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COMPARATIVE NORMATIVE HERMENEUTICS: SCRIPTURE, LITERATURE, CONSTITUTION

RONALD R. GARET

TABLE OF CONTENTS

I.	NORMATIVE HERMENEUTICS	37
A.	INTRODUCTION TO NORMATIVE HERMENEUTICS	37
B.	THE STRUCTURE OF NORMATIVE HERMENEUTIC PROJECTS	44
	1. <i>Normative Hermeneutic Projects and Their Objects</i>	44
	2. <i>Three Problems in Normative Hermeneutics</i>	46
	3. <i>Normative Hermeneutics as Rule-Hermeneutics</i> . . .	52
II.	THE NORMATIVE HERMENEUTIC OBJECT	54
A.	THE COMPLEXITY OF THE NORMATIVE HERMENEUTIC OBJECT	54
	1. <i>Simple and Complex Objects</i>	54
	2. <i>Problems in the Focal Text</i>	56
	3. <i>Problems in Tradition</i>	58
	4. <i>Problems in Institution</i>	61
B.	THE GRAMMAR OF THE CONCEPTS SCRIPTURE, LITERATURE, CONSTITUTION	63
III.	THE SETTING UP OF THE FOCAL TEXT	70
A.	THE ETHICS AND POLITICS OF TEXTUAL RESTRICTIONS	70
	1. <i>Sola Scriptura</i>	70
	2. <i>Literalism</i>	77
	3. <i>Text, Hermeneutics, and Ideology</i>	85
B.	THE CANON	89
	1. <i>The Sufficiency of the Canon</i>	89
	2. <i>The Closing of the Canon</i>	98
	3. <i>The Unity of the Canon</i>	99

IV. THE AUTHORITY OF THE HERMENEUTIC OBJECT

.....	102
A. VARIETIES OF AUTHORITY.....	102
B. THEORIES OF THE LOCATION OF TEXTUAL AUTHORITY	106
1. <i>Scripture</i>	106
2. <i>Literature</i>	111
3. <i>Constitution</i>	115
C. HERMENEUTIC FUNCTIONS OF NARRATIVE	120
1. <i>The Weak Sense of Narrative and Its Ideological Function</i>	120
2. <i>Narrative and the Canonical Status of the Constitutional Case Law</i>	125
3. <i>How Narrative Executes Consent Theory</i>	127

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RONALD R. GARET*

But when they are refuted from the Writings they [the Gnostics] turn around and attack the Writings themselves, saying that they are not correct, or authoritative, and that the truth cannot be found from them by those who are not acquainted with the tradition. . . . But when we appeal again to that tradition which has come down from the apostles and is guarded by the succession of elders in the churches, they oppose the tradition, saying that they are wiser not only than the elders, but even than the apostles, and have found the genuine truth. . . . What it comes to is that they will not agree with either Scripture or tradition.

Irenaeus, Bishop of Lyons (2d century, A.D.)¹

I. NORMATIVE HERMENEUTICS

A. INTRODUCTION TO NORMATIVE HERMENEUTICS

I want to consider the logic, organization, and meaningfulness of a distinct species of moral reflection. It is the sort of moral reflection that characterizes the Christian who consults the Gospels in a time of moral or spiritual crisis; the student who is awakened to oppression and liberty by the poems of William Blake; the judge who takes instruction in justice from the constitutional writings. In each case, the interpretation of certain texts that are invested by the reader with special value guides the reader's moral reflection and action. In this activity there is a connection between textual interpretation and normative guidance that is definitive of the species of moral reflection that I call "normative her-

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1. Irenaeus, *Against Heresies, Book III*, in *EARLY CHRISTIAN FATHERS 370-71* (C. Richardson ed. 1953).

meneutics.”² The nature of that connection—its coherence as well as its practical consequence—is the subject of this Article.

In this Section, I will attempt to show that in modern society, normative hermeneutics is as important and widespread in practice as it is misunderstood in theory. Correspondingly, the strategy of this introductory Section will be twofold. First, I will depict normative hermeneutics ostensibly, pointing to our normative hermeneutical activity in theology, literary criticism, and constitutional law, and to the importance of that activity. Second, I will expose certain ways in which we misunderstand the theory of normative hermeneutics. I will argue that we oversimplify normative hermeneutics by thinking of it in terms of literalism, or by imposing upon it the alien ideal of “scientific policymaking.”³ Both oversimplifications neglect the pragmatic theorizing that normative hermeneutics produces in the course of its own activity. Ultimately, the most adequate theory of normative hermeneutics will

2. I am employing the term “hermeneutics” in one of the four quite different senses that characterize the term’s current usage.

(1) Sometimes hermeneutics is regarded as the metatheory of understanding or interpretation. Thus, hermeneutics is to interpretation as metaethics is to normative ethics. This is the broadest meaning of hermeneutics, and it is roughly the sense in which I use the term in this Article.

(2) Reflecting the impact of Heidegger and Gadamer, especially in German philosophy and social theory, but also in contemporary theological hermeneutics, “hermeneutics” sometimes is employed to mean “hermeneutic phenomenology.” In this usage, hermeneutics refers to understanding as the definitive and constitutive feature of human existence. Obviously this usage has a substantive breadth which is comparable to the methodological breadth of the metatheoretical sense in (1).

(3) Especially in social theory and in treatments of the methodology of the social sciences, hermeneutics is sometimes presented as the distinctive method of the *Geisteswissenschaften*. In this usage, hermeneutics denotes “understanding” as the supposed aim of the social or cultural sciences, as opposed to “explanation” as the supposed aim of the *Naturwissenschaften*.

(4) Still more narrowly, hermeneutics sometimes is employed to name a particular view of understanding or interpretation as the *Geisteswissenschaftliche* method: namely, contextualism. Those who use the term “hermeneutics” in this way are heirs of Wilhelm Dilthey, and of Dilthey’s impact on the so-called *verstehen* methodology of classical German sociology.

I reject senses (3) and (4) because I regard the distinction between explanation and understanding as fundamentally confused. See generally M. MOORE, *LAW AND PSYCHIATRY: RE-THINKING THE RELATIONSHIP* (1984).

The main reason for assigning to “hermeneutics” the sense of (1)—the general theory of interpretation—is that I want to emphasize that normative hermeneutic activity presupposes (logically, meaningfully, and motivationally) that one is prepared to answer certain basic questions about interpretive practice. Thus, normative hermeneutics includes the theoretical features needed to answer the questions that normative hermeneutical practice regularly raises. Those questions are introduced in Part II of this Article.

3. The term “Scientific Policymaker” was introduced by B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION* 10-15 (1977). In Ackerman’s typology of legal analysis, the scientific policymaker employs a technical vocabulary in pursuit of policy objectives that implement “comprehensive views” such as Kantianism or Utilitarianism.

be one which manages to discover and expound orderly connections among key ideas, such as "canon," "tradition," and "narrative." These ideas are not just technical concepts found in individual disciplines such as theology ("canon") or criticism ("narrative"); they are main constituents of the practical wisdom of all normative hermeneutics.

The first step toward a theory of normative hermeneutics, therefore, is an act of recognition. If we learn to recognize normative hermeneutics as something that we *do*—an activity, a practical body of work—we will be able to see how this practice has produced its own theory. Let us take an initial look, then, at the important work that we do when we engage in normative hermeneutics in three fields or disciplines. In each case, we will see that the importance of the work is a function of the pervasiveness of the practice and the moral seriousness of its object.

In the field of constitutional law, judges seek guidance in the constitutional text and case law. These texts are thought to have the power to teach important lessons concerning the just ordering of democratic institutions. Governmental decisionmakers outside the judiciary, especially those we call "statesmen," also consult the constitutional texts as a guide in action and reflection. This consultation is animated by the belief that these texts offer some insight into the common good, or some understanding of the necessary constraints which bound the pursuit of that good. Citizens, finally, may study the constitutional materials as a source for civic ideals, duties, or rights. These practices of Constitution-reading, whether or not all of them deserve the name "constitutional law," support my claim that normative hermeneutics is a pervasive activity undertaken with reference to serious objects.

As compared to constitutional law, normative hermeneutics practiced with Literature is even more pervasive, and, in some senses of the word, more serious as well. All of us learned in our English classes to expect something serious and important to happen in our interpretive grapplings with *Moby Dick*, *The Scarlet Letter*, and other classics. Jolin Gardner, in reminding us about "moral fiction," has described this expectation as the belief that Literature should have "a clear positive moral effect, presenting valid models for imitation, eternal verities worth keeping in mind, and a benevolent vision of the possible which can inspire and incite human beings toward virtue, toward life affirmation as opposed to destruction or indifference."⁴ The eternal verities

4. J. GARDNER, ON MORAL FICTION 18 (1978).

The legal moralist, of whom Kierkegaard's Judge William will remain forever the archetype,

and a life of virtue; this is morally serious indeed. Its seriousness is not the seriousness of constitutional law—the sense that lives, liberties, and fortunes hang upon the interpretation of the text—but the seriousness of human experience deeply and artfully considered. “We learn through fiction,” according to literary critic Robert Alter, “because we encounter in it the translucent images the writer has cunningly projected out of an intuitively grasped fund of experience not dissimilar to our own, only shaped, defined, ordered, probed in ways we never manage in the muddled and diffuse transactions of our own lives.”⁵ Whether or not we accept all the claims in Gardner’s account of the moral ends of Literature, and in Alter’s account of the means, all of us can recognize in their views a basic truth about our expectations toward Literature. These are the expectations that fund the reading of Literature as a widespread normative hermeneutic practice.

One has a sense, finally, that those who do not find themselves staying up late at night with Tolstoy, or girding their loins with the due process clause and a serious review of *Goldberg v. Kelly*,⁶ are out there poring over the Bible. Here again, the normative hermeneutic practice is widespread, probably the most widespread of the three practices I am comparing. The practice of reading Scripture for guidance, moreover, is morally serious; arguably more serious than either Literature-reading or Constitution-reading. If the importance of Literature-reading is its reflective depth, and the importance of Constitution-reading is its practical consequence, the special importance of Scripture-reading is its combination of these two forms of moral seriousness. The believer who reads Scripture finds in it profoundly instructive moral meanings

will reject the basic comparative plan of this Article on the ground that literature is supposed to be aesthetic, while it is law’s province to pursue morality. The pure aesthete, who claims to read literature only for pleasure, not for enlightenment, will happily accept Judge William’s division of labor; so will the most radical Protestant theological proponents of the ancient dualism between Law and Gospel. Such dualistic Christians hold that Scripture’s truths are spiritual, not moral, at least in the “legal” sense of moral. See S. KIERKEGAARD, *EITHER/OR* VOL. II (1971).

To me, such compartmentalization of hermeneutic activity is both descriptively inadequate, as it radically oversimplifies the complexities of reading as a human experience, and prescriptively abhorrent, as it robs life of its richness. When I speak of comparative *normative* hermeneutics, obviously the “moral” sense of “normative” is paramount; nonetheless, it is not exclusive. I agree with Robert Alter, who concludes that Old Testament narrative “unforgettably illustrates how the pleasurable play of fiction in the Bible brings us into an inner zone of complex knowledge about human nature, divine intentions, and the strong but sometimes confusing threads that run between the two.” R. ALTER, *THE ART OF BIBLICAL NARRATIVE* 176 (1981). Alter enjoins us “to enjoy the Biblical stories more fully as stories,” so that “we shall also come to see more clearly what they mean to tell us about God, man, and the perilously momentous realm of history.” *Id.* at 189.

5. R. ALTER, *supra* note 4, at 156.

6. 397 U.S. 254 (1970).

which bear directly upon the reader's inmost contemplation and most practical life-choices. Thus the phenomenon of Scripture-reading confirms and in a way summarizes the prominence of normative hermeneutics in the universe of moral reflection.⁷

Despite its prominence, normative hermeneutics is not as well understood as other segments of the social organization of moral reflection. After all, the moment of pure interiority, of the individual's ethical *creatio ex nihilo*, has found expression in such theoretical achievements as Kant's philosophy of the self-legislating will, and Kierkegaard's theological exposition of the ethical and spiritual formation of the self. Similarly, the institutional and collective aspect of moral deliberation has been expounded in economic theories of democracy and in contractarian theories of justice. Compared to these images of the autonomous individual wrestling with the inwardness of his or her conscience, or the collectivity bargaining to generate rules of efficiency or fairness, we have no well-developed theoretical accounts of how an individual imbedded in an interpretive community derives moral insight from texts that the community takes to be uniquely valuable or authoritative.

Since the essence of normative hermeneutics is a reflective connection between textual interpretation and normative guidance, an ac-

7. Normative hermeneutics in modern society is not restricted to fields that have written texts as their objects. On some metapsychological theories, for example, psychoanalysis can be conceived of as normative hermeneutical activity, in which the analysand learns from dream-interpretation a "story" which brings coherence, meaning, and purpose to life. P. RICOEUR, *FREUD AND PHILOSOPHY: AN ESSAY ON INTERPRETATION* (1970); Steele, *Psychoanalysis and Hermeneutics*, 6 INT'L REV. PSYCHOANALYSIS 389 (1979).

Similarly, certain philosophies of history and historiography regard history as the object of normative hermeneutical inquiry. Cf. W.B. GALLIE, *PHILOSOPHY AND THE HISTORICAL UNDERSTANDING* (1968); Dray, *Conflicting Interpretation in History: The Case of the English Civil War*, in *HERMENEUTICS: QUESTIONS AND PROSPECTS* 239 (G. Shapiro & A. Sica eds. 1984).

In this Article, I restrict my comparative study of normative hermeneutics to Scripture, Literature, and the Constitution because: (1) The written character of the literary and Biblical texts makes them especially apt as counterparts to the constitutional document and case law; (2) The churches and literature departments are centralized institutions that play a normative hermeneutic role comparable to that of courts in constitutional law; and (3) Current constitutional law analysis has begun to consider literature and theology as constitutional law's closest interpretive cousins. See, e.g., Burt, *Constitutional Law and the Teaching of the Parables*, 93 YALE L.J. 455 (1984); Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Levinson, *"The Constitution" in American Civil Religion*, 1979 SUP. CT. REV. 123; Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982) [hereinafter cited as Levinson, *Law as Literature*]; Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551 (1985).

As the oldest interpretive disciplines, theology and criticism are more likely to illuminate constitutional law than are the interpretive social sciences, which have come more recently to a hermeneutic self-understanding.

count of normative hermeneutics must have as its central task the elucidation of the nature of that connection.⁸ In the remainder of this Section, I want only to suggest that the nature of the reflective connection between interpretation and guidance is misunderstood by two comprehensive models which have some currency in the normative hermeneutical fields. These two models are literalism and "scientific policymaking."⁹

Literalism, which I will discuss in more detail in Section A(2) of Part III of this Article, pictures normative hermeneutics as a series of commands issued by a sovereign text to the text's subjects. For literalism, the act of reading is defined as a form of obedience to those commands. Scientific policymaking, by contrast, rejects the sovereignty of the text, and reforms the reader into a decisionmaker, an artificer of norms. The scientific policymaker rejects literalism as a form of authoritarianism, a thoughtless subjection to the literal meaning of the text. Literalism rejects scientific policymaking as a form of tyranny, an imposition of will fatally cut off from the legitimacy of the text.

Quite clearly, neither literalism nor scientific policymaking is truly an account of the reflective *connection* between textual interpretation and normative guidance: the connection that is definitive of normative hermeneutics. Instead, both literalism and scientific policymaking are accounts of what the normative hermeneutic fields would look like if the reflective connection were severed or repudiated. While classical hermeneutical thought stresses the relation between *explicatio* (defense of a reading of the text) and *applicatio* (determination of the significance of that reading for the issue at hand),¹⁰ literalism suppresses the *applicatio*, and scientific policymaking suppresses the *explicatio*. Fur-

8. I am employing the term "normative hermeneutics" to refer both to the *activity* of deriving moral guidance from the interpretation of texts, and to the *theory* or *discipline* that concerns the way in which that activity resolves the problems that it poses for itself. (Compare: "history" is the study of "history.") My justification for this double usage is that normative hermeneutics is a craftlike activity that produces its own theory and discipline. Its wisdom is what Aristotle called "practical wisdom." Aristotle, *Nicomachean Ethics* 1140a-b, in 2 THE WORKS OF ARISTOTLE 389 (1952).

9. For the definition of "scientific policymaking," see *supra* note 3.

10. For the relation between explication and application in hermeneutics, see H. FREI, THE ECLIPSE OF BIBLICAL NARRATIVE 303-06 (1974). By "classical hermeneutical thought" I mean late eighteenth- and early nineteenth-century German theological hermeneutics, which was forced by the increasing consciousness of historical distance to struggle with the connection between meaning and significance. *Id.* at 303-04. E.D. HIRSCH, VALIDITY IN INTERPRETATION 8, 39 (1967), is largely responsible for posing anew the explication/application question in terms of a text's "meaning," which is the object of "interpretation," and its "significance," which is the object of "criticism."

thermore, literalism oversimplifies the *explicatio*; no explicatory defense of a reading is necessary if the proper reading is always the literal reading, supposedly as apparent to the understanding as the ink marks are to the senses. Similarly, scientific policymaking oversimplifies the *applicatio*; it addresses the subsumption of cases under rules or principles but ignores the textual application which licenses those rules.

If my criticisms of literalism are correct, then literalism is best understood as a failed account of normative hermeneutics. It is an account of normative hermeneutics because it wants to explain how it is that texts have normative guiding power. It is a failed account because it omits the applicative moment, in which the significance of the text for the issue-at-hand is grasped, and reduces the activity of explication into the passivity of obedience. Scientific policymaking, in contrast, is best understood as an account of what the normative hermeneutic fields would look like if we were ever to reject normative hermeneutics: for its alleged authoritarianism (on the literalist model of hermeneutics), for its complexity or obscurity, or indeed for no reason. Because literalism is a failed account of normative hermeneutics, while scientific policymaking is an alternative to normative hermeneutics,¹¹ this Article does not stand in the same relation to the two models. I criticize literalism because its picture of normative hermeneutics is oversimplified and descriptively inadequate, and because the ethical offensiveness of that oversimplified position seemingly discredits normative hermeneutics itself. I do not criticize scientific policymaking, either in constitutional law or in its theological or literary-critical counterparts,¹² since it is less a misdescription of normative hermeneutics than an alternative to it.

Between literalism, the *reductio* of *explicatio*, and scientific policymaking, the *reductio* of *applicatio*, lie various ways of conceiving of

11. Whether scientific policymaking succeeds as a moral and practical reformation of the normative hermeneutic fields depends on its ability to legitimate the scientifically produced norms. The *aspiration* to such an independent rational legitimation of norms is ancient, and is reflected in Max Weber's well-known typological distinction between legal-rational and traditional authority. M. WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* (1974).

12. Pure natural law theories are the theological counterpart to constitutional law "scientific policymaking." Like constitutional "scientific policymakers," natural law theologians have a comprehensive view that governs norms and their application. Natural lawyers understand their view to be congruent with Scripture, but not necessarily grounded in it. In literary criticism, the movement called the New Criticism, beginning in the 1920's, pursued a self-consciously scientific theory of literary value, grounded in semantics and psychology. See I.A. RICHARDS, *PRINCIPLES OF LITERARY CRITICISM* (1928). The point I wish to make is not that natural law or "new criticism," any more than "scientific policymaking" in constitutional law, is a well worked-out system just waiting to be implemented, but simply that these movements represent ideals or aspirations to which the normative hermeneutic fields have sometimes turned.

the reflective connection between the *explicatio* and *applicatio*, the interpretive and normative moments of normative hermeneutics. In Section B of Part IV of this Article, I will show how certain ideas prominent in recent constitutional theory—conceptualism, originalism, functionalism, and the value-consensus theory—can be evaluated as connecting theories. Like their close cousins in literary criticism and theology (notions such as “poetic genius,” “doctrinal content,” and “narrative”), these constitutional theories offer to tell us what it is about certain texts that makes them both meaningful (able to be understood through interpretation) and significant (entitled to bear upon our life). By comparing these connecting theories across disciplinary lines, we can assist their maturation by exposing the basic questions that brought them into existence, and that it is their mission eventually to resolve.

B. THE STRUCTURE OF NORMATIVE HERMENEUTIC PROJECTS

1. *Normative Hermeneutic Projects and Their Objects*

In this subsection I will briefly introduce certain key notions—normative hermeneutic object, normative hermeneutic project, and worldview—and indicate the work that these ideas will perform in the course of the essay’s general argument. I will say something about how these notions help us to perceive the logic of normative hermeneutics in constitutional law, theology, and criticism.¹³ By “logic,” I mean motivation and meaningfulness, as well as the logic of the practical syllogism. All told, the enterprise is one of locating the *sense* of the reflective connection between interpretation and norm.

“Normative hermeneutic object” is my general name for the object to which certain fields, such as those I am comparing, turn for the normative guidance and reflection that interpretation is expected to elicit.

13. I will employ the terms “theology” and “theological hermeneutics” in a very broad sense, to embrace not only the theoretical but also the practical interpretation of Scripture. Thus, “theology” includes the practical deliberations and reflections of a Christian who pores over Scripture in a time of moral crisis, as well as the constructive proposals of the academic theological ethicist. The rationale for my broad usage is discussed *infra* note 137. Except where context specifies a contrary reading, I will employ “literary criticism” in a comparably broad sense, to embrace not only scholarly criticism but also the general practice of reading and interpreting literature for the sake of broadly normative ends such as insight or experience. “Constitutional law,” similarly, is meant here to include not only what courts do when they adjudicate under, and in relation to, the Constitution, but also what Congress and administrative agencies may do when they look to the Constitution for structural guidance, and what constitutional scholars do when they make proposals about constitutional law. If there is a constitutional laity, comparable to the lay readers of Scripture and literature, then they are included as well.

Sometimes the object of interpretive attention is a written text. As it turns out, it is difficult to ascertain the boundaries of the normative hermeneutic object, whether text, unwritten tradition, or institution, or some combination of written and unwritten objects. The point in calling the normative interpretive object a normative *hermeneutic* object is to throw attention to problems just like the question of boundaries. The general subject of the boundaries and complexity of the normative hermeneutic object is taken up in more detail in Part II of this Article.

This Article argues that the logic and meaning of solutions to such fundamental problems of normative hermeneutic practice as ascertainment of the contents and boundaries of the normative hermeneutic object are provided by the worldviews that motivate that practice. By "worldviews," I mean basic options in the history of ideas concerning human nature and its possibilities. In this essay I will explore three such "worldviews": Martin Luther's theory of justification by faith alone, Matthew Arnold's humanistic perfectionism, and Alexander Bickel's Burkean version of consent theory. My thesis is that worldviews such as these are the "switchmen" that direct hermeneutic practice to the interpretive tracks along which they proceed.¹⁴

The worldviews embody basic motivating normative commitments that make sense out of the engagement with a normative hermeneutic object, and respond to the need for a way of framing and defining that object. Because of the foundational role of the worldviews as basic normative anthropological¹⁵ commitments, it is helpful to think of the normative hermeneutic activity responsive to such commitments as being organized by them into "projects." Thus the interpretation of Scripture, when animated and directed by the Lutheran worldview,¹⁶ is

14. The metaphor of the "switchmen" is borrowed from Max Weber. The passage in which Weber introduced the metaphor is also helpful in explicating the sense of a "worldview."

Not ideas, but material and ideal interests, directly govern men's conduct. Yet very frequently the "world images" that have been created by "ideas" have, like switchmen, determined the tracks along which action has been pushed by the dynamic of interest. "From what" and "for what" one wished to be redeemed, depended upon one's image of the world.

M. WEBER, *The Social Psychology of the World Religions*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 280 (H. Gerth & C. Wright Mills eds. 1946).

15. I am using the term "anthropological" here in its philosophical rather than in its social-scientific sense. Philosophical anthropology is the study of human nature; therefore, "normative anthropological commitments" are deeply held views about the moral possibilities or infirmities of human nature. For an introduction to philosophical anthropology, see L. STEVENSON, *SEVEN THEORIES OF HUMAN NATURE* (1974).

16. Throughout this Article, I use the term "Lutheran" as the adjectival form of Luther's basic theological insight, and not as a reference to any set of denominational practices. As will become clearer in Part II of this Article, the worldviews are insights which have had broad histori-

a normative hermeneutic project: it is a coherent interpretive attitude which executes certain basic normative commitments in hermeneutic practice. The interpretation of Scripture as animated and directed by Luther's understanding of justification by faith alone is not at all the same project as the interpretation of Scripture governed by alternative commitments. I will be especially concerned to depict the logic, meanings, and motives of (1) the theological normative hermeneutic project governed by the Lutheran worldview, (2) the constitutional normative hermeneutic project controlled by Bickelian consent theory, and (3) the literary-critical normative hermeneutic project directed by Arnoldian humanistic perfectionism. I will illustrate the ways in which these projects rest upon quite distinctive answers to the three problems which are fundamental to normative hermeneutics.

2. *Three Problems in Normative Hermeneutics*

I have said that normative hermeneutics is a kind of "practical wisdom," which produces its own theories or rules in the course of its own interpretive activity. That practical wisdom can be regarded as a body of responses to three major problems: (1) the problem of the complexity of the normative hermeneutic object; (2) the problem of textual authority; and (3) the problem of interpretive methodology. The shape of each normative hermeneutic project is determined by the way its motivating worldview addresses these three problems. In this subsection I will introduce the three problems, but not explore them in detail. The first problem—the complexity of the normative hermeneutic object—is the subject of Part II of this Article. A special case of this problem, involving the setting up of what I call the "focal text," that writing paramount in the normative hermeneutic object, is the subject of Part III of this Article. The second major problem in normative hermeneutics, concerning the authority of the text, is the subject of Part IV. In that Part, I make some comments about the problem of interpretive methodology, but in the main that problem must wait to be explored further in a subsequent essay.¹⁷

cal consequences. Sometimes, as with Luther, the insight can be sharply identified with a particular person's thought. More frequently, however, as with humanistic perfectionism and consent theory, the insight has a complex and diffuse intellectual history. I hardly need point out that Arnold and Bickel were not founders of humanistic perfectionism or consent theory, in the same sense or to the same degree that Luther was the founder of the Reformation theological worldview.

17. I have evaluated symbolism as a methodology in legal interpretation in *The Red Bird*, 58 S. CAL. L. REV. 237 (1985), published as part of this Symposium.

Because a normative hermeneutic project is inspired by a worldview to carry out interpretive activity in relation to a normative hermeneutic object, the identity of the normative hermeneutic project and the possible content of its interpretive production are bound up with the task of determining what a certain worldview's normative hermeneutic object really is. In other words, one of the chief ways in which a normative hermeneutic project defines itself is by struggling over the nature and content of its normative hermeneutic object.

