

READING ATTITUDE IN THE CONSTITUTIONAL WISH

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I. MATCHING SAID'S GAGE

In his essay “Opponents, Audiences, Constitutencies, and Community,” Edward W. Said throws down a gage to literary theorists and challenges them to break out of disciplinary ghettos, “to reopen the blocked social processes ceding objective representations (hence power) of the world to a small coterie of experts and their clients, to consider that the audience for literacy is not a closed circle of three thousand professional critics but the community of human beings living in society”¹ To the literary critic he admonishes:

When you discuss Keats or Shakespeare or Dickens, you may touch on political subjects, of course, but it is assumed that the skills traditionally associated with modern literary criticism . . . are there to be applied to *literary* texts, not, for instance, to a government document The intellectual toll this has taken in the work of the most explicitly political of recent critics . . . is very high.²

Should lawyers not match Said's gage by throwing down one of their own? If literary criticism should be socially engaged, should the social practice of law not be literate? If so, to what end?

A. TO WHAT END SHOULD LAWYERS MATCH SAID'S GAGE?

The end is in fact nothing less than the goal of attaining justice itself, as maintained by Richard H. Weisberg³ and suggested by others. One could well be tempted to think that a discussion of justice is at home in legal education and in the practice of law. It is not. Not long ago, I invited a colleague from the biology department of a neighboring university to lecture to my law school class. Never having been to a law school class before, she was curious as to the sorts of things that we lawyers discussed, and offered “justice” as an obvious topic. I told her that these were upper-

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¹ Edward W. Said, *Reflections on Exile and Other Essays* 146 (2002).

² *Id.* at 132.

³ See generally RICHARD H. WEISBERG, *THE FAILURE OF THE WORLD: THE PROTAGONIST AS LAWYER IN MODERN FICTION* (1984).

level law students and they had long since stopped uttering the word. She did not believe me. Near the end of my comments regarding her lecture to my class, I raised a question as to the motivation of the legislature to have constructed a statute a certain way. I received answers about balancing interests, procedural advantage, and judicial efficiency. Finally, I said “what about justice?” An audible chuckle arose from a substantial minority in the class. I looked at my guest—her mouth and eyes were opened wide in horror.

Using literary criticism, how might one arrive at justice? First, as to “literary”: The literary reading of a legal text, aided by those who study the art and practice of reading literature, should not simply be a power exercise of one’s will, but should be a reading that is fair to the text.⁴ And as to “criticism,” one might begin by pondering Bruno Latour’s recent query: “Why has critique run out of steam?”⁵ Latour’s notion of “criticism” may be construed more broadly than literary criticism, but in both instances, the answer is at least in part due to the fact that our critical tools have failed to change with the times. “Is it really asking too much from our collective intellectual life to devise, at least once a century, some *new* critical tools? To the fact position, to the fairy position, why not add a *fair* position?”⁶ Latour maintains that the explanations propounded by the criticism currently on offer only tire him when, among other things, he is studying a piece of law.⁷

Justice may just be that renewed tool of critique that literature can re-install in the law. Yet we speak of applying literary criticism to law or social sciences as though it were an extraordinary application. So for example, a recent book review was entitled “Book Explicates Economics Using Wisdom of Great Literature.”⁸ Unfortunately, with this title the reviewers meant only that the book under review effected its own wisdom by using well-known authors’ works as examples of principles of economics in daily and real situations.⁹ Admittedly, there is merit in making “the dismal science” appealing through the quality of these authors’ writing, but such a tour fails to treat *belles lettres* themselves as reflective lessons for social sciences like economics and law.

One of these lessons would be that reading itself is a deceptively dialectic and formative process. Persons already literate need no more to be taught to read than living people need to be taught to breathe—or so we might think. When we breathe, we do so without being conscious of the fact that we are, and without being conscious of how we do so. We can

⁴See generally Richard Weisberg, *On the Use and Abuse of Nietzsche for Modern Constitutional Theory*, in INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 181 (Sanford Levinson & Steven Mailloux eds., 1988).

⁵See generally Bruno Latour, *Why Has Critique Run Out of Steam? From Matters of Fact to Matters of Concern*, 30 CRITICAL INQUIRY No. 2, Winter 2004, at 225, reprinted in Bruno Latour, *The Last Critique*, HARPER’S MAGAZINE, Apr. 2004, at 15.

⁶*Id.* at 20.

⁷*Id.*

⁸Carnegie Library’s Business Librarians, *Book Explicates Economics Using Wisdom of Great Literature*, PITTSBURGH POST-GAZETTE, Feb. 1, 2004, at B2 (book review).

⁹See *id.*

even do it in our sleep. Persons in special situations—such as athletes training for competition, women giving birth, or persons with lung illnesses—all become conscious of breathing. They re-think it, study it, and teach it. Are there analogous, special situations in reading? When we read newspapers, e-mail, or the reams of print that still pass through the mail box each day, we are rarely, if ever, conscious of how we read or even of the fact that we are reading. Those prosaic exercises, coupled with trade books and magazines, may well be our most numerous exercises in reading. Reading novels, short stories, or poetry would seem to be different, however, as would even other prosaic exercises such as legal reading. And if reading a legal document is a special situation when we do become conscious of our reading practices—one that perhaps includes not only how we read, but how we learned to read—then within reading the law in general and reading a constitution in particular there is an acute reading attack.¹⁰

It is admittedly difficult for one to map his or her own path of having learned to read. The fact that we read at all shows that we did in fact learn some skill called reading, but how that happened remains foggy to us unless we happen to have excellent memories and we have studied the acquisition of reading scientifically. Even then, it is difficult. While teaching a course called “Reading the News” to undergraduate students, I would require each student to report on how he or she had acquired the ability to read. Everyone could report *what* he or she had read as a child, and in a rather repetitive order,¹¹ but when it came to explaining *how*—that is, the process of change from pre-literate to literate—they were at a loss, as I suppose most of us would be. Nevertheless, “reading and writing are not inevitable, not ‘natural.’ What people learn when they ‘learn to read’ depends on their culture’s ways of teaching and valuing reading.”¹² If one asks a student of the natural sciences, business, or journalism the question of why one reads, that student, in my experience, is likely first to answer “to get information.” After some cajoling, students then will acknowledge reading for pleasure, then after some discussion will separate reading for instruction from reading for information. But none come up with an answer like “to formulate a worldview.”

