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DERRIDOZ LAW WRITTEN IN OUR HEART/LAND: "THE POWERS RETAINED BY THE PEOPLE"

EMILY FOWLER HARTIGAN*

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[A] loss of sovereignty has occurred so that we are more subject to invisible authority—scientists and so forth. We now think of what *one* should do in a certain situation, not what *I* should do. Will Barrett [in *The Second Coming*] is a man who, whatever his faults, has reclaimed sovereignty; he demands to know what it's all about

— Walker Percy¹

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1. Linda W. Hobson, *The Study of Consciousness: An Interview with Walker Percy*, 35 GA. REV. 50, 51 (1981).

Henceforth, a text, if it is living and animated, full and authentic, will be of value only by virtue of the speech it will have as its mission to transport. Therefore, there also will be full texts and empty texts.

— Jacques Derrida²

I. PRELUDE

In April 1990, French intellectual Jacques Derrida of "deconstruction" fame, during a visit to the University of Nebraska, was a member of a roundtable at the Law College. As my part of the roundtable, I offered him a tale of welcome, a retelling of *The Wizard Of Oz*.³ In the movie, the wizard goes back to America's heartland in his hot air balloon, but Dorothy gets home her own way. I suggested to Derrida that the writing⁴ on the balloon in which the Professor-wizard returns home revealed its true origin and destination—on the balloon is written "STATE FAIR/OMAHA."⁵ And because Omaha is *not* in Kansas, Toto, I welcomed Derrida home to Nebraska.

From another perspective, political scientist Michael Genovese portrays the story of Dorothy, Toto, and the Wizard as a political allegory of the collapse of Populism.⁶ According to Genovese, the Cowardly Lion was intended by L. Frank Baum, the author of the original book, to be Nebraska's own Great Commoner, William Jennings Bryan.⁷

Much of Genovese's analysis is persuasive. He suggests "Oz" itself came from the abbreviation for ounce,⁸ the tally of the gold standard that Bryan denounced in his "Cross of Gold" speech; that the tin woodsman is industrial America, which lost its heart in the dehumanizing factories that turned workers into machines;⁹ and that the Wizard is the President, who is really a humbug of empty rhetoric.¹⁰ Some of what Genovese says is not

2. JACQUES DERRIDA, *THE POST CARD* 473 (Alan Bass trans., 1987).

3. See L. FRANK BAUM, *THE WONDERFUL WIZARD OF OZ* (University of Cal. Press, Ltd. 1986) (1900).

4. For the crucial role of writing in Derrida, see *infra* notes 28-32 and accompanying text.

5. NOEL LANGLEY ET AL., *THE WIZARD OF OZ: THE SCREENPLAY* 126 (Michael P. Hearn ed., 1989).

6. Michael A. Genovese, *The Wonderful Wizard Lives On: "Oz" Maintains Its Appeal in Our Political Consciousness*, L.A. TIMES, Mar. 19, 1988, § 2, at 8.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

quite right. He suggests that "Toto probably represents a dog."¹¹ Toto represents something much more crucial and mysterious—the one main character who never speaks, (s)he¹² unveils the Wizard, rescues Dorothy, and escapes, and is always faithful. And the Lion's fate is different, perhaps, than Genovese's judgment that he represents Bryan's lack of success.¹³ While Bryan is unsuccessful in gaining the presidency, the lion gets what he wants—he becomes king of the forest.¹⁴

This Article is about the wizard (Derrida), the king (the sovereign), and the scarecrow (the law reporter who wanted to get the "brain-words" right, but got it all right when he got it wrong). The wizard Derrida, the writer and pharmacist, brews for us a word-philtre, which in the wrong dosage kills (Derrida is notoriously hard to read; the reader's interest dies easily), yet in the right amount, cures (his basic movement of deconstruction images a wonderful, minutely woven means of finding freedom in the text, in life, in law).

While the place of home, along with the mystery of Toto, may be another story, in ours the blustery lion becomes king. And that is the key question of law here: who is sovereign; what does it mean, in Populist Nebraska at the turn of the century, and today, in America and her heartland, that the people are sovereign? To answer that question, we will find that the scarecrow, the "brains" of the outfit (the official court reporter of the text), is a very surprising character.

II. THE "OTHER" SIDE OF THE NEBRASKA CONSTITUTION

"Sec. 26. *Powers retained by people.* This enumeration of rights shall not be construed to impair or deny others, retained by the people, and all powers not herein delegated, remain with the people."¹⁵ This section of the Bill of Rights of the Nebraska Constitution resounds (aside from its legalistic "herein") with Populist undercurrent that moves through the law in America's heartland and echoes the language of the unenumerated "rights retained by the people" of the U.S. Constitution.¹⁶ However,

11. *Id.*

12. Although referred to as "he" in the script, Toto is played by a female terrier, "Terry." ALJEAN HARMETZ, *THE MAKING OF THE WIZARD OF OZ* 131 (1977).

13. Genovese, *supra* note 6, § 2, at 8.

14. In Baum's book, the lion actually goes back to the forest to reign. BAUM, *supra* note 3, at 232.

15. NEB. CONST. art. 1, § 26.

16. U.S. CONST. amend. IX. The federal version of this annotation's subject is the

section 26 is much like everything affirmative that we humans do—it is immediately flawed. In this case, the flaw sits literally right below the text of this heartfelt declaration of the people's sovereignty, in the annotations provided for section 26 in the *Revised Statutes of Nebraska*.

The subtext located beneath the main text of the Bill of Rights consist of five cases. Among those annotations to section 26 is the following:

This section removes all doubt that powers other than those specified in bill of rights were retained by the people, and any act in violation of such rights is as clearly invalid as though same had been expressly prohibited by fundamental law. *State v. Moores*, 55 Neb. 480, 76 N.W. 175, overruled 63 Neb. 219, 88 N.W. 243.¹⁷

The aspect of the annotation holding that the *Moores* case is overruled is wrong.¹⁸ Not only does it conflict with other annotations to the same Bill of Rights citing the very same case, but it also ignores the inadequacy of the supposed "overruling" and the existence of an explicit rehabilitation of that which was never adequately overruled initially. More centrally, the annotation, read literally to include the overruling, would erase the very section it annotates: it would negate the whole sense of section 26 and its deliniation of the retained sovereignty of the people.¹⁹ The annotation sets subtext against its primary text, against other text, against other subtext.²⁰ But what makes it "wrong," and not merely discordant, contradictory, or incoherent, is that it claims there is no "other side." Like most areas of law, this fundamental area—who has the power, what is the constitution — has at least two major strands of thought, multiple lines of cases, constant clashes, and evolving networks of authorities.

focus of considerable scholarship. See, e.g., THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT (Randy E. Barnett ed., 1989). In the Foreword, Floyd Abrams remarks that the issue "has become a legal, philosophical, and jurisprudential Rorschach test for the assessment of prospective judicial appointees." Floyd Abrams, *Foreword to id.* at viii.

17. 2 REVISED STATUTES OF NEBRASKA 86-87 annot. (1989).

18. See *id.* (case cited as overruled). The correction must begin with the more local reporters. See generally CLIFFORD GEERTZ, LOCAL KNOWLEDGE (1988).

19. Subtext for "the 'other' other side" would note that *no* written provision "removes all doubt," so the annotation is internally flawed.

20. "Text," which comes from the Latin for "weaving," refers ordinarily to some specific writing, like "the text of section 26." A subtext would be the writing below — either literally, as in the annotations in the *Revised Statutes*, or figuratively, as in commentary, context, or any implicit or unspoken meaning.

The writer of the annotations might have tried to portray one of the major strands as the “majority rule” and another as the “minority,” but in this case the writer went too far, altogether ignoring the existence of minority rules. This Article seeks to restore the harmony and disharmony, the fruitful tensions, by describing the slandered case and telling the story of the paradoxical annotation.²¹ The Article turns out, despite its author’s original intention, to be a mystery story as well.

III. FINDING THE CASE, *MOORES*

Before the story, we need a setting, a context—first the setting of the author, then of the theory. When I came to the Nebraska College of Law, I had clerked for a wonderful state supreme court justice, Shirley Abrahamson of Wisconsin. Trying to fit my experiences into the curriculum, I taught a course in state constitutional law. I photocopied the entire Nebraska Constitution and annotations, as I gathered other materials for the course. However, none of the major national materials on state constitutional law used any Nebraska cases, and the contemporary court seemed so overwhelmingly overdocketed that constitutional creativity was, well, “constitutionally” impossible. Yet the older annotations gave some interesting hints; the most prominent among those, sitting beneath section one of the Bill of Rights²² and touching nationwide themes, was *State v. Moores*.²³ It was such a rich case that, when the class began to come alive around the issues of power and the “law of the land,” I assigned it in full. I had found it originally under section one of the first article of the *Nebraska Constitution* which states that “[a]ll persons are by nature free and independent, and have certain inherent and inalienable rights.”²⁴ Only in my second year of teaching the course, while reviewing the annotations under all the sections of article one, did I find the contrary version under section 26, which labeled *Moores* “overruled.”²⁵ That morning, amid panicked pre-class searching, I worried that I might somehow have been teaching an invalid case as a bright beacon in

21. You may also have noticed that the annotation *itself* is the loudest clue to the “other side”—the deconstruction of my text begins already.

22. NEB. CONST. art. I, § 1.

23. 76 N.W. 175 (Neb. 1898).

24. NEB. CONST. art. I, § 1.

25. See *supra* text accompanying note 17.

Nebraska law. That is what led me to discover the first layer of its hidden history.

IV. THE WRITTEN AND THE "UNWRITTEN"

The theoretical context for this hidden history (and its subsequent layers) is not straightforward but at its core is accessible. There is a fundamental tension between what is written and what is unwritten that has existed in Western civilization since Plato (and before) and that underlies such basic debates as that between "original intent" and "penumbra" in constitutional interpretation.²⁶ In its Platonic guise, it is the question of which is more valuable, writing or speech. In its biblical guise, it is the relationship between the law written in the heart²⁷ and the law written on stone tablets, edicts, and catechisms. In one of its most obvious legal appearances, it is the relationship between the written and unwritten Constitution. The latter discourse has centered on the national Constitution, but it is of course applicable to the state documents, and came to full, eloquent debate in Nebraska around the turn of the century.

This will be a story with a historical cast. I will talk about state justices' personalities, local political parties, particular court reporters, Nebraska newspapers, and Omaha factions. But it will also use some of the movement of "deconstructing" and "reconstructing" history, which contemporary literary and legal theories provide, because that movement will—I hope—make the story both enlightening and fun.

In brief, I will use the key turning point (or as he calls it, "switchpoint") of Jacques Derrida, whose writing has had profound contemporary impact.²⁸ That turning point is some-

26. For the ongoing debate about intent, interpretation, and text, see generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (discussing Justice Scalia's interpretation of intent); H. Jefferson Powell, *The Modern Misunderstanding of Original Intent*, 54 U. CHI. L. REV. 1513 (1987) (reviewing R. BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)). For a conservative constitutional theorist (originally from Nebraska) who cites an example of the manifest superiority of going beyond the letter of the federal constitutional text, see David Fellman, *Original Intent—A Footnote*, 49 REV. POL. 574 (1987).

27. As in this instance, the law written in *Harte*. See *infra* notes 146-67 and accompanying text.

28. From experience, I recommend against solely reading about Derrida rather than reading his texts directly. If the reader wants to combine those two strategies, I recommend the following: Jonathon Culler, *Jacques Derrida*, in *STRUCTURALISM AND SINCE: FROM LEVI-STRAUSS TO DERRIDA* 28 (John Sturrock ed., 1979); Jacques Derrida, *Devant La Loi* (Avital Ronnell trans.), in *KAFKA AND THE CONTEMPORARY CRITICAL PERFORMANCE* 40 (A. Udoff ed., 1987); Jacques Derrida, *Otobiographies* (Avital Ronnell trans.), in

thing like Plato's journey in and out of the cave. In Plato's story,²⁹ we are like persons confined to a cave, facing the far wall on which shadows are cast. All we see are the shadows, never the substance. But some, by what Plato calls philosophy, manage to emerge from the cave into the sunlight. Still, it is part of their call to return periodically to the cave and talk to the cave dwellers who, for their part, find the journeyers a bit mad. But it is this intercourse that creates a world of discourse and care in which we all live together. My own interpretation of this is that each of us spends much of our time in the cave; sometimes we have the time, energy, care, humor, and inclination to reflect and be called to struggle and play our way out into illumination. Those "times out" sustain and interweave our necessary, everyday "shadow world." Rather than some people as philosophers and some as drudges, each of us is both; every day, we are some mix. (Perhaps even moment to moment, at our best, we dance in, then out, of the cave—or dwell in its threshold.) But we find the "other" side of ourselves, the one we spend less time dwelling in—whether cave or sun—a bit strange.

This is the relationship, I will suggest, between the written and unwritten constitutions and the power in the people and the power in the law as written. Neither has the full truth of our lives, because we do live in a world that has both cave and sun. We also live in a world that has both written and unwritten, both known and mysterious, both speech and script, both obvious and subtle. Derrida turns the usual dual hierarchies on their heads, and turns, and returns. While this risks the equanimity of the reader, his basic move is not too hard to track—and it contains, I hope we will find, some surprises.³⁰ One is that what is "unwritten" is also written—but the writing happens someplace

THE EAR OF THE OTHER 134 (Chriske V. McDonald ed. & Peggy Kamuf trans., English ed. 1985); Jacques Derrida, *Plato's Pharmacy*, in *DISSEMINATION* 65 (Barbara Johnson trans., 1981); Linda Kintz, *In-Different Criticism*, in *THE THINKING MUSE: FEMINISM AND MODERN FRENCH PHILOSOPHY* 113 (Jeffner Allen & Iris M. Young eds., 1989); see also Francis J. Mootz, III, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas, and Ricour*, 68 *B.U. L. REV.* 523, 533-39 (1988) (suggesting a context for Derrida and notable contemporaries in contextual play in an accessible format). See generally J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 *YALE L.J.* 743 (1987).

29. *THE REPUBLIC OF PLATO* 222-30 (Francis M. Cornford trans., 1941).

30. "I have never confused—indeed I have never stopped urging others not to confuse—traces or writing generally with what is said or written in books and newspapers, with archives and 'publications.'" Jacques Derrida, *Biodegradables: Seven Diary Fragments*, 15 *CRITICAL INQUIRY* 812, 816 (Peggy Kamuf trans., 1989).

other than we expect.³¹

The first move, for which Derrida is perhaps most famous, is to seem to put more importance on the written text than on anything else. Reversing the supposed Platonic (and common-sense) valuation of speech (because it is immediate, direct, particular, from this person to that person), he appears to say that what is written is what makes things real. There is nothing outside the text, and the text governs.³²

In one's ordinary life, this seems absurd. You live your life; you do some reading and writing, but most of your life is walking, talking, thinking, moving, feeling, deciding—activities sometimes using but all without being *dictated* by written words. Derrida subtly suggests that something like the pop-psych notion of being “scripted,” of having “tapes” in our heads, of internalizing someone else's written words and being dictated to (our always “taking dictation”), is closer to how we live than we may realize. In moments of reflection or distress, we may ask ourselves whether we are part of a plan. If we are part of a plan, is it like Fate, set and determined, or is it like Augustine's version of God's plan: the world made anew every day. We may ask: anew every moment or both?³³ Perhaps we are free only in appearance, and are actually enslaved by psychological, sociological, familial, pedagogical, and even theological determinisms? Are we some mix? Is this “mix” free? Derrida's writing is a way of beginning to turn all these basic categories and questions of life around each other, to move them (and us), so we might gain new perspectives and get a sensation, an intuition, of freedom. And in all the thinking about free will and determinism, about law and liberty, about what is written and what is up for grabs, from one perspective that may be the best we can do—have an educated sensation, never finally rebutted, of freedom.

Some commentators see this sort of movement as destructive nihilism (“trashing”), challenging the stable structure, the law of what is, with no grounds for affirming that there will be something else better.³⁴ I see it as based on the tacit premise of hope, that if we do leave the known cave for the unknown sun-

31. See, e.g., *id.* at 815-17.

32. This is a common reading of JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatori C. Spivak trans., 1976). For a quick antidote, see Derrida, *Plato's Pharmacy*, *supra* note 28, at 148-49.

33. See *supra* notes 26-29.

34. See Ted Finman, *Critical Legal Studies, Professionalism, and Academic Freedom: Exploring the Tributaries of Carrington's River*, 35 J. LEGAL EDUC. 180 (1985); P.W. Mar-

light freely (or vice-versa, as some are more naturally sun dwellers), we will better understand the shadows when we return. If we look at the written as we previously saw the unwritten, and the unwritten as we used to view the written, we will gain in wisdom. New and multiple perspectives add more than they disorient. Thus, Derrida's challenge to the supposed primacy of speech turned philosophy of language on its ear, upsetting the basic notion that what we experience in direct relationship is more valid than what comes on the anonymous written page. Yet a moment later Derrida inverts this new insight. What is "written" includes what is written in the heart, he says, and what is in books is not necessarily true text.³⁵ And we are back to where we started. Well, so was Dorothy after she visited Oz, and while both she and her home were the same, they were also very different.³⁶

Yahweh tells us that the law S/He gives, S/He writes on our hearts,³⁷ but the laws were also written on Moses's tablets. We have law "on the books," and law we hold in our "inward parts." We have a legal system and full statute books, and we have our own inherent sense of justice. Which to honor? What is writing on the heart—or of the heartland? Perhaps it is the process of unraveling and reweaving these answers and questions into a different "both/and," which Derrida suggests—and demonstrates. That is what he does in his own text. So I will try to unravel and reweave the written annotations and the written *and* unwritten subtexts of the Nebraska Constitution in sections 1 and 26 of article I,³⁸ and we will see what happens.