In its most inclusive and ambitious form, a normative hermeneutic object may be the totality of what I call a "deposit": the potentially meaningful strata laid down either by an extraordinary event (a revolution, the founding of the state, or the redemptive ministry of a savior) or by the slow sedimentation of human wisdom (the evolution of culture). Hence one can speak of "the deposit of faith," "the deposit of the founding of the state," or "the deposit of culture." In each case, the deposit can be understood as a formation of potentially meaningful lore whose vastness must be appreciated on a geological scale of time and distance.

Like the ore in a rich mineral deposit, the lore in a rich meaningful deposit is ordinarily too vast to be staked out by any one project. No project in our society is big enough to take the whole deposit of culture as its object.¹⁸ Thus, smaller claims are staked out within the cultural deposit. Literature is one such claim; it is a normative hermeneutic object which in one sense is simply part of the larger mining of cultural meaning, but in another sense is a marked-off project with its own interpretive institutions (Literature departments, journals) and texts ("Literature"). Of course, the precise nature of the subordinate relation of literature to the deposit of culture is established differently by each worldview. One sort of humanism may regard literature as fungible with other stakes in the deposit of culture, so that, to this worldview, it is a matter of indifference whether one interprets literature, plastic arts, or music. Another sort of humanism may take literature to be a necessary (or even a necessary and sufficient) access to culture.

I have said that in the ordinary case, the whole deposit is simply too big to become the normative hermeneutic object of any normative

18. Perhaps the last institution bold enough to claim the entire deposit of culture as its object was the late medieval or early Renaissance university. What made this claim possible was the identification of culture with the retrieval and recollection of the Classics. The exclusionary character of this view of culture—its omission of the self-understanding of heretics, foreigners, infidels, women, and the poor—suggests the inevitably ideological nature of the claim by a project that it takes the whole of culture as its normative hermeneutic object.

hermeneutic project. The extraordinary case is Catholicism, the project which invented the very idea of the deposit. Catholicism takes as its normative hermeneutic object the entirety of what it calls "the deposit of faith."¹⁹ Included in the deposit of faith are Scripture, church traditions, and the church community itself;²⁰ everything set in motion by the life, ministry, and resurrection of Jesus Christ. The hermeneutical struggles by which the various strands of Christianity have defined themselves can be related to each of these three components of the deposit of faith: text, tradition, and institution. As we will see, the conflict between Protestantism and Catholicism was in large measure a dispute over whether Christianity, as a normative hermeneutic project, was to have a simple object (consisting of one focal text, namely Scripture) or a complex object (consisting of a text, a tradition, and an institution).

All normative hermeneutic projects begin with the premise that a deposit has been laid down, to which we must attend, if we are to know what we must do. From that shared starting point, the paths of the projects diverge according to the worldview that sets them on their way. Under some premises it will make sense to take the entire deposit as the object of a project; under other premises, to do so would be either impossible or evil. Under some premises, the object must be a complex relation of text, tradition, and institution; under others, the object must be narrowed to include only a focal text. Therefore, struggles over the complexity of the normative hermeneutic object are experienced as moments of theory in normative hermeneutics, moments when practice depends upon the resolution of practical problems.

The founding of the state is sometimes regarded as laying down a deposit that is and ought to be regarded as a normative hermeneutic object. Thus, in France, the French Revolution provides the definitive analytical tool by means of which all subsequent French political history is understood. English constitutionalism also can be likened to a deposit: a complex deposit like the "deposit of faith," since it includes not only writings but also traditions and institutions.

Thus, the question arises: what is the normative hermeneutic object of American constitutional law? Is it a whole deposit, like the de-

19. Paul (or an author writing in Paul's name) may be alluding to the deposit of faith when he enjoins Timothy to "guard the truth that has been entrusted to you by the Holy Spirit who dwells within us." 2 *Timothy* 1:14.

20. For the relation between the deposit of faith and the concepts of Revelation, Scripture, tradition and Church, see 4 *NEW CATHOLIC ENCYCLOPEDIA* 780-81 (1967).

posit of faith; or is it a claim staked out of a larger deposit, in the way that literature is staked out of the deposit of culture? If the latter view is correct, what is the larger deposit in which constitutional law lies? Is the normative hermeneutic object of constitutional law complex—inclusive of a text, tradition, and institution—or is it simple, consisting solely of a focal text? Questions such as these provide some of the theoretical occasions in which constitutional law determines the nature of the connection it draws between interpretation and normative guidance.

Even where the normative hermeneutic object is simplified by being reduced to a focal text alone, the establishment of the focal text generates problems of great consequence for the shape of the connection between interpretation and norm. In order to understand the connection between *textual* interpretation and normative guidance, we must first know something about what a “text” is. As it turns out, however, the concept of “text” as it operates in normative hermeneutics is so complex that it is not easy to define or describe with precision. When pulling rabbits from hats, one suspects that one is dealing with a rather tricky hat; when pulling morals from texts, one suspects an equally tricky text. The two tricks in the establishment of the focal text concern the problem of which writings to include in the focal text (a problem which theology calls the problem of establishing the *canon*), and the problem of what it means to say that a text *is* a focal text: that it is Scripture, Literature, or Constitution.

As we shall see in Section B of Part II, one thing that is meant when a text is called Scripture, Literature, or Constitution is that the text, as focal text of a normative hermeneutic object, is *authoritative* for the project that takes that object. Indeed, authority is a characteristic imputed to all elements of a normative hermeneutic object, including tradition and institution (in complex objects), by those who engage in normative hermeneutics with that object. But of all the elements of the normative hermeneutic object, the focal text will be the one of most concern in our comparative analysis; and, correspondingly, the sort of authority into which we will need to look most closely will be the authority of the *text*.

What the authority of the text *means* turns out to be quite different for each worldview that we consider. We will see, for example, how in humanistic perfectionism the authority of the text is an empowerment of the interpreter's will, while under Lutheran premises the authority of the text defeats that will. Thus the specific *sense* of textual authority

with which a worldview endows a focal text will carry direct consequences for the moral character of the interpreter's relation to the text.

A worldview, with its implications for the authority of the text, suggests the ultimate point and meaning of interpreting a focal text. Especially when a text is vague, ambiguous, or multivocal, however, one can know *why* one is engaged in normative hermeneutic practice in relation to that text without knowing *how* to carry out interpretation itself. While the worldviews control methodological choices, they are not themselves methods.

The bridge between the "why" and the "how" in normative hermeneutic projects is constructed out of material I call "theories of the location of textual authority."²¹ These theories serve the worldviews by locating within the chosen text its specially authoritative "aspect." These "aspects" or "locations" may include the doctrinal or conceptual content of the hermeneutic object, its narrative sequences, its symbols, the author's intent which it embodies, or some combination of these.²² Once one knows "what to look for" in the text, one has a foundation for the practice of interpretation. All one lacks is a method or tool to facilitate the search. The selection of such a method constitutes the third problem posed by normative hermeneutics. It also provides the means by which each normative hermeneutic project creates unique solutions to the basic task of relating interpretation and norm.

To illustrate the manner in which theories of the location of textual authority provide a bridge between the "why" and the "how" of interpretation, I will study in Section C of Part IV the hermeneutic functions of "narrative" theories, one family of theories of textual authority. The idea of narrative has experienced a renaissance in recent literary-critical theory,²³ especially as a result of new theories of narrative which were produced on the margins of traditional literary criticism, in structuralism²⁴ and phenomenology.²⁵ These developments in turn have stimulated a great deal of interest in Biblical narrative, both

21. My treatment of the "theories of the location of textual authority" is especially indebted to the outstanding work of David Kelsey in D. KELSEY, *THE USES OF SCRIPTURE IN RECENT THEOLOGY* (1975). While I take issue with Kelsey at key points, *see infra* note 137 and text accompanying notes 189-97, his analysis of the role of textual appeals in normative argument remains the authoritative work in the field. It is far more sophisticated than any of the recent treatments of "interpretivism" in the field of constitutional law.

22. *See infra* notes 143-86 and accompanying text.

23. For recent literary-critical treatments of narrative, see *ON NARRATIVE* (W.J.T. Mitchell ed. 1981).

24. *See, e.g.*, T. TODOROV, *THE POETICS OF PROSE* (1977).

25. *See, e.g.*, P. RICOEUR, *THE SYMBOLISM OF EVIL* (1967).

by theologians²⁶ and by literary critics.²⁷ All of this scholarship has influenced the recent discussion of narrative in constitutional theory.²⁸ Despite, or perhaps because of, this fertility in the narrative field, the recent treatments of narrative are sometimes confused about its status in hermeneutic projects. In Section C(1) of Part IV, I show how confusion and ideology result when narrative is made an independent variable in interpretation, rather than a dependent variable controlled by a worldview. In Section C(3) of Part IV, I illustrate the properly subordinate (but still substantial) role that various specific views of narrative may play in executing the commitments of a particular worldview (Bickelian consent theory) as it animates constitutional law as a normative hermeneutic project.

In this subsection, I have identified three problems—the problem of the complexity of the normative hermeneutic object, the problem of authority, and the problem of interpretive methodology—which are highly formative in the life of normative hermeneutic projects. The answers that the projects give to these problems are shaped by the worldviews; in turn, the answers shape the daily practice of normative hermeneutics in the projects. Both the problems and their possible solutions are invented by normative hermeneutic projects themselves, as mediators between interpretation and norm.

Logically, the three problems are interrelated in complex ways. One cannot know why the object is authoritative unless one knows what is in it and roughly what it means; one cannot know what it means unless one knows what is in it and why it is authoritative; and so on. This complexity of interrelation is borne out by the fact that there is no regular historical sequence to the posing of these questions in normative hermeneutic projects. In principle, any of the questions can be raised at any time. Neither these questions nor their possible answers are decreed by any immutable hermeneutical fate. Instead, they are nodal points of debate that the projects have invented in the course of their own self-formation.

26. For the major study of the idea of narrative in the history of Christian theological hermeneutics, see H. FREI, *supra* note 10. The recent enthusiasm for narrative among certain theologians has not always produced work as subtle and careful as Frei's. See S. HAUERWAS, *A COMMUNITY OF CHARACTER* (1981); D. TRACY, *THE ANALOGICAL IMAGINATION* (1981).

27. With the exception of Frei, the theological treatments of Biblical narrative have not been as insightful as recent literary-critical treatments by several of the major contemporary critics. R. ALTER, *supra* note 4; N. FRYE, *THE GREAT CODE: THE BIBLE AND LITERATURE* (1982); F. KERMODE, *THE GENESIS OF SECRECY* (1979).

28. See Burt, *supra* note 7; Cover, *supra* note 7; Perry, *supra* note 7.

3. *Normative Hermeneutics as Rule-Hermeneutics*

I want to acknowledge freely, and rather ruefully, that I have burdened a formidable-sounding subject, normative hermeneutics, with formidable equipment: hermeneutic projects with hermeneutic objects, set in motion by worldviews and implemented by theories of the location of textual authority. Things will get worse before they get better; for we must see how the worldviews mold the shape of the hermeneutic object (by means of concepts such as "canon," "*sola scriptura*," and "deposit") and locate moral meaning in the text (by means of concepts such as "symbol," "genius," various notions of "narrative," and others). I concede that theories other than mine, such as literalism and scientific policymaking, have the petite charm of glass shippers; but for that very reason, they do not come close to fitting the old, gnarled, much-traveled feet of the normative hermeneutic disciplines.

The ways in which the framework of my account of normative hermeneutics differs from literalism are both numerous and apparent. Literalism supposes that the text itself commands that it be read literally, and justifies that command. Normative hermeneutics, by contrast, supposes that what the text *is*—the content of the canon, the relation between text and tradition, and so on—already poses a question whose answer must depend upon the deepest moral commitments. Once the text is established, normative hermeneutics sees the effect of the worldviews in the nature of the text's authority, and in the aspects of the text to which interpretation looks for a realization of that authority.

Metaethics supplies a distinction that may illuminate hermeneutics (which, it will be recalled, is metainterpretation); while literalism is *act-hermeneutics*, my theory of normative hermeneutics is *rule-hermeneutics*. In ethics, act-theories, such as act-utilitarianism or act-agapism, are theories that tell the moral agent always to choose the act that best conforms to the basic moral principle.²⁹ By contrast, rule-theories, such as rule-utilitarianism, are theories that tell the moral agent to live by those *rules* that best conform to the basic moral principle.³⁰ By adapting this distinction to our purposes, we can see why literalism is act-hermeneutics, while my account of normative hermeneutics is an example of rule-hermeneutics.

29. Thus, an act-utilitarian is always to do the act that maximizes utility; the act-agapist is always to do the act that is most loving.

30. Thus, a rule-utilitarian is always to follow the rules that, on the whole, best serve utility.

In theories of act-hermeneutics, one always adopts the interpretation that best serves the underlying hermeneutical principle. For literalism, that underlying principle is literal meaning; hence literalism is an act-hermeneutical theory because each distinct act of interpretation (each reading of a word, line, or text) always must conform to the principle of literal meaning. Theories of rule-hermeneutics, by contrast, require us to adopt the best interpretive rules, and to govern our individual acts of interpretation by means of those rules. The rules in any rule-hermeneutical theory are the accounts of the hermeneutic object, of the canon, and of textual authority. Once the rules have been enacted, as the best answers that the worldviews can provide to the fundamental problems that hermeneutical practice always encounters, then these rules are in force.

The distinction between act-hermeneutics and rule-hermeneutics also helps us to see the differences between normative hermeneutics and scientific policymaking. Scientific policymaking is act-hermeneutics. Even if the ethical theories in scientific policymaking's "comprehensive view"³¹ are ethical rule-theories (like rule-utilitarianism), scientific policymaking always governs each act of interpretation by the hermeneutical principle: let the interpretation conform to whatever is ethically required by the master ethical principle (in this case, rule-utilitarianism). For normative hermeneutics, however, the concern is for the structural features of hermeneutics that render it a workable and meaningful way to carry out moral reflection within a moral project. The rule-hermeneut who has, for example, accepted a certain account of why the text is authoritative, is subject to the gravitational pressures of that account. For the scientific policymaker, the text is a platform from which rules are launched with a minimum of thrust; while for the normative hermeneut, the authority of the text exerts a moral gravity that can be counteracted only by an extraordinary ethical counterforce.

There is a corresponding difference between the "comprehensive view," which controls scientific policymaking, and the "worldview," which controls normative hermeneutics. A "worldview," as we shall see later in detail, stresses the features of a philosophical anthropology that address basic questions about human competence to know the good. A worldview stresses these epistemological features because its main task is to set up a permanent human institution—an interpretive institution—that will mediate our knowledge of the good. The comprehensive view adopted by a scientific policymaker, by contrast, is al-

31. See *supra* note 3. A "comprehensive view" is the basic ethical theory, such as Kantianism or Utilitarianism, which the scientific policymaker seeks to implement.

ready a theory of the good. Utility, love, and autonomy—the cornerstones of the major comprehensive views—are not theories about the institutions through which our ethical understanding evolves, but theories about the end toward which it is evolving.

This suggests the third and most important difference between scientific policymaking and normative hermeneutics. In scientific policymaking, interpretation of the text is ultimately a form of window-dressing, since we already know independently what we ought to do. We have nothing to learn from the text. The whole point of normative hermeneutics, however, is that there *is* something to be learned from the text. We do not learn from the text through a direct encounter with commands, as literalism would have it, but through participation in a complex project shaped to the task by convictions about human possibilities and limits. The “rules” that give each normative hermeneutic project its shape—“rules” such as the limits of the canon, the content and complexity of the normative hermeneutic object, the identity of the interpretive community and of the authoritative interpreter, and the meaning of authority and its location in the text—regulate the ordinary practice of normative hermeneutics. More importantly, these “rules” make possible the profound and saving crisis which neither the literalist nor the scientific policymaker can experience: the capacity of the text to instruct so deeply that it revises the very convictions which give form and meaning to the project itself.³²

II. THE NORMATIVE HERMENEUTIC OBJECT

A. THE COMPLEXITY OF THE NORMATIVE HERMENEUTIC OBJECT

1. *Simple and Complex Objects*

I call texts such as the Bible or the Constitution “focal texts” since they are the focus of normative hermeneutic effort in their fields, and since they bring the other elements of the normative hermeneutic object *into* focus. These texts may or may not exhaust the content of the normative hermeneutic object in their fields. I will call a “simple object” an object consisting solely of a focal text. A “complex object” consists of some combination of text, tradition, and institution.

32. For example, the humanist who is brought to the study of literature by humanist premises, and who on the basis of those premises has acquired the traditional skills that are the key to meaning in literature, discovers through reading the fiction of Sartre that those humanist assumptions must be revised in certain ways.

Christian theology enacts the issue of simple versus complex object as an explicit struggle between the Catholic "deposit of faith" (a complex object staking out an entire deposit) and the Protestant doctrine of *sola scriptura* ("Scripture alone"). The deposit of faith, as we have seen, is virtually the prototype of the complex deposit. In addition to the focal text (the Bible), the deposit of faith includes traditions both written (the writings of the Church Fathers, which reflect the views and practices of the early church) and nonwritten (liturgical and sacramental rituals). The Church itself is a part of the deposit of faith. As such, the Church occupies two distinct roles: that of *reflexive community* and *authoritative interpreter*. In its role as reflexive community, the Church is the community (called "universal church" in Catholic ecclesiology) whose moral and spiritual identity is at stake in normative hermeneutical reflection. In Catholic teaching, the community that is the reflexive counterpart to the normative hermeneutic object, and that comes to understand itself through hermeneutical reflection, is as broad and inclusive as humanity itself; it is "universal." By contrast, the Church as authoritative interpreter is more narrowly defined as the Pope and the teaching office: still part of the deposit of faith (because instituted by Christ) but tending to become the interpreter of the deposit as well as being a *content* of that deposit.

The Protestant idea of *sola scriptura*, which is the subject of Section A(1) of Part III, rejects the Catholic complex object, the deposit of faith, in favor of a simple object, consisting of the focal text (the Bible) alone. Clearly, a great deal of practical interpretive weight hangs in the balance in the ancient argument between deposit of faith and *sola scriptura*. Traditionalism in interpretation, for example, is fostered by placing tradition within the ambit of the interpretive object itself.

The theological conflict between deposit of faith and *sola scriptura* has served as a prototype for struggles between complex and simple objects in other fields. In constitutional law, a major part of that struggle is well captured in Thomas Grey's question, "Do we have an unwritten Constitution?"³³ The unwritten Constitution might include certain traditions (constitutionalism; "Anglo-Saxon traditions of decency")³⁴ or institutional practices (such as those of the Supreme Court). Additionally, the normative hermeneutic object of constitutional law, if conceived as a simple object, might well include written texts other than the constitutional document, such as the Federalist Papers or the Declaration of Independence.

33. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

34. See *infra* text accompanying notes 116-25.

Literature—whose focal text includes the writings of Shakespeare, Milton, and others—is quite *generally* regarded as only a part of the larger deposit of culture. But this consensus rests on a normative platform: a sense of what it means to be cultured or educated. That particular vision regards the focal texts of Literature to be but one of several available *means* to a larger normative end articulated by a worldview. Hence, as we compare our three fields, the logic of the issue of simple versus complex objects is the same in all three cases; in every case, resolution is worldview-dependent. That Literature is but a part of culture depends on a certain view of how one ought to learn about serious things, just as the controversy over the deposit of faith depends on a clash of such views.

Figure 1, *Complexity of the Normative Hermeneutic Object*, summarizes the discussion to this point, and schematically depicts the various items that may be enlisted in the normative hermeneutic object by order of a worldview.

2. *Problems in the Focal Text*

Considered on its own, as the dominant element of the normative hermeneutic object, the focal text gives rise to two kinds of controversy. One controversy concerns the extension of terms such as Scripture, Literature, or Constitution.³⁵ The other controversy concerns the intension of these terms.³⁶

To illustrate the problem of extension, let us consider Scripture. The question here is: What texts count as Scripture? Theology poses this question in its own terms: What is in the *canon*? Throughout this Article, I will follow the lead of the normative hermeneutic fields by borrowing the idea of canon to refer generally to the extension of the focal text. A writing is *canonical* if it is in the range of texts that are to count as Scripture (in theology), Literature (in criticism), or Constitution (in constitutional law).

35. The extension of a term is, roughly, what it denotes: the range of items that it covers. Thus, in normative hermeneutics, the question of the extension of a term such as Scripture asks which texts are being referred to in the term Scripture; which texts count as Scripture.

36. The intension of a term is its connotation: its sense, as opposed to its reference. See *supra* note 35. Thus, the problem of the intension of a term such as Scripture is the question of what it means to say of a text that it is Scripture. Granted that we are denoting a certain text when we say "Scripture," what do we mean by calling that text "Scripture"?

Figure 1: Complexity of the

NORMATIVE HERMENEUTIC OBJECT						
FOCAL TEXT		TRADITION		INSTITUTION		
EXTENSION: CANON	INTENSION: PROPERTIES OF FOCAL TEXT	WRITINGS	CUSTOMS AND EVENTS	REFLEXIVE COMMUNITY	AUTHORITATIVE INTERPRETER	
DEPOSIT OF FAITH	The Bible	(a) Authority for (b) The identity of (c) A community	Liturgy	The Universal Church; Humanity	The Pope and the Teaching Office	
	LITERATURE (part of the larger deposit of Culture)	(a) Authority (b) Identity? (c) Community?	"close reading"; Shakespeare festivals? Poetry readings?	(Western) Civilization	The English Departments	
	"The Constitution" (Document); Case law?	(a) Authority (b) Identity? (c) Community?	"Anglo-Saxon Traditions of Liberty" Constitutionalism	The United States as a Political Community	Supreme Court	
CONSTITUTION (part of the larger deposit of the founding of the State?)		Federalist Papers? Bill of Rights? Gettysburg Address? Case law?				

The problem of intension is the problem of what is *meant* by calling certain texts Scripture, Literature, or Constitution, in answer to a question such as: Why are these texts in the canon? The question of intension is the question of which properties are imputed to a text when that text is called Scripture, Literature, or Constitution.

These two problems concerning the focal text function as tipping points for the worldviews in their management of hermeneutic projects. While worldviews do not create the category of focal text, or the two problems of extension and intension, they do focus on these problems as links between interpretive and normative issues. How worldviews address the extensional issue, the problem of canonicity, is the subject of Section B of Part III, while the meaning of terms such as Scripture, Literature, and the Constitution is the subject of Section B of Part II.

3. *Problems in Tradition*

Except in those projects that have been most radically concentrated and simplified under the pressure of *sola scriptura*, normative hermeneutics wrestles with certain problems concerning that element of the normative hermeneutic object commonly called "tradition." These problems concern the status of traditions within the logic of normative hermeneutic projects. Any tradition can be invested with the status of being canonical, quasi-canonical, or mediating. I will briefly define these three statuses, and explain why they matter in the logic of normative hermeneutics.

For written traditions—as an example, let us take the tradition of critical essays, including those of Coleridge, Arnold, and Eliot—perhaps the simplest move that one can make is to include them in the canon of the focal text. Rendering the written traditions canonical has the consequence of subjecting them to the same sort of devoted scrutiny as the other canonical texts. This process may be what has happened to some constitutional case law: key cases such as *Brown v. Board of Education*³⁷ are canonized, while per curiam opinions are not. The same situation is found in Judaism. The Halakhic Midrashim, early commentaries on the Mosaic law, constitute an independent canon of teaching texts and a complement to the canon of the focal text (Scripture).

It seems important, however, to hold fast to the rigors of canon. It must be denied that a close approach to canonical status is the same

37. 347 U.S. 483 (1954).

thing as canonical status itself. There is a difference between the three cases I have mentioned here. *Brown v. Board of Education* is arguably actually in the constitutional canon, while the critical tradition is only "almost in" the literary canon. And Midrash, for example, is definitely *not* in the canon of Hebrew Scripture.

The point I want to make here is somewhat complex, but what makes it complex is so paradigmatic for the logic of normative hermeneutics that it is worth developing at some length. On the one hand, the meaning of "canon" is the same in all three fields, and in each project that we are considering. The canon is always the extension of the focal text. But on the other hand, both the consequences of canonicity and the importance of policing the borders of the canon vary enormously among the projects. The reason for this variation is that projects taking simple objects have more at stake in the canon of the focal text than do projects taking complex objects. Furthermore, the boundaries of the canon are less significant where the project that takes that canon is simply one of several mining the same deposit, and more significant where the aims of a worldview succeed or fail on the strength of one project alone. The upshot of these dynamics, as I am about to illustrate, is that while the question of whether a tradition is accepted into the canon is always important, it is not always important in precisely the same way or to the same degree.

Let us begin by comparing the importance of the boundaries of canon in Protestantism and Catholicism. Because Protestantism takes a simple object consisting only of a focal text (the Bible), under Protestant theological conditions the canon is necessary and sufficient to the ends for which hermeneutic practice is initiated. In Protestantism (as set up by Luther), whatever one needed to know could be found in the canonical texts and *only* in the canonical texts. Hence in Lutheran Protestantism, the canon is not only the extension of the focal text (general theoretical definition) but the necessary and sufficient hermeneutic object (function which the canon performs under the Lutheran worldview).

Because Catholicism engages a complex object (not just text but also tradition and institution), its canon, for theological reasons which will be considered later, is not necessary to the ends for which hermeneutic practice is initiated. One can therefore discover what one needs to know through the offices of the Church, even if one has no access to Scripture (as in a missionary context). On the other hand, the canon may be sufficient under Catholicism (sufficient cognitively, that is,

although probably not ritually, since for salvation purposes the mediation of the sacerdotal priesthood is required). Hence in Catholicism the canon is still the extension of the focal text (as it is in Protestantism), but it no longer carries the same practical hermeneutic importance.

The situation in literary criticism renders the canon even less important than in Catholicism. This result depends on the fact that Literature is not the only project that mimes the deposit of culture in pursuit of humanistic ends. Since the ends of the humanistic worldview can be met by music or philosophy, then *with respect to the worldview* the canon of Literature is not necessary. Moreover, under the specific strictures of Matthew Arnold's version of humanism, as we will see, Literature alone could not be regarded as sufficient; for Arnold insisted that the humane value of culture could be realized only by well-rounded study. For Arnold, exclusive devotion to any one canon, including the literary canon, would be too constricting to lead to human perfection. Therefore the literary canon is neither necessary nor sufficient to the ends of the humanistic worldview as taught by Arnold.