B. “LITERATURE IS EQUIPMENT FOR LIVING”

It seems to remain unconscious, even while reading is under examination, that how we read and what we select to read result in our creative and intellectual formulation, as well as making us part of whatever

¹⁰ Relying heavily upon the work of Jürgen Habermas, Alfred Phillips provides a compelling account of how legal language in general merits analysis distinct from other language, without specifically discussing at length the act of reading. See generally ALFRED PHILLIPS, *LAWYERS’ LANGUAGE: HOW AND WHY LEGAL LANGUAGE IS DIFFERENT* (2003).

¹¹ Over a three-year study, the vast majority of these Irish students reported having begun with the “Ann and Barry” book series, followed by books by Roald Dahl and then by Enid Blyton. In similar majorities, girls reported having gone on to read the “Sweet Valley High” series of books, and boys reported having gone on to read comic books.

¹² DAVID BARTHOLOMAE & ANTHONY PETROSKY, *WAYS OF READING: AN ANTHOLOGY FOR WRITERS* 23 (4th ed. 1996).

the dominant forms of reading and text happen to be in our time and place. As a feature of New Criticism, Kenneth Burke brought new critiques to literary criticism, acknowledging that in itself sociological criticism was not something new. In step one of his essay, "Literature is Equipment for Living,"¹³ after reviewing a sampling of proverbs, Burke concludes that

The point of issues is not to find categories that 'place' the proverbs once and for all. What I want is categories that suggest their active nature. Here is no 'realism for its own sake.' Here is realism for promise, admonition, solace, vengeance, foretelling, instruction, charting, all for the direct bearing that such acts have upon matters of welfare.¹⁴

In step two, Burke's sociological criticism has direct application to the reading of law. He notes:

Proverbs are *strategies* for dealing with situations. In so far as *situations* are typical and recurrent [a necessary sociological convention for justice to mean treating like persons in like ways] in a given social structure, people develop names for them and strategies for handling them. Another name for the strategies might be *attitudes*.¹⁵

In step three, Burke addresses what the features of a sociological criticism would be. According to Burke, in this mode of criticism, one would seek to assemble and codify—much as one does in both the civil and common law systems of interpretation, as I shall explain below—the lore of social situations. Burke would even go so far as to say that "[y]ou can't properly put Marie Corelli and Shakespeare apart, until you have first put them together. First genus, then differentia. The strategy [or attitude] is common in the genus. The range or scale or spectrum of particularizations is the differentia."¹⁶ So, for example, apples could be grouped with bananas as fruits, or with tennis balls as round. Furthermore, Burke does not intend for this sociological criticism to be limited to literature or even art in general: "Sociological classification, as herein suggested, would derive its relevance from the fact that it should apply both to works of art and to social situations outside of art."¹⁷

Having considered the ends that might be achieved through literacy, what follows is a general consideration of reading. We begin with further general reflections on reading and then move on to the special situation of reading legal texts, constitutions in particular. The discussion of reading constitutions in general focuses upon Kenneth Burke's own explicit application of literary theory to the U.S. Constitution, and finally offers a new and further application of Burke's theory to another constitution, all in an effort to answer the basic questions set forth here at the outset. In literary criticism, one may say today that it is relatively accepted that the act of reading is a mediation among the author, the text, and the reader, and

¹³ KENNETH BURKE, *Literature is Equipment for Living*, in THE PHILOSOPHY OF LITERARY FORM: STUDIES IN SYMBOLIC ACTION 253 (Vintage Books 1957) (1941).

¹⁴ *Id.* at 255.

¹⁵ *Id.* at 256.

¹⁶ *Id.* at 261.

¹⁷ *Id.*

that the featuring of any of these three changes from time to time and place to place based not only upon the individual author, text, or reader, but also on larger, more culturally dominant attitudes about reading.¹⁸ But in the law, even if that dynamic is factually known, it is not employed in legal reading practice. For example, the text known as the U.S. Constitution was originally written by men living in the late eighteenth century. But as critic Wolfgang Iser notes at the beginning of *The Implied Reader*, the eighteenth century was also the beginning of the genre of the novel, and “a time when people had become preoccupied with their own everyday lives.”¹⁹ What could it mean for the practice of reading, to interpret the constitution as having been written in an era when the novel was treated as a relatively new form, and people were preoccupied with their own lives?

A study of reading will not give us the ability to recall how or when we went from pre-literate individuals to literate individuals, but it can help remind us that such a transformation did take place in all who are reading this page. It can help bring to consciousness the acquisition of reading practices as we encounter new and sometimes special reading situations throughout life; it can also help us understand how reading (and writing) practices, even regarding legal documents, change as a function of time and place. Thus, one aim of bringing literacy to consciousness in the study and practice of law could be that of Milner S. Ball when he writes, “My aim is to participate with others in making contextual thinking about law self-conscious.”²⁰

While one might argue that reading law is a different type of reading than reading literature, one finds little reflection in the teaching of law—and still less in the practice of law—about reading practices. Thus, it is helpful to look to discussions of reading among those who do reflectively consider it. According to Iser, the contemporary reader of the novel “is meant to become aware of the nature of these faculties [of perception], of his own tendency to link things together in consistent patterns, and indeed of the whole thought process that constitutes his relations with the world outside himself.”²¹

Some reflection can also illustrate that we come to reading not in a time or space void, but during a period in reading history and a place in reading time. These cultural influences indeed affect the author’s sense of text, the reader’s sense of text, and ultimately the meaning that a reader may create from the text. Such is the case when we first encounter reading the law while training to be lawyers. More specifically, a study of literature can help a lawyer become aware of how one acquires particular reading

¹⁸ Richard Weisberg has gone so far as to say that “[t]here is nothing less radical today than the position that textual meanings are indeterminate.” See Weisberg, *supra* note 4, at 181.

¹⁹ WOLFGANG ISER, *THE IMPLIED READER: PATTERNS OF COMMUNICATION IN PROSE FICTION FROM BUNYAN TO BECKETT* xi (1974).

²⁰ MILNER S. BALL, *THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC VIEW OF LEGAL PROCESS I* (1981).

²¹ ISER, *supra* note 19, at xiv.

practices that are appropriate to particular texts, authors, or situations of reading within the law.²²

Finally, and perhaps most importantly for a lawyer, a study of literature could show how even with the same texts, read in the same order, the individuals who read the texts bring different lives to the texts, thus legitimately arriving at different meanings when negotiating their way through the texts.