V. THE TEXT: VOLUME TWO

The Nebraska Constitution appears in text in a set of volumes of the Nebraska statutes numbered through six; volume II (or "2")³⁹ is, it says on the title page, "comprising the constitution of Nebraska and all the statutory laws of a general nature

tin et al., "Of Law and the River," and of Nihilism and Academic Freedom, 35 J. LEGAL EDUC. 1 (1985).

35. See *supra* text accompanying note 28.

36. And her own way home, which was *not* via the Professor's hot air balloon, is the key thing Derrida, to some extent, misses. "Derrida's brilliant readings have been centered on a subject who is male, white, European; then that critique of subjectivity has been generalized . . ." Kintz, *supra* note 28, at 115.

37. See 20 *Exodus*.

38. NEB. CONST. art. 1, §§ 1, 26.

39. The spine says "2" while the title page says "II."

in force at date of publication on the subjects assigned to chapters 24 to 26, inclusive."⁴⁰ There is no table of contents, but a page-by-page examination shows the title page⁴¹ is first, followed by a copyright page,⁴² a page containing the certificate of authentication,⁴³ and a page containing a short statement on citation form.⁴⁴ Next is a list of the editorial staff,⁴⁵ and then, unannounced, The Declaration of Independence.⁴⁶ The discourse of the volume begins in this Declaration: "When in the Course of human events, it becomes necessary for one people to dissolve the political bonds which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them . . ."⁴⁷ It continues, saying that when any form of government becomes destructive to the ends of equal rights of life, liberty, and pursuit of happiness, it is the right of the people to alter or abolish it.⁴⁸ That is what volume two begins with—the national declaration of an exercise of the power of the people.

Next in the book is The Enabling Act of Congress, passed April 19, 1864, which permits the people of Nebraska to form a Constitution and state government and admits Nebraska to the Union.⁴⁹ Then comes the actual admission, February 9, 1867,⁵⁰ and the Proclamation of Admission by President Andrew Johnson on March 1, 1867.⁵¹ The text continues with the Constitution of the United States,⁵² the declaration of this Union that the Nebraska heartland chose to enter. Then come the Nebraska Constitution of 1875 and "subsequent amendments."⁵³

Many states have revised their constitutions, some many times. Nebraska continues with its basic document intact, but the subtext changes it. The Preamble itself has not been

40. 2 REVISED STATUTES OF NEBRASKA, *supra* note 17 (title page).

41. *Id.*

42. *Id.* (copyright page).

43. *Id.* (certificate of authentication page).

44. *Id.* (statement of citation page).

45. *Id.* (list of editorial staff page).

46. *Id.* at 1.

47. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776); see Craig M. Lawson, *The Literary Force of the Preamble*, 39 MERCER L. REV. 879, 879-87 (1988).

48. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

49. 2 REVISED STATUTES OF NEBRASKA, *supra* note 17, at 5-9.

50. *Id.* at 10-13.

51. *Id.* at 14-15.

52. *Id.* at 16-35.

53. *Id.* at 37, 45.

amended since 1875.⁵⁴ "Preamble. We, the people, grateful to Almighty God for our freedom, do ordain and establish the following declaration of rights and frame of government, as the Constitution of the State of Nebraska."⁵⁵ Underneath the Preamble is one annotation, the first in volume two: "*Omaha National Bank v. Spire*, 223 Neb. 209, 389 N.W.2d 269 (1986)."⁵⁶ In the text, the annotation looks forbidding to one who desires to resurrect the unwritten constitution of Nebraska. It condenses the case to a seeming erasure of "We, the people":⁵⁷

The Preamble cannot exert any power to secure the declared objects of the Constitution unless, apart from the Preamble, such power can be found in, or can be properly implied from, some express delegation in the Constitution. *Omaha Nat. Bank v. Spire*, *id.* at 216, 389 N.W. 2d at 274.⁵⁸

If the power starts in the people, and they try to write down what powers they delegate to a government they call into existence but they retain any powers they did not so delegate, how can this annotation make sense? The declared objects of the Preamble are establishing a frame of government and declaring of rights. Among the rights declared is that all rights not enumerated stay with the people. But their Preamble cannot help the people retain power unless the power can be found in the express delegation—yet the declaration of rights says what is unexpressed is retained. Is this as nonsensical as it seems?

The *Omaha National Bank*⁵⁹ case is about a constitutional initiative. Under the Nebraska constitution, the people of Nebraska have direct access to amend their constitution. Fewer than half of the states have such a populist provision in their constitution.⁶⁰ The Nebraska Supreme Court notes the straightforward way the initiative ballot spoke to the voters: "A vote

54. The amendment changed the initial Preamble of 1866: "We the people of Nebraska, grateful to Almighty God for our freedom, in order to secure its blessings, form a more perfect government, insure domestic tranquility, and promote the general welfare, do establish this Constitution." NEB. CONST. pmbl. (1866). For a discussion of reclaiming the "blessings" of freedom and law, see Emily F. Hartigan, *The Power of Language Beyond Words: Law as Invitation*, 26 HARV. C.R.-C.L. L. REV. 63 (1991).

55. NEB. CONST. pmbl.

56. 2 REVISED STATUTES OF NEBRASKA, *supra* note 17, at 45.

57. NEB. CONST. pmbl.

58. *Id.*

59. *Omaha Nat'l Bank v. Spire*, 389 N.W.2d 269 (Neb. 1986).

60. See James M. Fischer, *Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence*, 11 HASTINGS CONST. L.Q. 43, 44 n.5 (1983). The initiative itself survived federal constitutional challenge. *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912).

FOR will create a constitutional prohibition against further purchase of Nebraska farm and ranch lands by any corporation or syndicate other than a Nebraska family farm corporation."⁶¹ The appellants argued that the initiative was a statute, not a constitutional amendment. The court rather directly said that under the power of initiative, if the voters say it's a constitutional amendment, it's an amendment.⁶² Trying to use the Preamble to say that only things that fit the declared objects of the Preamble (the "ends of government") are amendments, anything else being a mere statute, takes from the people the right to say what is a statute and what is an amendment.⁶³

For "power of the people," what looked ominous in the annotation looks much more promising in the body of the opinion:

The ultimate source of power in any democratic form of government is the people. Our Nebraska Constitution is a document belonging to the people. Subject only to the supremacy clause of the United States Constitution, the people may put in their document what they will. Even to the shock and dismay of constitutional theoreticians, the people may add provisions dealing with "non-fundamental" rights, as well as provisions bearing the most tenuous of relationships to the notion of what constitutes the basic framework of government. The people may add provisions which legal scholars might decry as legislative or statutory in nature. But the people may do it nonetheless.⁶⁴

Using heartland tornado imagery of which I am particularly fond, the court took a very direct, very democratic view of what the initiative process entails:

The motivations and mental processes of the voter in Verdigre or the elector in Elkhorn cannot be determined—except from the words of the enactment itself. Beyond that, all that can be known by this court is that the voters have been subjected to tornado-like winds in voting on this highly political question.⁶⁵

Even with an outrageous work overload, the court had creativ-

61. *Omaha Nat'l Bank*, 389 N.W.2d at 273.

62. *Id.* at 274.

63. State constitutions are notorious for having a great deal of detail that would at the national level be statutory, but in the states is just part of the elastic reach of a more local "constitution." Frank P. Grad, *The State Constitution: Its Function and Form for Our Time*, 54 VA. L. REV. 928, 942-43 (1968).

64. *Omaha Nat'l Bank*, 389 N.W.2d at 275.

65. *Id.* at 279.

ity. The court also had insight, for tornado-like winds, as Dorothy comes to realize, can bring unexpected good fortune.

This first foray into the text's subtext, a 1986 initiative case, indicates that the annotations are misleading—as anything so condensed is likely to be. Is there some more consistent problem in this writing about writing and not writing, in this annotation-level subtext to the written-and-unwritten text? If the powers are still in the people as the *Omaha National Bank* case suggests, then there are powers as yet unwritten—can only the people write them directly by initiative? This does not seem correct, because it was the people who created the judiciary and the legislature. What does the judiciary think should be deciphered among the writings and the people?

Let us return to the text. The next entry in volume two, after the Preamble and its singular contemporary annotation, is the "Index to Article I, Bill of Rights."⁶⁶ The index lists section one as "Statement of rights." Section 26 is listed as "Powers retained by the people."⁶⁷ We can scan in the index and find those two key rights and powers sections.

Under section one itself, there is more than a page of annotations. One is to *State v. Moores*⁶⁸: "Bill of rights is not enumeration of all powers reserved to the people."⁶⁹ There is no mention of *Moores* as overruled, like there is in the annotation under section 26.⁷⁰ What happened in *Moores*, that it can still stand for the people's retention of unenumerated rights, and yet, when cited for the proposition that "powers other than those specified in bill of rights were retained by the people," annotation number two⁷¹ tells us that it has been overruled?

Moores is a remarkable case. When I first read it, I knew next to nothing about Nebraska and took the case as written, without much context. It was filed June 23, 1898, by the state, against the mayor of Omaha. The legislature in Lincoln had passed a statute giving the governor in Lincoln the power to appoint four members of the board of fire and police commissioners of the city of Omaha,⁷² yet the mayor went ahead and

66. 2 REVISED STATUTES OF NEBRASKA, *supra* note 17, at 45.

67. *Id.*

68. 76 N.W. 175 (Neb. 1898).

69. 2 REVISED STATUTES OF NEBRASKA, *supra* note 17, at 47.

70. *See supra* text accompanying note 17.

71. 2 REVISED STATUTES OF NEBRASKA, *supra* note 17, at 86-87. I will not count the Preamble annotation, as it is to something that has no substance according to itself.

72. *See infra* Part XV.

appointed his own. The court concluded that the statute violated the right to local self-government which was retained by the people at the time the Constitution was adopted.⁷³ The opinion was written by Justice Norval and Commissioner Ragan, and the dissent by Commissioner Ryan. Chief Justice Harrington concurred in the majority opinion. Justice Sullivan and Commissioner Irvine joined the dissent.

Within the text of the *Moore's* opinion are several powerful texts from other states, most notably one by Justice Cooley of Michigan,⁷⁴ but the Nebraska court does more than string together the thoughts of other courts. Early in the sixty-page opinion, the court states:

[There is] no express provision in the constitution of this state which gives municipal corporations the power to select their officers or to manage their own affairs, nor is there any clause to be found in that instrument which in express terms inhibits the legislature from conferring upon the governor the power to appoint municipal officers to manage and control purely local affairs.⁷⁵

Norval and Ragan find that the retained power may be "by implication as well as by expression"⁷⁶ and conclude that "[t]he 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.'"⁷⁷ In that conclusion, the court actually uses what commentators mean by the unwritten constitution.⁷⁸ Citation of the Gettysburg Address, which is not formal judicial precedent, is a reference beyond the text of the Constitution printed in volume two of the *Revised Statutes of Nebraska*. It is a reference even beyond the annotations that are scattered beneath the "main text" of the Constitution. It spreads farther than the volumes of the *Nebraska Reports*. It may even be the first use in Nebraska "precedent" of Lincoln's phrase, and thus the first reaching beyond the canon that had existed until the Civil War, for this

73. *State v. Moore's*, 76 N.W. 175, 188 (Neb. 1898).

74. See *People v. Hurlbut*, 24 Mich. 44, 47 (1871) (Cooley, J., dissenting).

75. *Moore's*, 76 N.W. at 177.

76. *Id.*

77. *Id.* at 188 (quoting Abraham Lincoln's Gettysburg Address (1863)).

78. For a discussion of the unwritten constitution, see Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 7 (1984); Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

state that was admitted to Union on the cusp of the country resurrected from its deepest self-mutilation. The court was at once reaching into a text beyond volume two, beyond the *Nebraska Reports*, beyond *The Federalist Papers* and Washington's Farewell Address, and beyond the near-death of the Union. Was it reaching for (and from) this place where the people retain their rights, where they are the source of power and sovereignty?

Its contemporary locus includes places recognizable as highly controversial, such as Justice Douglas's penumbra⁷⁹ and aspirant justice Bork's desire to reverse decades of precedent⁸⁰—to overturn *Lochner*,⁸¹ the key case in deflecting substantive due process from economic matters. Some would recognize one (or both) of those ventures as overreaching, some as still underreaching. But the general topology reveals the layers of context for volume two's supposedly obvious text. Part of that text in volume two is, I would argue, sufficient both to point continuously outside itself and remain at war internally. One version of both that war and that pointing is the tension between the written and the unwritten constitution.⁸²

Moore's will not answer the questions about the scope of the unwritten, but it does give eloquent testimony to the existence of this dangerous idea, this notion of something still living in the people who wrote the text that is more powerful, at least potentially, than the printed page naively viewed. The *Moore's* court deals with this idea of the unwritten in the language of its culture, one that we can still remember, if dimly: the biblical language of letter and spirit. Just as Lincoln, who belonged to no organized church and was recognizably not sectarian, used the vocabulary and rhythms of the Bible, so do the justices writing and quoting in *Moore's*.⁸³ But also recognizable, and nearly as

79. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

80. See generally, Robert H. Bork, *The Constitution, Original Intent, and Economic Rights*, 23 SAN DIEGO L. REV. 823 (1986) (discussing constitutional interpretation as it pertains to economic regulations).

81. *Lochner v. New York*, 198 U.S. 45 (1905).

82. A resolution is not a matter of pursuing the "rules" of annotations further. In many states, annotations are explicitly of no authoritative value, but that rule is often ignored. Other states do not even have such a rule. Experience tells me that annotations have tremendous real authority. See generally Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STAN. L. REV. 207 (1989) (discussing problems of classification); J.M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661 (1989) (same).

83. See generally NORTHROP FRYE, *THE GREAT CODE: THE BIBLE AND LITERATURE* (1981).

elusive today, is the language of sister state courts.⁸⁴

In New York, the courts cited the spirit of the state law, even when it was not within the strict letter of the law, decrying a "literal reading only" as "'palpably in evasion of [the state law's] spirit.'"⁸⁵ Again in New York, in addressing what those inherent rights were that the people retain, the court said the rights were "'undefined, and perhaps undefinable by any general code,'" and that the people could not part with them.⁸⁶ What one cannot part with is unalienable. To tap those rights, the people are not "compelled to point out the exact article, section, clause, or phrase" that grants or denies a right when seeking recourse in the full measure of the organic law rather than in the mere, or strict, letter.⁸⁷ Otherwise, to write a constitution would be "'to weaken, if not endanger, those unnoticed [rights and powers].'"⁸⁸ Tapping both the idea of local governance reminiscent of New England town meetings and the heart of American democracy, *Moore*s notes that "[t]he right of the majority to govern is as much reserved to the people as though such right had been in apt language expressed in the constitution."⁸⁹ While it is unlikely that anyone could seriously doubt that a founding premise of American democracy is majority rule, this premise is not specified in the federal Constitution. Of course, the immediate question is majority rule by whom? In this case, the majority of the state or the city?

The *Moore*s answer is that all the people have the right of *local* self-government in local matters; all the citizens of the state have the right to be partly state, partly local and, eventually, partly (or even mostly) federal. How does the court know this right exists? Cooley tells us that "'[s]ome things are too plain to be written.'"⁹⁰ Indiana says that "[b]efore written constitutions, the people possessed the power of local self-government" because "'all power is inherent in the people.'"⁹¹ These cases

84. Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 65 TEX. L. REV. 1141, 1181 (1985).

85. *State v. Moore*s, 76 N.W. 175, 178 (Neb. 1898) (quoting *People v. Albertson*, 55 N.Y. 50, 55 (1873)).

86. *Id.* (quoting *People v. Morris*, 13 Wend. 325, 328 (N.Y. 1835)).

87. *Id.*

88. *Id.* (quoting *Morris*, 13 Wend. at 328).

89. *Id.* at 179.

90. *Id.* at 182 (quoting *People v. Hurlburt*, 24 Mich. 44 (1871) (Cooley, J., concurring)).

91. *Id.* at 185 (quoting *City of Evansville v. State*, 21 N.E. 267, 270 (Ind. 1888)).

are not California in the 1960s, but rather the heartland in the nineteenth century.

[W]hat is constitutional freedom? . . . 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 this might be permitted by the most arbitrary ruler, even though he allowed his subjects no degree of political liberty. The government of an oligarchy may be as just, as regardful of private rights, and as little burdensome as any other It would be necessary . . . to point out to [a protesting people] . . . where and by what unguarded words the power had been conferred. 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 revolutions which overturned tyrannies . . . which impelled our ancestors to summon the local communities to redress local evils . . . 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, that which distinguishes it from the numberless constitutions, so called, which in Europe have been set up and thrown down . . . many of which, in their expressions, have seemed equally fair and to possess equal promise with ours, and have only been wanting in the support and vitality which these alone can give—this living and breathing spirit, which supplies the interpretation of the words of the written charter, would be utterly lost and gone.⁹²

Because the annotations did not tell me what had happened to the retained sovereignty of the people, I had to go to the next level of text. Volume two of the *Revised Statutes of Nebraska* was no longer sufficient.