Of course, we can adopt a different perspective from which to estimate the importance of the canon in Literature. From the standpoint of literary study as a specific hermeneutic project, the canon is extraordinarily important. The specific work of the literature-interpretive project functions in part by a critical policing of the literary canon.

The position and function of the canon in constitutional law is so complex and uncertain that very little can be said about the matter here; we must wait until the comparative analysis of Part III. But on the basis of the Protestant, Catholic, and literary illustrations just presented, we can see that while the question of admission into the canon is always important, it is not always important in the same sense or to the same degree. The importance of the canonical boundary cannot be formalized, since this importance varies in each different hermeneutic project.

Since the question of whether a certain tradition is or is not in the canon *can* be of great importance under certain conditions, we must be careful not to employ the term "canon" loosely or analogically. Midrash, and the critical essays of Eliot, Arnold, and Coleridge, constitute what must be called a "quasi-canonical written tradition." Nonetheless the authority of Midrash as a quasi-canonical written tradition in Jewish hermeneutics, and of the great critical essays as a quasi-canonical written tradition in literary criticism, is unmistakable. In comparing the authority of quasi-canonical written traditions to the importance of

the texts in the canon, all that one can say as a general matter is that the relative weights depend on the structure and complexity of the normative hermeneutic object and ultimately on the worldview which animates interpretive practice in relation to that object.

Unwritten traditions, such as liturgies, norms of reading, or value expectations, which are authoritative within hermeneutic projects but are not in the extension of the focal text, should also be described as quasi-canonical. This usage permits us to capture some rather subtle and extremely important moves that are made in normative hermeneutics. In Section B of Part III, for example, we will see how certain provisions of the Constitution have been understood to refer the judicial imagination to a tradition: the alleged Anglo-Saxon or English-speaking tradition of decency or fairness. Since several of the cases which created this understanding of the Constitution are among the most commonly quoted, and because these cases purport to discuss the fundamental value-relatedness of the Constitution, the cases that refer to tradition in this way seem to be more than just quasi-canonical tradition. They may in fact be canonical: part of the focal text itself.

By contrast, the supposed Anglo-Saxon or English-speaking tradition of decency to which these arguably canonical cases refer is at best only quasi-canonical. It is quasi-canonical if the Constitution is viewed as a complex normative hermeneutic object containing not just a focal text but also a tradition of Anglo-Saxon decency. It is not even quasi-canonical if the Constitution is viewed as a simple object. Much of the normative struggle over tradition, in projects that have not managed to oust tradition altogether from the normative hermeneutic object through radical *sola scriptura*, involves the effort to demote traditions from the canonical or quasi-canonical status to a mediating role. In a mediating status, the tradition is simply an interpretive aid, or venerable method. Thus, Luther, as we shall see, accepted the writings of the Church Fathers as tradition, but demoted the tradition from quasi-canonical status (which it had enjoyed in the Catholic system) to mediating status. Canonical Scripture might be read "in the light of" the writings of the Church Fathers. The Church Fathers, however, may be read only as a means to the interpretation of Scripture, never as a normative hermeneutic end-in-itself.

4. *Problems in Institution*

The two sorts of institutions that may participate in the complexity of the normative hermeneutic object are the reflexive community and

the authoritative interpreter. We will see in the next subsection how normative hermeneutic projects are community-oriented in a very basic way. The person who engages in normative hermeneutics is making contact with the moral identity of some sort of community. That contact has two sides, a discovery and an enforcement. The community that is discovered in the normative hermeneutic object, the community that understands itself by virtue of that object, is the reflexive community. The community that enforces that self-understanding, through institutional authority legitimated by the object itself, is the authoritative interpreter.

In principle, the worldview itself specifies the reflexive community and authoritative interpreter in each project. Thus Catholicism claimed that humanity itself was the community that would learn its nature and destiny from the deposit of faith, while certain Protestant churches were much more concerned with the community of the elect, as in Calvinism, or of the sect, as in Anabaptism.³⁸ The basic anthropological commitments which generate *sola scriptura* (restricting the theological normative hermeneutic object to its focal text, the Bible) call for interpretive authority to be invested in the church community which hears the preached word of God. By contrast, the commitments that generate the deposit of faith as the complex normative hermeneutic object of Catholicism call for interpretive authority to be vested at the apex of the church hierarchy.

The moral ideal for which normative hermeneutic projects reach is a reflective ideal; the community ought to be able to make use of its hermeneutic object to improve its understanding of itself, and to realize the moral aims embodied in the motivating worldview. The hermeneutic object, ideally, is a moment in reflective communal self-understanding. Everything conspires, however, to frustrate this ideal. The hermeneutic object may become a dead letter, a placeholder or symbol for the community, rather than a means in a collective self-formative project. The reflexive community may become reified into images of actual community, images which deny the realities of intergroup conflict. I discuss this problem later in terms of ideology and of the ideological malfunctions of certain popular ideas about "narrative." The authoritative interpreter who looks into the crystal ball of the norma-

38. The classic comparison between the universalism of the Catholic church and the particularism of Protestant church forms is E. TROELTSCH, *THE SOCIAL TEACHING OF THE CHRISTIAN CHURCHES* (1960).

tive hermeneutic object may deny all visions save those which serve to legitimate the power of the interpretive institution.

B. THE GRAMMAR OF THE CONCEPTS SCRIPTURE, LITERATURE, CONSTITUTION

While the term "Scripture" refers to a text, it does not simply *mean* "text." David Kelsey observes that the meaning of "Scripture" implicates notions of tradition, community, identity, and authority.

1) Part of what it means to call a text or set of texts "scripture" is that its use in certain ways in the common life of the Christian community is essential to establishing and preserving the community's identity. That throws some light on the grammar of the concept "tradition" and its relation to "scripture."

2) Part of what is said in calling a text or set of texts "scripture" is that it is "authority" for the common life of the Christian community. "These texts are authority for the church's common life" is analytic in "These texts are the church's scripture."³⁹

"Scripture," in short, is not the name of a text. "Scripture" does have a textual referent, but the term does more than refer to a text. It conveys the idea that the text to which it refers is authoritative for the identity of a community, and for those features of the community's moral life in which its identity is at issue. These ideas, built into the concept of Scripture, require us to consider Scripture as the focal text of a normative hermeneutic object. As such, Scripture is a text which has been invested with certain properties. It is not to be expected that all normative hermeneutic objects, or all focal texts, will exhibit all of these properties. It should also be clear that Scripture *qua* focal text of a normative hermeneutic object is still a text, albeit an invested text; it is narrower than "the deposit of faith," and does not include items such as tradition or church in its embrace. Hence it is not in extension, but in intension, that the concept "Scripture" elaborates the textuality of the hermeneutic object.

Theological usage enjoys a differentiated terminology, which nicely distinguishes the several perspectives from which the focal text can be regarded. Theology raises the question "Which writings make up the focal text?" by asking "What's in the *canon*?" Theology then answers that question by saying, "The Bible is in the canon," or "The Bible is the canonical text." To the question, "Why is the Bible in the canon; what special properties does the Bible have?" theology answers:

39. See D. KELSEY, *supra* note 21, at 89.

"The Bible is Scripture." Hence theological discourse uses three different terms to convey three different perspectives on the focal text: *canon* (the extension of the focal text), *The Bible* (the content of the extension), and *Scripture* (the special properties of the focal text). This terminological differentiation is depicted in Figure 2.

This linguistic differentiation allows us to see that analytical approaches that may be valid in relation to the Biblical texts may not be valid in relation to Scripture. For example, the Biblical texts may be analyzed archaeologically, philologically, as literature, or as evidence of certain grammatical structures common to Semitic languages. But the existence and applicability of such interpretations and explanations of the text do not alone make these analyses interpretations of Scripture. An analysis qualifies as an interpretation of *Scripture*, given the meaning of Scripture, only if it furthers the task for which Scripture was set up as the focal text of a normative hermeneutic object. This statement is true analytically. If Scripture is that which is to be interpreted to both capture and guide the development of collective identity, interpretations not oriented in the requisite normative direction are not interpretations of Scripture. Consider, for example, a literary analysis of Biblical narrative. Neither the attention to narrative nor the employment of literary tools for the understanding of narrative suffices to render the analysis an interpretation of Scripture. Similarly neither establishes that the analysis is not an interpretation of Scripture.⁴⁰ If the analysis addresses the community by showing how the narrative structure executes the hermeneutic object's authority for the community's identity, then the analysis is an interpretation of Scripture.

It should be obvious that the concept of Scripture selects only certain of the various interpretive and explanatory interests. It rules out no *methods* in the strict sense, and licenses no particular *outcomes*. What is of importance in the concept of Scripture is the way in which

40. F. KERMODE, *supra* note 27, at 15.

A given writing may not be a focal text for any normative hermeneutic project; it may be a focal text for a normative hermeneutic project; it may be a focal text for both a normative and a non-normative hermeneutic project; or it may be a focal text for several quite different normative hermeneutic projects. At present, Biblical writings illustrate the latter possibilities. The Biblical texts are sometimes interpreted within disciplines, such as philology, that may be hermeneutic but are not normatively hermeneutic. At the same time, they are focal texts for theological study (where they serve as Scripture) and also for literary criticism (where they serve as Literature). Critics who pursue the latter sort of study, the so-called "Bible as literature," typically renounce theological aims but embrace the normative aims of literary study.

Figure 2: Comparative Differentiation of Terms for the Focal Text

	EXTENSION OF THE FOCAL TEXT	WHAT IS IN THE EXTENSION?	WHY IS IT IN THE EXTENSION? BECAUSE IT IS . . .
THEOLOGY	The Canon	The Bible	SCRIPTURE
LITERARY CRITICISM	LITERATURE ¹	<i>Paradise Lost</i> , <i>Hamlet</i> , <i>Ulysses</i> , etc.	LITERATURE
CONSTITUTIONAL LAW	(The) CONSTITUTION	(The) CONSTITUTION ²	(The) CONSTITUTION

¹Literary criticism sometimes borrows the term "canon" from theology.

²One of the evils of the undifferentiated terminology in constitutional law is that it hides the question of what is in the extension of the focal text. Aren't some cases, for example, in the canon?

authority and community identity-orientation are analytic to it. Not the power but the structure of the concept matters here. There are a thousand theologies, and the *concept* of Scripture certainly does not adjudicate between them. Appeals to Scriptural passages, by contrast, are made in adjudicative contexts, as when a believer seeks guidance in a moral dilemma, or when a theologian assesses the merit of competing theological proposals. The concept of Scripture helps us to understand the sense in which the textual appeals that might be made in such contexts are interpretations of a normative hermeneutic object.

The grammar of the concept "literature" is in major respects the same as that of Scripture. Literature is a focal text of a normative hermeneutic object. Of course, with respect to Literature, the sense of "normative" will embrace both ethical and aesthetic expectations, while the normativity of Scripture includes the ethical and spiritual.⁴¹ Literature is frequently thought to contribute to moral reflection and deliberation, although perhaps not in quite the same way that adherents look to Scripture for moral guidance. The community in relation to which Literature acts as an operator—its "reflexive community"—is in the first instance a community of the educated and "cultured," which in our time has special reference to those educated in universities. But Literature, like Scripture, is regarded by its adherents as also having a somewhat larger social and historical target. Literature is generally the custodian of a "literate" identity, much as Scripture is the custodian of the "universal church." It is interesting, then, that the concept of Literature shares with the concept of Scripture not only the element of authority (although a quite different *sense* of authority), but also elements of community and identity.

Literary language, however, is less differentiated than theological language, in three respects. First, literary language lacks a distinct term for the extension of the focal text. Literary discourse marks the extension by using the very same term, "Literature," which gives the intension of the focal text. Theological discourse is clearer about the distinction between extension and intension; it calls the former "canon," and the latter "Scripture." Literary discourse, in its undifferentiated form, constantly runs the risk of saying that a text is Literature (extension) because it is Literature (intension). It avoids this confusion at times by borrowing the concept of "canon" from theological discourse.

41. For my defense of employing the term "normative" to cover the aesthetic and spiritual as well as the ethical, see *supra* note 4.

The second difficulty is related to the first. Theology has a crisp way of giving the *content* of the canon: "What's in the canon? The Bible." This answer is seemingly value free and noncontroversial. Actually the question of what is included in the canon has engendered many answers. To the common question, "What's in the canon?" however, theology's answer ("The Bible") is more complete and self-contained than either of the two answers that literary discourse can make: "Literature," or "Paradise Lost, Hamlet, Ulysses, etc."⁴²

The third difference between theological and literary usage concerns the capacity to distinguish clearly between the focal text and the normative hermeneutic object as a whole, which might contain more than just the focal text. It is understood in theology that "Scripture" is the focal text. As such, the concept Scripture is nonhegemonic: it does not insist of its own force that Scripture is the sole incumbent of the normative hermeneutic object. The existence of a distinct term, "deposit of faith," makes possible a rather clear debate in theology over theology's proper normative hermeneutic object. What is debated is whether the object contains "Scripture alone" (*sola scriptura*) or Scripture, tradition, and institution (deposit of faith). By contrast, the term "Literature" seems to suggest, in hegemonic fashion, that the only proper element in the literary-normative hermeneutic object is the focal text. The matter, however, is open for debate; it is one of the self-definitional issues of literary-normative hermeneutic theory.

Constitutional law is more difficult still to analyze, since here the terminology is completely undifferentiated. Constitution is in the first place the name of a text; it is parallel in this regard to *The Book of Job* or *Paradise Lost*. But does the concept of Constitution also embody normative claims comparable to those that we have found in the concepts of Scripture and Literature? As employed by at least some constitutional scholars, the idea of Constitution does seem quite congruent in formal structure to the ideas of Scripture and Literature. Thus Monaghan holds that "[t]he authoritative status of the written [C]onstitution is . . . an incontestable first principle . . . not in need of further demonstration."⁴³ Perry takes it as "axiomatic" that the text is

42. One way of putting this is that literary criticism has no way of answering the question "What's in the canon?" without revealing its inability to articulate *why* some things are in the canon and some are not. Perhaps the most telling test proposed for the literary canonicity of a book is the criterion of whether or not one would feel humiliated to confess not to have read it. F. KERMODE, *supra* note 27, at 5.

43. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 383-84 (1981). *See also*

authoritative.⁴⁴ Perry goes on to suggest that the Constitution's authority is relative to a community whose identity it shapes and challenges.⁴⁵ Thus Perry gives the concept Constitution much the same content that others have given Scripture and Literature.

Absent careful studies in the uses of Constitution in constitutional law, comparable to Kelsey's research in the uses of Scripture in theology, it would be wrong to generalize that most constitutional lawyers use the concept of Constitution the way that Monaghan or Perry use it. At the same time, however, what people do with the Constitution (i.e., the appeal they make to it in the course of their constitutional arguments) is more important than what they say about it. Thus, I am more confident in the claim that Constitution is treated as the focal text of a normative hermeneutic object than I am in the notion that elements such as "authority," "community," and "identity" are analytic in the concept of Constitution.

Yet it is instructive to compare the undifferentiated state of "Constitution" to the differentiated state of "Scripture." In the first place, constitutional discourse is like literary discourse (but unlike theological discourse) in that it has no special term for the normative hermeneutic object as a whole. Therefore the term "(the) Constitution," which refers to the focal text, operates hegemonically to foreclose discussion of whether the constitutional normative hermeneutic object is a complex object, containing more than the focal text.

Like literary criticism, constitutional law lacks any special term for the extension of the focal text. Instead, the extension of the focal text is called "(the) Constitution." Since, however, constitutional law employs the very same term to give the special (intensional) normative qualifications of the focal text, constitutional discourse typically can offer only the confused proposition that "The reason it's [in] (the) Constitution [extension] is that it's (the) Constitution [intension]." Like literary criticism, constitutional law cannot make any statement comparable to theology's "It's in the canon [extension] because it's Scripture [intension]."

Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation*, 58 S. CAL. L. REV. 603 (1985).

44. Perry, *supra* note 7, at 302 [Pages I]. Perry says that he agrees with Monaghan that the constitutional text is and should be "authoritative for constitutional decisionmaking." *Id.* at 304.

45. *Id.* at 307, 313 [Pages I]. Perry is explicit in claiming an analogy between constitutional authority and Scriptural authority as understood by Kelsey. *Id.* at 303. He finds the analogy between constitutional and scriptural interpretation to be "considerably more illuminating" than the analogy between constitutional and literary interpretation. *Id.* at 313 [Pages I].

Unlike literary criticism, constitutional law has been slow to rectify this primitive state by borrowing the concept of canon.

Capping the "Who's on first?" comedy of constitutional discourse is its way of articulating and answering the question, "What's in the extension?" Theology wrestles with this problem by asking "What's in the canon?" and answering, "The Bible is in the canon." Constitutional law asks "What's in (the) Constitution?" and answers, "(The) Constitution is in (the) Constitution." In sum, constitutional law explains itself by affirming that "(The) Constitution is in (the) Constitution because it is (the) Constitution."

Constitutional law experiences extraordinary difficulty in giving an account of itself that rises above mere reference to the object, the document, on which its attention is fixed. In its everyday practice, constitutional law makes use of materials other than the Constitutional document: case law, the Federalist Papers, the reports of the Philadelphia Convention and others.⁴⁶ But the document-fixation obstructs the effort to explain the status of these materials. Theology experiences no comparable difficulty. Perhaps the reason for this difference in the sophistication of the two fields should be sought in the fact that while Scripture proclaims the supremacy of God, the Constitution proclaims the supremacy of itself. The supremacy of God always acts to frustrate the inclination to make Scripture a fetish. Perhaps, under the guidance of certain democratic worldviews, notions of sovereignty or of moral reality can serve a comparable function, and bring constitutional law to self-consciousness by freeing it from its document-fetishism.

In conclusion, let us identify the sort of questions we need to be able to ask just about case law. First, we want to know if constitutional case law is *canonical*. (This is less confusing than asking if it is "in (the) Constitution," or "constitutional.") Second, we need to know what it is about certain case law that renders it canonical. Third, we need to know whether case law is strictly canonical (in the focal text itself), or quasi-canonical (in the larger domain of the Constitution as a complex object).

46. Constitutional law does employ, of course, the general legal concept of "precedent." That concept could be taken to include all written contents of the constitutional normative hermeneutic object other than the focal text. Or is precedent a part of the focal text?

III. THE SETTING UP OF THE FOCAL TEXT

A. THE ETHICS AND POLITICS OF TEXTUAL RESTRICTIONS

1. Sola Scriptura

The setting up of the normative hermeneutic object, and its focal text, is controlled by the worldviews. I will discuss three worldviews: (1) Reformation theology, which is as broad as a world-historical event and as definite as Luther's theory of justification by faith alone; (2) humanistic perfectionism, which is as broad as the modern *Zeitgeist* and as narrow as the literary views of Matthew Arnold; and (3) consent theory, which can be as broad as constitutionalism itself or as definite as Bickel's reworking of Burke. I will compare the roles that these worldviews play in setting up Scripture, Literature, and Constitution as focal texts of hermeneutic objects. I will pay particular attention to the question of how the worldviews have pushed the hermeneutic objects toward simple structure (solely a focal text) or complex structure.

Given the sense of Scripture as "the church's texts," these texts were regarded from the very earliest period as hermeneutic objects.⁴⁷ In the early days of the church, reference to these objects gave the Christian community a sense of identity, since it linked the community (through the successive stages of Israel, exilic community, saving remnant, Christ's apostles, earliest Christian communities, etc.) to a well-known normative pattern. Scripture was authoritative for the community because it told the community's story, tracing it back to sacred models.

Yet there was never any inevitable reason that Christianity or Christian theology should take shape as a normative hermeneutic project. Christian ethics, for its part, has always hovered indecisively between being a hermeneutic project with Scripture as its focal text or a more positive moral science. Likewise, constitutional law in some periods emphasizes its hermeneutic characteristics, but in other periods (or under other pressures) it looks like a form of scientific policymaking. Far from insisting that theology or constitutional law is inevitably hermeneutic, I want to locate the pressures or incentives that make these fields look more (or less) like hermeneutic projects.

47. During the first two centuries after Christ, Christians who spoke of "Scripture" meant the books of what later came to be viewed as the Old Testament. The process by which certain Pauline epistles, and some gospel accounts, came to be regarded as Scripture was long and complex. See Grant, *The New Testament Canon*, in 1 THE CAMBRIDGE HISTORY OF THE BIBLE 284, 294 (1970).

Throughout the history of Christianity, various factors have operated to limit the role of Scripture as a focal text. First, the materials that came to be regarded as Scripture were for a long while undifferentiated from a vast quantity of oral and written traditions concerning the sayings and deeds of Jesus and the Apostles.⁴⁸ Second, these traditions were not always regarded as on a par with the Hebrew Scriptures.⁴⁹ Third, the Catholic attitude toward Scripture stressed its congruence with the traditions of the Church, the exposition of the Church Fathers, or reason.⁵⁰ This attitude shifted emphasis away from Scripture *qua* unique community-referring story to Scripture *qua* moral and cosmological doctrine. Since such doctrine was generally within human cognitive competence, the need for an independent hermeneutic object was not great. Finally, the development of strict centralization and the evolution of the Papacy made widespread interpretation of Scripture less important than the Pope's own proclamation of the Scriptural message.⁵¹ These factors combined to create a detour around Scriptural hermeneutics.

The crucial doctrine of *sola scriptura*, of Revelation by Scripture alone, must be understood in this context. This doctrine, as formulated by Luther, fits perfectly the belief in "justification by faith alone" for which Luther is best remembered.⁵² Belief in the unique role of Scripture completes the theological formula: *sola fide, sola gratia, sola scriptura*: faith alone, grace alone, Scripture alone.⁵³ According to Luther, human moral and religious incompetence consequent to the Fall could not be remedied by human moral striving (works-righteousness); the law condemns, and does not save. Justification before God is by God's grace and by faith alone, not by human works. Correspondingly, knowledge of God's grace could come by Scripture alone. The Lutheran view of human moral and religious incompetence was completed by a sense of epistemological incompetence. Scripture alone could reveal the justification before God, which God's grace alone could effect.

48. See R. GRANT, *THE FORMATION OF THE NEW TESTAMENT* 109 (1966).

49. Grant, *supra* note 47, at 294.

50. See R. GRANT, *THE BIBLE IN THE CHURCH: A SHORT HISTORY OF THE INTERPRETATION OF THE BIBLE* 109-17 (1948).

51. See the comparison between Lutheran and Roman Catholic hermeneutics in J. PELIKAN, *LUTHER'S WORKS: LUTHER THE EXPOSITOR* (companion volume) 73 (1959).

52. See generally G. EBELING, *LUTHER: AN INTRODUCTION TO HIS THOUGHT* 159-74 (1970).

53. Faith, grace, and Scripture, in turn, were to be understood by reference to Christ alone (*solum Christum*). See *infra* note 76.

This is, from one vantage point, a virtuoso religious position, achieved first by Luther, and most recently and persuasively by Karl Barth.⁵⁴ Clearly, however, it is not "only" a theologian's theory: it is the core of a world-historical event, the Reformation.⁵⁵ As such, it set up the religious and moral practice of churches and believers. Reformation theology placed all of the religious premiums on adoption of Scripture as focal text of a hermeneutic object. It invested Scripture with unique authority, and gave the reader of Scripture a definite interpretive frame of reference. Normative hermeneutics in Protestantism is simply incomprehensible apart from the fundamental religious orientation that animates it.

The case of Scripture suggests, therefore, that the setting up of normative hermeneutic projects is worldview-dependent in the most basic way. We see also that the worldview that sets up Scripture in Protestantism does so in a way that gives Scriptural interpretation unique authority in relation to other possible sources of moral instruction.

Literature *qua* hermeneutic object is worldview-dependent to the same degree. Literature does not get set up as a hermeneutic object until there are powerful reasons to mark off a particular set of texts and to initiate hermeneutic practice in relation to them. The worldview which generates Literature and Literature-regarding practice is much more recent than the worldview which sets Scripture-regarding practice in motion; in fact, the former is to some extent a reaction to the latter.

The concept of Literature—especially of English Literature, which will occupy us primarily—is a product of modern humanistic perfectionism. While humanistic perfectionism has more variants and a less clear point of origin than its Reformation counterpart, it is a simple matter to see how specific nineteenth-century critics, writing at the time that the first English departments were founded, constructed Literature to suit the needs of humanist commitments. Matthew Arnold's version of hermeneutic humanism is worth quoting at length.

What we want is a fuller harmonious development of our humanity, a free play of thought upon our routine notions, spontaneity of consciousness, sweetness and light; and these are just what culture generates and fosters. Proceeding from this idea of the harmonious perfection of our humanity, and seeking to help itself up towards this perfection by knowing and spreading the best which has been

54. See Robinson, *Hermeneutic Since Barth*, in *THE NEW HERMENEUTIC* 1, 22-32 (J. Robinson & J. Cobb eds. 1964).

55. I am interested here in Luther's theology as Reformation theology: in features it shares with Calvin and Barth, rather than with differences which may loom large in other connections. See *infra* note 141.

reached in the world—an object not to be gained without books and reading—culture has got its name touched, in the fancies of men, with a sort of air of bookishness and pedantry, cast upon it from the follies of the many bookmen who forget the end in the means, and use their books with no real aim at perfection But what we are concerned for is . . . to come as near as we can to the firm intelligible law of things, and thus to get a basis for a less confused action and a more complete perfection than we have at present.⁵⁶

While Arnold in this passage does not make special reference to Literature, he leaves us in no doubt concerning the normative mission that will fashion it as a category of texts and animate hermeneutic practice in relation to it. An early professor of English Literature at Oxford makes this explicit.

England is sick, and . . . English literature must save it. The Churches (as I understand) having failed, and social remedies being slow, English literature has now a triple function: still, I suppose, to delight and instruct us, but also, and above all, to save our souls and heal the State.⁵⁷

Arnold would not have agreed that the church had failed. Instead, Arnold thought that it was a particular kind of Christianity, the Non-conformism that was England's heir to the Reformation theology, which was at fault for "making strictures of the moral conscience so far the principal thing, and putting off for hereafter and for another world the care for being complete at all points, the full and harmonious development of our humanity."⁵⁸

Here we see that reading Literature as a hermeneutic practice is set in motion by a worldview, much in the same way as, and to an extent as an antidote to, reading Scripture as a hermeneutic practice. But the humanistic content of the worldview, directly at odds with Luther's understanding of total depravity, necessarily makes Literature as nonexclusive as Scripture is exclusive. On Arnold's humanistic premises, there could be no "one thing needful."⁵⁹ Literature was just one aspect of culture; salvation could be had outside the English department, over in the history and philosophy departments.