II. WHAT DO LAWYERS LEARN WHEN LEARNING TO READ?

Before addressing further how considerations of reading might have something to offer the lawyer, it would be helpful to describe more thoroughly the reading practices that one finds in the law. Analyses of legal reading, at least in common law jurisdictions, focus too often on the reading of judges' opinions in reported cases. Little, if any, attention is given to reading treaties, legislation, and regulations; and nearly no attention is given to the reading of memoranda of law, pleadings, transcripts of testimony, settlement documents, and documents of discovery, even though it is these documents which occupy most of the reading time of the practicing lawyer. While theories of jurisprudence are spun from the reading of constitutions, both with and without the mediation of judicial interpretation, insufficient attention is paid to analyzing the act of reading constitutions itself.²³

Within American constitutional theory, as taught to students of American law, it has become relatively standard to treat reading in three ways: textualism, historicism (also known as originalism and including arguments from the intent of the framers), and pragmatism (which serves as a sort of weak liberalism).²⁴ This typology is repeated in the texts that hold themselves out as being representative enough to introduce a student to the field of constitutional law as well.²⁵

In the civil law, one begins the process of applying the law to a case with an act of interpreting (*Auslegung*) words in legislation.²⁶ According to Zippelius in his standard student's legal method book in Germany, "The 'classic' interpretation theory (*Auslegungstheorie*) of Savigny held it to be the job of interpretation 'to place one's self in thought from the position of the legislator, whose occupation one artificially repeats.' Thus would

²² See generally ARTHUR SCHOPENHAUER, *THE WORLD AS WILL AND REPRESENTATION* (E.F.J. Payne trans., Dover Edition 1969 (1819)); Kellen McClendon, *The Convergence of Thinking, Talking, and Writing: A Theory for Improving Writing*, 38 DUQ. L. REV. 21 (1999) (echoing Schopenhauer's observation of "the Greeks, for whom speaking and thinking were one").

²³ See Weisberg, *supra* note 4, at 187-92. See generally L. H. LARUE, *CONSTITUTIONAL LAW AS FICTION: NARRATIVE IN THE RHETORIC OF AUTHORITY* (1995) (providing examples of notable exceptions).

²⁴ See, e.g., MICHAEL J. GERHARDT & THOMAS D. ROWE, JR., *CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES* (1993).

²⁵ See, e.g., THOMAS E. BAKER & JERRE S. WILLIAMS, *CONSTITUTIONAL ANALYSIS IN A NUTSHELL* (2d ed. 2003).

²⁶ REINHOLD ZIPPELIUS, *JURISTISCHE METHODENLEHRE* 19, 42 (8th ed. 2003).

interpretation be ‘the reconstruction of the law’s inherent thinking.’²⁷ In the civil law, one then entertains whether real persons or different real acts may be categorized the same, and calls the process “subsumption”²⁸ based upon the principle from formal logic.²⁹

Even in this formal deductive process, students are reminded that what might appear neatly to be a matter of fitting an act into a formal logical pattern (*subsumption*) is first an act of interpretation (*Auslegung*). “In order to assess whether the application of a legal provision or norm is possible in a particular case, one must interpret the relevant provision/norm and establish whether the set of facts involved can be subsumed under it.”³⁰ Students of German law learn to read the German Civil Code (*Bürgerlichesgesetzbuch* or BGB) in this manner,³¹ which since its inception on August 18, 1896, has been the model for many other civil systems, including those of Switzerland, Austria, and Japan. In Section 433(1) of the BGB, one finds in the first sentence, for example, that the content of the norm is explicitly stated (in this event, the existence of a sales contract), and then in the second sentence, the duty of the vendor is laid down as a particular legal consequence.³²

Alternatively, the common law has grown more by a method of induction from specific cases, rather than by deduction from a norm. Thus in the common law, in order to arrive at the goal of treating like persons or acts alike, the advocacy skills of the lawyer and the interpretive skills of the judge are acknowledged to create legal fictions about categories of behavior and the similarity or differences among comparative sets of facts. Henry Sumner Maine reminds us that historically, fictions such as “the allegation that the defendant was in custody of the king’s marshal or that the plaintiff was the king’s debtor and could not pay his debts by reason of the defendant’s default”³³ were necessary to accomplish such basics as jurisdiction. Such fictions, then and today, are conscious deviations from reality known to all present, but permitted because of their usefulness.³⁴ According to Jerome Frank, those two conditions are chief characteristics, if not necessary conditions, of true fictions; and because one finds a long, useful, and necessary history of legal fictions in the common law, one may be led to believe that common law lawyers are already somewhat

²⁷ *Id.* at 42 (quoting *F. K. v. Savigny*, in *JURISTISCHE METHODENLEHRE* (1951), which is the same source as *F.K. v. Savigny*, in *SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS* 213 (1840).

²⁸ See CREIFELD’S *RECHTSWÖRTERBUCH* 1333 (Klaus Weber ed., 17th ed. 2002). The standard legal dictionary in Germany, CREIFELD’S, defines “subsumption” as “subordination of the facts of a case under a legal norm or provision.”

²⁹ See KLAUS ADOMEIT, *RECHTSWÖRTERBUCH FÜR STUDENTEN* 38–40 (4th ed. 1998).

³⁰ HOWARD D. FISHER, *GERMAN LEGAL SYSTEM AND LEGAL LANGUAGE: A GENERAL SURVEY TOGETHER WITH NOTES AND A GERMAN VOCABULARY* 48 n.60 (1996).

³¹ See generally CLAUDIUS WILHELM CANARUS & KARL LARENZ, *METHODENLEHRE DER RECHTSWISSENSCHAFT* (4th ed. 2003); JOCHEN ZENTHÖFER, *JURISTISCHER GRUNDKURSE: RECHTSPHILOSOPHIE* (2001). See ZIPPELIUS, *supra* note 26, at 97–101.

³² § 433(1) BGB.

³³ See HENRY SUMNER MAINE, *ANCIENT LAW* 23–32 (New York 1864). These examples were from the rather narrow category of “*Fictiones*” from old Roman law. Maine in fact broadens “fiction” in English usage. That distinction is irrelevant to the point being made here.

³⁴ See Jerome Frank, *Law and the Modern Mind* 312 (1930).

accustomed to conceits in stylistic genre generally or fictions specifically.³⁵ Yet from Bentham until today, all but the most cynical of law students and practicing lawyers still shy away from having their work characterized as a fiction.