VI. BEYOND VOLUME TWO

Each volume of the *Nebraska Reports* is compiled by an official reporter. In 1898, D.A. Campbell was the reporter for volume 55, in which *Moore*s appears. As is usual for state

92. *Id.* at 182-83.

reporters, the case as reported consisted of headnotes, captions, and the body of the opinion. Volume 63, spanning 1901 and the first term of 1902, contained the case that "overruled" *Moore*s. This volume had a different reporter, Lee Herdman. Although Herdman went out with volume 66, he was a voluble annotator. His prefatory *Reporter's Notes* to volume 63 include a discussion of the nature of *facta* and *dicta*; he maintains *facta* is "what the court does and not what it says in the doing."⁹³ What it says in the doing is mere *dicta*. Keeping an eye on what the court does, he says, requires a single perspective.⁹⁴ Herdman criticizes cases that have been "discussed in a spirit of partisan bias oftener than with an eye single to the discovery of the truth,"⁹⁵ and he cites as an example the decision of Chief Justice Taney in *Dred Scott*.⁹⁶ Herdman writes that Taney supposedly delivered the majority decision, but his reasoning—that Scott because of his race and pedigree could not be a citizen—itself undermined the very basis on which Taney's and all decisions must rest: jurisdiction.⁹⁷ Herdman concludes that because there was no jurisdiction, the opinion on the merits could not be expressed consistently with the (jurisdiction-destroying) views of the majority, including Taney himself, so that the entire opinion is *dicta sine cera*.⁹⁸ Expansively, Herdman notes that "[a]s long as human minds are differently constituted, no two logicians will arrive at the same goal by the same route."⁹⁹ He has told us a deconstructive version of what overruling means: there is partisan bias if there is no single eye to truth, and there is no single way to truth. Then Herdman adds what Derrida does *not* entail: he says the goal is illusory; there *is* no decision in *Dred Scott*.¹⁰⁰

What does this prescient, post-deconstructive reporter do with this *facta-dicta* tension, with *dicta sine cera*, and with what reporters *do*? To cheat, I will tell you part of the "last page" of a chapter of the story. In volume 63, Herdman adds an advocate's view to the case supposedly overturning *Moore*s, the *Redell* case,¹⁰¹ via extensive reporter's notes at the end of the

93. Lee Herdman, *Reporter's Notes* to 63 NEBRASKA REPORTS at vii (1901-02).

94. *Id.*

95. *Id.*

96. *Scott v. Sanford*, 60 U.S. (19 How.) 395 (1856).

97. Herdman, *supra* note 93, at viii.

98. *Id.*

99. *Id.*

100. This *is* nihilism. Derrida might call *Dred Scott* a suicidal text, but he would likely consider it a decision. See *infra* note 245.

101. *Redell v. Moore*s, 88 N.W. 243 (Neb. 1901).

case (annotations right in mid-volume).¹⁰² In the same volume, volume 63, he does not list *Redell* as overruling. Even in volume 64, *Moore*s trumps *Seavey*,¹⁰³ but *Redell* is not yet over *Moore*s. In volume 65, Herdman's last as reporter of cases (though he lingers in half-life in 66),¹⁰⁴ comes the coup: in section four of "Digest of Nebraska Cases Overruled, Modified, Distinguished, Negatived and To Be Compared," we find *State v. Moore*s.¹⁰⁵ It is listed under "IV. OVERRULED IN TOTO."¹⁰⁶

Of course, right under *State v. Moore*s is this same reporter's continuance of the earlier entry: "*State v. Seavey*, overruled by *Moore*s."¹⁰⁷ If *Moore*s is overruled *in toto*, does this not resurrect *Seavey*? At the least, does it make *Moore*s retrospectively unable to overpower *Seavey*? Does *Moore*s make the cases cancel out? Our prolix reporter Herdman, who holds forth at some length about the section on overruling, etc., and comments profusely about *Redell* (more so than was formal practice at the time in the *Nebraska Reports*) seems to embody (but not state) the view that deconstruction does not fully destroy, for the ghost of *Moore*s still holds *Seavey* impotent. Herdman's *dicta* ("overruled *in toto*") are nihilistic, but his actions, his *facta*, are less total.

Meanwhile, *Redell* is facing its three-year-old foe, *Moore*s. In the *Redell* case, John Redell, chief of the Omaha fire department,¹⁰⁸ stands before the board of police and fire commissioners on charges that could result in his removal. The *Redell* court sets the case up as one of the authority of the commissioners,¹⁰⁹ which rests, in turn, on the statute: section 169 of chapter 12a of the *Nebraska Compiled Statutes*.¹¹⁰ Briefly stated, the court's conclusion is that section 169, which allows the board of commissioners to remove the fire chief when necessary for the more effective working of the fire department, is valid.¹¹¹

The way the court got there, and the concrete results of the

102. Herdman, *supra* note 93, at 232-33.

103. *State v. Seavey*, 35 N.W. 228 (Neb. 1887).

104. *See infra* note 220 and accompanying text.

105. Lee Herdman, *Reporter's Notes to 65 NEBRASKA REPORTS* at xlii (1902).

106. *Id.* "IN TOTO" — this is particularly perplexing news to me. *See* Hartigan, *supra* note 54.

107. Herdman, *supra* note 105, at xlii.

108. John Redell was appointed in 1895. *See* FRANK J. BERKLEY, *THE FADED FRONTIER* 344 (1935).

109. *Redell v. Moore*s, 88 N.W. 243, 243 (Neb. 1901).

110. NEB. COMP. STAT. § 12a:169 (1897).

111. *Redell*, 88 N.W. at 247.

case, are quite a story. The face of the case suggests that Redell, who is fire chief under an unknown appointment power, is at odds with Moores and his fellows on the board, and the court will not let the board get rid of Redell. However, the statutes that *Redell* brings back to life seem to include some not at issue in the case. How did sections 166 and 167, which are not involved in the board's removal actions, come alive in a dispute over section 169, the removal statute?¹¹²

The dissent gives the answer, but the thrust of *Redell* should be explained first. Only two justices were present and voting. While Norval prevailed in *Moores*, he is the lone dissent in *Redell*.¹¹³ Sullivan, dissenting loudly in *Moores*, concurs with commissioner Albert, who is also joined by commissioners Duffie and Ames.¹¹⁴ Harrison is gone, and no third justice appears. The encounter between the old adversaries, Sullivan and Norval, reverses, and Albert adds spin.

The reverse spin is dizzying. Albert asks, in false innocence, about the fate of section 169 once *Moores* is in place: "Assuming that the majority opinion in [*Moores*] is the settled law of the state, the question arises whether section 169 . . . must fall with [in sections 166 and 167]."¹¹⁵ He goes through the canons of severance of sections, which mandate maximizing constitutionality (never mentioning why the *Moores* court did not reach out and grab section 169 to overturn it), and cites the defendant's (*Moores*'s) argument that the act on its face consists of separate sections.¹¹⁶ The court in *Redell* acknowledges that construction rules require that the court sever what it can to presume constitutionality ("severance" of 169, never "attached" by the litigants, would resolve the case against *Redell*),¹¹⁷ but Sullivan's side becomes expansive. They argue that the mere words of the act, if used by themselves and out of context "would be unintelligible,— a jumble of words without meaning."¹¹⁸ The court is telling us, as it overturns *Moores*, that *text is meaningless without context*. The *Redell* decision broadens the context, enlarging the relevant "text" of section 169. (The challenge, recall, is to the existing board's power under section 169

112. *Id.* at 243-44.

113. *Id.* at 248 (Norval, J., dissenting).

114. *Id.* at 247 (Albert, J., concurring).

115. *Id.* at 245 (Albert, J., concurring).

116. *Id.*

117. *Id.*

118. *Id.*

to remove its own chief, Redell.) They ask whether sections 166 and 167 “served as an inducement to the legislature for the passage of [section 169].”¹¹⁹ They begin to form an attachment to 169 out of sections not before the court.

Being “realistic,” Albert and Sullivan argue that the court is not required to divest itself of all knowledge save that gleaned from the act. They assert that they can refer to “what they know of the history of the country and of the law,” “of the public necessities felt,” of the “general state of opinion, public, judicial and legislative at the time of enactment” and of the “history . . . topography and general conditions” of a country.¹²⁰ What they conclude is that the reason any legislation¹²¹ was passed was because of section 169’s portion of the governor’s appointment power, so the rest of the litigated sections come along.¹²² By this inversion, a case brought under section 169,¹²³ reaches sections in a much larger act that, as the dissent notes, no one in the case ever mentioned.¹²⁴ This broader context, allowing the court to construe in retrospect, gives it jurisdiction over a section not before the court, and what the court really wants, a foothold against *Moore*s. Next, the *Redell* court claims that, as section 169 brings 166 and 167¹²⁵ along in tow (and thus the *Moore*s case), it can, by other than mere *dicta*, overturn *Moore*s.¹²⁶ In a sort of *Dred Scott* in reverse, miming reporter Herdman’s erasure of jurisdiction, the *Redell* court gains purchase and creates jurisdiction over what it considers the real issue: local government.

In the context created so far, this is not necessarily impossible. What is really at issue is Omaha’s ability to select its own officials. But the *Redell* court has to cut its own lines in order to reach this issue—it has to step far beyond the words of the statute and make connections based on some common issue it per-

119. *Id.*

120. *Id.* at 246 (Albert, J., concurring).

121. They are inexact about the *outer* boundaries of this legislative package.

122. *Redell*, 88 N.W. at 246 (Albert, J., concurring).

123. *Redell*’s original brief barely mentions “the Omaha charter,” as he says the board claims to act primarily under Omaha ordinances. Plaintiff’s Petition in Equity at 2, *Redell v. Moore*s, 88 N.W. 243 (Neb. 1901) (No. 12,124).

124. *Redell*, 88 N.W. at 247 (Norval, J., dissenting). We are given no hint of the fate of §§ 1-165, and the question remains as to whether there is a § 170.

125. The statute was passed in 1897 (§§ 166-169), replacing older § 145, and remained unchanged until it was replaced by §§ 58-60 in 1905. See Lee Herdman, *Reporter’s Notes* to 55 NEBRASKA REPORTS 182 (1898).

126. *Redell*, 88 N.W. at 246-47 (Albert, J., concurring).

ceives in the passage of the bills, a commonality not available in the words of the text or its judicial history. The "history," "opinion," "purpose," and "real political" context of the statute—in which an exhaustive "spelling-out" of *all* the potential ties among contexts would be impossible—allowed the *Redell* court to overrule the *idea* of history, opinion, purpose, and broader context. What the *Redell* court banished in theory—that the text requires context, which can never be fully specified—it reinstates within its own order of banishment. What it claims to silence, it shouts among its own words. The unwritten beyond and behind the written, supposedly "killed" by the *Redell* decision, is written all over the *Redell* opinion, and its spirit prevails.

Redell takes *Moore's* poison in order to kill *Moore's*, and thus kills itself, executing a suicidal argument while claiming that this is what *Moore's* did. In considering whether there is an inherent right to local self-government, the *Redell* group states:

So far as the individual members of society are concerned, in the nature of things, there can be no such thing as an inherent right of local self-government. The right of local self-government is purely a political right, and all political rights, of necessity, have their foundation in human government. For an individual to predicate an inherent right—a right inborn and inbred—on a foundation of human origin involves a contradiction of terms. So far as a city is concerned, considered in the character of an artificial being, it is a creature of the legislature. It can have no rights save those bestowed upon it by its creator. . . . In other words, the power to create implies the power to impose upon the creature such limitations as the creator may will, and to modify or even destroy what has been created.¹²⁷

The court takes a plausible argument that cities are the artifacts of legislatures, so legislatures may, therefore, do as they please with their cities,¹²⁸ and slips the argument into the place reserved for the people. The rationale begins by saying the individual can have no political rights, but switches unannounced to the city as the unit of analysis, the subject of the sentence, the (dispossessed) focus of rights. We may debate whether cities do or do not have rights,¹²⁹ but in American jurisprudence people certainly do, the most fundamental of which is the right to

127. *Id.* at 247 (Albert, J., concurring).

128. This view requires an omnipotent legislature, a single-cause universe.

129. Other corporations, by way of the fiction of corporate personhood, do.

remain (within and as) a people and not just as individuals. The *Declaration of Independence* was a communal declaration. It was not several thousands of single declarations, or, if it was, it was simultaneously the declaration of nearly all of them together. It is the people, not the persons, who retain the power. The Nebraska and United States Constitutions contain in their preambles and in their reserved powers sections a statement of where sovereignty rests. Political sovereignty can only rest in a people; sovereignty is a relational term, requiring more than one atomistic soul in order to "apply" to the world. Where did this human government, which the *Redell* court says founds all political rights, come from? Is the use of "creator" language telling here? Does the *Redell* court think the government is the creator *ex nihilo*? Does the government create not only the people but also the person? If not, then indeed there are inalienable rights, "inborn and inbred." "The people" are not "the government," and "the government" is not "the people." Such an equation would be raw statism or totalitarianism.

Why would the *Redell* court make such a move? *It has mistaken its author*. Just as it takes on too facilely the language of the creator, it deals too quickly with the notion of authority.¹³⁰ In its unannounced slide from citizen to city, openly calling the latter (and covertly calling the former) "an artificial being" having "no rights save those bestowed upon it by its creator," the court concludes "[w]e shall not attempt to review the authorities bearing on this question."¹³¹ The court cites *no authority*. Yet it continues, after raising the specter that haunts the whole opinion—that "elusive something, elastic and uncertain as an unwritten constitution"¹³²—to the incomprehensible conclusion that *Moore's* "is unsupported by a single authority."¹³³ For sixty pages, case after case and state after state speak in *Moore's* giving their names, and yet *Redell* does not see a single authority.¹³⁴

130. See J. VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* (1986).

131. *Redell*, 88 N.W. at 247 (Albert, J., concurring).

132. *Id.*

133. *Id.*

134. After the dust settles on the central four cases (*State v. Savage*, 90 N.W. 898 (Neb. 1902); *Redell v. Moore's*, 88 N.W. 243 (Neb. 1901); *State v. Kennedy*, 83 N.W. 87 (Neb. 1900); *State v. Moore's*, 76 N.W. 175 (Neb. 1898)) dealing with the Omaha police commission, the locals are dismissed by a justice who says the consideration of authorities (the *Moore's* cases and their counterparts) cannot be allowed to interfere "with other duties that can not be postponed." *State v. Broatch*, 94 N.W. 1016, 1023 (Neb. 1903). Postponement, or deferral, is key to Derrida's "différance."

Redell is a case without authority, brooking no other authority—in what realm does it function? I would suggest that it is the realm of the unreal.¹³⁵ In a spare eight lines of dissenting text, it is noted that the *Moore*s case was never mentioned by either party let alone argued to the court.¹³⁶ The *Redell* case is made up of whole cloth. There is nothing “real” in the *Redell* decision, nothing of an openly contested case there.

Herdman, via reporter’s notes, at least made an attempt at an unvacuous defense of *Redell* when it supposedly “appeared” in 1901, which he put in volume 63 immediately after the case.¹³⁷ He suggests that the New England notion of town governance does not apply to a new state like Nebraska.¹³⁸ In Rhode Island, he remarks, local government was a vested right, but that was not the case in the heartland.¹³⁹ Of course, Herdman never announces what does govern: is it the land that governs? Is it the plat map that governs? Or are the rights of the people a matter of the people, not “who got here first,” the homesteaders or the government survey team. Herdman tries in the 1901 notes to say Cooley didn’t know what he was doing:¹⁴⁰ “The separate opinion of Judge Cooley [in *Moore*s] seems not to agree with the doctrine laid down in his work, *Constitutional Limitations*.”¹⁴¹ But even he slips backward over the edge: “[The Michigan case that Cooley wrote] is a construction of an express provision of the state constitution.”¹⁴² Herdman suggests that Cooley was not only confused about his own doctrine, but was finally deluded, moved needlessly to eloquence concerning the lack of an express provision about local government.¹⁴³ Despite Cooley’s and all other parties’ inability to locate that provision, Herdman announces (but does not recite) an anonymous, unspecified, “express” provision.¹⁴⁴

135. Sullivan briefly adds a raw but revealing note to the chorus: *Moore*s is “thoroughly vicious.” *Redell*, 88 N.W. at 247 (Albert, J., concurring).

136. The Nebraska Supreme Court files confirm this. *Id.* (Norval, J., dissenting).

137. Herdman, *supra* note 93, at 232-33.

138. *Id.*

139. *Id.* at 233.

140. There is a tension in the text. See *infra* note 143.

141. Herdman, *supra* note 93, at 233.

142. *Id.* (citing *People v. Hurlbut*, 24 Mich. 44, 47 (1871) (Cooley, J., dissenting)).

143. For a discussion of Cooley’s localism, see Joan C. Williams, *The Constitutional Vulnerability of American Local Government: The Politics of City Status in American Law*, 1986 Wis. L. Rev. 83, 145-49.

144. Herdman, *supra* note 93, at 233. For a discussion of the case in which Cooley wrote, *People v. Hurlbut*, 24 Mich. 44 (1871), see Emily F. Hartigan, *Law and Mystery*:

Two years later, Herdman rousts the illusory *Redell*, and puts it up as a phantom epitaph for *Moores* under "IV. OVERRULED IN TOTO."¹⁴⁵

Fifteen years after *Moores* the court has before it a new act from 1915 that puts the Lincoln legislature in the business of redistricting. In *State ex rel. Harte v. Moorhead*,¹⁴⁶ the court not only rehabilitated *Moores* but also used its rationale to add a new dimension to the political rights retained by the people. The *Moores* case, "overruled in toto," lives.

By the time of *Harte* in 1916, Herdman is gone, replaced by Lindsay as reporter (we will return to Herdman later). The *Harte* court discusses *Moores* but frames the discussion with a broader temporal and doctrinal brush. It turns the issue slightly; instead of talking of the *lack* of letter of the law, it talks of the *primacy* of purpose over letter. While Cooley talked of the validity of the unwritten, the *Harte* court suggests that unwritten constitutional text may speak to the written constitutional text; that is, interpretation based on purpose can, by implication, supply the "missing" letter, or overcome a "false" letter. To do so, it reaches back to *State ex rel Stull v. Bartley*:¹⁴⁷

The fact that a statute is within the letter of the Constitution is not sufficient An act which violates the true meaning and intent of the Constitution and is an evasion of its general express or plainly implied purpose is as clearly void as if, in express terms prohibited. *State v. Bartley*, 41 Neb. 277 (1894). That this statement of law is substantially correct has never been controverted in this state.¹⁴⁸

This conclusion is upheld by a distinction that the *Harte* court reads into *Moores*: "the distinction . . . between [the appointment of] officers whose duties are exclusively of a local nature and officers appointed for a particular locality, but yet whose duties are of a public or general nature."¹⁴⁹ By passing *Moores* (and *Redell*) as examples of a dispute over a kind of official, the *Harte* court says it is dealing not with officers but "with counties and their government:"¹⁵⁰ "County governments are

Calling the Letter to Life Through the Spirit of the Law of State Constitutions, 6 J.L. & RELIGION 225, 240, 242-43, 255-56 (1988).