Another result of humanistic commitments is that Literature is reflexive not just to the literary community but to the larger human com-

56. M. ARNOLD, *CULTURE AND ANARCHY* 162-63 (1969).

57. T. EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 23 (1983) (quoting George Gordon). Is the quoted professor prescribing, reporting, or mocking?

58. M. ARNOLD, *supra* note 56, at 156.

59. *Id.* at 150.

munity. Scripture, as we saw, was the reflexive counterpart to the identity of the Christian community. Because Catholicism understood itself to be the universal church, and because Scripture was the operator upon the church, in the Catholic view Scripture's reflexivity to all humanity followed with syllogistic force. Scripture's authority was universal on this view. The emerging Protestant sects either did not make universal claims or did not act on them practically. Scripture was therefore in a sense the reflexive counterpart to each separate Protestant community. Literature, when compared to Scripture, followed the Catholic rather than the Protestant tradition with respect to reflexivity. Literature is both the hermeneutic object of the literati, and an aspect of human perfection.

The limited textual nature of the Constitution—the fact that, apart from the amendment process and the case law, the “physical text” could be carried around in one's pocket—renders the Constitution somewhat like the Bible, and markedly unlike Literature. Of course, the physical completeness or portability of the text is itself problematic—not a given—for both Constitution and Scripture.⁶⁰ If, however, we take the physical finitude, the “readability” of the document, as a point of access into comparative hermeneutical issues, then we can pose the constitutional equivalent of the theological question of *sola scriptura*. In fact, only on the assumption that there *is* a text adopted as the focus of the hermeneutic object called Scripture or Constitution does it make sense to ask whether the relevant normative guidance is to be accomplished by recourse to that text alone, or to some combination of text and other sources such as experience, history, or reason.

Absent a worldview comparable to that of the Reformation theology, constitutional law has little idea of what the question would be to which “Constitution alone” is the answer. It will be recalled that *sola scriptura*, far from being natural or self-evident theologically, emerged quite late, and then only as a result of a specific complex of theological motivations. The maxim “by Constitution alone” is no more natural to constitutional law. If the question is, “Where are legislatures, courts, and administrators to seek normative guidance in the definition and execution of their tasks?” one might answer “by Constitution alone.” Such an answer, though, is not natural or self-evident. More significantly, the question itself is not at all self-certifying; many alternative questions could be substituted for it. *Sola scriptura* is plausible only

60. We will address this problem under the heading of *The Closing of the Canon*, *infra* text accompanying note 127.

because it coheres well with a larger view of the human condition (total depravity) and a larger sense of what is at stake in the giving of guidance or the provision of authority (i.e., salvation). The maxim "by Constitution alone" lacks intelligibility, to say nothing of credibility, unless it satisfies basic anthropological commitments in the same way that *sola scriptura* satisfies the Protestant posture.

It seems, therefore, that the sense that the Constitution alone "governs" (governs what?) lies in the shadow of the Reformation, while lacking its philosophical substance. Perhaps the Protestant demand for *government by text* has contributed to the shaping of our legal expectations. But the anthropological assumptions that render this demand sensible on the theological side carry much less force on the legal side. Belief in total depravity creates a good reason to trust solely in Scriptural revelation. It supplies no good reason to trust solely in Constitution. Whether constitutional law embraces some logical and functional counterpart to such a reason is difficult to tell.

If constitutional law actually lacks such a motivating reason for textual exclusivity, perhaps it is more like literary criticism in this regard. Because Literature makes no claims to exclusivity, and because constitutional law has no theoretical foundation for such claims, Constitution would seem to be, like Literature, a hermeneutic object whose focal text does not exhaustively fulfill the normative aims for which the hermeneutic object was constituted. But this does not seem to be an accurate description of attitudes toward the Constitution. Certainly the legal community, and probably the laity, do not regard the constitutional document as fungible with other members of a larger set of documents. Furthermore, Constitution *qua* hermeneutic object does not seem to be a member of a larger family, in the way that Literature *qua* hermeneutic object is a member of Culture. The sense of Constitution as a hermeneutic object *sui generis*, and of the Constitution as a text *sui generis*, renews the comparison to Scripture. To make this comparison work, we must ditch the constitutional pretension to *sola scriptura*, and realize that, until constitutional law has its Luther, it follows not the Protestant but the Catholic hermeneutic model. In constitutional law as in Catholicism, the general views that set up the hermeneutic object do not require that the community take moral guidance exclusively from the focal text.

It should be emphasized that the crucial parallel between constitutional law and Catholicism lies precisely on the plane on which I have placed it, and not on the institutional plane. A comparison of the

Supreme Court to the *magisterium* is obvious but superficial.⁶¹ Claims to inerrancy, and to direct Revelation, which are sometimes made about the *magisterium*, are very definitely *not* made about the Supreme Court. Apostolic succession invests the Supreme Court Justices with dignity, but not with definitive interpretive authority.

As a complex object, Constitution, following the Catholic model, contains not only a focal text but also a tradition: the "consent tradition." The "consent tradition" is the object of the community's self-referring attention. This tradition creates an identity-charter for the society and its legal institutions, in much the same way that the succession of models (Israel, exilic community, Christ, apostles) creates an identity-charter for the Catholic community and its ecclesiastical institutions.

Consent theory, of course, has a number of strands; it has an abstract side, with both radical and liberal representatives,⁶² and a more concretely social-historical side, which can be worked out in various fashions.⁶³ It is not my purpose here to examine any of these theories in detail. Instead, I will restrict my attention to Bickel, since among the consent theorists he has most clearly identified Constitution with the consent tradition, and also because his concrete/historical view of consent, as contrasted with more abstract formulations of social contract theory, brings out the "narrative" sense inherent in this view of the Constitution.

For Bickel, "What is above all important is consent—not a presumed theoretical consent but a continuous actual one, born of continual responsiveness."⁶⁴ The tradition of consent, not any particular text, is the object to which Bickel would have us direct our constitutional attention. The Constitution is taken to be the focal text for this attention to tradition. The precise nature of the relation between text and consensual tradition is a matter on which Bickel ought to be analyzed far more closely than I can accomplish here. But Bickel's general sense

61. Cf. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739-63 (1982); Grey, *supra* note 33; Levinson, *Law as Literature*, *supra* note 7.

62. Abstract consent theory, or "ideal contractarianism," includes Jurgen Habermas' concept of the ideal speech situation, and corresponding critique of distorted communication. J. HABERMAS, 1 THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY (1984); J. HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY (1979). Cf. B. ACKERMAN, SOCIAL JUSTICE AND THE LIBERAL STATE (1980); J. RAWLS, A THEORY OF JUSTICE (1971).

63. A. BICKEL, THE MORALITY OF CONSENT (1975); M. WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).

64. A. BICKEL, *supra* note 63, at 100.

of what the Constitution is can be evoked, perhaps, by his interesting treatment of civil disobedience. The first amendment, says Bickel, "makes allowance for domesticated civil disobedience"⁶⁵ which participates in the formation of consent. To say that civil disobedience is domesticated means that it is brought out of the wilderness, out of the state of nature into civil society itself, and tamed: incorporated into the Constitution itself. Far from being radically marked off from the world, the Constitutional text actually incorporates deliberate acts of law-breaking. Bickel arrives at this extraordinary conclusion because his theory, like Arnold's, subordinates text to tradition. Such a comparison of Arnold and Bickel is surely licensed by their mutual respect for tradition. Bickel's consent tradition is the reflexive counterpart to the unfolding Anglo-American democracy, just as Arnold's cultural tradition is the reflexive counterpart to English Christendom. Further, both Arnold and Bickel teach us, in their different contexts, that traditionalism is not always conservative. Tradition does not merely establish and preserve; it also challenges the normative identity of the community, charging it to realize its human perfection (Arnold), or to improve its justice (Bickel). Surely Bickel was right to boast that his "traditionalism" was more capable of tolerating civil disobedience than were other political theories that called themselves radical.

Bickel regarded his attention to the evolving consent tradition as an alternative to constitutional political theories oriented to abstract principles. In this respect, the Constitution as understood by Bickel operates in much the same fashion as Scripture, at least on certain widespread views of Scripture. While both Scripture and the Constitution set forth doctrine, and while doctrine can be rationalized and justified by reference to a systematic body of principles, it has seemed to Bickel and to many theologians⁶⁶ that an emphasis on doctrine and on formalization neglects the community-referring and identity-shaping orientation of the hermeneutic enterprise. This is perhaps the most important respect in which the normative hermeneutic disciplines are comparable.

2. *Literalism*

Because constitutional law, theology, and literary criticism are text-oriented projects in which matters of importance depend on inter-

65. *Id.* at 57.

66. See D. KELSEY, *supra* note 21, at 158-75; and theologians cited *infra* note 166. Compare the claim by Robert Grant that "to the Protestant spirit the Bible is not a book of law like the American Constitution, interpreted by judicial decisions which possess binding force. It is a book of life through which God speaks directly to the human soul." R. GRANT, *supra* note 50, at 128.

pretation, all of these fields are subjected now and then to pleas for literal readings. In this subsection, I will explain why literalism is an ambiguous and unhelpful idea in normative hermeneutic projects. My main arguments are that (1) literal meaning is ordinarily a supplement or complement to nonliteral meanings, rather than an alternative to them; (2) literalism is unable to secure or establish readings without the governing hand of a worldview; (3) even the hermeneutical positions, such as *sola scriptura*, that are friendly to literalism do not require it or make sense of it; and (4) the rhetorical power of the plea for literalism is dependent upon a problematic notion of primal or intrinsically valuable experiences of meaning.

The rhetoric of literalism suggests that texts offer a fundamental access to meaning, and that this access is impeded by "interpretation," which is a pejorative term in the literalist lexicon. Literalism offers several distinct accounts of how interpretation becomes an impediment to understanding the moral meaning of a text. One account takes the form of a history. According to this history, the text was once read literally, but in recent times has come to be read in new "interpretive" ways. (The claim that texts used to be read literally is a close friend to the claim that people used to be more God-fearing and moral in the old days.) A somewhat different account of how interpretation comes to be an impediment to understanding begins by drawing a connection between text and experience. According to this account, the text offers to the literal reader a host of inherently valuable meaning-experiences that are blocked when the text is approached from nonliteral angles. Still other versions of the notion that interpretation is an impediment to understanding stress the reader's moral weakness: the tendency to smuggle in personal values under the guise of interpreting the text.

Constitutional law, theology, and literary criticism yield many examples of literalist complaints about the evils of interpretation. Constitutional literalists sometimes complain that judges abandon literal readings of the Constitution in favor of imaginative "interpretations" that really legislate the judges' personal biases or values. Constitutional literalists also condemn nonliteralist judges for abandoning the original understanding of the constitutional text, which was (say the literalists) a literal understanding. Biblical literalists also sometimes claim that the Bible was originally read literally, or that interpretation is an invitation to egoistic, and possibly demonic, resistance to God's word. Literary literalists sometimes trade heavily on the idea that the

beauty, power, or wisdom inherent in a literal reading of a text is lost to the excessively theoretical or rationalistic interpreter.

While I cannot respond to each literalist claim in each field, I can, through a more limited discussion, expose the complexity that the rhetoric of literalism oversimplifies. In particular, I will try to reveal the weakness of the claim that literal meaning is somehow primal, either historically, experientially, or normatively. The analysis can begin fruitfully through a consideration of Biblical literalism.

In the face of the sophistication of contemporary critical methods of Biblical exegesis (employing the subtle tools of history, philology, archaeology, form-criticism, and so on) there is a certain elegant simplicity to the claim that the Bible ought to be read literally, as it was before the advent of modern interpretive assumptions. But taken as an empirical claim, this literalist assertion is at best only half true.

Early Christians did not read the Bible "literally" in any sense that matches the rhetorical aims of modern Biblical literalists. They did accept the historical veracity of the Biblical reports, but they did not assume that this veracity constituted the only or even the most important aspect of Scriptural meaning. Many Christians, following certain Jewish interpreters of Hebrew Scripture, understood Scripture allegorically. The Jew who regarded the prohibition against eating pork as an allegory for the avoidance of vice⁶⁷ did not for that reason feel compelled to abandon the literalness of the dietary command. The Jewish allegorist might refrain from eating pork, and at the same time find that allegorical meaning provided a heightened understanding of the moral and spiritual meaning of the rule. Similarly, the Christian who regarded the parable of the Good Samaritan as having a moral message illustrating Jesus' ethic of neighbor-love could also see in the parable an allegory of redemption, in which the traveler represented Adam, and the Samaritan represented Christ.⁶⁸ Historically, then, there was no inevitable conflict between literal and allegorical meanings. Yet the harmony between literal and allegorical meanings, while attractively pluralistic, also has the effect of casting confusion upon the very *idea* of a literal meaning. If a pig literally means a pig, how can it "also" mean vice? If a pig means both pig and vice, are both of these meanings literal?

67. M. DOUGLAS, *The Abominations of Leviticus*, in *PURITY AND DANGER* 44-48 (1966).

68. F. KERMODE, *supra* note 27, at 35-36.

Allegorical interpretation was by no means the only early challenge or complement to literal meaning. Typological interpretation,⁶⁹ also called "figuration," was employed from the outset by Christians who wanted to reconcile the New Testament with the Old. Typology is an interpretive device by which an event or character described in a text is understood both as a depiction of an actual historical fact and as a model for a forthcoming historical event fulfilling the model's essential promise.⁷⁰ Thus, it is apparent that if the early Christians who employed typology are to be called "literalists," then they were very strange literalists indeed. For such "literalists," the literal meaning of an Old Testament event or character was both its historical factuality and its status as the "type" or "figure" of a more perfect fulfillment in the New Testament.

This brief account of early Christian approaches to Scripture demonstrates that these approaches were characterized by hermeneutical catholicity. Later theorists enshrined this catholicity in hermeneutical systems; and in these systems we can see quite clearly the striking peculiarity of a hermeneutics in which literal meaning coexists with nonliteral meaning in interpretive pluralism. Thus Origen, for example, saw no difficulty in asserting that Scripture was to be interpreted according to three senses: the literal, moral, and intellectual or spiritual.⁷¹ By medieval times this system was set into definitive form in the doctrine of the fourfold path of Biblical interpretation: literal sense, allegorical sense, tropological sense (referring to norms of conduct), and anagogical sense (referring to the objects of hope). The literal sense was not thought to be in conflict with the other interpretive senses.⁷²

The facts are too complex, in summary, to permit the simple conclusion that the literal meaning of the Bible is primal in some historical sense. Instead, sensitivity to the various nonliteral meanings is just as old as the attempt to recover the literal sense. But this ancient coexistence of literal and nonliteral meanings in an interpretive pluralism renders the very sense of "literal meaning" quite problematic. What, precisely, could the early Christians have *meant* by literal meaning, for

69. H. FREI, *supra* note 10, at 2; J. PELIKAN, 1 *THE CHRISTIAN TRADITION* 17 (1971). For examples, see *infra* text accompanying notes 128 and 129.

70. E. AUERBACH, *Figura*, in *SCENES FROM THE DRAMA OF EUROPEAN LITERATURE* 4 (1959).

71. J. PELIKAN, *supra* note 69, at 61.

72. Bainton, *The Bible in the Reformation*, in 3 *THE CAMBRIDGE HISTORY OF THE BIBLE* I, 24-26 (1963).

that meaning to be consistent with allegory, typology, anagogy, and tropology?⁷³

Having cast some doubt upon the historical argument for literalism, I want to consider a quite different and more important argument: a theological argument. The sophisticated Protestant who concedes that literalism has no purely antiquarian certification may insist that Biblical literalism necessarily follows from the basic theological premises of the Reformation, or is essential to the coherence of those premises. In my terminology, this sort of assertion is one in which a particular worldview (in this case, Lutheran theology) mandates adoption of a particular interpretive method (here, literalism).⁷⁴

This kind of claim on behalf of a method is much more interesting than the historical claim, since, among other things, it attempts to draw the consequences of a particular worldview, thereby improving our appreciation of the hermeneutic benefits and burdens which flow from worldviews. To me, the effort to legitimate a normative-interpretive method by showing how it coheres with a worldview (which in turn can rest on no foundation stronger than the truth of its overall vision of human affairs) is much more serious and profitable than the attempt to ground a normative-interpretive method in a straight appeal to historical facts.

There is a clear connection between basic Lutheran theological assumptions and the hermeneutical posture of *sola scriptura*. If human nature is corroded by sin, and the natural capacity to know God's will and grace is just as damaged as the natural capacity to obey God's commandments, then we stand in need of a special revelation that expressly states the word of God. Scripture is that revelation. But there is no comparably tight connection between *sola scriptura* and Biblical literalism.⁷⁵ On the contrary, the operative theological premise that God has freed us from the chains of sin and ignorance implies that Scripture must always be read to preach faith, grace, and Christ. Literalism, like legalism, is a form of bondage, until the letter is animated by the spirit of a Christocentric hermeneutic.

73. Obviously, my assessment of the early history of Christian Biblical interpretation has no immediate application to literalism in literature or constitutional law, whether defended on historical or other grounds. It does, however, illustrate the way in which the rhetoric of literalism fails to accommodate interpretive complexity.

74. I am aware that for the true literalist, literalism is not an "interpretive method"; but in my view, as urged throughout this subsection, such claims are chiefly rhetorical and in the end unconvincing.

75. H. FREI, *supra* note 10, at 2.

We must conclude that literalism in the context of Luther's theology is just as complex as literalism in the context of the early church. Luther called for literalism, it is true; but he modified that literalism in a variety of ways.⁷⁶ He could modify his own rhetorical plea for literalism with a clear conscience, because literalism was simply not central to the architecture of his hermeneutics. In principle, having denied theological entry to epistemological works-righteousness (the belief that one could know the good on one's own) by closing the front door of natural law, Luther found himself obliged to shut the back door of speculative theological hermeneutics.⁷⁷ In practice, literal meaning in the Reformation was still a part of an interpretive pluralism, as it had been in classical Catholic formulations.⁷⁸ And in the long run, the Reformation opened the door to increasingly nonliteral theological approaches to Scripture, such as Rudolf Bultmann's program of demythologization.⁷⁹ More precisely, these modern approaches are not so much nonliteral as challenges to the very distinction that literalists draw between literal and nonliteral meanings.

The idea of literalism has been of even less importance in literary criticism than in theological hermeneutics. After all, what would it mean *not* to read most poems or novels literally?⁸⁰ Of course, the avail-

76. Thus, Luther softens the edges of literalism through several means: (1) He insists that Scripture be read spiritually. He follows the Pauline injunction to heed not the letter but the spirit. 2 *Corinthians* 3:6. See G. EBELING, *supra* note 52, at 99, 103; Bainton, *supra* note 72, at 5, 21-22. (2) Luther required that Scripture be read in the light of experience, just as "[n]o one can understand Virgil in the *Bucolics* and *Georgics*, unless for five years he has been a shepherd or farmer." R. GRANT, *supra* note 50, at 132 (quoting Luther). (3) Luther accepted, albeit reluctantly, the allegorical sense. *Id.* at 131; Bainton, *supra* note 72, at 25. (4) He accepted typology or figuration. *Id.* at 26. (5) Above all, Luther's literalism was controlled by a Christocentric criterion. G. EBELING, *supra* note 52, at 104; R. GRANT, *supra* note 50, at 133.

77. See *supra* note 35. It is best to regard Luther's *sola scriptura* as innovative in three rather narrow respects. (1) It demoted church traditions from objects of interpretation to a method of interpretation. Since he allowed tradition this interpretive function, it is not surprising that Luther actually defended liturgical and ecclesiastical traditions against the left wing of the Reformation. (2) *Sola scriptura* challenged the ultimate interpretive authority of the Pope. But since it admitted tradition as an interpretive method, and because Luther's theology was generally authoritarian, the church generally retains its interpretive authority in Luther. (3) In principle, although less so in practice, Luther's *sola scriptura* was an attack on the role of reason. Luther called reason a "beast," and suggested that "[t]he evening sacrifice is to kill reason; the morning sacrifice is to glorify God." M. LUTHER, *A Commentary on St. Paul's Epistle to the Galatians*, in MARTIN LUTHER: SELECTIONS FROM HIS WRITINGS 128, 131 (J. Dillenberger ed. 1961). Yet Luther could hardly abandon reason altogether in either theological hermeneutics or theological argument.

78. R. GRANT, *supra* note 50, at 129.

79. See J. ROBINSON, *supra* note 54, at 24-39.

"In Luther's insistence on the subjective element in interpretation we are close to modern theories of exegesis which stress the ultimate impossibility of 'objective' analysis of human thought." R. GRANT, *supra* note 50, at 117.

80. I am not denying that the concept of literal meaning can have a place in literary theory.

ability of mythic or legendary plots, and much later, the advent of schools of myth interpretation—following Frazer, Jung, Levi-Strauss, or Frye⁸¹—has made it possible for authors to treat complex subjects by means of symbolism. One who understands (for example) Hesse's use of Jung, however, is hardly failing to take Hesse literally. In literature as in Scripture, literalism is not a special hermeneutical option which can be selected or rejected in conformity with one's theory of interpretation. It is rather the common ground of all interpretation.

Literary criticism leads the way, then, toward the correct view of literal meaning. On this view, literal meaning is either a synonym for "verbal meaning," or a particular kind of meaning that tropes such as metaphor, myth, or symbol presuppose in order to achieve their special purposes. To illustrate, consider these lines from Eliot's "The Love Song of J. Alfred Prufrock":

The yellow fog that rubs its back upon the windowpanes

* * *

Slipped by the terrace, made a sudden leap,
And seeing that it was a soft October night,
Curled one about the house, and fell asleep.⁸²

If one wishes, this is literally fog, so that it can metaphorically be a cat; or it is literally a cat, so that it can metaphorically be (a) fog. While our familiarity with literal meaning helps us to understand these lines, it would make no sense at all to *restrict* the meaning of the lines to their literal meaning, whether fog or cat is that literal meaning. If the lines cannot mean both fog and cat, then we will take our semantic ball and go home.

My example also shows that literalism is *not* the same thing as "no interpretation theory." Given the fact that the lines want to tell us about a cat/fog, a literalist who insists that the lines must be either about a cat or about a fog is waxing very theoretical indeed. (Does the

On the contrary, it is precisely *within* a total literary theory, a theory which makes room for myth, metaphor, allegory, and symbol, that the idea of literal meaning has its place. For such a theory, see N. FRYE, *ANATOMY OF CRITICISM* (1957).

81. J. FRAZER, *THE GOLDEN BOUGH* (1963); N. FRYE, *FEARFUL SYMMETRY* (1947); C.G. JUNG, *Psychological Aspects of the Mother Archetype*, in *THE BASIC WRITINGS OF C.G. JUNG* 327 (1959); see also E. NEUMANN, *THE GREAT MOTHER* (1972); C. LEVI-STRAUSS, *The Structural Study of Myth*, in *STRUCTURAL ANTHROPOLOGY* 202 (1967). Compare J. WESTON, *FROM RITUAL TO ROMANCE* (1957), and its use by T.S. ELIOT in *The Wasteland*, in *THE WASTELAND AND OTHER POEMS* (1962); see generally *TWENTIETH CENTURY LITERARY CRITICISM*, 175, 190, 402, 422, 455, 546 (D. Lodge ed. 1972) [hereinafter cited as Lodge].

82. T.S. ELIOT, *SELECTED POEMS* 11-12 (1967).

literalist insist that the lines *literally* mean "cat/fog"? Do they not, then, literally mean "melancholy"?)

From these observations it should not be surprising that, in literary criticism, attacks against interpretation theory have *not* been couched as pleas for literalism. Susan Sontag's manifesto "Against Interpretation," for example, is neither a plea for literal meaning nor a rejection of it; for either would be pointless. When Sontag says that "interpretation is the revenge of the intellect upon art,"⁸³ she simply wants us to renew our basic experience of the texts themselves; she would no doubt regard the insistence that texts be read "literally" as a stifling form of "interpretation." Hence her aphorism: "In place of a hermeneutics we need an erotics of art."⁸⁴

There is a great danger, however, in attacking interpretation theories on the ground that they impede the intrinsic delight that the text offers. There is more than one kind of delight. Sontag objects to allegorical interpretations of the *Song of Songs*, for example, because she finds that such allegorization robs the reader of erotic experience. While I deny the empirical claim—even an ascetic allegorist is going to get a thrill out of "A bundle of myrrh is my well-beloved unto me; he shall lie all night betwixt my breasts"⁸⁵—there is something horribly parochial in thinking that the erotic delight is the only delight conveyed in the passage. The Christian allegorist who thinks that the love-making in the *Song of Songs* is an allegory of the relation between Christ and the Church will experience two levels of delight in reading the *Song of Songs*, while Sontag will experience only one.

Sontag's anti-interpretivism may dislike theological delight, since it is a moral or spiritual sort of delight. If so, her position must be least valid precisely in the normative hermeneutic contexts, where the primal or intrinsically valuable experiences (if any) sought in the text are *instructive* experiences: enlightenment and discovery. Consider, for example, a reading of the due process clause.⁸⁶ Sontag would not get excited by the clause as she would by a (nonallegorical) reading of the *Song of Songs*. Her lack of excitement at the hands of the due process clause is hardly caused by an excess of theory. If anything, it is caused by a lack of theory. What Sontag needs, if she is to be thrilled, challenged, and instructed by the due process clause, is a hermeneutical

83. Sontag, *Against Interpretation*, in Lodge, *supra* note 81, at 655.

84. *Id.* at 660.

85. *Song of Solomon* 1:13 (King James).

86. U.S. CONST. amend. V.

theory that relates the clause to events of mistreatment and protest, wickedness and mercy: in other words, to the stories reported in the case law.

Once the due process stories are put in play, they become like the pig, the cat/fog, the Good Samaritan, or the ecclesiastical lovemaking. They become abundantly blessed with moral meaning. Literalism loses itself in these semantic depths.

Where do we look to find the normative meaning of the cases: to the intent that lies behind them; to their conceptual structure; to the feelings that they evoke; to their narrative form; or to their ostensive reference to historical facts? Since literalism is consistent with most of these options, but illuminates none of them, it is best dropped from the analytical repertoire.