But even if we can come to accept some practices as fictions—arguably a necessary step in some areas of the common law³⁶—it remains a mistake to insist upon the same meaning from the same text when read by different persons at different times and places. That practice does not qualify as a fiction because it is in fact neither conscious nor useful. The sort of scholastic reading practice that insists every reader interpret a text the same was enforced in the Middle Ages by a teacher swatting students' buttocks with birch branches, as we are graphically and painfully reminded in Manguel's *A History of Reading*.³⁷ That sort of medieval reading practice would be consistent with reading a constitution as though there is one meaning—perhaps even hidden—to be found in the text, and that meaning is best known by knowing the intent of the author (who in the case of a constitution is called a “framer”). It then becomes the role of the teacher, the bar, and the bench to enforce the “one meaning” reading practice. The process by which we treat two different persons or acts *as though* they are similar—consciously knowing that they are not—for the purpose of bringing them under the same interpretation of a rule of law is a legal fiction. The process of forcing different readings of a text to have one meaning, unconscious of the fact that different readings have different meanings, is Procrustean violence.

Bringing the difference in meanings that are generated by different readings to consciousness, rather than arguing about what a legal text *really* means (as in the case of the “framer’s intent” in reading constitutions), accomplishes three reconfigurations of reading practices. The first reconfiguration is to free a reading lawyer from being forced to change the meaning that the reader realizes in the text to one that is dictated by an author, or another time, or another place.³⁸

A second reconfiguration, and one that occurs at the same time as the first, is to force lawyers to be explicit about what their agenda is—what they are trying to accomplish by giving the legal text the meaning they have found. Having arrived at this acknowledgement, a lawyer may note that this agenda is an ethical one, such as when the Model Rules of Professional Conduct say that in presenting a piece of advocacy supported by research, such as a brief to the court, all case interpretations—including

³⁵ See *id.* at 312, 314.

³⁶ MAINE, *supra* note 33.

³⁷ See ALBERTO MANGUEL, *A HISTORY OF READING* 76 (1996).

³⁸ The law sometimes even provides for how one should read pronouns. Pennsylvania’s Statutory Construction Act, for instance, states that “The singular shall include the plural, and the plural, the singular. Words used in the masculine gender shall include the feminine and neuter. Words used in the past or present tense shall include the future.” 1 PA. CONS. STAT. ANN. § 1902 (West 1995).

those that are contrary to the position being advocated—must be included.³⁹ Or the agenda may be political, or even aesthetic.

In the law, roughly employing Cartesian distinctions, we often distinguish between the objectively-observable actions of a person and the subjective intent of a person, as for instance in the lawyerly work of interpreting whether that person's actions constitute a tort or a crime. In reading literature from the perspective of New Criticism, Roland Barthes distinguishes a "readerly" text from a "writerly" text instead.⁴⁰ For Barthes, evaluation of a text "can be linked only to a practice, and this practice is that of writing."⁴¹ Thus the readerly text opens only the possibility that the reader accept it or reject it—a process in which the reader is "plunged into a kind of idleness," and is "intransitive," and for whom "reading is nothing more than *referendum*."⁴²

The opposite of the readerly text is the writerly text; one in which the reader appreciates plural meanings. For Barthes, "To interpret a text is not to give it a (more or less justified, more or less free) meaning, but on the contrary to appreciate what *plural* constitutes it."⁴³ Why do this? Because by admitting of the plurality of meaning, and removing the insistence upon a single denotation (that "old deity")⁴⁴ that is privileged as such because of the author or the text itself, we must then justify our selected connotation. That justification says something about us, the readers, and exposes our motivations, whether they be political, social, economic, or other. The writerly is of value to Barthes because "the goal of literary work (of literature as work) is to make the reader no longer a consumer, but a producer of the text."⁴⁵

So too a citizen or lawyer, in realizing that he or she is actively taking part in the creation of the meaning of a legal text such as a constitution, is not simply a consumer, but a producer of legal meaning in a democratic culture. The third reconfiguration is to bring the artificiality of similarity to consciousness, coupled with a utility (if one exists) that might qualify the reading as a grand legal fiction and open to us the benefits of an entire line of legal history to our reading practice.

These traditional modes go part way, but only part way, toward introducing the learning that exists regarding the reading of texts, the meaning of history, and the construction of policy. If lawyers are to throw down a gage and challenge themselves to break out of their legal disciplinary ghettos, alternatives⁴⁶ need to be considered, including what

³⁹ "A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . ." MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2002).

⁴⁰ See ROLAND BARTHES, S/Z 4 (Richard Miller trans., 1974).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 5.

⁴⁴ *Id.* at 9.

⁴⁵ *Id.* at 4.

⁴⁶ See PETER GOODRICH, LEGAL DISCOURSE: STUDIES IN LINGUISTICS, RHETORIC AND LEGAL ANALYSIS 63–81 (1987).

other disciplines may offer on their terms. To begin, one might consider what possibilities literary theory—in particular theories of reading and literary criticism—might offer on its own terms to the study and practice of law.⁴⁷ Here, I mean not just the common law, but civil law as well. Inviting a consideration of civil law practice can serve well to deflect the focus from judicial opinions as the sole object of analysis.

The first possibility concerns the fundamental act of creating meaning while one reads, including what the common law has come to know as “legal fictions.” When one considers what the practice of the law means for the language arts, one notices that the law codifies that which in everyday life is left to case-by-case interpersonal communication standards. The law, for instance, codifies who carries the burden of proof in a dispute and what that burden of proof is. The law also codifies the rules of evidence governing what may be considered in meeting the burden of proof, and provides rules of procedure for how one proceeds in attempting to meet this burden. This codification even extends to what and how one is to read. In some cases, the norms of how one is to read are in fact part of the substantive law itself; in turn, substantive law is driven by the norms of those reading practices.⁴⁸

For instance, insofar as one might distinguish the goal of the law as being justice from the goal of science as being truth,⁴⁹ both the common law and civil law systems traditionally⁵⁰ and currently⁵¹ define “justice” as treating similarly-situated persons in the same way.⁵² While this gives one a way of distinguishing the goal of science from that of the law, it remains open to question whether the law does in fact attempt to effect justice, or rather just determines whether human conduct does or does not match the elaborate matrix of rules held in place by legislators and judges. (Or even worse, as critic Kenneth Burke suggests later in this article, positive law gives us courts that are nothing more than business in a mood of mild self-criticism.)⁵³ Richard H. Weisberg argues that a study of literature can bring

⁴⁷ Even the creation of a catalogue of legal reading practices could best be done by a field outside of law; for instance, anthropology. *See, e.g.*, JESPER SVENBRO, PHRASIKLEIA: AN ANTHROPOLOGY OF READING IN ANCIENT GREECE (Janet Lloyd trans., 1993).