145. Herdman, *supra* note 105, at xcii.

146. 156 N.W. 1067 (Neb. 1915).

147. 59 N.W. 907 (Neb. 1894).

148. *Harte*, 156 N.W. at 1068.

149. *Id.* at 1069 (quoting *Burch v. Hardwick*, 71 Va. (30 Gratt.) 22, 24 (1878)).

150. *Id.*

local in their nature, and the Constitution protects them in their right of local self-government."¹⁵¹ We will have to pass fairly quickly by the unmet issue: *Redell* supposedly stands for the proposition that political bodies do not have rights,¹⁵² while *Harte* expressly protects counties "in their right of local self-government."¹⁵³ Unmet or not, *Redell's* target, *Moore's*, moves back into favor. The dissent tells us this conclusion is so.

Chief Justice Morrissey dissents because "no provision in our Constitution has been pointed out to which the act does violence."¹⁵⁴ Morrissey explicitly aims his complaint at the resurrected *Moore's*, stating that the *Harte* majority bases its decision on the *Moore's* doctrine "that an act might be unconstitutional as being in violation of the spirit of the Constitution."¹⁵⁵ *Redell*, Morrissey complains, set *Moore's* aside.¹⁵⁶ With the *Moore's* spirit roaming free, he opines, "the Constitution of the state is to be fully known only by studying the theories of the judges who are chosen to expound it."¹⁵⁷

What Morrissey does that Sullivan (and even Herdman) failed to do in *Redell* is to tie *his* version of the written-only Constitution to the sovereignty of the people. Here he frames the creative paradox fully:

"The Constitution of this state confers plenary legislative power upon the general assembly; and, if an act is within the legitimate exercise of that power, it is valid, unless some express restriction or limitation can be found in the Constitution itself.

. . . This doctrine is elementary, is cardinal, and arises out of the very nature of our form of government. With us, sovereignty resides with the people. Were they acting as a whole for themselves, there can be no doubt but this, or any other law that should receive a majority sanction, would be conclusive. But, parceling out the exercise of their sovereign power to the three departments of government—the legislative, the executive, and the judicial—to the first has been committed, except what has been abandoned to the congress of the United States, the exercise of the whole sovereign law-making power as completely and absolutely as possessed by the people, subject only

151. *Id.*

152. *See supra* text accompanying notes 128-34.

153. *Harte*, 156 N.W. at 1069.

154. *Id.* at 1071 (Morrissey, J., dissenting).

155. *Id.* at 1073 (Morrissey, J., dissenting).

156. *Id.*

157. *Id.* (quoting *State v. Kennedy*, 83 N.W. 87, 88 (Neb. 1900)).

to such limitations as the people may have chosen to impose. These limitations are set out in the state Constitution.”

The constitutional provision quoted in the majority opinion that “all powers not herein delegated are reserved to the people,” instead of being, as indicated by the opinion, a limitation upon the Legislature, is a positive affirmation that, unless restrained by constitutional limitations, the people, acting through their Legislature, are free to enact any law they deem desirable.

Where no limitation is expressed in the Constitution:

“The framers of the Constitution relied for protection in this regard upon the wisdom and justice of the representative body and the accountability of its members to the people, rather than the restraining power of the courts of law. It is said that ‘the courts can enforce only those limitations which the Constitution imposes, and not those implied restrictions, which, resting on theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives.’ COOLEY, CONSTITUTIONAL LIMITATIONS, 129.”¹⁵⁸

The key is the conflation of people and legislature. Now, rather than equating people with government, the dissent equates the people with only one branch of government, the legislature. The dissent takes the final step in restricting government to the legislature by proposing the elimination of the judiciary from the equation. The dissent must be claiming that because any notion of what government really is belongs to the legislature only, the judiciary has nothing to say about the powers reserved to the people, or the guarantee of a republican form of government—the republican guarantee that grounds the majority’s rationale for equal voting power: “[T]he nature of a republican form of government . . . is a political question, and is beyond the jurisdiction of the judiciary.”¹⁵⁹ The problem with this is that the judiciary in Nebraska, created long after John Marshall’s unequivocal recognition of judicial review, was also set up by the people to do what the Nebraska court and all American courts have been doing and fighting about all along: bringing into being the law as expressed in written texts, especially constitutions, in the name of the people.

The *Harte* majority not only cites article I, which states:

158. *Id.* at 1071 (Morrissey, J., dissenting) (quoting *Hallenbeck v. Hahn*, 2 Neb. 377 (1873)).

159. *Id.* at 1072 (Morrissey, J., dissenting).

“ ‘all persons are by nature free and independent’ and have certain inherent and inalienable rights,”¹⁶⁰ but also invokes the reserved powers: “ ‘all powers not herein delegated remain with the people.’ ”¹⁶¹ “If all power rests in the first instance with the people, and they delegate certain powers to certain of their representatives and retain all other powers, this distinguishes such a government from a monarchy or oligarchy.”¹⁶² This chorus is not new. What is new about *Harte* is its further expansion of the text. The writing moves out another layer and the context grows. In *Moore*, it was local government and Lincoln’s famous speech that expanded the text.¹⁶³ In *Harte* the text is expanded by equal representative power¹⁶⁴ and the great seal of the state of Nebraska: “The principal of our Constitution of absolute equality in governmental matters is recognized in the legislation which requires that the great seal of the state shall contain the words ‘Equality before the Law.’ ”¹⁶⁵

The great seal is called to move from the context into the text. The words “equality before the law” are not in Volume two’s “Constitution,” but they are unavoidable, unwritten, forebearers of that text:

When our forefathers emigrated from their European home, it was in the main to escape from the oppression of inequality. They brought with them a burning love for this great democratic principle, and imbedded it deep in the foundation of the empire they were destined to erect, and which they will preserve so long as the love of liberty is more than a name. When they threw off the supervising government of the mother country, it was because they were denied equality of representation; or, as they then expressed the evil, they had imposed upon them taxation without representation. Equality of representation is a vital principle of democracy. In proportion as this is denied or withheld, the government becomes oligarchical or monarchical. Without equality republican institutions are impossible. Inequality of representation is a tyranny to which no people worthy of freedom will tamely submit.¹⁶⁶

In the same opinion the court said:

160. *Id.* at 1069 (quoting NEB. CONST. art. 1, § 1).

161. *Id.* (quoting NEB. CONST. art. 1, § 26).

162. *Id.*

163. See *supra* text accompanying notes 77-80.

164. The U.S. courts later refer to “equal representation power” as one person, one vote.

165. *Harte*, 156 N.W. at 1069.

166. *Id.* at 1070.

It is not insisted that the equality of representation is to be made mathematically exact. This is manifestly impossible. All that the Constitution requires is that equality in the representation of the state which an ordinary knowledge of its population and a sense of common justice would suggest.

....

... It was never contemplated that one elector should possess two or three times more influence, in the person of a representative or senator, than another elector in another district. Each, in so far as it is practicable, is, under the Constitution, possessed of equal power and influence. Equality in such matters lies at the basis of our free government.¹⁶⁷

Herdman decries *dicta sine cera*—words not under seal. The *Moore-Harte* doctrine is now under seal.

VII. BACK TO THE REPORTER, HERDMAN

The unwritten constitution, the theory of the power of the people cited in the original annotation under section 26—that powers other than those specified in the bill of rights were retained by the people—was resurrected in the *Harte* case. But was *Harte* a late announcement of something much closer in time to the overruling *in toto* of *Moore*? The reporter Herdman made the pronouncement of *Moore*'s demise in volume 65 of the *Nebraska Reports*.¹⁶⁸ As of volume 64 of the *Nebraska Reports*, however, *Moore*, or at least *Moore* in *facta*, was alive and well.¹⁶⁹ It took fourteen years and some unspoken channel for the news to reach the written text overtly, but the *Moore* decision, which Herdman pronounces dead on page lxxviii of volume 65 of the *Nebraska Reports*, was found, after having never been missing in action, on page 701 of the prior volume. The finder is, of all people, Justice Sullivan. The plot thickens.

The *Redell* case did at least two things: it "overruled" *Moore* and all ghosts of unwritten constitutions,¹⁷⁰ and it rehabilitated the governor's power to appoint a fire and police commission for Omaha.¹⁷¹ However, we find in *State v. Savage*¹⁷² that Ezra Savage, the governor of Nebraska in 1902, refused to exercise that reinvested appointment power. The key to *Redell*

167. *Id.* (citing *Ragland v. Anderson*, 100 S.W. 865, 869 (Ky. 1907)).

168. Herdman, *supra* note 105, at xcii.

169. Lee Herdman, *Reporter's Notes to 64 NEBRASKA REPORTS* 701 (1902).

170. *Redell v. Moore*, 88 N.W. 243, 247 (Neb. 1901).

171. *Id.*; see *supra* text accompanying notes 108-34.

172. 90 N.W. 898 (Neb. 1902).

by its own account, the governor's power created by the all powerful legislature (to which the court defers), remained unexercised. Now where is the legislature, that repository, according to *Redell* (via Sullivan), of all sovereign power? It is helpless in the face of the judiciary's refusal to act. The people passed the law, their court returned to them their powerful statute, and the governor balked. The court is powerless (before rehearing—but I am getting ahead of the story again) to guard the absolute sovereignty of the people in the face of a recalcitrant executive. Finally, on reconsideration, the court says to the governor that the law requires him to appoint, but the court declines to issue mandamus to that end.¹⁷³

How does *Moore*, personally and in his namesake case, prevail in this volume before being overruled in toto? Sullivan gives two reasons for this outcome. The first reason is an outburst in mid-discussion that “[a]ll judicial controversies must end some time and this one seems to have run its course.”¹⁷⁴ The other reason is revealed by a construction of what the court had done with, and said about, *facta* and *dicta*. Sullivan takes recourse in the solely political reality, stepping completely outside the line of judicial authority. He concludes that the political fight, the attempt of the state to oust the board of fire and police commissioners in Omaha, “has been once tried and determined, and, under existing conditions, the judgment rendered is an effective bar to another suit for the same purpose.”¹⁷⁵ Why is the judgment, the decision in *Moore*, an effective bar, given that *Moore* was overruled?

The right of the mayor's appointees to hold the offices was the thing adjudged in *State v. Moore*, and it is the only thing to be adjudged in this action. The decision in the *Moore* Case is not law, but for the purposes of this litigation it *stands in the place of the law*. The governor may, of course, appoint, but in the face of a plea of *res judicata* we can not put his appointees in possession of the offices. The court is held in bondage by its own error.¹⁷⁶

Sullivan concludes that “*Stat pro ratione voluntas* is the rule of decision in this case.”¹⁷⁷ This rule, according to *Black's Law Dictionary*, means that “the will stands in the place of rea-

173. *Id.*

174. *Id.* at 899.

175. *Id.* at 901.

176. *Id.* (emphasis added).

177. *Id.*

son.”¹⁷⁸ The next entry in *Black’s* is *state pro ratione voluntas populi*, “the will of the people stands in the place of reason.”¹⁷⁹ If it is not the people’s will that prevails, whose will is it? The court and the governor who seem to lack a will? The political endurance of the people of Omaha? Or the will of the people, the local people whom the court has tried to strip of the protection of law and have been driven outside “the law” and yet abide with *Moores*, which, Sullivan states, “stands in the place of law.”¹⁸⁰ The court feels “held in bondage by” *Moores*:¹⁸¹ *Moores* governs, and local government is alive.

For reporter Herdman, this judicial capitulation to reality is more than he can bear. His *Reporter’s Notes to Savage* go on for pages.¹⁸² He cites case after case after case from Nebraska, disseminating precedents wildly, trying to continue the role the court has abandoned, the continuation of the old written law in the face of the patient, surviving *Moores*.¹⁸³ But it isn’t over until the fat lady sings, and it also isn’t over until the reporter gives up.¹⁸⁴

Who is this Herdman who hangs on, after Sullivan who had thought he had triumphed over the vicious *Moores*, surrenders? What is he so desperately attached to, that he continues to note and annotate after the justices have gone home? In what cause are his efforts? One hint comes in the rehearing in *State v. Savage*.¹⁸⁵ Sedgwick tries his hand at explaining why *Moores* prevails. He begins by saying that the *Moores* and *Redell* question was the location of the legal power of appointment, the governor or the mayor, but immediately asks “was that the thing (*res*) in litigation, the substantive matter that the respective parties were contending for?”¹⁸⁶ The alternative he offers for discussion is that the thing at issue was a proposition of law.¹⁸⁷ Sedgwick says that what the attorneys argued about, what the

178. BLACK’S LAW DICTIONARY 1410 (6th ed. 1990).

179. *Id.*

180. *Savage*, 90 N.W. at 901.

181. *Id.*

182. Herdman, *supra* note 169, at 706-10.

183. *See id.* at 707-10. Very soon after *Savage*, Governor Savage, in turn, capitulated to politics and did appoint a board. *See* SOUTH OMAHA TIMES, Aug. 5, 1902, at 2. It was the court challenge to Savage’s board which elicited the postponement of authorities noted above. *See supra* note 134.

184. Nor is it over while authority is postponed—but that is another story.

185. 91 N.W. 557 (Neb. 1902).

186. *Id.* at 558.

187. *Id.*

court discussed and what the court decided, was the legal question—but the real subject of the litigation could not have been the law, because “[a]bstract questions of law cannot be made the subject of litigation.”¹⁸⁸ He concludes that in the *Moore*s case, the thing in dispute was the office itself.¹⁸⁹

Sedgwick has done what *Redell* did. He has left the text. The entire controversy was not what counsel argued or the court decided, but the “substantive” (his word) controversy, in the offices then and there.¹⁹⁰ He attempts to heal this substance/law/fact split by another distinction between *res judicata* and *stare decisis*, but that only rehabilitates the theory of *Moore*s, because only misapplication of legal theory can split the theory and the fact so that the “bottom line” comes out as Sedgwick hopes. Like Derrida’s *pharmakon*, the medicine intended to heal that may poison,¹⁹¹ Sullivan and Sedgwick’s “theory” poisons their own enterprise. Their instrument of death for *Moore*s has not only resurrected the body—the commissioners still sit as *Moore*s sat them—but by implication, also the spirit, if Sedgwick is right that the rule of law exists but was wrongly applied. Those of the anti-*Moore*s group have tangled their own lines hopelessly. Herdman is still casting about, however.

At this point, in writing this very text, I was sitting in my office, having reviewed Lee Herdman’s *Reporter’s Notes* for all the volumes he reported and edited, mulling over the section that was to begin: “Who was Herdman, anyway?” My first readings had shown a learned but redundant, literal man, almost compulsively attached to the letter. Yet another theme ran through my rereading of his notes. He began to betray flexibility. He became more verbose but more ambivalent. He seemed to have two sides. My research assistant called. I had asked her to find a picture of Herdman, had told her that I thought Herdman was somehow the main character in this story, and that it was becoming a mystery story, complete with the murder and the misplaced body. She told me there were two obituary pictures for Herdman: one, she said, was grim, and the other benign.

But the best part was what he did when he left his post as

188. *Id.*

189. *Id.*

190. Does it matter that in volume 64 we find, as in volumes 61 through 65, that one of the court commissioners is Roscoe Pound?

191. See DERRIDA, *supra* note 32, at 71-72.

reporter. Herdman stepped out of the text into the real story. He became a police commissioner for the city of Omaha.¹⁹²

We still don't know who appointed him,¹⁹³ but we do know that he had an extensive library, was allegedly once William Jennings Bryan's secretary, and often talked with Roscoe Pound.¹⁹⁴ At the birth of legal realism, Herdman did what Pound talked about: he was *facta* to Pound's *dicta*. Somehow, however, I think he struggled with his ambivalence between letter and spirit until the end, as we all must. The obituary tells us that he was divorced some years before his death in 1936 at age 71, but his wife had two years before his death returned from California, and taken up residence with their daughter in the same Blackstone Hotel in which Lee Herdman died.¹⁹⁵

What do his texts, written as reporter, tell us? I must warn you: in the phone call, my assistant told me that his name was Robert E. Lee Herdman.¹⁹⁶ He, who was fully in charge of "every jot and tittle" of the reporter volumes, always names himself simply Lee Herdman (an unassumed name). Does his name tell us he was a shepherd (a sovereign), a herd member, or both?¹⁹⁷ I suspect we will learn about him from his texts and, perhaps, from old newspapers, but, in the end, we may have found only the body.¹⁹⁸ I feel as if the error in the first section 26 annotation was Lee Herdman's epitaph, and he has no grave to visit. Do I want to advocate erasing what is written for Herdman on his gravestone, or is this Article a better trace of him?¹⁹⁹ Who was Robert E. Lee Herdman?

He begins his text as reporter with a fierce dedication that invites good-natured laughter: "The present rule is to follow quotations from records, reports and text-books *verbatim et literatim et punctim* with the verity of a Chinese copyist."²⁰⁰ By volume 60, his introductory notes tell us not only that he

192. *Herdman Dies at 71*, OMAHA MORNING BEE, June 16, 1936, at 3; *Lee Herdman Dies in Omaha Hospital*, EVENING STATE J., June 15, 1936, at 1.

193. Even this becomes ambiguous, as the yearly listings of such officers in the Omaha City Directory for the years 1900 to 1907 do not list Herdman.

194. See Lee Herdman, *Reporter's Notes* to 62 NEBRASKA REPORTS at viii (1901).

195. *Herdman Dies at 71*, *supra* note 192, at 3.