3. *Text, Hermeneutics, and Ideology*

Following Marx⁸⁷ and Mannheim,⁸⁸ we can define "ideology" as a set of beliefs articulated by a ruling class or elite that serves to rationalize the elite's power. It does this by denying or omitting those features of the historical situation that, if pressed, would lead to the dissolution of that power. Because normative hermeneutic objects are community identity-operators which are seen as offering moral guidance, they frequently serve as ideologies. In this subsection I will point to certain ways in which Scripture, Literature, and Constitution have functioned as ideologies. The ideological function of hermeneutics is important in the operation of *canonicity*⁸⁹ and in understanding the assessment of types of hermeneutic *authority*.⁹⁰ While the critique of ideology may have wider implications for social theory, it is of interest here only for the way it concerns hermeneutic projects on their own terms. If interpretive practice contradicts the normative charter for the hermeneutic object, then the practice is subject to the "critique of hermeneutical ideology." Of special interest in this subsection is the role of textual analysis in criticizing hermeneutical ideology.

Scripture provides the pattern for the identity of the church, as we have seen, by fitting the church into a sequence that conveys a sense of its soteriological (saving) mission. Transformative and redemptive power lie at the heart of this mission. Hence the identity offered by

87. K. MARX & F. ENGELS, *THE GERMAN IDEOLOGY* 40-41 (1947).

88. K. MANNHEIM, *IDEOLOGY AND UTOPIA* 55-57 (1936).

89. See *infra* notes 102-34 and accompanying text.

90. See *infra* notes 135-228 and accompanying text.

Scripture is intrinsically challenging: it is an identity whose meaning relies on images such as "suffering servant," "saving remnant," "Christ crucified," and so on. The authority of Scripture is incomprehensible apart from the charter that the community grants it to enforce those images upon the church as an actual social and historical institution. Time after time, however, the church has accommodated itself to the secular world. It has benefited materially from the accommodation, and has called upon Scripture to legitimate these material interests. But this demand creates a distortion in hermeneutic practice. The *content* of the hermeneutical ideology speaks of transformation and redemption, but its *function* is to support the church's entrenched institutional power. Wherever Scripture delivers something different from that which it promises, it is subject to the critique of ideology. It is but a step from this kind of internal, theological criticism to Marx's conclusion that religion must be abolished in order to be realized.⁹¹

The disruption of hermeneutic practice in order to retrieve hermeneutic authority is quite visible in certain contemporary programs of "political hermeneutics." Jurgen Moltmann, for example, urges that when "the gospel becomes the religious basis for the justification of society as it is and a mystification of the suffering reality," there must be a "criticism of Christian myths."⁹² When Christian identity is lost due to ideology's power to confine the meanings of Scripture, it is to be retrieved "in concrete historical identification with projects involved in overcoming affliction and enslavement."⁹³ Liberation theology also reminds us that "Christianity itself was used to sanctify and perpetuate the hierarchical society and world view of classical culture. Yet, despite the Constantinian co-optation of the Church, Christianity nevertheless inserted into the stream of human history the seeds of dissolution of this hierarchical pattern of classical sacral societies."⁹⁴ Eschatological social movements have always been the practical co-partners of theological hermeneutics, critically freeing Christian identity from ideological control.

Literature, like Scripture, functions ideologically in ways that threaten literary authority. Social and historical differences between literary and theological practice make Literature perhaps the more vul-

91. K. MARX, *Introduction to the Contribution to the Critique of Hegel's Philosophy of Right*, in KARL MARX: EARLY WRITINGS 43, 43-44 (1963).

92. Moltmann, *Toward a Political Hermeneutics of the Gospel*, in NEW THEOLOGY No. 6, at 66, 79 (1969).

93. *Id.* at 84.

94. R. RUETHER, *LIBERATION THEOLOGY* 176 (1972).

nerable to the critique of ideology. The absence of both a centralized institutional control and a clear set of qualifications for canonicity constantly threatens the integrity of Literature as a normative hermeneutic object. The category Literature is enormously vulnerable to the attack that as an ideology it supports the power of an elite and excludes whole classes of textual production. This sort of attack may accept the authority of a hermeneutic object whose mission is to civilize and humanize, but reject a narrow identification of that object with a small set of canonical texts. The result of this type of attack is a change in the set of texts which count as Literature.

A quite different sort of challenge denies the intelligibility and authority of Literature as a hermeneutic object, and redirects attention to the text. This political revolution has been mounted by some forms of structuralism, and by the current wave of deconstructionist critics. Without doubt, part of the appeal of such criticism⁹⁵ is that the exposure of the structures that give rise to the text disrupts the effort to set up the text as a normative hermeneutic object. If Lautreamont's *Les Chants de Maldoror* is "generated" by two "rules"—the rule of "expansion" ("every component of the matrix generates a form more complex than itself,") and the rule of "conversion" ("simultaneous modification of the same factor in every semantically relevant component of the matrix")⁹⁶—then the book resembles less a hermeneutic object than a blueprint. We are unlikely to set the book up as Literature, as a means of realizing our Humanity, if the critic presents it to us as a complex job of plumbing.

It must be noted that redirection of attention to the text itself does not in all circumstances operate to reveal ideological distortions of hermeneutic practice. Some, although not all, eighteenth-century practitioners of the historical/critical method, understood themselves to be assisting Scriptural authority by giving the text a firm historical anchor.⁹⁷ Historical/critical exegetes did not understand themselves to be theological revolutionaries. In a retrospective assessment, Marx assigned historical criticism of Scripture an important place in the growing awareness of the bifurcation between the actual world of history and the spiritual story-world of religion. Marx thought that historical criticism had contributed to the awareness of religion as ideology.⁹⁸

95. See, e.g., Riffaterre, *Generating Lautreamont's Text*, in *TEXTUAL STRATEGIES* 404-20 (J.V. Harari ed. 1979).

96. *Id.* at 405.

97. E. KRENTZ, *THE HISTORICAL-CRITICAL METHOD* 16-22 (1975).

98. K. MARX, *supra* note 91, at 44.

But apart from scholars like David Strauss, who "demonstrated to the satisfaction of young radicals that historical exegesis of the gospels does not justify basing the dogma of divine-human reconciliation on the historical factuality of Jesus' story,"⁹⁹ practitioners of historical/critical method did not regard themselves as enemies of hermeneutical distortion. They were not the liberation theologians or the deconstructionists of their day.¹⁰⁰

Constitutional interpretivism, like the historical/critical method in theology, offers to shore up hermeneutical authority by giving it sound historical support. Constitutional interpretivism finds that support in the authorial intent of the Framers. Biblical exegetes employing the historical/critical method, by comparison, rely upon "explaining the thoughts of the biblical authors and the origin and shape of the writings on the basis of the most likely, natural, and specific conditions of history, culture, and individual life out of which they arose."¹⁰¹ Constitutional interpretivism is somewhat more oriented to individual authorial intent than is historical/critical method, and slightly less oriented to general historical reconstruction, because the constitutional authors (although not the ratifiers) are a small set of figures whose biographies are still accessible. The biblical authors, by contrast, are scattered over a millennium, and little evidence for their biographies survives.

This methodological differential has its parallel in a distinction which ought to be drawn between the status and location of the reflexive communities in the two cases. To see the distinction, we can look to the way in which the two cases speak of their "fathers." The "fathers" of constitutional law (the "founding fathers," or "framers") are the

99. H. FREI, *supra* note 10, at 224.

100. The relation between text-oriented analysis and critique of ideology in constitutional law more closely resembles the eighteenth-century theological than the late-twentieth-century literary configuration. Close attention to the Constitutional text by "interpretivists" and "originalists" has admittedly forced judicial "activists" into the role of left-wing ideologists. To this extent, text-oriented analysis in constitutional law has indeed pursued a critique of ideology. It has not, however, been precisely a critique of *hermeneutical* ideology. Rather, the interpretivists have accused liberal judges of asserting their political philosophies. The aim of interpretivism has not been to *puncture* the hermeneutical object but precisely the reverse: to claim that the text *is* the hermeneutic object. Hence the constitutional interpretivists are not at all functioning like the literary deconstructionists. While the latter's attention to the *structures which generate the text* is designed to disabuse the reader of the humanist hermeneutical ideology, the former's attention to the *original meaning of the text* is designed to remind the reader of (one view of) the text's hermeneutical authority. For a lucid exposition and critique of the discussions of interpretivism and originalism in recent constitutional writing, see Cheimerinsky, *The Price of Asking the Wrong Question*, 62 TEX. L. REV. 1207 (1984).

101. H. FREI, *supra* note 10, at 18.

constitutional authors (Madison, the Congress that wrote the fourteenth amendment, etc.), while the "fathers" of theology (the "fathers of the church," the study of whom is called "patristics") are not the Scriptural authors, but the first bishop-polemicists (Ignatius, Irenaeus, etc.). This reflects the special status of the church as reflexive counterpart to Scripture; the "fathers of the church" must be assimilated to the hermeneutic object, and set up as authorities on the model of the apostles. Constitutional law, by contrast, has as its reflexive community an entire society. It therefore has not been appropriate to set up the early Supreme Court Justices, with the possible exception of Marshall, as the equivalent of "church fathers," or to introduce a constitutional discipline comparable to patristics.

At present, Constitution *qua* hermeneutic object is insufficiently differentiated from the Constitution to render systematic study of the text a radical and demystifying endeavor. Instead, renewed attention to the Constitution is conservative and apologetic. However, if the parallelism between constitutional interpretivism and eighteenth-century historical/critical methodology holds true, then perhaps interpretivism will someday have its David Strauss (who will convince us that constitutional doctrine cannot be grounded in authorial intent) and its Marx (who will draw the political consequences from this conclusion). Just as contemporary theology has been radicalized, much against its will, by the failure of historical/critical methodology to reconcile theological value and historical fact, so the constitutional law of the not-so-distant-future may be radicalized if contemporary interpretivists fail to reconcile constitutional value and historical fact. In that event, the sense of constitutional law as an interpretive activity will depend on our ability in constitutional law to differentiate text and hermeneutic object, and to follow the path of Scriptural and Literary interpretation as normative hermeneutic projects.

B. THE CANON

1. *The Sufficiency of the Canon*

The definition of "canon" I will use in this Article, borrowed from theology and then broadened into a general category in normative hermeneutics, is "extension of the focal text." From this platform, the normative hermeneutic projects frequently raise special claims about the necessity or sufficiency of the canon to the normative ends for which hermeneutic practice is initiated. In theological use, "[w]hen a community of Christians calls a set of writings the 'Christian canon' . . . [i]t is

to say that *just these* writings are *sufficient* for the ends to which they ought to be used in the church."¹⁰² In this subsection, I will show how special claims such as these are sometimes problematic.

When Christianity adopted a certain set of writings as canon, it meant to indicate that these were the writings that already exercised, and would continue to exercise, guiding power over the self-formation of the church. Thus, the canon is the "mirror for the identity of the believing community which in any era turns to it to ask what it is and what it is to do, even today."¹⁰³ Yet the mirror of canonicity may distort the identity that it is supposed to reflect and preserve. This possibility arises, first, from political and philosophical problems troubling the assertion of *criteria* for canonicity, and, second, from the way in which ideology rushes in to fill the vacuum created by the failures of those criteria.

Criteria for canonicity are tests that a text must pass if it is to be admitted into the canon. The primary criterion advanced in the earliest known statement on New Testament canonicity, the Muratonian canon of c. 200 A.D., was authorship by an apostle.¹⁰⁴ The best known legal counterpart to this sort of criterion for canonicity is H.L.A. Hart's "rule of recognition," which supposes that every legal system rests on a master rule that specifies the conditions a rule must meet to count as a legal rule.¹⁰⁵ For example, one might suppose that "what the King enacts in Parliament" is the rule of recognition—the criterion for canonicity—of English law. I am not aware of any comparably heroic attempt in the field of literary criticism to articulate a master criterion for admission into the literary canon; I will return to this question shortly.

Criteria for canonicity, such as the Muratonian test of apostleship, or Hart's rule of recognition, suffer from several well-known diseases.¹⁰⁶ They invite regression: what rule certifies the rule of recognition as the rule of recognition? They are seldom complex and subtle enough to accommodate all of the widely accepted texts or rules. (The Gospels according to Luke and Mark were accepted as canonical even

102. D. KELSEY, *supra* note 21, at 104-05 (emphasis in original).

103. *Id.* at 105 (quoting James Sanders).

104. R. GRANT, *supra* note 48, at 156-59; Grant, *supra* note 47, at 300-01.

105. H.L.A. HART, *THE CONCEPT OF LAW* 92-93 (1961). The legal "rule of recognition" has the same relation to the canon of legal rules that the Christian *regula fidei* occupies in relation to the canon of Scripture. For the idea that early Christian issues of canonicity were governed by a *regula fidei*, see K. ALAND, *THE PROBLEM OF THE NEW TESTAMENT CANON* 17-18 (1962).

106. See generally R. DWORKIN, *The Model of Rules, I*, in *TAKING RIGHTS SERIOUSLY* 14, 20-21, 39-45 (1977).

though their authors were not technically apostles;¹⁰⁷ rules of mercantile practice are just as "legal" as other rules even though they lack pedigreed promulgation.¹⁰⁸) The notion of a master rule that certifies legal texts or rules neglects the fluid boundaries of texts. The boundaries of the "deposit of faith" are fluid because the deposit includes traditions and institutions that are difficult to delimit. The boundaries of the Constitution are fluid because the Constitution includes extra-documentary texts and social facts such as Bickel's "consent tradition."¹⁰⁹

Faced with these difficulties, and with the fact that the weakness of the criteria invites political manipulation, it is natural for hermeneutic projects to subordinate the criteria for selection to the needs of communal identity. Hence the

"truly crucial factor" in selecting writings for the canon was not the contingent facts about their authorship but simply "the usage and judgment of the one true church, spread throughout the world." That is, in declaring just these writings "canon" the church was giving part of a self-description of her identity. . . .¹¹⁰

Philosophically, the problem for this collapse of criteria into community-reflection is that it dissolves the rules of recognition into the general practices of the community in accepting texts as canonical.¹¹¹ With this move, the canon loses its supposed ability to *shape* the moral identity of the community, since it is now defined by reference to ongoing communal practices.

Politically, the collapse of criteria into community-reflection corresponds precisely to the ideological vulnerability of the weak conception of narrative.¹¹² Just as the sense of *Scripture* as "the community's story" simply licenses dominant elements of an actually fragmented church to read dissident theological views out of the "story," so the sense of *canon* as "the mirror of the community" licenses dominant elements in the church to exclude texts cherished by threatening minority movements.¹¹³ There is no better way to delegitimize a cult than to

107. D. KELSEY, *supra* note 21, at 116 n.16. See also K. ALAND, *supra* note 105:

From the Muratorian canon, e.g., we can see how every emerging principle on which the choice [of canonical books] has professedly been made is expressly repudiated again in words. The authors of the canonical Scriptures are said to be Apostles: but Luke and Mark are not Apostles, Luke is not even an eye-witness.

Id. at 15.

108. R. DWORKIN, *supra* note 106, at 42.

109. *Id.* at 39-44.

110. D. KELSEY, *supra* note 21, at 105 (quoting Hans von Campenhausen).

111. See R. DWORKIN, *supra* note 106, at 42-44; see also H.L.A. HART, *supra* note 105, at 230.

112. See *infra* notes 187-213 and accompanying text.

113. Among the books that were rejected were the *Gospel of the Egyptians*, the *Gospel of*

sever its sacred writings from the canon. This exclusion, justified in the name of "the identity of the community," actually has the *effect* of creating an exclusionary community.

This fact, which is an embarrassment to canonicity in theology and in constitutional law, given the criterial pretensions to a "rule of recognition," is much less embarrassing on the literary side, which, as we have noted, lacks formal criteria for canonicity. The literary canon—that is, what counts as Literature—is adopted by the community of literary scholars in a frankly self-referring fashion. The community adopts as Literature those texts which appear to produce insight in respect to the community's actual life. Thus a particular body of work (for example, the poetry of Dryden) "comes and goes" as Literature.¹¹⁴

It will be noticed that literature as a discipline can have a canon without adopting a position comparable to *sola scriptura*. "By this focal text alone" means that attention to this text *qua* hermeneutic object is necessary to the normative character and mission of the community. Theology can make this declaration much more forthrightly than can literary criticism. While it is true that literature is the reflexive counterpart to the critic's *academic* identity, it is not the reflexive counterpart to the critic's *normative* identity as an agent of civilization. Exclusive devotion to literature as hermeneutic object is analytic in the proposition that one is a professor of Literature. But exclusive devotion to literature is not analytic in the proposition that one is part of the civi-

Thomas, and the *Gospel of Truth*, which were employed by the Valentinian Gnostics. R. GRANT, *supra* note 48, at 129-30; H. JONAS, *THE Gnostic RELIGION* 39-40 (1958); Grant, *supra* note 47, at 298. The *Apocryphon of John*, which was used by other Gnostics, H. JONAS, *supra*, at 39-40, and the *Gospel of Peter*, which was accepted by Docetists, Grant, *supra* note 47, at 298. Of books whose canonicity was ultimately accepted, the *Apocalypse (Revelation)* was opposed by the eastern church so long as Montanism was a force to be reckoned with. K. ALAND, *supra* note 105, at 20-21.

These examples suggest that canonicity was a tool that religious parties employed in an attempt to claim the mantle of orthodoxy. Some of the rejected books, of course, can be recognized as late or corrupt texts. Nonetheless, many of the rejected Gnostic books were perhaps as old as many of the books that ultimately came to be accepted as canonical. Grant, *supra* note 47, at 285. Overall, it is difficult to resist the conclusion that the orthodox canon was a response to the threat of Gnostic books and of canons proposed by Gnostics. H. JONAS, *supra*, at 146. Hence "the authority of New Testament and Church comes to be rather circular. The Church uses the documents it has selected to provide its own credentials. The documents are chosen so as to prove what the Church wants proved." R. GRANT, *supra* note 48, at 186.

114. See T. EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 33 (1983). Northrop Frye complains that "the reputations of poets boom and crash in an imaginary stock exchange. That wealthy investor Mr. Eliot, after dumping Milton on the market, is now buying him again; Donne has probably reached his peak and will begin to taper off; Tennyson may be in for a slight flutter but the Shelley stocks are still bearish." N. FRYE, *supra* note 80, at 18.

lized and civilizing community. Therefore there is no literary counterpart to the Reformation commitment to *sola scriptura*. Nonetheless, the literary community can, and probably must, define a canon. The literary canon comprises those texts which are thought to make possible a relation between, on one hand, the arts of reading and interpreting, and, on the other, the realization of a humanized and civilized community.

The functioning of the concept of *canon* on the literary side, and of *sola scriptura* on the theological side, together form heroic polar extremes. The idea of a literary canon, when placed in its proper normative hermeneutic context, heroically singles out certain human products and claims that these are the literary works in relation to which we can realize our humane nature. The idea of *sola scriptura*, by contrast, does not aspire to realize our humane nature, since that nature is thought to be fallen and sinful. *Sola scriptura*, which focuses our attention upon revealed texts, fits perfectly the larger vision of human depravity and divine grace. The literary canon fits perfectly the larger vision of humane humanity, by offering to direct our attention to that which brings out the humanity in us.

The constitutional canon functions in an intermediate way between the functions of the Biblical and literary canons. The constitutional canon is determined less directly than the literary canon by specific worldviews, if only because the range of canonical candidates is much narrower in the constitutional case than in the literary one. Still, problems of canonicity in interpretive practice loom larger for the constitutional lawyer or judge than for the theologian. Most constitutional litigation raises questions about the boundaries of the constitutional canon; the constitutional lawyer or judge must wrestle with these difficult questions, while the theologian ordinarily need not explore the limits of the Biblical canon in the course of theological argument.

The constitutional lawyer or judge wrestles with the limits of the canon in trying to determine whether the views put forth in an old and doubtful decision still count as "good law." Appeals to little-used constitutional provisions, such as those guaranteeing a republican form of government or the privileges and immunities of citizenship, also give rise to crises in which constitutional lawyers and judges must take a stand upon the contents of the canon. Perhaps the most difficult canonicity questions in constitutional law, however, are actually questions of quasi-canonicity. The close relation between these two sorts of questions, and also the general problem they pose for special claims about

the sufficiency of the constitutional canon, are thrown into relief by the problem of "incorporation."

This problem arose when the Supreme Court, in reviewing state police practices or judicial procedure, had to determine the extent to which the due process clause of the fourteenth amendment had "incorporated" various federal or fundamental rights, thereby constraining the states. In form, "incorporation" was a canon problem: a question of whether the "old" text (Bill of Rights) was to be reproduced in the "new" text (fourteenth amendment). It was just like the early Christian quandary concerning the relation between the Old and New Testaments, but inverted. While the early Christians wondered whether the new Gospel should be understood to incorporate the old Law, the early incorporators wondered whether the new law should be understood to incorporate the old Gospel: the gospel articulated in the Bill of Rights.

In practice, however, the problem of incorporation was conceived and worked out as a problem of quasi-canoncity. The effort to decide whether the text of the fourteenth amendment incorporated the text of the Bill of Rights took shape as an attempt to delineate a certain sort of normative tradition. The question of whether one text incorporated another was reformulated as a question of whether a text incorporated a tradition.

The due process clause of the fourteenth amendment said only that the states could not deprive people of life, liberty, or property, without due process of law.¹¹⁵ To the majority of those Justices of the Supreme Court who wrestled with the incorporation problem, although perhaps not to Justice Black, the constitutional text could not settle the question of whether any particular right or liberty, or procedural safeguard, should be applicable against the states. Rather than serving as the object of interpretive attention in its own right, the text was regarded as focusing judicial attention on a normative tradition. In Justice Cardozo's terms, the values and rights to be incorporated were those "so rooted in the traditions and conscience of our people as to be ranked as fundamental."¹¹⁶ Justice Frankfurter's opinion for the Court in *Rochin v. California*¹¹⁷ formulated the canonical hermeneutic object rather more precisely.

Regard for the requirements of the Due Process Clause "inescapably imposes upon this Court an exercise of judgment upon the whole

115. U.S. CONST. amend. XIV, § 1.

116. *Snyder v. Commonwealth of Mass.*, 291 U.S. 97, 105 (1934).

117. 342 U.S. 165 (1952).

course of the proceedings [resulting in a conviction] in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.”¹¹⁸

Frankfurter’s attention here is upon ideas and feelings that compose what might be called the contents of conscience. Frankfurter rejects the state police proceedings at issue in *Rochin* as “conduct that shocks the conscience.”¹¹⁹ Perhaps this inquiry is narrower than that proposed by Cardozo, who, as we have seen, spoke of both “traditions and conscience.” The more manifest and institutional/historical content of “tradition” was explored by the Court in *Duncan v. Louisiana*.¹²⁰ In his opinion for the Court in that case, Justice White observed that

[S]tate criminal processes are not imaginary and theoretical schemes but actual systems bearing virtually every characteristic of the common-law system that has been developing contemporaneously in England and in this country. The question thus is whether given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty.¹²¹

Frankfurter and White are engaged in normative hermeneutics in relation to a complex object. The center of the object is the focal text: the constitutional document, and in particular the text of the due process clause. In addition to serving as the focus of their attention, the text also focuses their attention on something outside the text: a tradition. The tradition is outside the text but inside the normative hermeneutic object; it is quasi-canonical.

While both justices conceive of this quasi-canonical interpretive object as a tradition, Frankfurter and White differ in their specific understanding of the tradition. Frankfurter conceives of the tradition in intellectual and emotive terms, as a matter of the “canons of decency and fairness which express the notions of justice of English-speaking peoples.”¹²² White conceives of the tradition in systemic and institutional terms, as a matter of “an Anglo-American regime of ordered liberty.”¹²³

118. *Id.* at 169 (quoting *Malinski v. New York*, 324 U.S. 401, 416-17 (1945)).

119. *Id.* at 172.

120. 391 U.S. 145 (1968).

121. *Id.* at 149-50 n.14.

122. 342 U.S. at 169.

123. Frankfurter’s emotive and intellectual conception of constitutional tradition leads him to think that the Constitution requires each challenged state behavior to be tested according to this traditional canon of conscience. By contrast, White’s systemic and institutional understanding of

The Frankfurter/White approach to the incorporation problem raises two questions. First, what is the correct way of viewing the "tradition"? As a corollary, what is the precise relation between this tradition and the focal text? In order to answer such questions, there must be recourse to a worldview of the sort discussed earlier in relation to Bickel's understanding of the consent tradition.¹²⁴ There is no way to determine which version of the tradition is better or more constitutional, Frankfurter's or White's, or indeed whether either of their analyses is constitutionally appropriate, without recourse to a commitment that sets up some field called "tradition" in the hermeneutic object. Here I claim only that a theory of the consent tradition has the status and structure of a body of thought that can be responsive to such questions; I am not at all claiming that Bickel's work provides the answers.

The second question posed by the Frankfurter/White approach closely concerns the nature and boundaries of the constitutional *canon*. The question is: What licenses the Anglocentrism, either linguistic or cultural, of the analysis? Why does Englishness define the limits of the canon? Justice Black is terribly troubled by this issue in his *Rochin* concurrence:

If the Due Process Clause does vest this Court with such unlimited powers to invalidate laws, I am still in doubt as to why we should consider only the notions of English-speaking peoples to determine what are immutable and fundamental principles of justice. Moreover, one may well ask what avenues of investigation are open to discover "canons" of conduct so universally favored that this Court should write them into the Constitution? All we are told is that the discovery must be made by an "evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts."¹²⁵

How can constitutional law justify the restriction of the canon to Englishness? The primitive nature of the theory of "tradition" in constitutional law makes this question frankly embarrassing.

A department of English literature can define its canon in the manner of Frankfurter and White. In Literature, the restriction to English is normative only in the limited community-reflexive sense. It

the tradition of "ordered liberty" calls only for an assessment of the general importance of the right that is offered for incorporation.

124. See *supra* notes 62-66 and accompanying text.

125. 342 U.S. at 176. Justice White, dissenting in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), thought that "[w]hat the deeply rooted traditions of the country are is arguable," and "which of them deserve the protection of the Due Process Clause is even more debatable." *Id.* at 549 (White, J., dissenting).

is not normative, but only instrumental, in the larger sense of the commitment and worldview that sets up literary texts as a hermeneutic object. An English department studies Literature *as opposed to studying texts* because of the larger commitment to humane ideals; it studies Literature *as opposed to studying comic books* because of the determination that Literature is the relevant canon staked out by the humane ideals; it studies *English literature as opposed to French literature* because the limitation is defensible instrumentally and reflects the linguistic and cultural community of the practitioners.