⁴⁸ I am not arguing, as perhaps Owen Fiss might, that the rules or codifications themselves solve the problems of reading, but rather that we should note that in the law, unlike many (if not most) other disciplines, there are explicit rules for reading, which can be a good thing. The explicit rules, however, do not benefit whatsoever from the learning of literature. *Compare* Owen Fiss, *Objectivity and Interpretation*, in INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 229–50 (Sanford Levinson & Steven Mailloux eds., 1988), with Stanley Fish, *Fish v. Fiss*, in INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 251–68.

⁴⁹ *See* SHEILA JASANOFF, SCIENCE AT THE BAR: LAW, SCIENCE, AND TECHNOLOGY IN AMERICA 5–7 (1995).

⁵⁰ *See generally* J. H. BAKER, THE COMMON LAW TRADITION: LAWYERS, BOOKS AND THE LAW (2000); ZENTHÖFER, *supra* note 31.

⁵¹ BUNDESMINISTERIUM FÜR WIRTSCHAFTLICHE ZUSAMMENARBEIT UND ENTWICKLUNG, *The Principle Of The Rule Of Law As Seen By German Development Cooperation* (Feb. 12, 2004), at <http://www.bmz.de/include/cgibin/druck.pl?default> (on file with author).

⁵² *See generally* WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES (3d ed. 2002).

⁵³ *See* discussion *infra* note 130 and accompanying text.

back to the law the ability to discuss justice.⁵⁴ This too could serve as the project that answers Latour's call for a "fair position" in criticism.⁵⁵

A second possibility would be that a study of reading might expose those weak understandings of reading that insist that each student arrive at the same meaning for the same text, as in the tortuous school poetry session when the student must learn the one right meaning of a passage from Keats or Shakespeare or Dickens. These sessions are often premised explicitly upon a notion of what Keats or Shakespeare or Dickens meant—that is, *intended to mean*.⁵⁶ Unfortunately, for many, the exploration of literature, text, and meaning ended there. Many people who become lawyers have only these forays into reading literature under their belts when it comes to thinking about reading the law. We should not be surprised, therefore, by the reading practices of law students or scholars such as those one hears in discourse about the meaning of constitutions, statutes, regulations, judicial opinions, and scholarly articles. Despite the fact that this form of medieval scholasticism had already begun to give way to the new humanists by the mid-fifteenth century and reading was becoming the responsibility of each reader,⁵⁷ when it comes to legal texts today, the statutes themselves, the teaching practices of law professors, and the complicity of the law students and lawyers remain based upon a dominant sense of reading that is characterized by getting information and finding arguments. This all makes for a very scholastic experience in reading the law, especially in reading constitutions.

Third, the study of reading can teach lawyers to be conscious of the differences that their reading practices can make in their legal practices. When we read a text—even under the gaze of a weak high school English teacher insisting that we wrench the same drop of meaning from the same twist of the same paper pulp—we are looking for a sense of motivation that could be characterized, using Barthes's term, as being terribly readerly. As such, the motivations are presented as though they are pre-determined and fixed in the text, and delivered to the reader as a finished product. No room is left for the reader to be a producer of meaning. The recognition that we receive a readerly view of the law when we study it, and that it does not comport with our otherwise writerly sense of the production of meaning for ourselves, can help us to understand how judges and lawyers can read the same constitution, statute, regulation, or case decision and arrive at different conceptions of the rule of law; and how non-lawyers can read the same contract, instruction manual, warning, or legal notice and arrive at a variety of meanings. This sensitivity towards a production of meaning in reading can help all of us in the study and practice of law, because the

⁵⁴ Weisberg, *supra* note 4.

⁵⁵ See discussion *supra* notes 5–7 and accompanying text.

⁵⁶ Intentionality and its critiques are beyond the scope of this effort, and probably remain more properly the province of psychologists and philosophers. The focus here is on textual interpretation and the creation of meaning by lawyers through their reading practices.

⁵⁷ See MANGUEL, *supra* note 37, at 77–78.

practice of law is thoroughly a textual enterprise.⁵⁸ But with no finer tools with which to read a constitution than our analytic distillery of readerly intentionality, as when looking for Keat's intent to determine the one true meaning of the text, we fall flat on our bespectacled noses.

A fourth lesson that lawyers can learn from a study of reading is textual comparison. Textual comparison might begin simply by employing the similarity-difference principle.⁵⁹ Even at this level, something can be gained. Extending by analogy a principle from comparative religious studies, Robert D. Taylor has noted that any lawyer who knows only one legal system knows none.⁶⁰ Returning to the example of reading constitutions, simply by comparing one's own text (texts in the case of the United Kingdom) to those of other countries, one can learn not only what those other texts may say, but also the meaning of one's own text. This meaning is brought to the reader's own constitution with a sense of context, rather than as a sole positive document. It provides the possibility of reading one's constitution dialectically compared to another constitution or constitutions.

Beyond that, a superior sense of comparison begins with questioning why one is making a comparison and proceeds to recognizing one's own position in making the comparison and then distinguishing the position of the subject from the position of the object. Thus a reader acknowledges that comparative reading cannot be accomplished from nowhere, the bird's-eye view, or from the position of the object—what is known in more everyday language as the “objective” position. This serves as a check on what one might hope to accomplish, even in such a liberating endeavor as comparative reading of legal texts. Günter Frankenberg cautions that “the fictitious neutrality stabilizes the influence and authority of the comparatist's own perspective, and nurtures the good conscience with which comparatists deploy their self-imposed dichotomies, distinctions and systemizations.”⁶¹

A fifth lesson that lawyers might learn from literature is to recover legal reading from the illusory necessity of the document. Law students soon learn in their first year of study that a contract is not a piece of paper or an electronic text, but rather an abstraction—an agreement among two or more people.⁶² Paper, electronic files, audio recordings, video recordings, and testimony are all only evidence as to what the agreement is or is not.

⁵⁸ See generally Katharina Sabota, *The Rhetorical Construction of Law*, 13 INT'L J. SEMIOTICS L. 39 (1992). A historical study would show that early forensic rhetoric was in large measure due to the limited number of people who could write speeches for the accused. The same is true in the history of the English common law. See J. H. BAKER, *supra* note 50, at 15.

⁵⁹ Professor Deborah Gale-Dysart of the University of Wisconsin-Whitewater has insightfully criticized much of academic discourse in the arts for doing nothing more than saying that “x and x look the same, but are *really* different,” or “x and y look different, but are *really* the same.” See generally MARTIN HEIDEGGER, *IDENTITY AND DIFFERENCE* (1974) (discussing the philosophical substructure for this observation).