196. See *supra* note 372 and accompanying text.

197. He is listed in the Omaha City Directory of 1893 under *four* different combinations of names and initials; he is dissimulating from the start.

198. We will not have found even that—the obituary tells us he was cremated. *Herdman Dies at 71*, *supra* note 192, at 3.

199. "Trace," "ashes," and "life/death," are all key motifs in Derrida's work.

200. Lee Herdman, *Reporter's Notes* to 59 NEBRASKA REPORTS at viii (1899-1900).

includes a list "believed to be complete" of every Nebraska decision bearing on mechanics' liens, but also that "under protest"²⁰¹ he has used a caption for appellate cases because "Man yields to custom as he bows to fate."²⁰² Herdman the "true" [sic] (the literal), begins to bend. However, Herdman the literal is sometimes pretentious; he is, in his self-introduction, both Latin and Chinese in the same sentence. His Latin is, unfortunately, not only untranslated but also not as it seems. The *dicta sine cera* we saw above in his dismissal of *Dred Scott* and Taney²⁰³ means "things said without wax." In legal phraseology, *dicta* means things said by the way, opinions that do not "embody the resolution or determination of the court, and made without argument or full consideration of the point."²⁰⁴ But there is no entry in *Black's* for *dicta sine cera*. Indeed, there is not entry for that phrase or *sine cera* in any of the major lexicons of legal maxims.²⁰⁵ *Cera* is, in old English law, wax or a seal. The great seal was one "by virtue of which a great part of the royal authority is exercised."²⁰⁶ "Seal" comes from the Latin for sign.²⁰⁷ Yet Herdman, so willing to dismiss all Taney wrote except his jurisdiction-destroying sentence, counts *Redell*, "made without argument or full consideration of the point"²⁰⁸ and later conceded to have been about nothing but who was on the police and fire commissions, as overruling *Moore in toto*.²⁰⁹ He is going to be pointed word by word and by the letter, but we shall see that his letters and his signs, seeming so strict, are actually at sea.

In volumes prior to Herdman's advent, there had been a list of cases overruled.²¹⁰ Herdman notes this fact in volume 60 and again in volume 61,²¹¹ and adds that "[t]he listing of cases con-

201. Lee Herdman, *Reporter's Notes* to 60 NEBRASKA REPORTS at viii (1900).

202. *Id.*

203. *See supra* notes 96-100 and accompanying text.

204. BLACK'S LAW DICTIONARY 620 (6th ed. 1990).

205. For the omission, see CASSELL'S LATIN-ENGLISH AND ENGLISH-LATIN DICTIONARY (26th ed. 1953); CYCLOPEDIA LAW DICTIONARY (3d ed. 1940); WILLIAM F. FOSTER, LATIN MAXIMS OF ANGLO-AMERICAN LAW (1924); FRED C. MULLINIX, LEGAL PHILOLOGY: EPIGRAMS AND EXCERPTS FROM THE LEGAL OPINIONS OF THE HONORABLE HENRY LAMM (1923); OXFORD LATIN DICTIONARY (6th ed. 1982); LATIN WORDS AND PHRASES FOR LAWYERS (1980); S.S. PELOUBET, A COLLECTION OF LEGAL MAXIMS IN LAW AND EQUITY (Rothman & Co. ed., 1985) (1884).

206. BLACK'S LAW DICTIONARY 1701 (6th ed. 1990).

207. THE CONCISE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY 426 (1986).

208. *See supra* text accompanying notes 96-106.

209. *See supra* note 17 and accompanying text.

210. *See, e.g., Reporter's Notes* to 52 NEBRASKA REPORTS (1895).

211. *See supra* note 201 and accompanying text.

taining apparently conflicting dicta would subserve no useful purpose," a cryptic and redundant statement.²¹² In volume 62, he is warming to the task. He notes that a total revision of the list of overruled cases is underway, but it was a job of unanticipated magnitude.²¹³ He decides that:

Even where the case of A v. B is in apparent conflict with the case of C v. D; and in the subsequent case of E v. F, the writer of the opinion does not *in ha/ec verba* [in those words] overrule A v. B, but says that it is overruled by C v. D, A v. B should not, except in an extreme instance, be placed in the list of cases overruled.²¹⁴

When in the next volume, volume 63, Herdman begins his detailed discussion of *obiter dicta*,²¹⁵ he uses the notions of *facta* and *dicta* noted above. He says that in his work, "what the court does and not what it says in the doing"²¹⁶ determines whether or not the former opinion is overruled. This seems in direct tension with what he said last volume—that only overruling *in ha/ec verba* counts—that is, overruling "in those words." If the court does not use the magic words, volume 62 says, Herdman will not count a case as overruled (so scrupulous). He goes by the literal, the very letter and word, he insists in volume 59.²¹⁷ But in volume 63 he will watch what the court does and not what it says in the doing. He stoutly maintains that "[c]ases containing *dicta* in apparent conflict, where the *facta* are not antagonistic, will not be placed in the family of overruled cases."²¹⁸ You have to have a real fight, the very same fight, to get into this family of overruled cases.

This is not the only time Herdman overrules himself. In volume 63, he tells us that he has used *Dred Scott* and other federal cases (rather than Nebraska cases) as "[i]llustrations . . . because such discussion [of the cases in his own jurisdiction] by an editor is *ultra provincium*," outside his official duties.²¹⁹ To comment on Nebraska cases would be outside his legal boundaries. Yet by his exit in volume 66, Herdman contradicts himself, goes against his own words. He ends his last reporter's notes

212. Herdman, *supra* note 201, at viii.

213. Herdman, *supra* note 194, at viii.

214. *Id.*

215. Herdman, *supra* note 93, at vii.

216. *Id.*

217. *See supra* note 200.

218. Herdman, *supra* note 93, at vii.

219. *Id.*

saying that an opinion by Sullivan in an earlier volume (one of his own) is mere dicta.²²⁰ For his finale, this punctilious reporter reaches out from the text (volume 66) two books back to volume 64, and says that the engineer of *Redell*, Sullivan, refused to issue a writ, but that all he said in so doing was nothing.²²¹ Herdman does what he says in volume 63 is unacceptable for him—he sets his aim on his own court instead of on Taney and the federal court. I suggest that it is in volume 65 that Herdman loses track of himself, becomes deconstructed, and begins to move from the text into the story—by volume 66 he is already in the story.

Volume 65 contains *Moore's* obituary.²²² The word of *Moore's* death appears in the only listing of the increasingly fancy section on cases overruled, now called the "Digest of Nebraska Cases Overruled, Modified, Distinguished, Negatived and to Be Compared," that still has Roman numerals.²²³ Imperial Latin has triumphed again, and "IV. OVERRULED IN TOTO" sits above *Moore's*.²²⁴ Meanwhile, in the *Reporter's Notes* to volume 65, Herdman's flexible side, the one that bent to custom, has given way completely.

Grammar is simply the *fashion* of writing and speaking. A man who violates a syntactical rule, is guilty of the same kind of an offense as one who would appear at a four-hundred ball in corduroy pantaloons The truth is that men do not write and speak by logic, but in accord with fashion. The verdant editor of a book is sophomorical in his criticisms. But experience is the parent of wisdom; and, in time, the editor will settle down to the rule of preserving, as far as possible, the idiosyncrasy of the author²²⁵

He celebrates Americanisms, praises the diversity among Greek dialects, and revels in plurality. A volume before, he augmented and "noted" *Savage* as saying *Redell* came to naught and *Moore's* had triumphed in reality; next volume he will exit the text to enter the reality undergirding it; yet in this volume, in his most prolix table of cases, he lets Roman numerals and dictato-

220. Lee Herdman, *Reporter's Notes* to 66 NEBRASKA REPORTS (1903).

221. *Id.* at x.

222. See Lee Herdman, *Digest of Nebraska Cases Overruled, Modified, Distinguished, Negatived and to Be Compared* for 65 NEBRASKA REPORTS (1902). Obituary is from *obitus* death, going down—*obiter dicta*, words going down, going to death, dead words.

223. *Id.* at lxxxix, xlii.

224. *Id.*

225. Herdman, *supra* note 105 at xxxviii.

rial distinctions “overrule” *Moore*s not only in toto, but also, perhaps, in perpetuity.

Why would Herdman take his leave so harshly, so careless of his use of words, calling Sullivan’s writing dead words? There was one other strong “loose end” floating in my mind: why did every version of Herdman’s new improved “Cases Overruled” begin with some set of notes dealing with whether murder while robbing, lacking intent to kill, was first degree?²²⁶ As it was evening, and my research assistant would not arrive with the pictures and background on Herdman until at least the next day, I looked at the case to which Herdman referred. As he had said in his farewell salvo, there were extensive notes following Sullivan’s opinion in *In re William Rhea*.²²⁷ The notes began: “William Rhea was executed at the state penitentiary at 1:22 p.m., July 10, 1903.”²²⁸ Rhea was convicted of murder without specific intent to kill while committing a saloon robbery at the age of eighteen. Here were two dead bodies, by anyone’s version of reality.

Was Herdman’s note an outburst at Sullivan Rhea’s epitaph as well as a cry of new wisdom? “There is meaning testified to in interjections and outcries, before being disclosed in propositions”²²⁹ Were his words alive, not dead, when he subsequently acted as police commissioner? What did he think of words then, after his experience with Sullivan’s refusal to grant a writ, to stay Rhea’s execution? It seems that he saw taking care with words, making words count, writing carefully, very differently than he had as a “verdant” Chinese copyist. And thus Herdman did write, if intemperately, true words: Sullivan’s words were empty of meaning and yet full of death.²³⁰

A final expansion remains to be taken from out of the texts and the encirclement of texts: the historical context. But we have broken through to the final edges of that text with the execution of William Rhea. In law, what philosophers call a “performative utterance” can be lethal.²³¹

226. See Herdman, *supra* note 222, at 7xxxix.

227. See Herdman, *supra* note 169, at 887-89.

228. *Id.* at 887.

229. EMMANUEL LEVINAS, COLLECTED PHILOSOPHICAL PAPERS 172 (Alphonso Lingis trans., 1987).

230. See Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1622 (1986).

231. See *id.*

VIII. THE NEXT DAY

I feel as if I were in a Gabriel Garcia Marquez novel or in Alice Walker's *The Temple of My Familiar*²³²—my research assistant today provided the two pictures of Herdman and something she had found. She announced that one of the police and fire commissioners whom the *Moore*s case unseated was Herdman himself.

Neither of us had recognized him before, sitting there in the text, in plain view, on page 488 of volume 55. When we had read the case, we had not known the name of the reporter of later volumes. And until she got the obituaries, the words of Herdman's death, we did not know that "R.E.L. Herdman" of volume 55 was "Lee Herdman" of volumes 59 through 66. This name, in its various disguises, is the purloined letter: sitting in plain sight in the text, revealing the substance of the case. It was Sullivan in *Savage* who said that the *substance*²³³ was *who sat on the commission*.²³⁴ Appointed by the governor back in 1898, Herdman did not get his seat back until 1904—when, the obituaries tell us, he left the job of reporter to take a seat on the Omaha police commission.²³⁵

I suggested there would be surprises, but this is beyond a story I could have conceived. I am tempted to include affidavits: the story as I am telling it to you is how it came to us. Now I understand why Derrida says things in his text like "I am sitting here at my typewriter and I raise my hand and swear."²³⁶ I did not mess with this text; this story has unfolded itself. Herdman, by whatever first names he chooses, was totally unknown to me. Now he illustrates what the literature about critical and psychoanalytic theory is talking about, the purloined letter, the detective story that turns on a letter hidden in plain sight.²³⁷ The text is playing with us. It is strange and wonderful and sad. William Rhea was executed at 1:22 p.m. on July 10, 1903, despite Herdman's frantic annotations²³⁸ and Sedgwick's dissent on

232. ALICE WALKER, *THE TEMPLE OF MY FAMILIAR* (1989).

233. For an accessible discussion of the contemporary "fear of substance," see generally WILLIAM BARRETT, *THE DEATH OF THE SOUL* (1986).

234. See *supra* text accompanying notes 185-89.

235. See *supra* note 192 and accompanying text.

236. See *supra* note 28 (for a sampling of works).

237. See DERRIDA, *supra* note 32, at 442-43; see also STANLEY CAVELL, *IN QUEST OF THE ORDINARY* 160-68 (1988); Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, 75 CORNELL L. REV. 644, 663-64 (1990).

238. See Herdman, *supra* note 169, at 887-89; *supra* text accompanying notes 226-31.

rehearing.²³⁹

Sedgwick decried a jury instruction in Rhea's case²⁴⁰—a saloon robbery, in which one of the card-players, the proprietor, supposedly rose from the table and was shot (but that is another story).²⁴¹ The instruction said that even an accidental killing committed in the process of a robbery was first degree murder.²⁴² Sedgwick cited the move away from severity, that crimes are not prevented by too severe penalties, that "[s]ome of the states have refused to legalize the taking of human life as a punishment for a crime."²⁴³ He called for a "more humane" use of sanctions.²⁴⁴ Herdman had already piled on two and a half pages of annotations.

In the *Savage* case, Sullivan gave in to the will of the local people, finally, over the letter of the law that he had earlier propounded. In the *Rhea* case, he did not give up the letter, instead making it into a death sentence,²⁴⁵ and two volumes later, Robert E. Lee Herdman pronounced Sullivan's letter dead, *obiter dicta*, and left our text for the world of the Omaha police commission.²⁴⁶ We will follow the story long enough to give the next-to-last expansion of the context of the annotation to section 26 in volume 2 of the *Revised Statutes of Nebraska*.²⁴⁷ But we have found a switch point in Lee Herdman. The text turns on him, and in following the clue he left us—the "wrong" annotation—we have found the bodies (Rhea shot Herman Zahn). But who did it? Who is the killer of letter and spirit? Who makes the letter dead? Is it the letter alone that kills, as Paul seems to say in the Greek scriptures²⁴⁸ along with Abraham Joshua Heschel in rabbinic Judaism,²⁴⁹ or is it the dead letter that kills?

239. *Rhea v. State*, 64 Neb. 885 app. at 889 (1903) (Sedgwick, J., dissenting) (dissenting opinion to *Rhea v. State*, 63 Neb. 641 (1902)).

240. *See id.* at 889-90 (Sedgwick, J., dissenting).

241. *See* DERRIDA, *supra* note 32, at 501 (Sedgwick, J., dissenting).

242. *Rhea*, 64 Neb. at 889-90 (Sedgwick, J., dissenting).

243. *Id.* at 890 (Sedgwick, J., dissenting).

244. *Id.*

245. Derrida plays on the French version of "death sentence." *L'arrête de mort* becomes "both death sentence and reprieve from death." *See, e.g.,* DERRIDA, *supra* note 32, at 9; DERRIDA, *supra* note 2, at 285-6. This idea was addressed most seriously in a text delivered by Derrida at the Nebraska Union. Jacques Derrida, Force of Law: "The Mystical" Foundation of Authority, Address at the Nebraska Union (Apr. 19, 1990) (transcript available from author).

246. *See supra* note 220 and accompanying text.

247. *See supra* note 17 and accompanying text.

248. *See* 1 *Corinthians*.

249. *See, e.g.,* ROGER BROOKS, *THE SPIRIT OF THE TEN COMMANDMENTS* (1990);

Can we live without killing, or is killing, which Sedgwick wanted to minimize in the law, a lingering, inevitable, and tragic, if progressively gentler, aspect of life? Sedgwick notes:

If no purpose to kill is necessary to constitute murder, where the killing is brought about by administering poison, then the most innocent act of one's life may turn out to be a murder [A] man [would then be] a murderer, who innocently administers what he supposes to be a proper dose of medicine, but which turns out to be a poison which kills²⁵⁰

Yet, is this not what we do in life, innocently doing the best we can, while often poisoning by mistake? That is what Derrida works with in *Plato's Pharmacy*—the *pharmakon*, that which is medicine yet can also poison.²⁵¹ If we do harm only in ignorance, as Plato says,²⁵² then what cures and what kills are indistinguishable, and yet, Derrida insists, not unchoosable.²⁵³ We always have a choice. In the face of death, we can choose life.

IX. THE DAY AFTER THAT

After writing the sentence before this one, I went home. There was a message on my answering machine: I had asked my research assistant, two weeks ago, to find out what the two political factions were, who fought in court and in reality over the police commission. Yesterday, she sifted through the newspaper archives—one faction was the Omaha people who had been functioning as police and fire commissioners before the legislation that set Herdman and others on the commission and precipitated *Moore's*. The other faction behind the *Moore's* case the newspaper called "the Herdman gang."

Before I listened to the phone message, I began to reread *Plato's Pharmacy*, as I had been operating purely from memory, not having read it since April, shortly after Derrida left. One of his points, I recalled, had to do with how much there was in the text that we do not see at first. Like "R.E.L. Herdman" at the beginning of *Moore's*.

ABRAHAM J. HESCHEL, *MAN'S QUEST FOR GOD: STUDIES IN PRAYER AND SYMBOLISM* (1954); E.P. SANDERS, *PAUL AND PALESTINIAN JUDAISM* (1977); EDITH WYSCHOGORAD, *CROSS CURRENTS* (1990).

250. *Rhea v. State*, 64 Neb. 885 app. at 891 (1903) (Sedgwick, J., dissenting) (dissenting opinion to *Rhea v. State*, 63 Neb. 641 (1902)) (quoting *Bechtelleimer v. State*, 54 Ind. 128, 136 (1876)).

251. Derrida, *Plato's Pharmacy*, *supra* note 28, at 71-72, 95.

252. *See supra* notes 28-29 and accompanying text.