Contrast the sequence of moves on the constitutional side. Constitutional law attends to *something* (it is unclear what) as opposed to a text because of some commitment that has yet to be clarified. To pursue the matter, suppose with Bickel that the hermeneutic object is the historical and communitarian unfolding of consensual relations: the "consent tradition." Then we could say that constitutional law attends to the consent tradition rather than to a text because of the larger commitment to the community's evolving identity as a consensual body. We could say, further, that constitutional law attends to the consent tradition as opposed to other traditions (such as traditions of domination) because the consent tradition is in the quasi-canon defined by the constitutional worldview (as articulated for example by Bickel). There is, however, no reason to limit the quasi-canon further to English-speaking traditions and values. Because the social relations and traditions of the society that adopts the consent tradition as its hermeneutic object are pluralistic and polyglot, the restriction to English is both unauthorized and illicit.

To render this comparison workable in the face of uncertainty about the nature of the constitutional hermeneutic object, I have relied rather heavily on the sense of a constitutional canon, at the expense of its reference. On the literary side, we can say not only that canonicity means normative function, but also that it refers to a set of texts. While the complete set could not be enumerated by anyone, and while it is unlikely that any two critics would compile precisely the same list, nonetheless the literary canon refers to texts which can be lined up on a bookshelf. The same is true on the theological side, where canon is not synonymous with either scripture or text, but where the textual content of the canon can be enumerated.¹²⁶ But we are in a worse position on

126. While any Christian can, in principle, enumerate the contents of the canon as defined by his or her denomination, there is disagreement about those contents among the denominations. The disagreement concerns the question of whether the Old Testament includes any books not

the constitutional side. Here we either have a set of texts but are not certain of the purpose for which they are sufficient, or we have a normative purpose but are unsure how that purpose selects a set of texts. The latter alternative is the one played out in the comparative analysis of the English-speaking restriction.

2. *The Closing of the Canon*

The closing of the canon is the event by which it was decided that no new scriptures would be added to the canon. Historically, the closing of the Christian canon implemented a theological view that regarded the days of scriptural Revelation as done. This was not to say that the redemptive process was over, or that personal revelation was impossible. The closing of the canon meant only that scriptural revelation was complete.

It is important, however, to see that the closing of a canon is not analytic in the concept of a canon. It would have been possible to hold both that existing Scripture (as delimited by the relevant criteria and community) was canonical, and that future revelation could also be scriptural and admissible into the canon. Politically, the closing of the canon deprived various religious movements of what would have been a powerful instrument for shaping the subsequent identity of the Christian community.

There has been no closing of the canon on the literary or constitutional sides. It is possible in principle, cocktail party discussions notwithstanding, for Literature to be written either today or tomorrow; the canon will come to incorporate it. Things are more interesting in constitutional law. If the reports of the Supreme Court decisions are canon, then the canon is not closed.

The amendment process also introduces a barrier to the closing of the canon. The amendment process makes the constitutional canon something of a clay sculpture; new clay can be added, and old clay can be removed. It is very slow sculpting, since the amendment machinery is cumbersome and dilatory. If the openness of a canon is to be measured in terms of actual fluidity, and if we set aside the case law in order to make the comparison more striking, then the literary canon is more open than the constitutional canon; texts come and go as Literature more frequently than they come and go as Constitution.

included in Hebrew Scripture. K. ALAND, *supra* note 105, at 4-5. In contrast to the Christian canon it seems fair to conclude that the literary canon could not be enumerated even in principle.

That the Constitution was fundamentally transformed by the adoption of the fourteenth amendment, for example, seems as obvious as our inability to explain the precise nature of the transformation. It might be possible, however, to believe that in some basic sense there can be no new counterpart to the fourteenth amendment; the canon is closed, even though the amendment process continues. Or it may be that the Constitution embodies what the theologians call a "canon within a canon."¹²⁷ That is, certain fundamental rights or structural allocations of decisionmaking authority may be unalterable, whereas others are repealable or modifiable. The constitutional "canon within a canon" can be protected by setting up procedural barriers to the amendment process, designed to protect the "canon within the canon" from radical revision. In contrast, protections of the canon may be jeopardized by the ability of Congress to withhold federal court jurisdiction over selected constitutional claims. Yet such restrictions can themselves be rejected as extra-canonical.

This great uncertainty and complexity on the boundaries of the constitutional canon is evidence that the foundational commitments that are logically prerequisite to the establishment of a canon are not as highly developed on the constitutional side as they are on the theological and literary sides.

3. *The Unity of the Canon*

Demonstration of the unity of the canon has been a favorite pursuit of theologians. The attempt to prove unity by means of exegesis is prompted by an understandable political motive. The legitimacy and identity of Jesus Christ and of the Christian church rest heavily upon the claim to fulfillment of the law and prophecy contained in the Hebrew Scriptures. The need to support this claim exerts an exquisite pressure on the interpretation of Christian Scripture. The New Testament must be seen both as sufficiently *realizing* the Old Testament to capture the Old Testament's legitimacy, and as sufficiently *overcoming* the Old Testament (compare the standard interpretation of Paul's Epistle to the Romans) to explain the necessity of the New Testament. This is the original paradigm of the Hegelian *aufheben*; the Old Testament is overcome in order to be realized.

Typology, also called figuration, has long been the favorite interpretive technique for the demonstration of the requisite unity. Tertul-

127. D. KELSEY, *supra* note 21, at 104.

lian, for example, takes Joshua to be a figure of Jesus; just as Joshua rather than Moses brings the people of Israel into "the promised land flowing with milk and honey," so Jesus' redemptive grace rather than Mosaic law will lead the people "into the possession of eternal life, than which nothing is sweeter."¹²⁸ Joshua is a real historical person, but he also prefigures a second real historical person. Likewise the Adam of the Book of Genesis is generally accepted by practitioners of figural interpretation as a figure or type of Jesus, who is then regarded as "the second Adam."¹²⁹ In both of these examples, interpretation is governed by the quest for unity between the testaments.

To the extent that this search for unity is actually political, as I have suggested, unity is not analytic in the concept of canon.¹³⁰ The canon could simultaneously be the sufficient set of texts and be internally fragmented. Some passages may not cohere with one another; others actually may contradict one another. On this view, the canon need no more be unified than closed. But such a view of the canon neglects the fact that the fundamental life-orienting commitment that activates the normative hermeneutical system seeks coherence. The whole point of a canon, as we have seen, is the carving out of a body of texts that, when set up in a hermeneutic object, propels a community toward an identity to which it has broadly committed itself. Inconsistencies or contradictions in the canonical corpus will have their reflexive counterparts in the organization of the community and in the meaningfulness of the life lived therein. Precisely because Scripture is focal to the hermeneutic object of a normative hermeneutic project, canonical inconsistency must threaten the unity of the lived world.¹³¹

Constitutional law shares the problem of the unity of the canon, in almost precisely the same form. Here again, canonical unity is not analytic in canonicity itself. Yet the fact that our endeavor is normative throws latent constitutional inconsistencies into stark and inevitable relief. Of these, the most important by far has been the "contradiction of slavery."

When the original Constitution was ratified, it embodied a complex compromise upon the institution of slavery, and no amount of fig-

128. E. AUERBACH, *supra* note 70, at 28-29 (quoting and discussing Q. TERTULLIAN, *ADVERSUS MARCIONEM* 3, 16 (1878)).

129. See, e.g., *Romans* 5:14: "Adam . . . was a type of the one who was to come." Here we see typological interpretation of the Old Testament embedded in the very text of the New Testament.

130. D. KELSEY, *supra* note 21, at 106.

131. Cf. H. FREI, *supra* note 10, at 3-4.

ural or typological reasoning could render this compromise normatively coherent and stable. The Constitution had little independent normative leverage upon society with respect to slavery, since with respect to slavery it simply embodied the social division.¹³² It is in the nature of constitutional argument and of the social role occupied by that argument that internal constitutional inconsistencies are found, exploited, and broken open. Since appeals to Scripture lack the coercive institutional consequence of appeals to Constitution, and perhaps for other reasons having to do with the source differentiation and the narrative complexity of Scripture, inconsistencies that are normatively operable may hide more effectively in Scripture than in the Constitution.¹³³

In summary, even if unity is not analytic in the concept of canon, what we actually *do* with canon can render unity a practical necessity. The pragmatics of the Constitution differentiate it here from the pragmatics of Scripture.

The disunity of the literary canon is both greater and more obvious than the disunity in Scripture or Constitution, and yet seemingly of much less normative concern. That we read mystics and otherworldly ascetics such as Dostoyevsky or Tolstoy along with Anglo-Catholics such as Eliot does not falsify our sense of normative identity, but rather animates it in the characteristically literary way. The disunity furthers the goal of humanizing by broadening the reader's knowledge of different categories of human experience. This makes literature the polar opposite to constitutional law with respect to the unity of the canon. Conflicts among the normative positions in literature are validated and rationalized by the sense of literature's humanizing function, to the extent that literature demands only that we speculate, contemplate, and empathize. So long as this is what we mean when we refer to Literature's humanizing *telos*, then Literature can be terribly inconsistent and still propel us in the requisite direction. In constitutional law, by contrast, disunity in the canon always threatens the normative integrity of the enterprise.

Efforts to render the literary *telos* more *engaged*, which would, if successful, heighten the need for literary unity by changing the pragmatics of literature, have not proved enormously influential. By contrast, aesthetic studies have rationalized existing literary disunity in

132. R. COVER, *JUSTICE ACCUSED* (1975); D. DAVIS, *THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION* 39 (1975).

133. D. DAVIS, *supra* note 132, at 523-56.

extraordinarily powerful ways. The typology of genres in Northrop Frye's *Anatomy of Criticism*,¹³⁴ for example, seems to *harmonize* the competing literary elements by fitting them into a larger cosmology. If we know that comedy, romance, tragedy, and irony participate like the seasons of the year in a higher synthesis, then we will not feel compelled to choose sides.

IV. THE AUTHORITY OF THE HERMENEUTIC OBJECT

A. VARIETIES OF AUTHORITY

David Kelsey has made the important observation that "there is no one normative or standard concept 'authority,'" but only "a family of related but importantly different concepts."¹³⁵ Relying on Stephen Toulmin's analysis of the structure of normative argument,¹³⁶ Kelsey demonstrates how the various uses of textual appeals in theological argument involve distinct senses in which Scripture is regarded as authoritative. Thus, argument structure provides one axis of differentiation of the concept "authority." After a brief summary of Kelsey's account of how the senses of Scriptural authority depend upon the different uses to which Scripture is put in theological argument, I will identify a second and more important axis of differentiation of the concept "authority." On this second axis of differentiation, the sense of "authority" is dependent upon the worldview that textual authority implements.¹³⁷

Illustrating Toulmin's categories with theological examples, Kelsey shows that Scriptural appeals can perform a number of different tasks in theological argument. Each sort of task has a corresponding sense of "authority." The task of providing evidence for a theological proposal gives rise to the authority of "Data." Scripture may serve as

134. N. FRYE, *supra* note 80.

135. D. KELSEY, *supra* note 21, at 139.

136. S. TOULMIN, *AN EXAMINATION OF THE PLACE OF REASON IN ETHICS* (1950).

137. A third axis of differentiation of the concept "authority" is important to Kelsey's project, but not to mine. Kelsey is exclusively interested in appeals to Scripture as authority for theology; he explicitly distinguishes between "authority for theology" and "authority for church." D. KELSEY, *supra* note 21, at 147. Kelsey also shows (by discussing the force of the parables) how Scripture can be authority "for the shape of one's personal life, not for one's Christian theological proposals." *Id.* at 124 (emphasis in original). These distinctions are washed out in my very general definitions of the three "fields" or "disciplines." As I am using the term, "theology" includes all the forms of the practical/normative use of Scripture. In my view, the distinction between authority for personal life, church life, and theological proposal is derivative, not fundamental. The distinction is an artifact of certain basic worldview commitments that may animate hermeneutic practice in relation to Scripture.

Data, but it may also serve as a "Warrant" that licenses the inference from the Data to the theological proposal. Furthermore, Scripture may be employed to provide "Backing" for the Warrant, or it may be taken to stipulate conditions of "Rebuttal" of the Warrant's claims. Because each use of Scripture "authorizes" the theological proposal in a different way, each is "authoritative" in a distinct sense.¹³⁸

Kelsey's insistence on the variety of uses of Scripture in theological argument is an important antidote to the naive view that theology is simply the direct manifestation, reflection, or translation of Scripture into a different but parallel format. (Compare Justice Roberts' notorious view that constitutional law consists of laying the constitutional text next to the challenged statute "to see if the latter squares with the former."¹³⁹) Yet the "family resemblance" between the senses of authority diagrammed by Kelsey is so striking that it is tempting to define that resemblance, and thereby resist the asserted differentiation in the concept. After all, each of the senses of "authority" (Data, Warrant, Backing, and so on) is an appeal that, in dialogical context, tends to make an argument rationally acceptable. If this conclusion is correct, textual authority is really just one sort of thing (that which renders an argument acceptable to reason), albeit a thing with a complex grammar.

Yet this sense of unity recedes if we introduce a second axis of differentiation. To explore this axis, the worldviews discussed earlier must be recalled. Authority, for consent theory, is that to which one can consent. Law has no claim to authority if it does not elicit the approval of the public; and while that approval is going to be sorted out differently by the different forms of consent theory, it is always going to be a matter of the satisfaction of the will. Yet authority on Lutheran premises is that which masters the will and defeats it. Luther spoke, not of the freedom of the will, but of its bondage.¹⁴⁰ Hence authority that serves the Lutheran worldview is as dedicated to constraining the will as authority that serves the consent-theory worldview is dedicated to fulfilling it.

138. *Id.* at 126-27.

139. *United States v. Butler*, 297 U.S. 1, 62 (1936).

140. M. LUTHER, *The Bondage of the Will*, in MARTIN LUTHER: SELECTIONS FROM HIS WRITINGS, 166 (J. Dillenberger ed. 1961). Luther did recognize the validity of one sort of freedom: freedom as "escape from the slavery of works." *The Freedom of a Christian*, *id.* at 85. This is not freedom of the will; rather, it is freedom *from* the will. In his argument against Erasmus, Luther cites God's foreknowledge and predestination: "This bombshell knocks 'free-will' flat, and utterly shatters it." *The Bondage of the Will*, *id.* at 181.

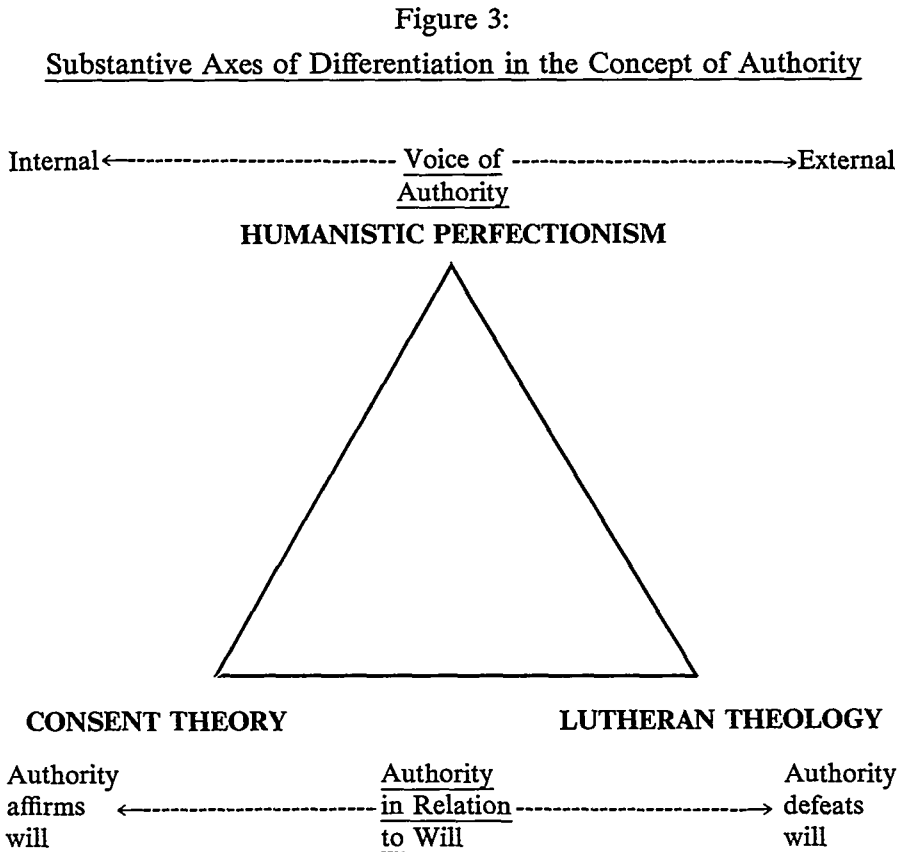
Clearly, the contrast between the two positions can be moderated within specific political theories. Certain social contract theories, for example, might justify the state as a damper upon the violent and corrupt wills that abide in the state of nature or of civil society. Even here, however, the will is bounded so that it may be better served. Lacking is the Lutheran view that the will is so corrupt that it must not only be bounded but corrected, transformed, and saved.¹⁴¹

The central point is that authority conceived as that to which we can consent is remarkably different from authority conceived as that which we require because our consent itself is worthless, corrupted, and evil. There is a further difference between both of these senses of authority and the sense of authority which flows from humanistic perfectionism. Concerns for freedom of the will which generate the opposition between Lutheran and consensual authority are much less central in humanistic perfectionism than in either of the other worldviews. Arnold wanted to give all human faculties the education due them; he would have rejected exclusive focus upon the will as a misdirected obsession with "one thing needful." Hence authority, on perfectionist premises, lacks both the sense of suspicion toward the will that is characteristic of Lutheran authority, and the sense of respect toward the will that is characteristic of consensual authority.

To understand the nature of authority in humanistic perfectionism, it is helpful to note a second respect in which the Lutheran and consensual worldviews are at odds. The worldviews place the voice of authority in different locations vis-a-vis the person. Within the consensualist worldview, the voice of authority is ultimately internal to the person, even though it is proximately invested in the state. Within the Lutheran worldview, by contrast, the voice of authority is external to the person in God's command and grace. Humanistic perfectionism marks a middle ground. In it, authority is in the humane deposit of culture (not so external as God's voice); yet culture is objective in relation to the individual (not so internal as one's own will). Hence the

141. Again, I am more interested here in the general Reformation character of the Lutheran sense of authority than in the differences between the views of Luther, Calvin, and Barth. The Reformation position that I am sketching is actually a composite of Luther's emphasis on redemption from the law's condemnation, Calvin's emphasis upon depravity, and Barth's emphasis upon the extrinsic character of God's sovereign command. See *supra* text accompanying note 55. Similarly, in order to draw the contrast between the Reformation position and consent theory, the range of variation in consent theory must be relegated to the background. We can only mention in passing that what the Rousseau/Kant wing of consent theory means by "will" is not the same as what is meant by the Hobbes/Locke wing.

distinct senses of authority that correspond to the three worldviews can be arrayed as follows:



The crucial point is that the meaning of authority differs substantially among the basic worldviews that set hermeneutic practice in motion. These differences leave their mark on the authoritativeness of the hermeneutic object. The authority of Scripture, on Lutheran premises, is the authority of God's saving externality in relation to the mortally depraved will. The authority of Constitution, on consensual premises, is the authority of one's own free will, objectified in the form of the state, but returned to the individual in the form of justice and liberty. The authority of Literature, on perfectionist premises, is the authority of the call to the all-sided realization of the best in human nature: the recognition of one's own perfection in the objectivity of the culture.¹⁴²

142. In the following sections of the Article, it will sometimes be helpful to mark the differences in the content of authority by employing a variety of ethical terms other than "authority"

It is important to see that one is not forced to regard any of these hermeneutic objects as carrying any of these forms of authority. Even if Kelsey is correct, that "authority" is analytic in "Scripture," and even if Perry and Monaghan are correct, that "authority" is analytic in "Constitution," the analytic truths are not strong enough to dictate the content of the concept of authority. Rescind the Lutheran assumptions in favor of a natural-law posture, and the authority of Scripture shifts in the direction of the authority that Literature exerts when animated by perfectionism. Rescind Arnold's perfectionism, and the authority of Literature not only shifts but is shaken to its very foundation. It is clear from these observations that the distinct senses of authority are not derived from "disciplines" or their distinct "practices," but from the basic meanings that motivate hermeneutic projects.

B. THEORIES OF THE LOCATION OF TEXTUAL AUTHORITY

1. *Scripture*

In his study, *The Uses of Scripture in Recent Theology*, David Kelsey asks four questions of each of his theological cases:

1. What aspect(s) of scripture is (are) taken to be authoritative? Is it the concepts in scripture, or the doctrines, or the historical reports, or the liturgical utterances, or the "symbols," or some combination of these, or something else?
2. What is it about this aspect of scripture that makes it authoritative?
3. What sort of logical force seems to be ascribed to the scripture to which appeal is made? Has it the force of a descriptive report, of an injunction, of an emotive ejaculation; is it self-involving?
4. How is the scripture that is cited brought to bear on theological proposals so as to authorize them?¹⁴³

We are concerned primarily with the first two questions. We want to identify the range of answers given in theology, and the comparable range of answers in literary criticism and constitutional law.

In answering his first question, Kelsey distinguishes three types. The aspect of Scripture that theologians take to be authoritative may be

that capture some of these differences. For example, it can be illuminating to call literary authority (on perfectionist premises) "value," since the authority resides in the intrinsically valuable features of human nature which are to be perfected.

143. See D. KELSEY, *supra* note 21, at 15.

its "doctrinal or conceptual content," its "recital or narrative," or its "mythic, symbolic, or imagistic expression of a saving event."¹⁴⁴ Kelsey does not claim that this typology is exhaustive. It simply organizes the data from his case studies into versions of scriptural authority, each of which has its characteristic way of answering the last three questions Kelsey asks.

The aspect of Scripture that theologians take to be authoritative—its "doctrinal or conceptual content," or the various alternatives—is not so much an answer to the big questions (Why is Scripture authoritative? What authority does it have?) as a necessary step that is taken once the big questions have been answered. Supposing that one already has a rough-hewn answer to the largest questions of Scriptural authority (a Sunday-school sort of answer: This is where we learn about God), one still needs a way of refining that answer in the course of Scriptural interpretation. The authoritativeness of Scripture as God's Book still leaves us unprepared for the vast interpretive task of facing up to and coming to understand the text. Kelsey's types are not ultimate answers to the mysteries of authority, but intermediate-level theories. These theories *locate* authority in the canonical text, either as a subset of the text (a "canon within the canon") or as a trait or feature of the whole text. Hence I will call Kelsey's types, and their literary or constitutional counterparts, "theories of the location of textual authority."

The first or "content" type regards the authoritative aspect of Scripture as the ideas that it teaches. Such ideas may correspond to church teachings or creedal affirmations ("doctrine"), or may consist of somewhat more abstract views taken as unique to Scripture ("concept"). The "doctrine" version does not answer basic questions about the nature of Scriptural authority, since it seems to refer to teachings already regarded as authoritative. If the location of Scriptural authority is "doctrine," then the reason must lie in some previous understanding and acceptance of the authority of church doctrine. Alternatively, if the authority of Scriptural doctrine relies, as it apparently did in the theology of the late nineteenth-century American Calvinist B.B. Warfield,¹⁴⁵ on the numinous effect of Scripture in the experience of the reader, then numinosity would actually bear the weight of authority on this view. We would be close to a phenomenological view of basic religious experiences, such as the *mysterium tremendum et fascinans* de-

144. *Id.*145. *Id.* at 17-24.

scribed by Rudolf Otto.¹⁴⁶ On such a view, the authority of Scripture would rest on its capacity to create numinous feelings, experiences of "the holy," in the reader.

The conceptual version of the "content" type seems less dependent than the doctrinal version on extrinsic proofs of authority. Kelsey's example of an exponent of such a view, the contemporary Lutheran theologian Hans-Werner Bartsch,¹⁴⁷ thought that Scripture features concepts such as "peace" and "reconciliation," which have a definite structure, common to both testaments. The concepts are unique to Scripture; they differ from other religious and secular ideas. On this view, of course, these distinctive Biblical concepts bear authority only insofar as they are convincing ways of thinking. Otherwise they are authoritative only for those who stand ready to accept Scriptural guidance on proof of its distinctiveness alone. One cannot help but feel that whatever feature of Scripture accounts for this readiness to accept it (on corroborative proof of distinctiveness) is far more important than the distinctiveness.

The second type in Kelsey's typology sees Scriptural authority as located not in doctrinal or conceptual content, but in the Biblical story or stories. This view has the advantage of responding to the sheer volume of storytelling in the Bible, which on the first type must be squeezed into the confines of doctrinal teaching or the transmission of concepts. Kelsey distinguishes two views of the authority of Biblical stories: narrative as "recital" and narrative as "identity description."

In the "recital" view, "[t]he Bible is not primarily the Word of God but the record of the Acts of God, together with the human response thereto."¹⁴⁸ This way of looking at Scriptural authority emphasizes episodes such as the Babylonian and Egyptian captivities, emancipation from bondage, deliverance in the desert, and the crucifixion and resurrection of Jesus. (The "election" of the covenant people, a Biblical theme whose significance for the American understanding of constitutional law cannot be overestimated, is a recurrent theme of these episodes.) This "recital" understanding of the location of Scriptural authority is essentially a view of meaning as historical reference.¹⁴⁹ The saving events themselves are the true and final object of

146. R. OTTO, *THE IDEA OF THE HOLY* (1950).

147. See D. KELSEY, *supra* note 21, at 24-29.

148. *Id.* at 33 (quoting G. Ernest Wright).

149. H. FREI, *supra* note 10, at 86.

religious attention; the value of Scripture lies in the fact that it reports the events.

Kelsey distinguishes this "recital" or referential view of narrative from the view of narrative adopted in theological enterprises such as Karl Barth's, in which the narratives are regarded as "identity descriptions." "The [gospel] stories are taken [by Barth] as having the logical force of identity-descriptions of Jesus. They give, Barth says, a 'picture' of Jesus. The picture is not inferred from the details of the story. It *is* the stories."¹⁵⁰ As Kelsey and Hans Frei have observed, this understanding of Scripture takes it to be something like a "nonfiction novel."¹⁵¹ Indeed, Frei is quite explicit in his acknowledgment of the role of literary narrative theory, especially Erich Auerbach's study of realistic narrative in *Mimesis*, in educating the modern reader to the difference between the moral meaning of referential and novelistic narrative.