⁶⁰ See Robert D. Taylor, Lecture at the Duquesne University School of Law (Feb. 1995).

⁶¹ Günter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT'L L.J. 411, 425 (1985).

⁶² See JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* 16–18 (Michie Co. 3d ed. 1990) (1947).

These tangible things themselves do not constitute contracts. Likewise, first-year law students also learn that property is a bundle of rights, not a clod of earth or an automobile or a house.

But for some reason, when it comes to legislation or constitutions, our abstract abilities as lawyers dissolve into linguistic materialism and we privilege documents to the point of acting as though, and speaking as though, the material thing is the constitution, the legislation, the regulation, or the contract. We in fact codified our privileging of documents in our rules of evidence when we adopted the statute of frauds, which holds that in certain subject areas of contract—namely promises to pay someone's debt obligations, a contract that takes longer than one year to complete, real property leases that run for more than a year, contracts for an amount or other consideration that exceeds the state's threshold, a contract that will go beyond the lifetime of the one performing the contract, or the transfer of property upon the death of the party performing the contract—the contract must be in writing.⁶³ But that very same act of demanding writing in these situations also serves to acknowledge that speaking is the primary or default category of legal communication and that speaking is sufficient in all other situations.

Yet despite our announced role of writing in the law, in areas not addressed by requirements to write, we still seem to treat the law as though it is written text. The assumption that the law is written seems to occur in classrooms everywhere. Recently, in a seminar on the European Constitution, our German, Turkish, Italian, and Russian students found it difficult to discuss the United Kingdom's constitution without calling it "unwritten."⁶⁴ First of all, as Margot Horspool notes, the U.K.'s constitution *is* written, but it is written in more than one document.⁶⁵ Second, the European Court of Justice has also made clear that the European Economic Community Treaty is a "basic constitutional charter" of the Community.⁶⁶ That reminder reveals a prejudice many of us have learned whereby we regard nations as being constituted by single written documents. Could we imagine a similar discussion of world constitutions, growing out of the common law tradition, as describing the constitution of France or Germany as "unspoken"? This of course would lead one to conclude that without a single document called a "constitution," a nation, or Europe, is not constituted.

The sixth and last possibility of what lawyers may learn about the practice of law from a study of reading is through the process of reading dialectically in order to give a proper and solid place to the role of attitude in the creation of meaning. Before settling on this final and extended

⁶³ See *id.* at 300–03.

⁶⁴ Faculty of Law at University of Cologne, Seminar zum internationalen Recht: Europäisches und internationales Verfassungsrecht: eine Verfassung für Europa (Winter Semester 2003–04).

⁶⁵ See, e.g., MARGOT HORSPOOL, EUROPEAN UNION LAW 171 (3d ed. 2003).

⁶⁶ See Case 294/83, Parti Ecologiste 'Les Verts' v. Parliament, 1986 E.C.R. 1339, [1987] 2 C.M.L.R. 343 (1986). Later confirmed in the first opinion on the Draft Treaty on a European Economic Area. See Opinion 1/91, Draft Treaty on a European Economic Area, 1991 E.C.R. I-6079, [1992] 1 C.M.L.R. 245 (¶¶ 21, 46) (1992).

discussion, one might note that this learning process is not a one-way street. What law does accomplish, although the work-a-day laborers of the law in offices and courtrooms may not call it such, is a sense of the utility in codifying rules of persuasion. While working with students of rhetoric and communication, it has become clear to me that the law also offers a codification of rules of persuasion that are otherwise left to rhetorical situation by rhetorical situation.⁶⁷ For instance, in the presentation of a case to the court, the burden of proof, the type and form of evidence, the order in which parties argue or question witnesses, the form of the questions, and so on, are all set by rules of court, statutes, or common law standards. Contrast that to a situation in which two people are simply arguing over whether American foreign policy is sound or which restaurant serves better pasta. In those cases, persuasion is left open to cultural codes that are unconsciously reinvented with each argument.

Thus one may see the range of possibilities for the study of reading to teach us something about the practice of law, including the inherent nature of different readings by different readers, the legitimacy of the resulting different meanings developed by those different readers, the variety of possibilities for legal practice based upon the differences among readers and their meanings, and the need for constructive comparisons of readers and meanings—beyond scientific appeals to mechanical accuracy that would suggest the intention of the author or the text alone can restrict or dictate a meaning for a reader. What follows is an extended application of these considerations to one type of legal text—the constitution. In this application, one can take the literary theory of Kenneth Burke, who explicitly treated the U.S. Constitution in his work, and see how it might yield understanding in a further constitutional application.

This brings me back to the sixth possibility and to questions of audience and method in my investigations. In legal education, there exists a class of course offerings known as the “law and” group, such as “law and philosophy,” “law and psychology,” “law and music,” “law and literature,” and so on. It is worth pausing to note just what one means with the conjunctive “and” in such course titles. Unless one can demonstrate an inherent connection of one subject to the other, or how one is constitutive of the other, it becomes reasonable to ask, why put these two things together at all (if in fact they are together)? If one is presenting more of a compare and contrast situation, then grammatically we might just as well say “law or philosophy,” “law or psychology,” and so on. The “and” in “law and” courses sets a knife on edge. The knife is the word “and.”

Grammatically, as we announce the coupling of law with another discipline in order to name a new discipline,⁶⁸ a movement, a project, a

⁶⁷ Here I am referring to rhetoric in the sense of its ancient tradition as per, for instance JOHN POULAKOS & TAKIS POULAKOS, *CLASSICAL RHETORICAL THEORY* (1999), and not, for instance in the sense that Edward Said chastises as a trendy synonym for any sort of literary study. See SAID, *supra* note 1, at 146.

⁶⁸ Building interdisciplinarity brings its own problems. See generally Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 *YALE L.J.* 1059 (March 1999). See also Richard H.

student's classroom course of study, a degree, a symposium, a book, or an article, we use the conjunctive as a balance that might suggest equal treatment of two different subjects. Of course, it is also possible that one would want to be ambiguous and leave open as many possibilities for as many variations to be included under these rubrics as possible. But if we do want to be specific in our titles, remaining balanced on an "and" is just as difficult as sitting on the knife's edge. By comparison, if we used some other part of speech such as a preposition, for example, we might more accurately reflect what the mixing means: "law of psychology," "law in literature," or "accounting for lawyers." More importantly, if we were to decide to use prepositions, we would then be required to think more about what relationship we mean between the two subjects in our title. Not only that, but the preposition does not allow one to suggest that the two subjects are treated equally in association—"law in psychology," for example, is much different than "psychology in law." With the conjunctive "and," one can likely speculate which of the two is likely to be treated as the explanans and which as the explanandum⁶⁹ from the context in which one finds them. "Law and Rhetoric," for example, when offered in law school is likely to treat rhetoric as the special subject to be considered by lawyers, while the classics, communication, or rhetoric department of the university is likely to treat law as a special topic to be considered by rhetoric.