253. Derrida, *Plato's Pharmacy*, *supra* note 28, at 95.

A text is not a text unless it hides from the first comer, from the first glance, the law of its composition and the rules of its game. A text remains, moreover, forever imperceptible. Its laws and its rules are not, however, harbored in the inaccessibility of a secret; it is simply that they can never be booked, in the *present*, into anything that could rigorously be called a perception.²⁵⁴

The text, he suggests, is a web, making and unmaking for centuries (here, just about one century), and when we touch it, we risk getting a few fingers caught in the reweaving, and the addition of some new thread.²⁵⁵ To do this, we must have the “ability to follow a given thread [t]hat is, if you follow me, the hidden thread.”²⁵⁶ It seems that one hidden thread is the line of signatures of Lee Herdman.

X. THE THIRD DAY, TURNING AROUND

In Derrida's texts, there is a fundamental movement of turning. He puts the center of Plato's *Phadreus*²⁵⁷ and its questions of writing, at the “precise calculated center” of the dialogue—by counting the lines in the dialogue.²⁵⁸ He is right that the central name (“speechwriter”) is written “in the heart” of the dialogue, if what is being examined is the thread of speech/writing, or speech/writing. The center of our story is Lee Herdman's overruling *in toto*, which is really an overturning in Toto, too much turning, whirling in the All—it gets going around too fast, and the reader gets dizzy. This is true of Derrida's texts and of this story. The end of *Plato's Pharmacy* is just such a dizzying reversal after reversal, a whirling into dervishhood, like the game we played as children, spinning in circles until we lost our equilibrium and fell down—and felt the earth moving with and beneath us. We did it for fun. In the best sense of play, Derrida does it for play.²⁵⁹ When we lose our normal equilibrium, we “feel” a reality that we in our ordinary body orienta-

254. *Id.* at 63.

255. *Id.*

256. *Id.*

257. PLATO, *Phadreus* (R. Hackforth trans.), in *THE COLLECTED DIALOGUES OF PLATO* 475 (Edith Hamilton & Huntington Cairns eds., 1985).

258. Derrida, *Plato's Pharmacy*, *supra* note 28, at 68.

259. On “the best sense of play,” see DERRIDA, *supra* note 32, at 156. Frank Kermode comments on Derrida that “[i]t's not a walk through a subject, it's a dance on a subject. He's always picking up the last phrase he used and looking at it and sort of doing a little dance around it, and yet it's a deeply serious performance.” FRANK KERMODE, *POETRY, NARRATIVE, HISTORY* 81 (1990).

tion cannot feel—that the earth moves. In this story, I said I hoped we would have fun, but the spinning has come to its apex and it is time to wind down. We have discovered the bodies, the perpetrator, and the Herdman gang, but we do not know how fully indeterminate (not undecidable, at least for the moment?) the story is. This knowledge would come with research, the third key day.

It started with trying to locate the annotation itself. Why does the present revised statutes volume, volume two, contain two “versions” of *Moore*s? As I searched for that thread, through the library shelves, my research assistant was there, with her unrecorded, unorganized but experienced range of information gleaned from supreme court files, old briefs, and newspapers. The conversation and the books wove in and out.

She said that most of the papers for *Moore*s were in another court case file; Lee Herdman had left a note in the *Moore*s file saying the rest of the materials were in the *Kennedy* file.²⁶⁰ The *Kennedy* case was controversial because Holcomb was a sitting justice, yet he had been the appointing governor two years before, and there were the allegations he should not sit on the case with his own appointments at issue.²⁶¹

The *Kennedy* court, per Sullivan, noted that the respondent’s brief suggesting any impropriety or partisan bias by any justice was so offensive that the brief would be stricken from the file.²⁶² There is a brief alleging such impropriety, there, perhaps, thanks to Herdman, but we do not know if it is *the* brief allegedly stricken from the file or another, chastened version.²⁶³

Still, the flap over partisan bias led us to another case, *State v. Rosewater*,²⁶⁴ and then the circle closed for a moment. The case, related to *Kennedy*, was a case by the state against the editor of the *Omaha Daily Bee*, the paper from which my assistant had been getting most of her history, including one of Herdman’s obituaries. Edward Rosewater, the editor, had challenged the court in his editorials, so the state sued him for charging the court with partisan bias.²⁶⁵ Our final layer of context, the histor-

260. *State v. Kennedy*, 83 N.W. 87 (1900).

261. See *infra* note 263 and accompanying text.

262. *Kennedy*, 83 N.W. at 90.

263. Respondent’s Brief, *State v. Kennedy*, 83 N.W. 87 (1900) (No. 11, 226). The brief, dated April 16 and date-stamped April 17, which predates the order to excise, seems to be the original.

264. 83 N.W. 353 (Neb. 1900).

265. *Id.*

ical layer, was contaminated. Holcomb himself held Rosewater in contempt.²⁶⁶ The very texture of the news reports was not only political in the ordinary sense—it had also *been drawn right into the court*. There in Lee Herdman's volume 60 was the fight among text, subtext, and context. The fight gets so complicated that it is unbalancing, but in the end, it may be decidable (for the moment) by you, the reader. I hope not to leave this story such that the final level of evidence, the day by day newspaper accounts, is itself so untrustworthy that the historical tale unravels, that the "indeterminacy" of the text means that there is no truth. It is just that you will have to make part of that decision. Because after following the thread from the *Kennedy* case and the thread from the annotation, I literally turned around in the stacks of the library of the Nebraska College of Law and saw at eye level something I could never have seen before: I saw on the spine of a book "*Nebraska Reports, Herdman*," and "1." What I saw was a set of unofficial reports, "shadow volumes," published for only five volumes. This supplementary reporting system was started by Lee Herdman. The volumes contain the cases not officially reported, without syllabi by the justices, and perhaps without much legal authority.²⁶⁷ In the short-lived supplementary volumes there is the story of a little person caught up in the great, visible, protracted struggle over the Omaha police and fire commission. It is the story of W.W. Cox,²⁶⁸ and it is his story that I will give you to decide; the whole case may hinge on it.

XI. THE ANNOTATION ITSELF

In the meanwhile, I should give you the history of the original *Revised Statutes* volume two annotations, because they turn in much the same place as does *Moore's*—somewhere in the unknown life of "the reporter." Somewhere in the time period between 1948 and 1956 *Moore's* was overruled by the predecessors of volume two, the *Revised Statutes*. We cannot tell why from the text. Perhaps it is there, and I overlooked it. During that eight-year period, apparently the only time in the history of the reporting of Nebraska statutes and cases, the same person, Walter James, was both Reporter for the official reports, and Revisor of Statutes. Prior to James's double tenure the 1943

266. *Id.* at 354.

267. Herdman says the propositions of law are not the responsibility of the justices.

268. *See Moore v. State*, 4 Herd. 235 (Neb. 1903).

Revised Statutes had, in volume two, under section 26 of the state constitution, listed *State v. Moores* without any mention of its being "overruled." In 1948, the reissue of the 1943 *Revised Statutes* was the same. In 1956, the reissue of 1943 listed *Moores* as overruled under section 26 for the first time.²⁶⁹

Meanwhile, under section one, *Moores* was still intact in 1956, as it is today.²⁷⁰ It first appeared under section one, without notice, in 1929. However, in 1903, before *Harte* and after *Redell*, *Cobbey's Annotated Statutes of Nebraska* lists *Moores* under section 26, and not at all under section one.²⁷¹ Apparently, Cobbey considered *Moores* good law after *Redell*,²⁷² as did the subsequent revisors of statutes until Walter James. Only in 1929, for no apparent reason, did the 1929 *Compiled Statutes of Nebraska* put an (unoverruled) annotation to *Moores* under section one, where it has remained.²⁷³ The next year, the Nebraska court cited *Moores*—for the exact opposite of its actual holding—in *Elmen v. State Board of Equalization and Assessment*.²⁷⁴ Five years later, the two cases, *Moores* and *Redell*, surfaced in another case, *State ex rel Taylor v. Hall*,²⁷⁵ but the court dodged their confrontation.²⁷⁶ In *Hall*, the court recited the rationale of *Redell*, which ties together sections: "[The justices] are not required to divest themselves of all knowledge save that to be gleaned from the act alone. For, were it possible for them thus to divest themselves, the act would be unintelligible—a jumble of words without meaning."²⁷⁷ This is the common wisdom from *Redell* itself²⁷⁸: all words need context. Yet we are learning that expanding the context can seem to produce a *bigger* jumble of meaningless words.

The jumble is apparent on the "face" of the case-level context, the reporters. The next citation to *Moores* is in *Sandberg v. State*.²⁷⁹ The court once again cites *Moores* for its unmistakable

269. See *supra* note 17 and accompanying text.

270. See *supra* note 68 and accompanying text.

271. COBBEY'S ANNOTATED STATUTES OF NEBRASKA § 26 annot. (1903).

272. *Id.*

273. See *supra* note 17 and accompanying text.

274. 231 N.W. 772 (Neb. 1930).

275. 262 N.W. 835, 847-48 (Neb. 1935).

276. Yet the court said that because the invalid section of a statute was severable in the case at hand, they were not called to determine the effect of *Moores* on the entire act. *Moores* must not have been dead for them.

277. *Hall*, 262 N.W. at 848.

278. See *Redell v. Moores*, 88 N.W. 243, — (1901).

279. 196 N.W. 501 (1972).

opposite: "It is within [the legislature's] power to legislate upon any subject not therein prohibited."²⁸⁰

Why this confusion? One reason may be that Derrida is right: if the world is reversed, it comes to *almost* the same thing, but not the same.²⁸¹ If the people have the power, and the people speak, then the constitution should not stop them. But is the legislature the people? The constitution says no. But what is the "constitution" to say that the people (written "legislature") can be stopped? Why this continual equation, *sotto voce*, of the people and the legislature? One reason is that the judiciary is less obviously democratic.²⁸² But I think the history goes further back.

Much of the most eloquent talk of the power of the legislature stems from the seventeenth century and people like Sir Edward Coke.²⁸³ His description of the people in deliberative assembly is powerful. But we must remember his context: his legislature was Parliament, and it stood against the sovereign—the king.²⁸⁴ The tyrannical sovereign was in reality the authoritarian monarch, in Coke's time. We seem to have forgotten that the people are an entirely different adversary/friend for a legislature than a legislature is for a monarch. All the early English rhetoric about the representatives of the people must be put in the much larger, older context. Thus what we fear, and what we stand to lose, are very different than what our English forebearers faced. If we revolt against our sovereign, we revolt against ourselves.

XII. SOVEREIGNS AND KINGS

How did we lose track of our fight to be the people? One

280. *Id.* at 504 (citation omitted).

281. This addresses the notions of repetition, reiteration and their psychological counterparts, repetition compulsion and inheritance. See DERRIDA, *supra* note 2, at 202.

282. But see Kenneth Karst, *Equality and Community: Lessons from the Civil Rights Era*, 56 NOTRE DAME L. REV. 183, 207 (1980) ("[C]ourts mainly represent our communitarian side, while our legislatures mainly serve as brokerage houses for individualistic exchange.").

283. A thumbnail sketch of Coke's fight with the sovereign, one that includes his valuation of the judiciary, not solely the legislature, is in Don Herzog, *As Many as Six Impossible Things Before Breakfast*, 75 CALIF. L. REV. 609, 624-27 (1987).

284. See A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 130 (1968); CHARLES H. MCILWAIN, *CONSTITUTIONALISM: ANCIENT AND MODERN* 130-31 (1947); see also Carol Rose, *The Ancient Constitution vs. the Federalist Empire: Anti-Federalism from the Attack on "Monarchism" to Modern Localism*, 84 NW. U. L. REV. 74, 80-81 (1989).

reason is that we fought a war that we labeled a revolution, but which was at once a war of colonial liberation and leaving home, never to return. Contemporary psychological literature talks about the law of the father, the system that we seek to grow beyond.²⁸⁵ Our father in 1776 was George III; the *Declaration of Independence* talks to him and to the world in which he remains King of England. But rather than the Freudian primal scene in which the sons kill the father and then set up laws so that it will never happen again,²⁸⁶ we just left. We have never resolved our Oedipal dilemma. Unlike the French, we did not kill our king; unlike England, we did not keep our king.²⁸⁷ Where is our sovereign?

We tried to revert, but the father of our country, George (another George)²⁸⁸ refused the crown when we pressed it on him. We left home and then broke our ties with the help of the regicide nation, France. We are confused about who the opponent is. In England, it was the tyranny of the monarch.²⁸⁹ In America, we have no such overt hierarchy, but we remain confused about who we are, when we are in power, and where.²⁹⁰ Political theorist Louis Hartz brought this dilemma to consciousness in 1955 in *The Liberal Tradition in America*, arguing that we have a very narrow (and intolerant) political spectrum because we never had a hereditary aristocracy against whom to revolt, and have been unconscious of what our real political ideology has been all along.²⁹¹ That ideology—pragmatic philo-

285. See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* (1930); URSULA K. LEGUIN, *DANCING AT THE EDGE OF THE WORLD: THOUGHTS ON WORKS, WOMEN, PLACES* (1989).

286. For a lucid discussion sympathetic to Freud, see Robin West, *Law, Rights, and Other Totemic Illusions: Liberal Legalism and Freud's Theory of the Rule of Law*, 134 U. PA. L. REV. 817 (1986).

287. There is a story to suggest the sovereign is the living law, like Cooley's and Moores's unwritten constitution. See William Klassen, *The King as 'Living Law' with Particular Reference to Musonius Rufus*, 1 STUD. IN RELIGION 63 (1985) (discussing Hellenistic Kingship and *nomos empsychos* ("animate law")).

288. For the necessity of the cooperative "George" in the building of governmental communities, see Carol Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN, 37 (1990).

289. See Rose, *supra* note 284, at 80.

290. See generally ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* (1980) (discussing the dilemma of "the people" as "originators of the basic law of the land").

291. LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955) (seeking to explain the absence in American political theory of socialists or "continental" conservatives).

sophical liberalism—is too shallow, Hartz and his considerable contemporary progeny agree, though they disagree about what the correct, more deeply founded political theory should be.²⁹² Remember the first real text in volume two: “When in the course of human events, it becomes necessary for one people to dissolve the political bonds which have connected them to another, and to assume among the powers of the earth, the separate and equal station”²⁹³ This is the statement of a child’s emancipation, but now that we have left the father, how are we to be brothers and sisters?²⁹⁴ We had little theory besides “on our own” when we left. I would suggest that Populism was one of the early attempts to ground America’s political debate more profoundly after the Civil War.

XIII. POPULISM

America’s identity crisis was particularly poignant in Nebraska at the turn of the century. This was the center of the country at the turn of the hundred-year mark in United States history. People in Kearney, so my students tell me, believed it would be made the nation’s capital because of its central location. In the heart of America there had arisen an eloquent voice in the name of the people. That voice came from William Jennings Bryan, an orator of unparalleled gift. Yet all around his movement swirled confusion. Why was it to come to so little, to the ignominy of the Scopes trial, to Kearney in oblivion? You may decide, but I will make some suggestions before we begin the last layer of context. I will point in two directions, one past and one toward the future.

The first direction is directly behind the Populists—because they came after the demise of the Native American nation, the “twilight of the Sioux” of which Nebraska Laureate John Neihardt sings.²⁹⁵ The song of the Populists (and they sang, literally, a great deal)²⁹⁶ is an echo, in confusion, of the cry of the people—the people of Black Elk.²⁹⁷ We came, white settlers, and claimed Nebraska by plat map and by law, laying out towns

292. *See id.*

293. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

294. What happened to Mom? For the place for Mom and the question “who is she, anyway?” see Rose, *supra* note 288.

295. JOHN G. NEIHARDT, *THE TWILIGHT OF THE SIOUX* (1925).

296. ROBERT W. CHERNEY, *POPULISM, PROGRESSIVISM, AND THE TRANSFORMATION OF NEBRASKA POLITICS, 1885-1915*, at xiii-xiv, (1981).

297. *See* J. NEIHARDT, *BLACK ELK SPEAKS* (University of Neb. Press 1962) (1932).

like cookie pressings by each railroad depot.²⁹⁸ We put our imprint on the land when we were not yet here, as if there had been no one here first.²⁹⁹ But the land was haunted, and the cry of the people was the land calling for her own, and getting in return, at first, only the letter of the law. Today, Nebraska has people who have lived, fought, and loved her history and land for generations. At the turn of the century, we were all outsiders and did not know it. Today, even James Kirkpatrick³⁰⁰ realizes that we have forgotten the Native Americans—although the one thing I feel sure of, in the final context of this Article, is that the land has not.³⁰¹

What we did was to lay down the law, literally, on the land.³⁰² And that is what created the worst of the confusion. We left our father, but we did not recognize our brothers and sisters. We imported old law to a new place and tried to impose it. Even the white settlers, once settled, resisted that external imposition.³⁰³ The city council in Omaha resisted the centralized law from Lincoln. Populism from the top down did not work very well; it risked being a contradiction in terms.

The second direction in which I point, to decipher the demise and confusion of Populism, is to the future. We forgot not only who was here first, when we came, but also we forgot who came with us. The women. A political movement that claims to go to the very roots, the grass roots, the radical basis of sovereignty, cannot leave out half of the people who live at the level of the grass. The radical refers to a root, to what is inherent and fundamental, to what pertains to the moisture inherent in animals and plants, to water from the ground.³⁰⁴ If we are to continue to move in our spiral dance so that it is life-giving, we must circle around and up to include the women of Nebraska.

298. See DOROTHY W. CREIGH, *NEBRASKA: A BICENTENNIAL HISTORY* 104-06 (1977); 1 J.S. MORTON & A. WATKINS, *ILLUSTRATED HISTORY OF NEBRASKA* 166 (1905).

299. For a thoughtful exploration of "laying down the law" on land including Nebraska, and a sense of the violence of such an imposition, see C. Wilkinson, *Law and the American West: The Search for an Ethic of Place*, 59 *COLO. L. REV.* 401 (1988).