In his study of eighteenth- and nineteenth-century biblical hermeneutics, Hans Frei presents a complex breakdown of the hermeneutical options pursued in that period. Several of these options can be regarded roughly as versions of Kelsey's second type. The first of the two versions of the second type, narrative as "recital," is exemplified by the *heilsgeschichtliche Schule*, which regards Scripture as reporting the special God-enacted sequence of events called "salvation history." According to this nineteenth-century school, "the unitary meaning of scripture is its reference to one special sequence of real events, from creation to the end of history, with their center in Christ's incarnation, the whole sequence ambiguously related to other historical events."¹⁵²

The problem for the salvation-historical view of Scripture as historical narrative is that it does not decide whether the historical events themselves, as viewed by neutral observers, are saving events, or whether they become so only when approached from a confessional position. To this extent, salvation-history is an unstable compromise between two more definite hermeneutical positions. One, which Frei calls the theory of "ostensive reference," "treated the narrative portions of the Bible as a factually reliable repository of divine revelation rather than the immediately inspired text that it had been to orthodox and pietist commentators."¹⁵³ This view of narrative was the hermeneutical

150. D. KELSEY, *supra* note 21, at 45 (emphasis in original).

151. *Id.* at 45.

152. H. FREI, *supra* note 10, at 46.

153. *Id.* at 87.

counterpart to empiricism in epistemology. By contrast, the theory of "ideal reference" corresponded to the onto-epistemology of the pre-Kantian philosopher Christian Wolff, who "equated meaning with the transconceptual essence or possible reality to which a concept and word refer. The ultimate ground for meaning is ontology."¹⁵⁴

Frei argues that both of the main referential options, ostensive and ideal, tended to undermine the unique authority of Scripture.

When the meaning of the biblical stories becomes their ideal reference, so that they are interpreted by more generally derived notions, it cannot be long before the suggestion will arise that the same ideal truths to be discovered in the Bible may be found in more appropriate forms and concepts elsewhere and in later times.¹⁵⁵

For its part, historical reference tended to decay into an evidentiary position. From their original status as realistic narrative, the biblical stories declined in power until they came to be viewed simply as some evidence that the event described had occurred.

In both ideal and ostensive reference, the meaning of the biblical stories ultimately becomes a rather poor access to what really counts, namely, their reference. "In either case, . . . the *meaning* of the stories was finally something different from the stories or depictions themselves, despite the fact that this is contrary to the character of a realistic story."¹⁵⁶ In Frei's assessment, the referential hermeneutical theories, whether ideal or historical-ostensive, have abandoned the pure narrative attitude that can be regarded as best tailored to a storytelling Scripture.

In Kelsey's final type, Scriptural authority is located in images, symbols, or myths, perhaps scattered through the Bible rather than organized thematically after the fashion of conceptualism or of narrative theories. These images are as close as the Christian tradition comes to the "hierophanies," manifestations of the sacred that characterize the phenomenology of archaic religion.¹⁵⁷ When so-called "primitive" or archaic religions attended to certain geographical locations, or celebrated physical objects such as certain stones or trees, it was because these objects were thought not only to express but actually to occasion contacts with the "really real."¹⁵⁸

154. *Id.* at 101.

155. *Id.* at 172.

156. *Id.* at 11 (emphasis in original).

157. See generally M. ELIADE, PATTERNS IN COMPARATIVE RELIGION (1958).

158. M. ELIADE, THE SACRED AND THE PROFANE 11-13 (1959).

When this religious attitude is applied to Scripture, and specifically to Biblical symbols, the result is the symbolic-ontological theology of Paul Tillich.¹⁵⁹ While some theologians have felt that these symbols or images can operate today of their own force, other theologians, notably Rudolf Bultmann, have argued that they must be placed in their specific historical contexts, and so "demythologized," if their power to activate the "really real" is to be preserved.¹⁶⁰ The program of demythologization has tended to render the "reality experience" expressed and occasioned by the symbolism somewhat private and personal, while theologies that do not subject the images to historical criticism understand the images in a more public and impersonal fashion.¹⁶¹ Still, what these symbolist or mythic views have in common, and what distinguishes them from the other types, is their location of Scriptural authority in those passages which carry expressive and generative force.

None of the types found by Kelsey or Frei are truly inconsistent with the general definition of Scripture as the church's text, in which the community is to find the call to its mission and identity. For Kelsey, at least, this result is ordained by his method: he certainly did not want his definition of Scripture to be strong enough to exclude as non-Christian the uses to which the biblical texts were put by his theological subjects.

The situation changes dramatically, however, when concrete theological worldviews such as the Reformation theology are adopted as a fixed point of reference. While Kelsey found Protestant examples for each of his types, it must be the case that certain views of Scriptural authority—such as the historical-ostensive position described by Frei—are inconsistent with the theological matrix of *sola scriptura*. If Scripture is understood as a report of historical events, then *sola scriptura* cannot be affirmed, since it is possible in principle for there to be other eyewitness reports that have the same events as their referents.

2. Literature

There are, to my knowledge, no studies of the textual location of literary authority as comprehensive and sophisticated as the theological work of Frei and Kelsey. This is surely not a surprising state of affairs. After all, the literary canon is so vast by comparison to the Biblical that

159. See D. KELSEY, *supra* note 21, at 73.

160. See generally R. GRANT, *supra* note 50, at 200-04.

161. D. KELSEY, *supra* note 21, at 85.

no attempt to typologize locations of authority in the former could ever hope to be sufficiently inclusive. Furthermore, criticism has sometimes divorced aesthetic from ethical concerns, while theological hermeneutics has been comparatively more reluctant to indulge in purely spiritual interpretations, severed from moral questions. Finally, the sense of Scripture as Revelation, common to all theological hermeneutical postures, bounds and defines the theological hermeneutic enterprise in a fashion with no parallel in literary criticism. Conceptions of the location of literary authority are not answers to a single question, but a family of theories with only a family resemblance.

Certain views of literary authority are historically related to views of Scriptural authority. Thus, the figural or allegorical mode of textual moralism that dominates medieval narrative was borrowed from the allegorical interpretation of Scripture. The reader of the Arthurian romances, for example, is struck by the sheer weight of allegorism in the texts, and by the constant interruption of the narrative by "decodings" of the allegory, designed to reveal their other-worldly or spiritual meanings.¹⁶² "In this conception [of reality]," according to Auerbach,

an occurrence on earth signifies not only itself but at the same time another, which it predicts or confirms, without prejudice to the power of its concrete reality here and now. The connection between occurrences is not regarded as primarily a chronological or causal development but as a oneness with the divine plan, of which all occurrences are parts and reflections. Their direct earthly connection is of secondary importance, and often their interpretation can altogether dispense with any knowledge of it.¹⁶³

This use of allegorism clearly is dominated by the "ideal reference" type of Scriptural authority.

The links in the transmission of ideas between theological and literary interpretation can be quite complex. The gospel story, as Auerbach observed, with its combination of the highest tragedy and the lowliest characters, was largely responsible for breaking the hold of the classical view that great, morally instructive and operative tragedy depended on great characters: the kings and princes of the Greek tragedies.¹⁶⁴ This view opened the way for "realistic narrative," which "took random individuals from daily life in their dependence upon cur-

162. T. TODOROV, *supra* note 24, at 122.

163. E. AUERBACH, *MIMESIS* 555 (1946).

164. "It was the story of Christ, with its ruthless mixture of everyday reality and the highest and most sublime tragedy, which had conquered the classical rules of style." *Id.* Unless the Old Testament stories of patriarchs, kings, and prophets are viewed as occupying a less quotidian

rent historical circumstances and made them the subjects of serious, problematic, and even tragic representation."¹⁶⁵ By the nineteenth century, however, when the realistic novel began to emerge, theology had forgotten the insight that had contributed to this emergence. Preoccupied with referential views of Scripture, theology had to be reminded by literary criticism that a realistic narrative theory is possible. The current revival of theological interest in narrative¹⁶⁶ is incomprehensible apart from the narrative studies of the literary critics.

The same must be said of the symbolist, imagist, and mythological views of Scripture that occupy Kelsey's third type. Current practitioners of those methods have been influenced by such literary "myth critics"¹⁶⁷ as Northrop Frye, who in turn was the beneficiary of the tradition of symbolic interpretation in Christian theology (and also, of course, in Jewish mysticism and Judeo-Christian Gnosticism).

It will be recalled that in Kelsey's third type, symbolism, myth, and image operate both by expressing an experience of the holy and by producing it in the reader of Scripture. Literary treatments of symbolism and myth are sometimes endowed with a comparable sort of authority: a capacity to arouse in the reader a crisis in which the "really real" is encountered. More frequently, however, the experiences that literature provides are given an importance that is less spiritual and more humane. In short, literary criticism shares with Kelsey's third type a view of the text's authority as being located in the text's capacity to give the reader unique and transformative experiences, but takes a larger view than this theological hermeneutical stance of the sort of experiences that the text offers, and also of their value.

Theories of literary value rooted in the text's experience-generating and reader-transformative power can be subdivided, according to the nature and value of the experience. While these experiences shade into one another, they fall rather loosely into three types: affective, epistemic, and intellective.

The affective type of transformative experience/value is exemplified by Aristotle's theory of tragic catharsis,¹⁶⁸ and by T.S. Eliot's no-

reality or a less sublime tragedy, they would seem to share in the process by which classical standards were altered.

165. *Id.* at 554. *Cf. id.* at 457.

166. H. FREI, *THE IDENTITY OF JESUS CHRIST* (1967); S. HAUERWAS, *supra* note 26; E. MCKNIGHT, *MEANING IN TEXTS: THE HISTORICAL SHAPING OF A NARRATIVE HERMENEUTICS* (1978); D. TRACY, *supra* note 26; D. TRACY, *BLESSED RAGE FOR ORDER* (1975).

167. See Lodge, *supra* note 81, at 422-55.

168. ARISTOTLE, *POETICS* 1449b 25-9.

tion of the objective correlative.¹⁶⁹ In both cases, the value of the text lies in its operation on the feelings, freeing them from their preoccupation with passion and suffering, or attaching them to symbolic universals. In neither case must the reader understand or appreciate the operation in order for it to succeed. The authority of the text is its power to educate the feelings themselves, not to inform the reader about them.

Theories of the epistemic type trace the authority of literature to its power to "cleanse" "the doors of perception."¹⁷⁰ Susan Sontag's argument in "Against Interpretation," discussed earlier,¹⁷¹ is of this type. What counts here is the text's capacity to refresh the reader's direct perceptions of the world. This theory is not at all one of *mimesis*, a notion of literature as imitating reality, or as fashioning our conception of it. Instead, this view values the direct operation of literature on the perceptive experiences themselves.

The third type of theory of the text's operational value is the intellectual. Here a distinction must be drawn between two very different, and in fact opposed, schools of thought. One school values literature because, or at least insofar as, it teaches philosophy. This position is represented by Leo Strauss, and his critic/political-philosopher students.¹⁷² An excellent example of this sort of analysis is the treatment of Shakespeare as a neoclassical political philosopher.¹⁷³ A quite different school of intellectual theory concerns itself with the *operation* of the text: its effect upon the reader's categories or constructs, not the thesis or analysis that it presents to the reader's conscious judgment. Auerbach's *Mimesis* is an outstanding example of this sort of criticism. The more recent examples of intellectual criticism in this second sense are "structuralist." My own analysis of the way in which Malory's *Morte d'Arthur* functions as an intellectual operator¹⁷⁴ is of this type, as

169. T.S. Eliot discusses the effect of literature upon the feelings in *Tradition and the Individual Talent*, printed in Lodge, *supra* note 81, at 75.

170. W. BLAKE, *The Marriage of Heaven and Hell*, in COMPLETE WRITINGS 154 (G. Keynes ed. 1971).

171. See *supra* notes 83-86 and accompanying text.

172. ANCIENTS AND MODERNS (A. Bloom & H. Jaffa eds. 1953).

173. A. BLOOM & H. JAFFA, SHAKESPEARE'S POLITICS (1964).

174. Garett, *Arthur and President Kennedy: The Myth of Kingship*, 57 ROYAL ANTHROPOLOGICAL INST. NEWS 5 (1983). See also Garett, *Arthur: The Myth of Kingship*, U.S.C. CITES, Fall/Winter, 1982-83, at 36-43.

is Levi-Strauss' interpretation of myths as "good to think [with],"¹⁷⁵ and Tzvetan Todorov's structural study of narrative.¹⁷⁶

Thus far we have attended to certain views of literary authority that are parallel to (and historically associated with) certain theological theories, and also to the three experience-oriented theories that are comparable to theological symbolism but much broader in scope. It remains to mention the view of literary authority that, in the nature of the case, is most divergent from the theological hermeneutical options. This is the Romantic notion that the foundation of the authority of Literature is the genius of its author. Genius has never been an important concept in theological hermeneutics, since God is usually taken as the ultimate author of the Biblical texts. The framers of these texts may have had special authority if, for example, they were also prophets or apostles; but they had no special authority as geniuses. As belief in Scriptural inspiration waned, however, Biblical hermeneutics acquired a literary-critical parody in the form of belief in poetic inspiration. While the theory of poetic genius is not favored in contemporary criticism, it may still be the dominant theory of literary authority in the mind of the reading public.

None of the views of the location or source of literary authority are excluded by the worldview—humanistic perfectionism—that sets up the reading of Literature as a normative hermeneutic project. At the same time, none of these views are selected or preferred by the underlying theory. Instead, the affirmations of Literature's humanizing power—for example, D.H. Lawrence's belief that "[t]he novel is a perfect medium for revealing to us the changing rainbow of our changing relationships,"¹⁷⁷—are typically so broad that they can accommodate most of the popular views of the location of literary authority. Literature can "reveal our changing relationships" by means of affective, epistemic, or intellectual power over the reader, by historical reference, or by "realistic narrative" in Auerbach's sense.

3. *Constitution*

Until quite recently, constitutional law paid much less attention to the location of constitutional authority than had our other fields in relation to their interpretive objects. The current situation is that several views of the location of constitutional authority can be distinguished. The difficulty lies, as we shall see, in imagining how any of these views meet the needs of constitutional law as a normative hermeneutic pro-

175. C. LEVI-STRAUSS, *TOTEMISM* 89 (1963).

176. T. TODOROV, *supra* note 24, at 120-43.

177. Lodge, *supra* note 81, at 131.

ject. While all of the literary views discussed in the previous subsection can execute the mission of Literature, and while most of the theological hermeneutic positions can execute the mission of Scripture, none of the constitutional views persuasively executes the mission of Constitution.¹⁷⁸

Originalism, which dominates the contemporary discussion,¹⁷⁹ locates constitutional authority in the original meaning of the Constitution: its meaning at the time of its authorship and enactment. This view can embrace several somewhat different methodologies. The original understanding might be retrieved by inspection of authorial intent; by historical reconstruction or *Verstehen* of the Diltheyan sort; or by analyzing the text as the realization of a unique set of grammatical and lexical possibilities afforded by the language of the period.

Conceptualism, as proposed by Ronald Dworkin, closely follows the conceptual type described by Kelsey.¹⁸⁰ For Dworkin, as for Kelsey's conceptualists, what renders the text authoritative, and deserves to be the object of attention, is the set of concepts embodied in the text.

A third view of the location of authority in the Constitution traces it to the ability of key constitutional phrases, such as "cruel and unusual punishment" or "due process," to pick up the underlying and evolving public value-consensus.¹⁸¹ While this sort of consensus cannot be scanned by the ordinary techniques of opinion sampling, it is in principle within the reach of the sociology of knowledge¹⁸² or of linguistic analysis.¹⁸³ If the consensus is understood sociologically, then the corresponding view of constitutional authority is historical-referential; what the Constitution means, and what renders that meaning authoritative, is the social value-structure to which it refers. If the consensus is understood linguistically, then the corresponding view of constitutional authority is nonreferential, and merges imperceptibly into the conceptualist view.

178. For the distinction between "Constitution" (normative hermeneutic object) and "the Constitution" (extension of the focal text), see Figure 2, *supra*, and corresponding text.

179. See Chemerinksy, *supra* note 100.

180. R. DWORKIN, *supra* note 106, at 134-36; cf. Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

181. Radin, *Cruel Punishment and Respect for Persons*, 53 S. CAL. L. REV. 1143 (1980) [hereinafter cited as Radin, *Cruel Punishment*]; Radin, *The Jurisprudence of Death*, 126 U. PA. L. REV. 989 (1978) [hereinafter cited as Radin, *Jurisprudence of Death*].

182. Radin, *Cruel Punishment*, *supra* note 181, at 1176 n.109; Radin, *Jurisprudence of Death*, *supra* note 181, at 1032-42.

183. See Bruce Ackerman's discussion of "ordinary observing" in B. ACKERMAN, *PRIVATE PROPERTY AND THE CONSTITUTION*, 93-97 (1977).

A fourth prominent view of the location of constitutional authority is functionalism. According to this perspective, constitutional authority should be located wherever political theory places it. Whether this placement is genuinely *in* the text *qua* hermeneutic object is entirely unimportant on this view, since theories of meaning are regarded as functions of political philosophies. To illustrate constitutional functionalism, let us begin by affirming a certain species of utilitarian political philosophy: "holding-utilitarianism." Holding-utilitarianism proposes that the Supreme Court ought always to arrive at that holding which, in both the short and long run, will maximize utility. If we take this as our underlying philosophy, then constitutional functionalism allows the Court to regard its holding in each case as an interpretation and application of the authoritative constitutional meanings. *Most* theories of the location of authoritative meaning, of course, would insist that the Court give us an independent account of why its behavior in deciding cases counts as an interpretation of constitutionally authoritative meanings. For functionalism, however, interpretation of authoritative textual meaning is just a placeholder, occupied by whatever normative theory generates the holding. If there are good utilitarian reasons to think of what one is doing when one performs holding-utilitarianism as interpreting authoritative meanings, then one ought to think that way. Utility—or whatever norm animates the political theory—is the measure of meaning.

Of these views, functionalism obviously is least suited to the needs of constitutional law conceived as a normative hermeneutic project. Instead, functionalism is the sort of meaning-theory that constitutional law might adopt if it were ever clearly to abandon the hermeneutic model in favor of scientific policymaking.¹⁸⁴

The failings of originalism stem from its inability to explain what it is about the original understanding that is authoritative. Authorial intentionalism in literary criticism may be a reasonable method for executing the poetic genius view of literary authority, but it is not itself a theory of authority. Similarly, the *Verstehen* method in theological hermeneutics may execute several views of Scriptural authority, including the theory of historical reference, but, again, this method is not itself a theory of authority. Originalism is an umbrella for several methodologies, rather than an idea of what it is in or about a text that makes it authoritative. This is surely obvious in literary criticism and in theology, where the fact that one has discovered the "original under-

184. See *id.*

standing" of *Paradise Lost* or *The Book of Ruth* does little or nothing to convey a sense of the authority of those texts. If originalism is to succeed as a component of constitutional hermeneutics, it must explain why the "original understanding" conveys authority in the constitutional hermeneutical context when it does not convey authority in other hermeneutical contexts.

Conceptualism succeeds in constitutional law about as well as it does in literary criticism and in theological hermeneutics. If we are already sure that a text is authoritative for us, then its unique conceptual content may provide a reasonable view of the textual location for that authority. But nothing about the idea of unique conceptual content conveys any sense of authoritativeness. Unless we already know that the text is a work of genius, or a reference to saving events in history, or a "bricoleur" (handyman)¹⁸⁵ that restores the creative power of our categories (as in the intellectual version of the literary theory that values texts as operators upon the reader), or some other embodiment of normative value, then the fact that the text offers a unique conceptual structure gives it little claim upon us.

The idea of constitutional authority as located in a deep and evolving value-consensus is plausible, but does little to carry through the enterprise of a hermeneutic constitutional law. Courts can consult this consensus just as they can consult any other oracle. Such a consultation, however, lacks the characteristic of mediacy which is central to normative hermeneutic projects. The hermeneutic object is not simply a mirror in which one's preexistent values can be viewed, but an independently authoritative object that exerts leverage on one's identity. If Constitution is like Scripture or Literature, it does not simply report the communal identity; it operates on that identity, by establishing, challenging, and preserving it, and by realizing its normative mission.

It can be said of all four constitutional views that they pay insufficient attention to the sort of question that Kelsey asks: What is it about the text that renders it authoritative? I am far from denying that the question can be regarded as irrelevant to constitutional law, especially on functionalist premises. But if constitutional law is to be understood as a hermeneutic enterprise, then the sort of question put by Kelsey is inescapable. Viewed as answers to this question, the four views discussed in this subsection are incomplete. Originalism and conceptualism have an inadequate account of why these aspects of the text are

185. This is Levi-Strauss' image, from C. LEVI-STRAUSS, *THE SAVAGE MIND* 16-33 (1966).

authoritative, while the value-consensus view, which carries somewhat greater moral force (within a rather sophisticated version of moral conventionalism and evolutionism), is inadequately related to the text, and to hermeneutic practice carried out with respect to the text.

These difficulties are manifestations of the general failure of constitutional law to harmonize the recourse to political-philosophical norms, which every constitutional lawyer and scholar understands to be a necessary feature of constitutional jurisprudence and adjudication, with interpretive activity. The truth which functionalism observes, but exaggerates and distorts, is that every political theory that offers to justify constitutional decisions and to systematize constitutional jurisprudence must build its own bridge to interpretive practice. It is true that this need exerts pressures on views of textual authority, but it is difficult to believe that these pressures are much greater than those exerted by the theologian's need to reconcile systematic theology and hermeneutics, or the critic's need to harmonize general critical theory and practical criticism. In every case, the bridges between normative theory and interpretation theory must be built out of materials that have the status of the views discussed in the preceding subsections on Scripture and Literature.

It is certainly not my purpose to urge that the bridge in constitutional law be built to any particular design: only, by comparative analysis, to indicate its indispensability, and to provide some of the lumber out of which it might someday be built. In that spirit, the final Section of this Article will compare the uses to which one view of textual authority, the narrative view, is put in our three fields. The point is not to replace existing constitutional notions such as originalism or conceptualism with a new "narrative theory," but to exhibit some of the normative operations of narrative, especially in relation to the kind of constitutional political theory which sets up Constitution *qua* normative hermeneutic object as a "consent tradition." That much of what will be said about the constitutional stories will seem terribly obvious does not count, I think, against the use of narrative as a bridge-building material. Narrative is as obvious a part of constitutional authority as it is a part of theological authority. The problem, to employ Frei's useful metaphor, is that narrative in both fields has been "eclipsed" by a variety of practical and philosophical interests.¹⁸⁶

186. See H. FREI, *supra* note 10.

C. HERMENEUTIC FUNCTIONS OF NARRATIVE

1. *The Weak Sense of Narrative and Its Ideological Function*

Claims currently made for the power of narrative are terribly broad. It has been said that "we dream in narrative, daydream in narrative, remember, anticipate, hope, despair, believe, doubt, plan, revise, criticise, construct, gossip, learn, hate and love by narrative,"¹⁸⁷ and that narrative is important in social ethics to "character and the virtues, questions about the foundation of ethics and moral rationality, issues in christology and political theory, the significance of the virtues of hope and patience for the Christian life, . . . the meaning of marriage and the value of the family for the church."¹⁸⁸ Claims as broad as these are unlikely to be redeemed by any nontrivial notion of narrative.

I want to draw attention to two very different statuses that narrative may occupy in hermeneutic projects. On one hand, narrative may be located at the level of the analytic truths about the hermeneutic object. I will call narrative that occupies this status "weak narrative": weak because, on this plane, narrative simply restates that which is inherent in the concept of the hermeneutic object. On the other hand, narrative may adopt a specific shape (ideal-referential, historical-referential, intellectual, "pure" novelistic, etc.) and serve to execute the commitments of a worldview in the course of interpretive practice. I will call this second sort of narrative, which is in the service of a worldview and gives authority a specific location in the text, "strong narrative." In expounding the two sorts of narrative, I will be especially concerned to demonstrate the peculiar vulnerability of weak narrative to ideological abuse. I will describe the ideological function of weak narrative in contemporary theology, and warn against a repetition of the same mistakes in contemporary constitutional law.

To see how weak narrative works, let us recall Kelsey's account of the concept of Scripture. According to Kelsey, to call a set of texts "Scripture" is to say that they are authority for the identity of the church community. If we suppose this account to be correct, it is easy to see how it suggests that the relation between text and community is a kind of narrative. One imagines a community that lives by remembering the story of its mission: how and why it was founded, its calling, the times it strayed and the retribution it received, and so on.

187. A. MACINTYRE, *AFTER VIRTUE* 197 (1981) (quoting Barbara Handy).

188. S. HAUERWAS, *supra* note 26, at 3-4.

Perhaps the feature of (Kelsey's account of) Scripture *qua* hermeneutic object that is most responsible for this invitation to narrative is the element of "identity." We have already seen how narrative can be understood to "render an agent" or tell us "what kind of people we ought to be."¹⁸⁹ Alasdair MacIntyre tells us that questions of obligation and identity depend on "the prior question 'Of what story or stories do I find myself a part?'"¹⁹⁰ He also says that to have an identity is to be "the subject of a narrative."¹⁹¹ It is this weak and rather loose sense of narrative that Stanley Hauerwas has seized as the warrant for regarding Scripture's authority as an authority of narrative. If Scripture is that which authorizes our identity, and if that which authorizes identities is narrative, then Scripture authorizes by virtue of narrative.

Hidden in this syllogism is the elevation of an (asserted) conceptual truth into a historical claim. Hauerwas' treatment of narrative in *A Community of Character*¹⁹² leads us to believe that there is (or was) such a thing as a "community" that has a "tradition" that is itself the prolongation of the community's "story." One imagines the church hearkening to its story in the expectation of learning what the church has been and ever must be. But what licenses this leap from analytic truths about the concept of Scripture to historical, descriptive, and prescriptive claims about the church community? The proposition that Scripture *means* the set of texts taken as authoritative for communal identity does not entail or even support the inference that there actually is or ever has been a community that is the subject of a story, or the inference that what this community ought to do is to recall its story and live out the identity that this story renders.¹⁹³

If my account of canonicity¹⁹⁴ is correct, then one should greet with skepticism the view of Christianity as a "community" with a "story" that imparts its "identity." In the formation of the canon, the

189. *Id.* at 67.

190. A. MACINTYRE, *supra* note 187, at 201. See generally *id.* at 197-209; S. HAUERWAS, *supra* note 26, at 9-152.

191. A. MACINTYRE, *supra* note 187, at 202.

192. *Supra* note 26.

193. Two difficulties for the prescriptive inference should be distinguished. (1) From the analytic truth about Scripture, one cannot infer the existence of either the community, which is to be the subject of the obligation, or the traditional story, which is to be the object of the obligation. Yet the existence of an obligation presupposes the existence of its subject and object. Therefore the analytic truth does not support the prescriptive inference. (2) If one thinks not only that the analytic truth about Scripture does not support the inference to the existence of community and story, but also that there are extrinsic (perhaps historical or sociological) grounds for doubting that the church can ever be a "community" with a "story," then, on the further assumption that "ought implies can," the prescriptive inference is barred.

