gracie trans. 1987).

119, Deitrich Bonhoffer observes that we no longer are bound by law to perform before we are blessed; rather, we are now freed in love to know that blessing comes first and obedience freely follows.²²⁶ Our land is a rich blessing. We can trust in part because we have hope. Just as liberation theology points the people in local "base communities" towards studying Scripture on their own, developing state constitutional law contains the local voices of the less elevated courts, closer to the people. The scripture of the constitutions, many of which are very close or identical in words to the federal document, is being interpreted into being in fifty different states. The "new federalism" has an unpredictable reality, which does not neatly follow anyone's political agenda.²²⁷ It has the means for authenticity; it practices the core virtue of American local government, participation. It manifests a political restiveness and creativity too long absent in this huge post-modern Leviathan. There are new voices in the land, and new homes for new visions. We are taking back our texts, living our laws.

The texts are public. To them we bring our own histories and allegiances, our identities formed in diverse communities of faith (including liberal secular humanism).²²⁸ We are, as Michael Sandel reminds us, encumbered selves. Our core beliefs are not chosen like preferences; they are grown in our very being.²²⁹ There, where deepest beliefs flourish and conflict, the text must be lived through. It must be attended. It must be prayed, and then spoken in public, in a discourse the unity of which we hope to see in experience and vision.

In our federal constitutional jurisprudence, we have forgotten what gives life to the reading of the text and the commentary on the text. The discourse has become desiccated, its skeleton sucked dry by the processes of over-politicizing an already unrooted positive law.

Let the whiteness of the bones atone to forgetfulness.

There is no life in them. . . . And the bones sang chirping

Under a juniper tree the bones sang, scattered and shining

We are glad to be scattered, we did little good to each

other,

Under a tree in the cool of the day, with the blessing of

sand,

226. *Id.*

227. Mosk, *State Constitutionalism: Both Liberal and Conservative*, 63 TEXAS L. REV. 1081 (1985); Gormley, *Ten Adventures in State Constitutional Law*, EMERGING ISSUES IN STATE CONSTITUTIONAL LAW 31-35 (1988).

228. Fish, *Liberalism Doesn't Exist*, 87 DUKE L.J. 997 (1987).

229. Sandel, *supra* note 17; *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Forgetting themselves and each other, united
 In the quiet of the desert. This is the land which ye
 Shall divide by lot. And neither division nor unity
 Matters. This is the land. We have our inheritance.²³⁰

There is new moisture in the state courts; new ways of talking and reclamation of fundamental law have loosed new streams of life-giving spirit to en flesh the "mere skeleton[s]" of the words of text. It is time to prophesy, as Thomas Shaffer and Michael Perry and Michael Walzer call us to be prophets,²³¹ of the new voice and reconstituted body of the polis, of the law of the land. It is time to call to the dry bones of constitutional law. We have felt the frustration, the stasis. We are called to move beyond Eliot's early desperation; it is no longer time "to sit still." It is time to claim our inheritance and call it to life.

He said, "Prophesy over these bones. . . . Say, 'Dry bones, hear the word of the Lord. The Lord God says this to these bones; I am now going to make the breath enter you, and you will live They keep saying 'Our bones are dried up, our hope has gone; we are as good as dead.' . . . So say to them: . . . I shall put my spirit in you, and you will live, and I shall resettle you on your own soil. *Ezekiel 37:4-14.*

We are on our own soil, but we have been unsettled, unsundered. We have the means to bring the land to life; it begins in inwardness. A dialogic community grows from the ground of what is common in the heart.²³² Whether we are internally faithful to Self, soul, mantra, Force, Yahweh, Allah, Goddess, Other or unknown, we have within, the adequate and only resources for animating the law so that it is not autonomous and deadly²³³ but integrated and inspired. To summon this, we must take an attitude that is like the famous prayer, "I believe; help thou my unbelief," that is, an attitude of attention to the inner law, knowing we will never get it right. We will have to "hope to turn again" in time: "In and through even the best speech for Ultimate Reality, greater obscurity eventually emerges to manifest a religious sense of that Reality as ultimate mystery."²³⁴

That attitude of attention which knows its inherent flaws, as-

230. Eliot, "Ash Wednesday" *supra* note 40, 87-88.

231. T. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* (1981); M. PERRY, *MORALITY, POLITICS AND THE LAW* (1988); M. WALZER, *INTERPRETATION AND SOCIAL CRITICISM* (1987).

232. See S. CAVELL, *THE UNCANNINESS OF THE ORDINARY* (1988) esp. chap. 6.

233. Herzog, *supra* note 120, at 625 (praising liberal law's autonomy); Weinrib, *Legal Formalism: On the Immanent Rationality of the Law*, 97 *YALE L.J.* 949 (1988).