300. See *Editorials*, *LINCOLN J.*, June 29, 1990, at 10.

301. See PETER MATTHIESSEN, *INDIAN COUNTRY* 5-13 (1979).

302. For a discussion of the Quaker tradition's way of avoiding this violent version of laying down the law, see Howard J. Vogel, *The Judicial Oath and the American Creed*, 39 *DEPAUL L. REV.* 1107, 1119 (1990). For the story of another version of the lineaments of the law of the land, in this case the law of the land in Australia, see BRUCE CHATWIN, *THE SONGLINES* (1987).

303. Rose, *supra* note 284, at 84, 91.

304. For the relation of ground and water to the feminine, see HELEN M. LUKE, *WOMAN, EARTH AND SPIRIT: THE FEMININE IN SYMBOL AND MYTH* (1984).

That spiral motion, that very tornado mentioned by the contemporary Nebraska court in 1986 in the *Omaha National Bank* case,³⁰⁵ is one that catches Dorothy up and sets her temporarily in Oz, but which finally lands her home. The dizziness is part of another way home.

XIV. THE CONTEXT OF NEBRASKA'S HISTORY

We are ready to try the most open-ended "outer" layer of context, the historical record outside the texts of Nebraska law in its official guise and also outside the level of the newspaper history we relied on above. The main sources of history so far were two prominent newspapers, the *Omaha World Herald* and the *Omaha Daily Bee*. We now add other papers and some of the historical commentaries on Nebraska, Populism, and the city of Omaha. We should not be surprised, in fact we should expect, that there will be inconsistencies, tensions, and paradoxes.

In his work *Omaha: The Gate City and Douglas County Nebraska*, Arthur Wakely notes that the first mention of fire protection in the records of the Omaha city council was on October 27, 1857.³⁰⁶ On March 22, 1866, the year before Nebraska's statehood, Omaha established a police force of four men.³⁰⁷ Early on, the populace tied their police and fire protection to the city government. In September 1865, in response to solicitation of contributions for the purchase of Omaha's first fire engine, "the people took the view that, as they paid taxes to support the city government, the engine should be purchased by the city."³⁰⁸

In 1878, Burch's *Nebraska as It Is*³⁰⁹ reported Omaha as the county seat of Douglas County (organized in 1855), with four daily and eleven weekly newspapers, and a city population of 26,000.³¹⁰ By 1887, both the police and fire departments had full-time, paid staffs. However, in March of 1887, the Lincoln legislature passed the act at issue in *Moore*, and on May 10, 1887, the police commissioners, appointed by Governor Thayer

305. See *supra* notes 59-65 and accompanying text.

306. 1 ARTHUR C. WAKELY, *OMAHA: THE GATE CITY AND DOUGLAS COUNTY NEBRASKA* 115 (1917).

307. *Id.* at 118; see also JAMES W. SAVAGE & JOHN J. BELL, *THE HISTORY OF THE CITY OF OMAHA AND SOUTH OMAHA* (1976).

308. 1 WAKELY, *supra* note 306, at 117.

309. L.D. BURCH, *NEBRASKA AS IT IS* 27 (1878).

310. *Id.*

under the new legislation, took office.³¹¹ The board met nine days later and appointed a police chief³¹²—but the city council would not accept the appointment.³¹³ The judiciary committee of the council concluded that the board of gubernatorial appointees were “without the necessary rules and regulations to be prescribed by ordinance,” and thus had no authority; the necessary ordinance was pending before the council.³¹⁴ As we know from *Moore*s, the first challenge to this new board and its appointees came in *State v. Seavey*.³¹⁵ In terms of practical results, the crisis over Seavey’s appointment as police chief resulted in all members of the “old” police department keeping their jobs, the calling of a public mass meeting to force the council to pay the police, and the apparent continuation of the police department as it had existed prior to the state legislation.³¹⁶ The fire department was more shaken up; fourteen old employees were ousted.³¹⁷

In July 1892, the Populist National Convention was held in Omaha, attracting 10,000 delegates and observers.³¹⁸ In 1894 and 1896, with the support of William Jennings Bryan,³¹⁹ Populist Silas Holcomb was elected governor.³²⁰ Soon after his reelection, Holcomb acted on a new bill called “the Omaha Charter,” which gave him power to appoint the Omaha Police and Fire Commission, appointing four men, one of whom, R.E.L. Herdman, was appointed to hold a one year term ending in April 1898.³²¹

Holcomb’s appointees were challenged in January 1898, in Omaha district court.³²² Judge Cunningham R. Scott found that vesting appointment power in Lincoln for officials in Omaha violated the right to local self-government.³²³ It is in Holcomb’s

311. 1 WAKELY, *supra* note 306, at 119.

312. *Omaha’s First Police Chief*, OMAHA WORLD HERALD, Mar. 31, 1975, at 3.

313. E.D.F. MOREARTY, OMAHA MEMORIES 183 (1917).

314. *Id.* at 119.

315. 35 N.W. 228 (1887).

316. 1 WAKELY, *supra* note 306, at 120.

317. *Id.*

318. DOROTHY D. DUSTIN, OMAHA AND DOUGLAS COUNTY: A PANORAMIC HISTORY 83 (1980).

319. 2 J.S. MORTON & A. WATKINS, ILLUSTRATED HISTORY OF NEBRASKA 259 (1905-13).

320. WAKELY, *supra* note 306, at 120.

321. OMAHA EVENING BEE, Jan. 12, 1898, at 1.

322. *Id.*

323. *Id.*

response to that decision by Scott that we find perhaps the best “other side” to the *Moore*s rationale.

On January 12, 1898, the *Omaha Evening Bee* reported that Judge Scott had that morning decided that the law providing for the appointment of a police and fire commission for Omaha by the governor was unconstitutional.³²⁴ The decision was in response to a petition for writ of mandamus by two attorneys directed to Mayor Moore to appoint his own board.³²⁵ Although Scott declined to issue the writ, he said that the mayor, in conjunction with the city council, had authority to provide for the government of the police and fire departments in Omaha.³²⁶ His opinion begins with de Tocqueville: “Local assemblies of citizens constitute the strength of free nations. Municipal institutions are to liberty what primary schools are to science; they bring it within the people’s reach”³²⁷ He continues with a series of authorities, prominent among them Judge Dillon of Iowa. Although Dillon is famous in local government law for “Dillon’s Rule,” which makes municipal corporations the creatures of the legislature, Dillon, like Cooley, was a prolific author who spanned the tensions of his topic and sometimes tipped into what might look like contradiction.³²⁸ Thus, Dillon is quoted by Scott for the contrary of “Dillon’s rule”: he says the stature of local government rests “in all our legislation, and is expressedly *or impliedly* guaranteed in our state constitutions.”³²⁹ Scott commented on section one of the state constitution; he concluded that the people are and have been since Creation, endowed with rights, hence inalienable rights, hence rights “greater than all constitutions; all legislatures; and hence any act of any legislature” that violates those rights is absolutely null.³³⁰ The rights, he says, need no constitutional recognition or declaration, because they are the unchangeable foundations of a republican form of government—“an inheritance of a free people from the foundation of the world to the end of time. A legislature may do a great many things, but it cannot repeal God’s

324. *Id.*

325. *Id.*

326. *Id.*

327. Respondent’s Objections at 10 exhibit A, *State v. Kennedy*, 60 Neb. 300 (1900) (No. 11,226).

328. The counter to Dillon’s thesis was offered by Eugene McQuillin. See EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* (1911); see also Gerald E. Frug, *The City as a Legal Concept*, 93 HARV L. REV. 1059, 1114 (1980).

329. See Respondent’s Objections at 10 exhibit A, *Kennedy* (No. 11,226).

330. *Id.* at 5.

endowments" of inalienable rights or the declaration of American independence.³³¹ He names and founds his opinion on the Creator: a different one from the creator and author in *Savage*—an express deity, not a state. He cites the right of local self-government as one of the strongest and most efficient checks in our system of checks and balances, and concludes that Holcomb's four appointees have no lawful claim to their offices, so they are vacant offices to be filled by local measures.³³²

Rosewater is more direct in his economic analysis of law: "In a nutshell . . . if the commissioners are municipal officers, to be paid salaries out of the city treasury, their titles must be derived from the people of the city."³³³ Two days later, the *Bee* and the *World Herald* carried a response to Scott's decision, written by Governor Holcomb.³³⁴ Holcomb pronounced Scott's decision, in effect, mere dicta. He complains that Scott took a mandamus suit and expressed what was a "masterly" argument in favor of "the most liberal application of the principle of home rule" in the wrong place.³³⁵ Holcomb claimed it should have been a speech to the legislature.³³⁶ He characterized Scott's decision as an extreme response to the potential of legislative abuse, which made every court a law unto itself, "and this is anarchy and anarchy is as deplorable as despotism."³³⁷ He felt that the issue of local government had to be determined on some definite, fixed and certain rule, but asked the obvious: who sets the rules? He determined that the entire question, the full trust, is to rest in the state legislature. Section 26, which seems on its face to provide for the retention by the people of those powers not explicitly delegated elsewhere to the government, appears lost: "There is no other way except through the law making body which is composed of their (the people's) duly chosen representatives."³³⁸

Two years later, on June 7, 1900, the Nebraska Supreme Court issued two opinions related to *Moore*s. In *State v. Kennedy*, an action explicitly instituted in order to overrule *Moore*s,

331. *Id.*

332. *Id.*

333. *Id.* at 12 exhibit B.

334. *Editorials*, OMAHA EVENING BEE, Jan. 14, 1898, at 5.

335. *Id.*

336. *Id.* A home rule statute was established in 1909.

337. *Id.*

338. At this point, the initiative did not exist in Nebraska. See Fischer, *supra* note 60.

the court failed to act against *Moores*.³³⁹ In the other, the Supreme Court, de novo on their own initiative, heard charges of criminal constructive contempt against Rosewater.³⁴⁰ What was his contempt? He had criticized Holcomb for sitting in on the *Kennedy* case, as Holcomb had pledged the reversal of *Moores*,³⁴¹ and had, as governor, made the appointments now under challenge, and was in June of 1900 no longer governor, but a sitting justice of the Nebraska Supreme Court.³⁴² In the course of the *Kennedy* case,³⁴³ the brief that challenged Holcomb's objectivity—in a retrial of a case he had denounced in print as governor and had pledged to combat—was ordered stricken from the file. But by the time of that order to strike, something had happened to Lee Herdman—he became reporter for the state, and clerk of the Supreme Court. In the *Bee*, the rumor that Holcomb pledged *Moores's* reversal was alleged to have been spread by the "Herdmanites." The same paper announced a week later that Holcomb arranged a deal with the Democratic leaders in Douglas County to give the reporter-clerk spot to Herdman,³⁴⁴ although by January 21, 1900, the *Bee* reported a "Hot Fight for Clerkship" between Herdman and another former Populist and Democrat.³⁴⁵ On February 14, the *Bee*³⁴⁶ reported that Herdman had the call, due to infighting that included the "Herdman junta of the Jacksonian Club" within the Democratic Party.³⁴⁷

By this point, the Herdman trail crosses and recrosses too finely. The record begins to shred. We cannot follow Lee Herdman any further in the historical tissue.³⁴⁸ Omaha and Nebraska histories describe a welter of parties and factions, of Democrat, Populist, "Fusionist," and "silver Democrats," and even juntas of Jacksonian clubs among Populist-Democrats (Herdman and his brother William), but the weaving is too erratic to sustain a reading.³⁴⁹ We hear reports of "frenetic political activity that

339. 83 N.W. 87, 88 (Neb. 1900).

340. State v. Rosewater, 83 N.W. 353, 354 (Neb. 1900).

341. *Factors in the Election*, OMAHA EVENING BEE, Nov. 8, 1899, at 1.

342. D.P. STOUGH, THE SUPREME COURT OF NEBRASKA 540 (1917).

343. State v. Kennedy, 83 N.W. 87 (1900).

344. OMAHA EVENING BEE, Nov. 16, 1899, at 5.

345. *Hot Fight for Clerkship*, OMAHA EVENING BEE, Jan. 21, 1900, at 1.

346. *Lee Herdman Has the Call*, OMAHA EVENING BEE, Feb. 14, 1900, at 5.

347. *Never Such Flagrant Bossism as That in Democratic Party*, OMAHA EVENING BEE, Feb. 5, 1900, at 4.

348. See, e.g., *supra* note 193.

349. See, e.g., 1 WAKELY, *supra* note 306.

dominated the Omaha newspapers between 1880 and 1904 [that] diminished somewhat with the election to the Senate of 1905 of Gilbert Hitchcock, editor of the *World Herald* and with the death in 1906 of Edward Rosewater."³⁵⁰ Rosewater was held personally in contempt by Justice Holcomb after a shoot-out: Holcomb, the sole justice facing Rosewater pro se, Rosewater with his own stenographer so careful of the record,³⁵¹ but the record is disintegrating. There is no record that Rosewater paid a fine or of any further proceedings. Right before the first contempt hearing, Lee Herdman was sworn in as clerk of the supreme court.³⁵²

A year and a half later, "as Predicted Exclusively by the *World Herald*,"³⁵³ the *Redell* case overruled *Moore*s. Attorney Connell, the *Bee* reported,³⁵⁴ thought that the part of *Redell* that seemed to overrule *Moore*s was mere dictum.³⁵⁵ A year later, Governor Savage had not taken advantage of *Redell*, refusing to appoint anyone to the commission. As we know already, "the will has overcome reason," and *Moore*s is the real law, as even Sullivan admitted.³⁵⁶

During the time of *Kennedy*, *Redell*, and *Savage* (the try, the apparent overruling, the concession to reality), what was happening? The *World Herald* accused the *Bee* of failing to tell the story that Omaha had a boss. Boss Dennison, a gambler out of "the wild third ward," ran the town, the *World Herald* suggested.³⁵⁷ Have we been getting the story of the 1968 Democratic National Convention without any mention of Mayor Daly? Was all this court action a veneer, a play reported by Lee Herdman that signifies nothing?

XV. THE BOSS—AND KING? SOVEREIGNS AND PIGS: THE STORY OF A CITIZEN DETECTIVE

The *Savage* rule, *stat pro ratione voluntas*, is that the will stands in the place of reason.³⁵⁸ The *Moore*s commission stood,

350. DUSTIN, *supra* note 318, at 92-93.

351. See OMAHA EVENING BEE, June 5, 1900, at 1; OMAHA EVENING BEE, June 6, 1900, at 1; OMAHA EVENING BEE, June 7, 1900, at 1.

352. *Can Court Revive a Statute?*, OMAHA EVENING BEE, May 2, 1900, at 4.

353. OMAHA EVENING BEE, Dec. 5, 1901, at 1.

354. *Id.*

355. See *supra* note 17 and accompanying text.

356. See *supra* text accompanying notes 175-80.

357. OMAHA EVENING BEE, Dec. 5, 1901, at 1.

358. See *supra* text accompanying note 178.

but whose will kept it there? Sullivan declined to use the next closest maxim, which would have identified the will with that of the people. Was it the will of the boss? And, if so, what is the relationship between the boss and the people? We noted above that Populism from the top down, from Lincoln imposed on Omaha, seemed to produce incoherence.³⁵⁹ But there was a kind of coherence in Omaha, beginning in 1900, the year the first assault on *Moore's* (via the *Kennedy* case) was launched, continuing through 1901 when *Redell* ostensibly overturned *Moore's*, and through the concession to reality of the court in *Savage*. Then, in 1904, Herdman returned to the police commission. Who was in charge? What was the source of order, both in the sense of predictability and in the sense of meaning?

The answer to the last question depends on the reader's view of bossism, in general, and of Tom Dennison, in particular.³⁶⁰ In 1900, Dennison's ascendancy in Omaha was unofficially official. Let us look at this layer of context, the life and times in Omaha, from the viewpoint of the historical political analyst. One of the first things we find out in Orville Menard's *Political Bossism in Mid-America*³⁶¹ is that this man who never held public office in Omaha and was marginally literate had a definite code of honor.³⁶² His background as a gambler and extralegal organizer of political power rested on a view of law that gives a striking role to the people:

He believed that some people by nature are good, some bad, and no amount of lawmaking was going to alter that basic fact. Furthermore, he saw legislation as self limiting, since "Laws that people don't believe in can't be enforced if whole armies tried it. There are so many laws," he added, "that people are either lawbreakers or hypocrites. For my part, I hate a damn hypocrite."³⁶³

Overall, Menard is not sympathetic to local government, and attributes an undue fear of centralization in America as the source of decentralized fragmentation and, thus, bossism.³⁶⁴ However, in the case of Omaha, Menard's narrative runs

359. See *supra* text accompanying notes 348-52.

360. For one discussion showing multiple perspectives on bossism, see J. NOONAN, *BRIBES* 584-600 (1984).

361. ORVILLE D. MENARD, *POLITICAL BOSSISM IN MID-AMERICA* (1989).

362. *Id.* at 18.

363. *Id.*

364. *Id.* at 36.

counter to his own thesis: it was the state legislature's intrusive actions that made the city ripe for Dennison's political machine.

The people working in city hall and the courthouse endured over the years frequent bills passed by the Nebraska state legislature altering their governmental structures and powers Paying little heed to the constitution's prohibition against passing local or special laws respecting incorporating cities, towns, and villages, or changing or amending their charters, the legislature created in 1887 the category of metropolitan class for Omaha.³⁶⁵

This legislative disregard for both constitution and city sentiment meant that Omaha officials' terms were set "according to the legislators [sic] latest whim,"³⁶⁶ as were numbers, titles, electoral bases and election versus appointment.³⁶⁷ Immediately following the description of city government created by the chaotic dictation from Lincoln, Menard concludes, "Omaha in the early 1890s was a candidate for a political boss, someone capable of amassing a following, penetrating complexity, and able to get things done" ³⁶⁸ Menard describes Dennison as the pupil of Edward Rosewater, and a member of the Rosewater-Dennison-Moores machine at the turn of the century.³⁶⁹ This became the Dennison machine, with Jim Dahlman as the perpetual mayor, and lasted until 1933.³⁷⁰ As part of the machine, the *Bee* was reticent about Dennison; Menard notes that the *Daily News*, the *Examiner* and the *World-Herald* criticized Dennison, but the *Bee* was silent.³⁷¹

Where is Lee Herdman in all of this? He does not appear in the histories, not even in Menard's detailed chronicle of Omaha. On the one hand, Menard notes that "[o]f all the agencies and operations of local government, the most crucial to Tom Dennison's political machine were the police and legal machinery,"³⁷² and Dennison was superbly organized, gaining effective electoral selection of the police commissioner, the chief of police, and

365. *Id.* at 46.