This presents a difficulty if we allow for the ambiguous "and" when we want to seriously consider the audience. An audience of lawyers, reading a text that flies the flag of "law and literature," for example, will of course bring different expectations to the text than will an audience of literary critics. Here I must lay my cards on the table and admit that although I would be happy that anyone finds this text provocative or at least bemusing, it is primarily the audience of lawyers and legal academics whom I have in mind. With that said about audience, some issues of method begin to precipitate. A colleague reports that while teaching a course on the subject of victim's rights at a law school, she finds it helpful to make references to literature that she assumes would be known by all students (thereby raising issues regarding canon construction, but that is an issue for another day) as a way of articulating a narrative framework for discussions of victimage, identity, and so on. When I asked whether she accomplishes the same through film or music, she said yes. That suggests that there is nothing unique to literature in her use of literature with law, but rather that it serves as a very useful tool to remind students that law functions as a part of culture.

Two other methods come to mind that would seem to rely more specifically on what role literature might uniquely play in the study and practice of law, and perhaps even raise the question of whether literature is

Weisberg, Antonio's *Legalistic Cruelty: Interdisciplinarity and "The Merchant of Venice,"* 25 C. LITERATURE 12 (1998) (discussing the effects of interdisciplinarity).

⁶⁹ I borrow these terms from their philosophical usage. See, e.g., WESLEY SALMON, FOUR DECADES OF SCIENTIFIC EXPLANATION (1989).

constitutive of law. One could, for example, in treating law *as* literature⁷⁰ use a sort of inductive procedure, very much in keeping with the history of teaching in the common law, whereby lawyers taught law students by reporting on their own cases in practice.⁷¹ As a matter of pedagogical method, one might do as journalists do in a content analysis when they count column inches of articles devoted to particular subjects. If one counted the texts lawyers spend the most time reading, one could treat those texts as the objects of literary criticism, practice, study, and analysis.

Alternatively, in treating law as literature, one could take an approach more consistent with the history and deductive practice of legal education in civil law countries, wherein one first considers the texts which announce the highest norms and then considers the texts that are derived or deduced from those norms. One would teach a student in the German system, for example, that the highest norms are articulated in the *Grundgesetz* (Basic Law), which functions as a constitution.⁷² If we take this deductive approach in the common law, as Americans have in altering the British system, we too might begin a consideration of law as literature with a reading of constitutions.

As but one example, I offer Kenneth Burke's reading of the constitution as a sixth possibility in my list of what lawyers might learn from a study of reading. The appeal of Burke is based less upon his position within New Criticism than it is upon his direct, extended, and language-based theory of constitutions. While Wolfgang Iser and others are careful to limit their reflections on reading to what Iser calls "literary texts" (indeed, Iser is careful enough to say that he is not even constructing literary theory, but literary history, in *The Implied Reader*),⁷³ other critics are more inclusive, such as Roman Ingarden, who extends the explanatory power of his "intentional sentence correlatives" to short stories, novels, dialogues, drama, and scientific theory.⁷⁴

Of imaginative literature Burke has shown that it is a form of communication, something that takes place between writer and readers, and that it is strategic or rhetorical in the sense that it must order and encompass situations in ways that make sense to readers. Moreover, just as imaginative works may be said to have a sociological side, so life itself may be understood dramatically, as though it were a literary text.⁷⁵

But most specifically, Burke goes so far as to develop a dramatic pentad to explain human motivation *from* the dialectic practice of reading

⁷⁰ This distinction is elegantly materialized in the two-volume set *THE WORLD OF LAW: LAW IN LITERATURE AND LAW AS LITERATURE* (Ephraim London ed., 1960). In application of this distinction, James Boyd White claims that law is essentially literary. See James Boyd White, *Writing and Reading in Philosophy, Law, and Poetry*, in *LAW AND LITERATURE* 1, 20 (Michael Freeman & Andrew Lewis eds.) (Current Legal Issues Vol. 2, 1999).

⁷¹ See generally BAKER, *supra* note 50.

⁷² See ZIPPELIUS, *supra* note 26, at 42. See generally FISHER, *supra* note 30, at 20.

⁷³ See ISER, *supra* note 19, at xiii.

⁷⁴ See ROMAN INGARDEN, *VOM ERKENNEN DES LITERARISCHEN KUNSTWERKS* 29 (1968).

⁷⁵ Joseph R. Gusfield, *The Bridge Over Separated Lands: Kenneth Burke's Significance for the Study of Social Action*, in *THE LEGACY OF KENNETH BURKE* 28, 29 (Herbert W. Simons & Trevor Melia, eds., 1989).

constitutions.⁷⁶ According to Wayne Booth, “What Burke has done better than anyone else is to find a way to connect literature with life without reducing either.”⁷⁷

III. MAKING SENSE OF THE CONSTITUTIONAL WISH THROUGH A STUDY OF READING

Because Burke has very specific meanings for some common words, and uses several neologisms, a discussion of his ideas on reading constitutions first requires defining some of those terms and placing others in context. After having done so, one has a set of hand tools, so to speak, with which to go to work on reading a constitution in Burke’s sense. For this reading, Burke offers two overlapping concepts to help us bring our reading practices to consciousness when reading constitutions. The first is the admonition to read dialectically, and the second is to focus on the role of attitude in our readings of constitutions. He uses these concepts to critique the type of reading that he says leads to legal positivism. In legal circles, one might find resistance to positivism on ideological or philosophical grounds, against which one can argue differing ideologies or philosophies. But Burke demonstrates that our way of reading can itself carry forward and reproduce positivism.