194. See *supra* notes 102-33 and accompanying text.

very texts that are thought to mediate the alleged story were themselves pawns in the political struggles of the early church. Dominant elements in the church, it will be recalled, offered spurious criteria for canonicity, ignored those very criteria in favor of the view that the canonical texts were really "the community's texts," and then defined that very community by expelling undesirable texts and the sects most attached to them.

Narrative functions ideologically when it exploits an asserted analytic truth about Scripture to enforce a community's existence (against a backdrop of intergroup rivalry and stratification) and a communal tradition (against a background in which groups are struggling to seize traditions for purposes of self-legitimation). There are two ways to correct this ideological function. The first accepts the asserted analytic truths; the second criticizes them.

The first corrective accepts the claim that the proposition that a set of texts is authority for the identity of the community is analytic in the proposition that a set of texts is a church's Scripture. The corrective works by restricting the force of the weak sense of narrative, as a genre which captures this analytic truth, to the status of a "Just So" story. Such stories are familiar in social theory, but they are always in danger of being mistaken for historical claims. Thus, Freud called his account of the primal family (in which the sons overthrew, killed, and ate their father, who had monopolized the women) a "Just So" story,¹⁹⁵ an account that makes sense of experience but that is not offered as an historical truth. Similarly, Rousseau offered the social contract in the spirit of a fable that highlights certain matters of interest to political theory.¹⁹⁶ Yet generations of epigones have mistaken these theoretically-motivated "Just So" stories for empirical historical claims.

One way to correct the ideological function, then, accommodates the weak sense of narrative but thinks of it in terms of a "Just So" story. Here we have a fairy tale about fairy tales. To make sense of the analytic truths about Scripture, we say: Once upon a time, there was a community that had a story. (That story in turn starts out: "Once upon a time, there was a community that had a story. . . .") We do not mean that there ever *was* such a community or such a story. We

195. The concept of the primal horde is only a "Just-So" story, "but I think it is creditable to such a hypothesis if it proves able to bring coherence and understanding into more and new regions." S. FREUD, *Group Psychology and the Analysis of the Ego*, in 18 THE STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 65, 122 (1955); see also annotation, *id.* at 128.

196. J. ROUSSEAU, *THE SOCIAL CONTRACT: ANNOTATED EDITION* 22-33 (1974).

simply tell this story about the community-with-the-story to highlight certain features of the way we talk about Scripture.¹⁹⁷

A second way to correct the ideological function of narrative is to reject the very claim that we do talk this way about Scripture. After all, are we so certain that features such as authority, community-referral, and identity are analytic to the concept of Scripture? While this Article is not the place to decide this question, it is worth noting an oddity in Kelsey's account. Kelsey makes identity analytic in Scripture; yet identity is also central to one of the substantive theological *types* (the "identity-description" variant of the narrative type) that Kelsey investigates. According to his methodology, his account of the concept of Scripture is supposed to be neutral as between the competing theologies. But fixing identity in the very concept of Scripture obviously tilts the theological investigation in favor of the theological types best equipped to generate identity-accounts. If we stipulate the methodology of neutrality, then we must expunge the offending content from the exposition of the concept of Scripture. We do not want to settle a substantive theological battle under the guise of a conceptual analysis of the hermeneutic object.

Use of the weak sense of narrative is invited by *any* hermeneutic object that exhibits the features that Kelsey attributes to Scripture. As we have seen, Constitution is sometimes described as having these attributes. Thus, both Monaghan and Perry regard the Constitution as intrinsically authoritative.¹⁹⁸ There are any number of ways to support this characteristic imputation of intrinsic authority to the Constitution. (For example, one could say that the Constitution is authoritative because we have consented to it, or because its provisions are just, etc.) The notion that the Constitution is authoritative begins to use (and perhaps abuse) the weak sense of narrative only when constitutional authority is tied to the claim that the Constitution is the "tradition" or "narrative" of a "community." Just these claims are made by Perry.¹⁹⁹ Indeed, Perry goes so far as to describe the community for which the Constitution is authoritative as the "embodiment" of its traditions or narrative.²⁰⁰

197. Note how this corrective to the ideological function of the weak sense of narrative operates by pushing weak narrative in the direction of nonreferential narrative: a more specific conception of the location of textual authority.

198. See *supra* notes 43 and 44 and accompanying text.

199. Perry, *supra* note 7, at 563, 594-95.

200. While the term "embodiment" is Perry's, *id.* at 563, the underlying urge to overcome the subject/object distinction in hermeneutics is quite widely shared. The principal critic of the sub-

Perry recognizes that in locating the authority of the Constitution in its embodiment of a community's tradition or narrative, he is following and applying Kelsey's concept of Scripture, Alasdair MacIntyre's theory of narrative, and Stanley Hauerwas' theological rendition of MacIntyre.²⁰¹ It should not be surprising, therefore, that my earlier objections to these theories are applicable to Perry. First, the analyticity of authority, community, and identity in Constitution is no warrant for a belief in the historical existence of a community and a tradition or story. Second, the relation between stories and communities is not a reflexive relation of "embodiment" but a political relation of conflict, in which the manipulation of stories carries the power to excommunicate. Third, the contrary-to-fact account of a "community" that has a reflexive "narrative," "story," or "tradition" is tantamount to ideology, defined as the suppression of the complexity of historical conflict in the service of an unacknowledged normative end.²⁰²

Since the kind of narrative we are talking about here, namely narrative in the "weak" sense, is simply a redescription in genre terms of certain features that are analytic to the concept of the hermeneutic object, it should have no power to license or exclude substantive proposals assertedly authorized by appeal to that object. I believe that Perry, unlike Hauerwas, understands this. While Hauerwas wants to exploit weak narrative to build a specific Christian social ethic on the formal features of Scripture, Perry intends his account of constitutional narrative to be neutral. But I am not sure that Perry successfully resists the temptation to make weak narrative adjudicate between constitutional theories. First, he realizes some methodological interest from his nar-

ject/object distinction in hermeneutics is Gadamer. Gadamer asserts, for example, that "[t]rue historical thinking must . . . learn to see in the object the counterpart of itself and hence understand both. The true historical object is not an object at all, but the unity of the one with the other. . . ." H. GADAMER, *TRUTH AND METHOD* 267 (1975). Gadamer calls that unity—the deconstruction, as it were, of the opposition between community (subject) and tradition (object)—the *Wirkungsgeschichte*. *Id.* For an unusually lucid account of Gadamer's concept of *Wirkungsgeschichte*, see Holy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. REV. 135 (1985). It should be noted, however, that Gadamer does employ the term "hermeneutic object." H. GADAMER, *supra*, at 351.

201. Perry, *supra* note 7, at 593-94, *passim*.

202. Perry recognizes that the "community" to which he refers is subject to conflict and "dissensus," *id.* at 594, and stresses that the "community should take a critical stance toward its 'tradition,'" *id.* at 561. This recognition of conflict, however, does not cure, but only exacerbates, the central theoretical problem which must arise when the authority of a normative hermeneutic object is made to rest on the intensional attributes of its focal text. Perry's conclusion that the constitutional "text-as-symbol *should be* authoritative," *id.* at 591 (emphasis in original), does not follow from the premise that one of the things we *mean* when we call a text "Constitution" is that it "embodies" the tradition of a community.

rative investment by excluding authorial intentionalism or "originalism." Second, when he calls the Constitution a "prophetic/commemorative symbol,"²⁰³ it is difficult to resist the impression that he is smuggling in both prophecy and commemoration under cover of weak narrative.

In summary, hermeneutical use of the weak sense of narrative requires criticism when it reifies the notions of community, identity, and tradition, and makes normative proposals under cover of the concept of the Constitution. As long as these difficulties are understood, however, weak narrative has something of importance to contribute to constitutional law. Narrative as a redescription of certain features that are analytic to Constitution helps us to understand the canonicity of the constitutional case law.

2. *Narrative and the Canonical Status of the Constitutional Case Law*

The case law of a constitutional subject such as equal protection has two dimensions: synchronic and diachronic. The synchronic dimension includes doctrinal formulations: seemingly timeless oppositions such as strict scrutiny versus minimum rationality, and categories such as suspect classifications or fundamental rights. The diachronic dimension of the case law is the story of how *Brown v. Board of Education*²⁰⁴ overruled *Plessy v. Ferguson*,²⁰⁵ the tale with one episode about the civil war and another about how little schoolchildren have been harmed by their educational bondage.

The distinction between the synchronic and diachronic dimensions of the case law is not a contrast between order and randomness. Precedent, stare decisis, and above all the case-method by which law is taught in law schools, give form to the temporal succession. The weak sense of narrative usefully describes that form. Just as the New Testament stories about feeding the hungry and reversing the hierarchies of social status invest the otherwise vacant counsel of the "agape clause" ("thou shalt love thy neighbor as thyself")²⁰⁶ with applicable authority, so the case stories of schoolchildren, poor people, and strangers articulate the normative authority of the equal protection clause. The content of these constitutional stories, of course, is a matter for interpretation. The fact that the stories *are* a matter for interpretation

203. *Id.* at 340.

204. 347 U.S. 483 (1954).

205. 163 U.S. 537 (1896).

206. *Matthew* 22:37-40.

supports, rather than offends, my claim that they are a repository of constitutional authority. We bother to interpret them because we think that they matter.

Although narrative in the weak sense accommodates case law in the canon, it does not license any particular view of the equal protection clause or of *Brown*. It does not tell us whether we should conceive of equal protection in terms of equality of opportunity or equality of result; it does not single out the antidiscrimination principle or the group-disadvantaging principle. Nor does it offer any alternative to these. Furthermore—and here we begin to see the difference between weak and strong narrative—it does not tell us *in what sense Brown* (in relation to equal protection) is a narrative.

The narrative form of *Brown* can be regarded, for example, as parable. Robert Burt pursues this strategy.²⁰⁷ When Burt describes the narrative form of *Brown* (and other racial discrimination cases) as parable, he means that their method

is first to command the attention of people who conceive themselves as safely inside some protective flock; then to persuade these people that they are no different from others visibly outside, even others whom they believe they have excluded from their own safe superiority; and, finally, having provoked in these once-smug insiders feelings of vulnerability and consequent empathic identification with the old outsiders, to show how this empathy in itself can serve as the route for membership in a community that promises a more reliable, more secure haven.²⁰⁸

Obviously, parable in Burt's sense is an example of the generative/transformational type of textual authority, discussed earlier.²⁰⁹ Burt has made the crucial move from weak narrative to a strong narrative that locates textual authority and begins to orient the interpreter toward the text in a specific fashion. Burt's analysis of *Brown* as parable is strong because it does more than merely restate analytic truths about the Constitution.

Burt's analysis ought to be contrasted to weak narrative in a second sense as well. While weak narrative supposes that there is a community, Burt's theory of parable recognizes that there is a conflict of communities. Rather than reminding us of a community that never was, parable generates community in a forward-looking fashion. Its

207. Burt, *supra* note 7.

208. *Id.* at 478.

209. See *supra* notes 168-76 and accompanying text.

authority inheres, not in fidelity to the social order, but in transformation of it.

This point has been made with great sensitivity by Robert Cover.²¹⁰ While Cover is critical of the image of law as coercion, he rejects also the contrary extreme of law conceived as a unified narrative of a unified community. Instead, each "jurisgenerative" community in the society lives in its own narrative world, while at the same time offering to transform the society and to donate the communal story to the more inclusive system of the law. The law may ultimately be shaped by these communal self-understandings, but it does not and should not dissolve into those localized narratives. Hence Cover's judge will never make the ideological mistake to which weak narrative leads. While resisting a false positivism which would isolate the law from, for example, the egalitarian or libertarian crusade of antislavery forces and their *Brown* era counterparts, Cover's judge would also resist the dissolution of law into the self-understandings of such political communities. "[L]aw is that which holds our reality apart from our visions and rescues us from the eschatology that is the collision in this material social world of the constructions of our minds."²¹¹ Nothing could be more striking than the contrast between Cover's view of law, with its corresponding account of narrative as "diffuse and unprivileged,"²¹² and Perry's idea of the Constitution as a "prophetic/commemorative symbol" of a community which is its "embodiment."²¹³

3. *How Narrative Executes Consent Theory*

The purpose of this subsection is to demonstrate the nature of the relations between the several components of normative hermeneutic practice: the commitments embodied in a worldview, adoption of a theory of the location of textual authority, and deployment of methodologies. While I will make some observations about the way in which different conceptions of narrative might work within the general programs of consent theories, I mean these observations to be tentative and exploratory.²¹⁴

210. Cover, *supra* note 7.

211. *Id.* at 10.

212. *Id.* at 4 n.3.

213. See *supra* notes 199-203 and accompanying text.

214. I hope to write a separate Article devoted to the normative hermeneutic operations of consent theories in constitutional law.

I want to draw attention to three points of special importance: (1) the dependence of method upon locational theory and of locational theory upon worldview, (2) the underdetermination of locational theory, and (3) the tracing of normative conclusions in hermeneutics to the underlying worldviews.

Before tackling the complex case of narrative under consent theory in constitutional law, it is helpful to run through a relatively simple case in the field of Literature. Suppose, then, that one's reason for bothering to read Literature, and especially for regarding Literature as a source of moral instruction, is that one believes that the study of Literature will assist in the realization of one's human possibilities. These commitments are consistent with any number of views of the location of textual authority. One may think that what gives Literature its (perfectionist) authority is, for example, its power over the emotions, or the poetic genius which lies behind the text, etc. If one adopts poetic genius as the locational theory, then certain methodological corollaries follow. It will make sense to adopt methods that explicate authorial intent²¹⁵ since the author's inspiration is what matters.

Keeping in mind this rather simple description of the direction in which the normative hermeneutic currents run, let us turn to narrative. There are, it will be recalled, various views of narrative authority. Two of these versions are, in Frei's sense, "referential." The first of these versions regards narrative as authoritative because of its reference to actual historical events. The second views narrative, and here Biblical narrative is paradigmatic, as referring to a special strand of historical acts called "salvation-history" (*Heilsgeschichte*). The third version of narrative authority views narrative as a story in a pure and nonreferential sense; the meaning of the story is the story, not any series of events outside the story to which it refers. A final version of narrative authority, also nonreferential, sees narrative as providing the transformative experiences of an effective, epistemic, or intellectual type described in a literary theory.

Humanistic perfectionism, as the theory that sets up Literature as normative hermeneutic object, can be and has been executed by both referential and nonreferential conceptions of narrative authority. On the referential side, we find both the highest generalizations²¹⁶ and very specific attempts to see the literature of a particular period as a fund of detailed historical description (the "history and literature" model of

215. See E.D. HIRSCH, *supra* note 10; Michaels & Knapp, *Against Theory*, in 8 CRITICAL INQUIRY 723 (1982).

216. N. FRYE, *supra* note 80, at 119 ("Literature imitates the total dream of man.").

humane education). Yet the liberal *telos* is also furthered by pure narrative theories: as when Francis Fergusson affirms of *Oedipus Rex* that "the spiritual content of the play is the tragic action which Sophocles directly presents."²¹⁷

When we come to the final version of narrative authority—let us take its intellectual variant as our focus—the subordinate role of methodology (of interpretive "schools" or "movements") is demonstrated unmistakably. In hermeneutic projects, methodology is simply a tool, employed to realize the capacity of an idea of locational authority to execute the mission determined by an underlying worldview. Structuralism, on this scale, is simply a method. It may be used for any number of purposes. Some structuralist studies of Literature, such as my own treatment of the political ethics of the *Morte d'Arthur*,²¹⁸ execute narrative authority in relation to humanist commitments. Other structural studies, mentioned elsewhere in this Article, pursue quite different ends. Levi-Strauss himself believed that "the ultimate goal of the human sciences is not to constitute, but to dissolve man," by the "reintegration of culture in nature and finally of life within the whole of its physico-chemical conditions."²¹⁹ Yet structuralism does not carry this rejection of humanism as its inevitable philosophical commitment. Methodologically, structuralism is simply one way of working out a project. If one believes in humanism and also in narrative authority, then structuralism can help execute the latter as a means to the former. "Interpretation theories" are the servants, not the masters, of hermeneutic activity.

Theological hermeneutics also illustrates this principle. Here we have a very widespread interest in structuralism as a way of executing the authority of narrative in relation to basic religiously-defined ends.²²⁰ This interest would be futile if structuralism were wedded to the "reintegration of life within its physico-chemical conditions."

Among the various conceptions of narrative authority, perhaps the only location to which the Reformation theology (as our example of an underlying theory that animates Scriptural hermeneutics) could not attach is the historical-ostensive referential. The views of Hans Frei on this score have already been reported. While the current fascination

217. See Fergusson, *Oedipus Rex: The Tragic Rhythm of Action*, in Lodge, *supra* note 81, at 402, 405.

218. See Garet, *supra* note 17.

219. C. LEVI-STRAUSS, *supra* note 185, at 247.

220. See E. MCKNIGHT, *supra* note 166.

with narrative in theological hermeneutics is focused primarily on the nonreferential conception of "novelistic narrative," this nonreferential focus is of recent origin. Referential views dominated theology in the eighteenth and nineteenth centuries. Those earlier preoccupations can be excluded only by a vigorous reapplication of Reformation theological noncognitivism.

I have already suggested that consent theory exerts a force in setting up hermeneutic practice in constitutional law, that is comparable to the force of Reformation theology in theological hermeneutics, and of humanistic perfectionism in literary criticism. Consent theory, as worked out for example by Bickel, sets up something that we called the "consent tradition" as the normative hermeneutic object of constitutional law. The issues that troubled us in Part III of this Article concerned the role of the Constitutional text in the Bickelian conception of the hermeneutic object, and the nature and role of "tradition." These questions are consent theory's version of the general issue of constitutional theory: the relation between normative theory and interpretive practice. Since views of the location of textual authority are "bridge concepts" that execute the aims of the underlying worldview, they should be responsive to the problem of relating consent theory to interpretive practice. We want to know, in particular, how versions of narrative authority function in relation to that problem.

Location of textual authority in narrative is not going to resolve all problems for consent theory as a ground-norm of constitutional law. Narrative authority need not be exclusive, of course; as already indicated, it coexists with the authority of doctrinal content, and probably with other locations of authority as well. Yet, narrative does play a role of special importance in executing the tasks of consent theory. It directs the investigation of consent.

Narrative as historical-ostensive reference directs the search for consent to the social facts surrounding the enactment of legislation. The *locus classicus* of this narrative function is the fact-studded argumentation on behalf of economic regulatory legislation during the first decades of this century. The Supreme Court that heard these arguments, the Court of the *Lochner*²²¹ era, was wedded to the principle of freedom of contract, and understood that principle to be authoritative constitutional doctrine. Rather than challenging this doctrine on its own terms, the "Brandeis brief" told a story of legislative history whose

221. 198 U.S. 45 (1905).

meaning lay in its reference to the weight of popular consent underlying the challenged regulatory legislation. The logic of the argument was that the challenged legislation was so responsive to such terribly basic needs of workers and their families, which had gone unmet for such a long time, that a critical mass of consent had accumulated around the legislation. Here we see how the historical-ostensive referential version of narrative authority operates antiformalistically as it executes the sort of investigation licensed by consent theory.

The historical-referential version of narrative authority understands consent in a quantitative evolutionary way. On this view the Constitution, its amendments, and the evolving case law lie entirely within the seamless historical process. Here there is no such thing as "metaconsent" that can override the slow accumulation of actual historical consent. Thus the historical-referential hermeneutic reads the Constitution in the light of the social history of consent, which is the meaning of "tradition."

This hermeneutic stands in sharp contrast to the "salvation-historical" view, which, while referential, takes as its reference a particular *strand* of history. This is the mode of history written by Justice Black; and it may, in fact, be the species of narrative which is most commonly encountered in the opinions of the justices of the Supreme Court.²²² It refers to a sequence of "saving events": the Philadelphia Convention of 1787, the drafting of the Bill of Rights, the debates over ratification, and the writing of the Federalist Papers. In the narrative prose of Justice Black, these events are not just accumulations of a critical mass of consent. These events are the very umbilicus of consent. It is the duty of the constitutionalist, on this view, to hearken back to the saving events of consent.

The force of the constitutional text, as *heilsgeschichtliche* narrative, stems from its status as the report of the events that occurred *in illo tempore*.²²³ This force is, once again, superior to doctrinal content. Those who execute consent theory through this medium of salvation-historical narrative are apt to serve as prophets in combat with the priestly servants of the law; and this describes something of the tone of Justice Black's histories.

222. See C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* 191-92 (1969).

223. Compare the use of this concept in religion. M. ELIADE, *THE SACRED AND THE PROFANE* (1959).

We have been accustomed to understand constitutional narrative referentially, whether in the historical or salvation-historical mode. But consent theory does not require such a referential understanding of narrative. It is probable, in fact, that consent theory will make increasing use of pure narrative forms. There are several reasons for this change of emphasis. First, the referential object of the historical version of narrative has been thrown into shadow by the Arrow theorem and its decision-theoretic descendants, all of which deny that most accumulations of individual preferences into a social ordering can be regarded as a mass of consent.²²⁴ Second, the referential object of the salvation-historical version of narrative is rendered obscure by problems concerning the nature of intents, especially collective intents. Finally, modern theories of meaning, which distinguish between sense and reference, have opened up the former as an independent subject of study.

As executed by a pure or novelistic narrative form, the consent tradition is much like a tradition of oral epic. From these tales of midnight rides, tea parties, and houses divided against themselves, we learn certain self-understandings directly: not by turning our attention to some feature of the world, but by hearing what the stories themselves have to say. It will be objected, of course, that such stories are not to be found in the Constitution. This assertion is mistaken, however, since what the Constitution is depends at least in part on the underlying worldview that controls hermeneutic practice and defines the canon. In any event, my undergraduate students believe that the Declaration of Independence is "part of" the Constitution, and I am not so certain that they are wrong. Constitution, for them and perhaps for many, is our controlling folk-tale: a story about the endowment of equality and about the just revolution of the oppressed. That this tale is so remote from any description of our social and historical reality, and yet so vivid in the imagination, is some evidence that its meaning is to be sought internally and not referentially.

Pure narrative fulfills consent theory by *teaching* consent, by naming us as the community of consent, and by inculcating republican virtues. The Supreme Court, on this view, is a major custodian of the narrative, and occupies an office comparable to the tribal elders who preserve and recite the oral tradition.²²⁵ That the public schools perform this function also is conceded; but Charles Miller is correct when he concludes that "the Court is the only public and official institution consciously and continuously concerned with relating past, present,

224. See generally K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1963).

225. C. MILLER, *supra* note 222, at 195 n.9.

and future in American life."²²⁶ The dangers of ideology and self-delusion in this view of the consent tradition are obvious, and have not been given adequate attention by proponents of narrative such as MacIntyre.²²⁷

The last of the four views of narrative authority, and the alternative to pure or novelistic narrative as a nonreferential theory, is the transformative/experiential theory that arises in literary criticism. According to this view, stories are authoritative when they operate on the reader in certain affective, epistemic, or intellectual ways. This conception of narrative authority is least congenial, of the four, to consent theory. The reason for this is that most of the work accomplished by texts, on this view, is subconscious: it affects the reader directly; not by "illuminating" the world, but by shaping the reader's experience of the world. While some shaped experiences may be better than others, it is not clear that some are better in the specific sense of "more consensual." Even if it is true that one of the ways in which Literature humanizes is by producing the experiential groundwork for consent, no special role follows for Constitution *qua* normative hermeneutic object.

Versions of narrative authority in constitutional law have the status of links between text and worldview. The various notions of narrative are not in any sense new contributions to constitutional law, but instead are descriptions of features of constitutional reasoning that are quite familiar. Regarding these features from the viewpoint of narrative authority simply highlights the connections they forge between text and consent theory. This can be seen by pairing narrative concepts with their closest constitutional counterparts. The historical-ostensive type is similar in some respects to the value-consensus view of constitutional authority, but raises to the surface the way in which the text relates to public values. The salvation-historical type has some affinities for originalism, but has a clearer view of what it is about the text that relates it to the founding events. The nonreferential types of narrative authority may suggest more forthrightly than conceptualism why the fact that the text teaches certain ideas lends it authority.

This analysis of the hermeneutic functions of narrative has of necessity been brief and somewhat mechanical. Although our attention has been restricted to narrative authority, focused on constitutional law, and limited to consent theory, still the analysis has barely begun to indicate the sorts of issues that must be addressed even in that bounded

226. *Id.* at 193.

227. See A. MACINTYRE, *supra* note 187.

terrain. Subtle overlaps of the types of narrative authority have been ignored; the ultimate aims and also the variants of consent theory have not been pursued in any depth; and the range of methodologies (structuralism, intentionalism, symbolism, hermeneutic phenomenology, and so on) that can be applied to narrative has not been explored. A thorough investigation of the role of narrative in theories of consent must await further research and much further thought.

* * *

The thread of argument that runs through this comparative study of normative hermeneutic projects leads backward to the disputes between the "Church Fathers" and the Gnostics. In the epigraph to my study, Irenaeus accuses the Gnostics of believing that they were in possession of secret wisdom, embodied in secret texts, not accessible to the ordinary Christian. The Gnostics of that period, as well as the later hermetic philosophers, argued a hermetic hermeneutics: a faith that the text itself transmitted wisdom. The practical corollary of hermetic hermeneutics was alchemy: the transmutation of lead (the text, the corporeal) into gold (wisdom and spirit).

Against this hermetic hermeneutics, the "Church Fathers" argued a public hermeneutics. In their view, Scripture had moral power because it was backed up by tradition, and tradition carried force because it operated on behalf of the community. "For my part," said Augustine, "I should not believe the gospel except as moved by the authority of the Catholic Church. So when those on whose authority I have consented to believe in the gospel tell me not to believe in Manichaeus, how can I but consent?"²²⁸

From the constitutional point of view, what is familiar and constant in Augustine's position is just as important as that which is alien and unacceptable. It is the substance of the position, the idea of consenting "on authority," that horrifies constitutional law. In the matter of form, however, constitutional hermeneutics set in motion by consent theory agrees with Augustine against Manichaeus and the Gnostics. While Catholicism grounds consent in authority and constitutionalism grounds authority in consent, both projects "believe" the text, and initiate normative hermeneutic practice in relation to it, only because of basic public commitments that they have made. There is much less in common in what Catholicism and constitutionalism understand than in how they understand it.

228. Augustine, *Against the Epistle of Manicheus Called Fundamental 5*, in IV THE NICENE AND POST-NICENE FATHERS 129, 131 (1956) (footnote omitted).