366. *Id.*

367. *Id.*

368. *Id.* at 48.

369. *Id.* at 66-67.

370. Jim Dahlman, a Democrat, was the mayor of Omaha from 1906 to 1918 and again from 1921 to 1930. Dahlman was opposed politically by Herdman. See *Mayor James O. Dahlman Speaks at Nebraska*, WORLD HERALD: OMAHA, Aug. 1, 1910, at 5.

371. MENARD, *supra* note 361, at 67.

372. *Id.* at 223.

other officers.³⁷³ On the other hand, there is some suggestion that the "Jacksonian Club" (in which the Herdmans had their "junta") challenged Dennison.³⁷⁴ In 1906 the Club took a strong shot at an electoral theme of law enforcement directed against Dennison, and was partly successful.³⁷⁵ Thus, Herdman's ascendancy to the police commissioner post in 1904 may have marked him as a foe of Dennison. Did he stay opposed to this boss who crossed party lines in order to run an efficient city when the government affixed from Lincoln could not? And which "law" was the law of the people, their sovereign? These questions lie in the "real political context"—a phrase used by Sullivan in *Redell* to overrule *Moore*s.³⁷⁶

Hendrik Hartog, in a charming article in the *Wisconsin Law Review* entitled *Pigs and Positivism*,³⁷⁷ tells the story of pig-keeping on the streets of nineteenth century New York. He demonstrates that, despite a colorful trial in which the mayor's struggle to de-pig the city and a pig-keeper's resistance resulted in a judgment that keeping pigs on city streets was a criminal nuisance, the practice of pig-keeping on city streets continued for at least thirty years after the decision outlawed it. Hartog investigates the potential class bias against pigs,³⁷⁸ the dearth of common law,³⁷⁹ the ways of butchers,³⁸⁰ and the "artisanal community of pig-keepers,"³⁸¹ and concludes that the members of a politically active and insistent community of New Yorkers believed pig-keeping to be their right, while those opposed to the social practice were unwilling and unable to do what was necessary to stop it.³⁸² "The legal right to keep pigs in New York City's streets was constituted both by the activities of the right's defenders and by the relative passivity and ineffectuality of its opponents."³⁸³ Hartog interprets this as a kind of legal order; he documents that those who continued to keep pigs considered themselves not only righteous but also lawful.³⁸⁴ Tom Dennison considered

373. *Id.* at 224.

374. *Id.* at 104.

375. *See supra* notes 348-52 and accompanying text.

376. *See Redell v. Moore*s, 88 N.W. 243 (Neb. 1901).

377. Hendrik Hartog, *Pigs and Positivism*, 1985 Wis. L. REV. 899.

378. *Id.* at 902-04, 908-12.

379. *Id.* at 906-08.

380. *Id.* at 917-18.

381. *Id.* at 933.

382. *Id.*

383. *Id.*

384. *Id.*

himself righteous, and not a hypocrite. What was the status of those who tried to rule Omaha from Lincoln, who dragged newspaper editors before them *sua sponte*, who reached to overrule cases, who finally made a legal maxim of non-letter-law, into law? When the will of the people in Omaha kept the reality of the *Moore*s case the law, what kind of law was the letter, and who was the sovereign? Was Tom Dennison called King Gambler in derision by those who posed themselves as "legitimate" candidates but could not run a city?³⁸⁵ Who was sovereign?

Hartog suggests that our conventional legal theory makes it impossible to account for the legal consciousness of groups like the pig keepers, the citizens of Omaha, or of Daly's Chicago. "In defining law as the command of the sovereign we ordinarily deny the legitimacy of interpretive stances other than those—like the [Lincoln legislature and courts]—which have the benefit of formal authoritativeness. Although the sovereign in American political ideology incorporates the pig keepers," the way we see government rejects their participatory role and creates a false unitary vision of the sovereign.³⁸⁶ We do this, he suggests, "to maintain our valued vision of law as a (single) text."³⁸⁷ But we already know better, here in this weave of texts and contexts in the Heartland. We know there are so many strands, dimensions, thicknesses, and colors in our social fabric that pulling on one thread, one wrong annotation, can unravel the entire thing. Our unraveling leaves the fabric still somehow in the main intact—yet our vision has changed. We know how deceptive each piece of text can be. We know Lee Herdman has two sides and more, that Omaha was really organized by Boss Dennison³⁸⁸ yet also inspired by William Jennings Bryan at the same time. We know that pig keepers kept the mayor at bay, but not forever. We know that the law has many sides, many perspectives—and no single authoritative one, yet there was still law in Omaha, Nebraska, in 1898 and 1900 and 1902.

The people keep the power because they know they are not solely the creations of the state; the government, whether one branch or all in concert, did not author them. Nebraskans know

385. For a sobering view of less overt and organized "private government," see Joel Garreau, *The Shadow Governments*, WASH. POST, June 14, 1987, at A1.

386. Hartog, *supra* note 377, at 934.

387. *Id.*

388. Yet, to use Derridean word play, note that ultimate insider Dennison's homonym—denizen—comes from "foreigner admitted to residence," which applies to all non-Native Americans, at the least.

that as deeply as New Englanders, despite Herdman's annotations about how in Nebraska the towns did not precede the government.³⁸⁹ When they came to Nebraska, the people knew themselves haunted by those already there, and they knew that the grids laid down by railroad engineers did not create communities. Nebraska was one of the first states in the Union to name for its people the sovereign power that most other states must exercise in opinion polls. Nebraska was among the first states to create the direct initiative power of her people to amend the Constitution.³⁹⁰ Although the principle had been invisible before, in 1912 article III, section 2 of the Nebraska Constitution stated that "[t]he first power reserved by the people is the initiative."³⁹¹

This reclamation of a hitherto unnamed retained right is part of the people finding themselves. It entails risk; Charles Black reminds us that the "only hitch" with unnamed rights: "in short, . . . the rights unenumerated are not enumerated. We are not told what they are."³⁹² We have to find such rights out by living and discussing our laws and discussing them. In Book IX of *The Republic*, Socrates says that each person can be subject to an inner sovereign, but, "failing that," the outer sovereign rules.³⁹³ We are sovereign *in as much as we participate* from our own sovereignty, "equal and united" in a people.³⁹⁴

We found in our pursuit of an anomalous annotation a text-maker of extraordinary interest.³⁹⁵ Lee Herdman, hidden in plain sight, entered our legal-text-book-land at the outset of *Moore's* as "R.E.L. Herdman," having been police commissioner of the city of Omaha. He edited, commented, labeled, elaborated, Latinized, uttered an exit cry of protest, and returned to the story outside our "legal" text. His journey is from the land of the pig keepers into the law books and back to the streets. Did he enfold himself in Dennison's machine, this man whose

389. Herdman, *supra* note 105, at 232-33.

390. For a discussion of the literature on participatory mechanisms like initiative, Clayton Gillette, *Plebiscites, Participation, and Collective Action in Local Government Law*, 86 MICH. L. REV. 930 (1988).

391. NEB. CONST. art. III, § 2.

392. Charles Black, *On Reading and Using the Ninth Amendment*, in *POWER AND POLICY IN QUEST OF LAW* (Myres S. McDougal & W. Michael Reisman eds., 1985).

393. THE REPUBLIC OF PLATO, *supra* note 29, at 311.

394. *Id.* at 7.

395. Due to the unavailability of the author's research materials, the editors are unable to verify the following information. This information is integral to the author's story and will therefore be presented notwithstanding the unavailability of the sources.

obituary said he was reputed to have been W.J. Bryan's secretary (but Bryan's biography does not mention him) because law, like grammar, is merely a matter of fashion, like pantaloons? We know some of his eventual story—that he stepped in to clean up an insurance regulation problem near the end of his life—but the rest is a matter of his reputedly wide-ranging political acquaintances. In such a web of friends, how could Tom Dennison have been missed? Yet the real mystery may be the smaller fish, W.W. Cox. He is the chief of detectives who sued for back pay. He was reported only in the shadow volumes of Herdman's short-lived unofficial reporters. He was ousted in the era when the city was being cleaned up for the 1898 Exposition. Then he was reinstated, then removed for cause. He was discharged as chief of detectives through the abolition of the post, on April 14, 1898. Herdman's one year term on the police commission had expired the week before April 14; the commission discharged Cox as soon as Herdman was gone. On November 1, 1898, Cox returned to the force to fill a vacancy for captain of police and remained until discharged for cause." It turns out that he was appointed in 1895, told he was suspended but was not, as another proceeding for injunction kept that suspension in suspense, so he continued to serve until April 1898 despite a further order of suspension. He claimed he continued after April 1898, until November 1898, and was entitled to back pay. On May 13, 1901, the city was ordered to make out a "proper pay roll and certificate" for Cox, and pay him \$585 plus interest. The ordinary means of collecting for being a police officer at this time, apparently, was by mandamus. The two prior attempts to get rid of Cox had resulted in his filing quo warranto actions, which he won. During the April to November hiatus, he seems to have worked at Swift & Company in south Omaha. From the reporter, it would seem that the state sued on Cox's behalf because he was caught in the post-*Moore's* dance of who was in and who was out. In 1901, Cox won, until *Moore's* and the city appealed; he lost.³⁹⁶ Menard notes that while the Lincoln legislature fiddled with the Omaha government, city employees often did not know how or if they were to continue in their jobs.³⁹⁷ The city more than once had two simultaneous commissions.³⁹⁸

396. *Moore's v. State ex rel. Cox*, 4 Herd. 235, 240 (Neb. 1903).

397. MENARD, *supra* note 361, at 46.

398. This occurred in 1898, prior to *State v. Moore's*, 76 N.W. 175 (1898), and in 1900, prior to *State v. Kennedy*, 83 N.W. 87 (1900).

The case does not say that Cox performed no duties, nor that he was unable to do so. It does not tell us when and why he was discharged "for cause." We do not know if in 1901 he had a job at Swift, or was unemployed with six kids at home. We do not know if he tried to fit in the Dennison machine but failed, or if he tried to fit in the Herdman text and failed. It is Cox whom I leave to the reader.

When I was a child and a book did not turn out in a way I could accept, I simply re-did the ending for myself. Cox is my invitation to the reader to enter this text, and see what your imagination can spin from the text, W.W. Cox's story. What was it like for him in the world of Boss Dennison, W.J. Bryan, and Lee Herdman? There are those, like Jorge Luis Borges,³⁹⁹ who say it is all one text, all one story, in which we live. There are those like Derrida who insist on the singularity of each story. It is Orville Menard who says that "total truth" about Dennison may not be found in his book on Dennison, but the effort at a true rendering may at least suggest that "*Se non e vero, e ben trovato.*"⁴⁰⁰ (Even if it's not true, it's believable.) Herdman initially insisted on a "single eye," but we humans live in a world of multiple perspectives.⁴⁰¹ The only single eye is one we cannot sustain.⁴⁰² I invite you to imagine a believable story for the fellow who, caught in the entwined texts of the multiple legal systems and the turnings of the "Case of the *Moore's* Annotation," does not appear in print except in the shadow reporter.

Let me suggest a beginning. In all Derrida's writings about Plato and Socrates and writing, he barely mentions Diotema. Her name appears briefly in *The Post Card*.⁴⁰³ Yet she is the central character in the Platonic succession. Plato writes (or, in Derrida's version, speechwrites) that Socrates traces all journeying in philosophy and pursuit of the good, to the conversation in the *Symposium*, with Diotema. She tells Socrates of where the

399. See Myrna Solotorevsky, *The Model of Midrash and Borges's Interpretive Tales and Essays*, in *MIDRASH AND LITERATURE* 253 (Geoffrey Hartman & Sanford Budick eds., 1989).

400. MENARD, *supra* note 361, at xiii.

401. For the relationship between the multiple perspectives in modern art and in legal reality, see David Luban, *Legal Modernism*, 84 *MICH. L. REV.* 1656 (1986). For a story version of the necessity of more than one perspective, see WALKER PERCY, *THE THANATOS SYNDROME* 128-39 (1987).

402. Philosopher Thomas Nagel calls this "the God's eye view." See THOMAS NAGEL, *THE VIEW FROM NOWHERE* (1986). The "single eye" is depicted on the United States one dollar bill. See M. TAYLOR, *TEARS* (1992).

403. See, e.g., DERRIDA, *supra* note 2, at 55.

highest good and its perception lie, if he can journey there. She has been there (or is she just leading Socrates on?). If there is anything to Socrates besides irony, it is that he was taught (inspired) by Diotema, as he taught Plato, who taught Aristotle, who taught Alexander the Great (the original Boss of the Greek story?). Diotema is foundational, yet barely visible in the text. I would ask you for a moment to imagine that W.W. Cox was, like a character in Shakespearean comedy, a woman (Winefred, Wendy, Willa) in disguise—but that may be asking too much. Maybe it is even too much to imagine that he was (part) Indian,⁴⁰⁴ African American, Mexican, or Jewish? I simply suggest that W.W. Cox was an honest but illiterate, and, somehow, inspiring confederate of Herdman, who was gotten rid of the week following Herdman's first exit from the commission. Cox lost the appeal in 1903. In 1904, Herdman returned to the board. By what law would you continue the story?

XVI. CONCLUSION

Sullivan, the very man who wrote to overturn *Moore's*, later declared that *Moore's* "stands in place of the law."⁴⁰⁵ Herdman, the man who carved the tombstone with the epitaph ("overtomb" or "over-duties")⁴⁰⁶ "IV OVERRULED IN TOTO,"⁴⁰⁷ uttered the prophetic cry against words unconnected with their true, deadly effect — meaningless words. (Tom Dennison might add, hypocritical words.) We have found that there is, indeed, nothing outside the text, or, as Derrida would explain it, nothing outside-the-text.⁴⁰⁸ That is, everything is in the text, is context, and there is never sufficient context to know fully. The only thing left outside the text is nothing, or the Author. Even if we do not know who the author is, every attempt at either defining the author away or appropriating authorship totally will fail, and we are left with our dance within the text, our part in authorship. The one thing we know is that there is no definitive edition. Volume two of the *Revised Statutes of Nebraska* is not definitive; it has two annotations to the same case that are in

404. "Indian," it has been suggested, not because Columbus was disoriented but because the native people were *una genta in Dios*, a people in God. MATTHIESSEN, *supra* note 301, at 3.

405. *State v. Savage*, 90 N.W. 898, 901 (Neb. 1902); *see supra* text accompanying notes 177-81, 358.

406. THE CONCISE OXFORD DICTIONARY OF ENGLISH ETYMOLOGY (1986).

407. *See supra* note 17 and accompanying text.

408. *See, e.g.*, DERRIDA, *supra* note 32, at 85.

contradiction. But what that tension has created is the other side of the story. There are the people, and there are the people, and then there are the people. Populism is for the people, but is Populism from the top down an inherent contradiction? Was Bryan fated, by his very faith in "the people," never to be their President? Is a Populist President an oxymoron or an ideal never to be realized? We have found that the people exist in many guises and that they are sovereign, but "they" (we) are still coming to know what that means.

I would suggest that it means that at least the annotations should put the *Moore's* rationale under each section of the constitution, and also the best of the *Redell* rationale (the *Harte* dissent), the one which fears judicial anarchy. These two sides (and there are, as I hope we have seen, more than that) are what one commentator calls "nested opposition,"⁴⁰⁹ that is, seeming opposites which are really circling one another to get turned right. That requires a move which is very difficult, and yet I believe there is an old American Quaker song to describe that move, which is also very simple:

When true simplicity is gained
 To bow and to bend we shall not be ashamed
 To turn, to turn will be our delight
 Til by turning, turning, we come round right.

There is a relationship between how we turn inside and how we turn outside, between the law in the heart and land, and the law in our heart/land:

As for law, it too partakes of the radical uncertainty of the rest of life, the want of firm external standards. But it is also a special way of living on these conditions, a way of making standards internally, out of our experience, as we make ourselves in our talk.⁴¹⁰

XVII. POSTLUDE

If Herdman is the scarecrow, he gets to govern Oz in the Wizard's absence, once he has realized he has a brain (and is more than a Chinese copyist). The Lion, however, in the book, goes back to the forest, to be the king of the forest of which he sings in the movie. He is crowned, with his broken flower pot,

409. See J.M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669 (1990) (reviewing JOHN M. ELLIS, *AGAINST DECONSTRUCTION* (1989)).

410. JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* 267 (1990).

acknowledged by all the characters. He is a forester⁴¹¹—is that what Tom Dennison was? The flowerpot king in the real law of the city, under “officials” elected and reelected by the people, affirming the order he maintained? But who is sovereign now, in the absence of effective bosses? Not the Wizard, not the lion, not the scarecrow, not the woodsman. Where are Dorothy and Toto, anyway? But that is another story.

411. For the hint of his “lawful counterpart,” consider the words of Sir Thomas More in *A Man for All Seasons*:

Roper: Then you set man’s law above God’s! More: No, far below; but let me draw your attention to a fact — I’m *not* God. The currents and eddies of right and wrong, which you find such plain sailing, I can’t navigate. I’m no voyager. But in the thickets of law, oh, there I’m a forester.

ROBERT BOLT, *A MAN FOR ALL SEASONS* 65-66 (1960).