234. Tracy, *supra* note 9, at 108.

sumes some form of common humanity, some inchoate level of the law in our hearts, which we can tap, participate in, and speak from, but never codify adequately. It is a form of "original intent" that assumes that we stand equal before God (or Ultimate Reality) and in our experience of trying to reach that inward place, we can approach knowing the best of what those who tried to put law into words, meant. As Eckhart notes, the best way to know the sense and truth of the Scriptures is *to be in the spirit* in which the scripture-writer wrote them.²³⁵ What Herzog calls Coke's almost mystical reverence for the common law²³⁶ is the faith that the people do have in their spirit access to the wisdom of their hearts, and they will find the law there as they come to reclaim their text. "The rebirth of the word comes in the process of conversation,"²³⁷ this is a call to conversation.

IX. CONCLUSION

Holmes could have said much of what Juniper said, I suspect. Despite the argument that law and morality have nothing to do with one another, that law must operate as if aimed at the bad person, and that law is to make life predictable, Holmes was an inveterate poet of the spirit of the living law of the land. He sounded all the American canons of pragmatism, near-cynicism, and "realism" yet sang of the law's spirit.²³⁸ He called practitioners to read and ponder on the "remoter and more general" aspects of the law, which would lead not only to mastery within one's calling, but to connection "with the universe and [catching] an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law."²³⁹ The way to that infinite, that unfathomable, that universal law, was through knowing a word not as unchanging but as "the skin of a living thought."²⁴⁰

Lawyers and judges rub up against that skin of words all the time; the people of the land live in that skin as they participate as the direct and indirect parties in and out of court. They are thinking about the law, as the public reaction to the Bork nomination showed. They must think about the law, because it shapes much of their lives. And they are a rich source of potential interpretation of the law. As

235. TREATISES AND SERMONS OF MEISTER ECKHART 130-31 (J. Clark and J. Skinner trans. 1983).

236. Herzog, *supra* at note 120, at 624.

237. Shawn Elliott, 3rd year, University of Nebraska, College of Law.

238. O.W. HOLMES, COLLECTED LEGAL PAPERS (1920); See Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989).

239. *Id.*, "The Path of the Law" at 167, 170.

240. *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

liberation theologies encourage the foundational project of popular biblical studies in base communities, so state constitutional law brings the interpretation of our legal, social texts closer to the people. If a language is a form of life, then what better contribution to interpretation and sustenance of that language, than that of the people? To step to the state level is to move where the words of the texts are "less encrusted with layers of court decisions."²⁴¹ It is to move where judicial election, local questions and ballot initiatives bring the courts closer to the people. It is to move where the spirit of the law of the land may be a little easier to hear. We have heard it before.

In this rhythm of conversation and prayer, of inwardness and outwardness, will either the primarily public or the primarily private transcend sectarian vision? I would suggest that the answer is yes and no. We can not sustain the perfectly objective "God's Eye" view²⁴² and we cannot capture it in words, even if we are to hope to touch it from time to time. Our subjectivity is particular as well as universal. But the hope is that a community of dialogue which reaches even the "theys" can be sustained, in the right spirit.²⁴³ Robert Cover talks about a spirit of obligation based on Torah, which is deeper, richer, truer than a rights-first sense of obligation. To him, this is command.²⁴⁴ To me, it is invitation, as his own account of mitzvah is inviting. The invitation is to acknowledge the bonds of solidarity which we have been given, to claim the spirit of our land and its law. The invitation is to resurrect the story of the People's vitality. Law will still have its violence, but we will not be hopeless in the face of our own inevitable flaws.

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I hope this essay has met the reader with some "echo of the Infinite," "unfathomable" law toward which Holmes aspired. It was intended to present Heschel's wisdom about the relations among inwardness, word and bond which a praying of text involves, and to recommend that process of attention as a crucial aspect of interpreting law. The language and deliberations of 19th century state courts portrayed a vision of the law's spirit, alive in and yet beyond words of law. Those state opinions acknowledged the unfathomable but turned to speak in words which aspired to call forth the living law from the

241. Abrahamson, *Criminal Law and State Constitutions*, 65 TEX. L. REV. 1141, 1181 (1985).

242. See H. PUTNAM, *REASON, TRUTH AND HISTORY* 50 (1981).

243. Burt, *Constitutional Law and the Teaching of Parables*, 93 YALE L.J. 455 (1984).

244. Cover, *Obligation*, *supra* note 200, at 74.

public text. The texts of state constitutional law remain public, and the discourse of those texts is a promising place to hear and talk about the law of the land. The fruits of spirited discourse include an enlivened law, a sense of bond in our communities, and even times and places of peace and justice.