Although both dialectic reading and a focus on attitude are found in multiple places throughout Burke’s body of work, they come together most thoroughly and explicitly in what is perhaps his most well-known work, *A Grammar of Motives*.⁷⁸ Although he addresses reading across a broad spectrum of genres in that work, in the end he applies the concepts specifically to constitutions. For present purposes it is worth noting that the entire project of developing *A Grammar of Motives* was accomplished by writing backward in a search for further foundational explanations from his original desire to discuss the reading of constitutions. One finds at what is now the beginning of the book the analytical terms that together he calls a “pentad of key terms”—the “five terms [used] as generating principle of our investigation” of motives⁷⁹—that leads to reading the constitution. According to Burke, “any complete statement about motives will offer *some kind of* answer to these five questions: what was done (act), when or where it was done (scene), who did it (agent), how he did it (agency), and why (purpose).”⁸⁰ And also worthy of note for present purposes, it is

⁷⁶ See generally KENNETH BURKE, *A GRAMMAR OF MOTIVES* 323–444 (1969).

⁷⁷ Ben Yagoda, *Kenneth Burke: The Greatest Literary Critic Since Coleridge?*, *HORIZON*, June 23, 1980, at 66, 67.

⁷⁸ BURKE, *supra* note 76.

⁷⁹ *Id.* at xv.

⁸⁰ *Id.* This pentad of dramatic terms has been applied to many different human endeavors by scholars and students alike in attempts to explain human motivations. Scholars are listed in Richard H. Thames, *A Selected Bibliography of Critical Responses to Kenneth Burke, 1968–1986*, in *THE LEGACY OF KENNETH BURKE* 305 (Herbert W. Simons & Trevor Melia, eds., 1989), updated in Richard H. Thames & John Mcinerney, *Kenneth Burke: Secondary Bibliography 1985–1995*, 10 *THE KENNETH BURKE SOCIETY NEWSLETTER* 1, June 1995, at 26. For students’ and scholars’ applications, see for example any conference catalogue of papers presented at the National Communication Association’s annual conference.

important that later in other books and articles that employ the pentad, Burke added the term “attitude”⁸¹—a term that he said had really been there all along, but had escaped having been named as its own necessary term for analysis in earlier works. He distinguishes the “how” of agency from the “how” of attitude when he adds that “[t]o build something with a hammer would involve an instrument, or ‘agency’; to build with diligence would involve an ‘attitude,’ a ‘how.’”⁸² These together form the components of Burke’s notion of “dramatism,” a “method of terministic analysis” as he later calls it in an essay entitled “Dramatism.”⁸³

Returning to the two concepts that help us to bring our reading practices to consciousness when reading constitutions, one first comes to the notion of dialectic. In Burke’s *Grammar*, the first sentences of the last section, “Dialectic in General,” tell the reader:

By dialectics in the most general sense we mean the employment of the possibilities of linguistic transformation. Or we may mean the study of such possibilities. Though we have often used ‘dialectic’ and ‘dramatistic’ as synonymous, dialectic in the general sense is a word of broader scope, since it includes idioms that are non-dramatistic.”⁸⁴

Thus it would seem that a discussion of the “Dialectic of Constitutions” will also be of a broader scope than a consideration of the pentad of dramatistic terms as applied to the Constitution. Burke’s notion of dialectic is a winding tour through a typically-Burkean landscape of literary sources. Yet, in the balance, he settles largely on the Platonic concept of Socratic dialectic. The notion of Socratic dialectic is a sort of discussion and reasoning through dialogue that is spoken or written. He even defines “dialectic” dialectically:

In this connection, we might note a distinction between positive and dialectical terms—the former being terms that do not require an opposite to define them, the latter being terms that do require an opposite. “Apple,” for instance, is a positive term, in that we do not require, to understand it, the concept of a “counter-apple.” But a term like “freedom” is dialectical, in that we cannot locate its meaning without reference to the concepts of either “feudalism” or “socialism.”

Our courts consider the Constitution in accordance with theories of positive law—yet actually the Constitution is a dialectical instrument; and one cannot properly interpret the course of judicial decisions unless he treats our “guaranties of Constitutional rights” not as positive terms but as dialectical ones.

* * *

⁸¹ According to Trevor Melia, “‘attitude’ has been implicit in the pentad from the beginning, and it is clear that were Burke writing *Grammar* today, he would treat the term separately.” Trevor Melia, *Scientism and Dramatism*, in *THE LEGACY OF KENNETH BURKE*, *supra* note 80, at 71 n.21.

⁸² BURKE, *supra* note 76, at 443.

⁸³ Kenneth Burke, *Dramatism*, in *COMMUNICATION: CONCEPTS AND PERSPECTIVES* 327–52 (Lee Thayer ed. 1967) (hereinafter Burke, *CONCEPTS AND PERSPECTIVES*). A shorter version of this article appears in *7 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 445 (1968).

⁸⁴ BURKE, *supra* note 76, at 402.

However, the statement that a term is “dialectical,” in that it derives its meaning from an opposite term, and that the opposite term may be different at different historical periods, does not at all imply that such terms are “meaningless.” All we need to do is to decide what they are *against* at a given period . . . Much of the cruder linguistic analysis done by the debunk-semanticist school . . . involves the simple fallacy of failing to note the distinction between positive and dialectical terms, whereby, in applying to *dialectical* terms the instruments of analysis proper to *positive* terms, they can persuade themselves that the terms are meaningless.⁸⁵

This sense that one must read a constitution as a dialectic response to perceived ills of the time is akin to Iser’s sense of reading the novel as well:

Though the novel deals with social and historical norms, this does not mean that it simply reproduces contemporary values. The mere fact that not all norms can possibly be included in the novel shows that there must have been a process of selection, and this in turn, as we shall see, is liable to be less in accordance with contemporary values than in opposition to them.⁸⁶

E. H. Gombrich has reminded us that whenever “consistent reading suggests itself . . . illusion takes over.”⁸⁷ This is precisely one of the reasons why we might consider lessons from reading literature in reading constitutions. Burke addresses the question, “Why is literary theory concerned with constitutions at all?” in two points. First, he begins his *Grammar* by asking, “What is involved, when we say what people are doing and why they are doing it?”⁸⁸ Consider Burke’s etymological definition of the term under consideration: “constitution.”

In addition to understanding Burke’s definition of “dialectic,” one needs to understand his definition of “constitution” to in turn understand the role of attitude in reading a constitution. Initially, Burke believed that with the term “constitution” he was at a beginning point for understanding human motives,⁸⁹ but while pondering the notion of being logically prior, he arrived at his pentad of dramatic terms “as a ‘final’ set of terms that seemed to cluster about our thoughts about the Constitution as an ‘enactment.’”⁹⁰ In his essay “Antinomies of Definition,” found in *Grammar*,⁹¹ Burke provides an exegesis of what he calls the “Stance family”—a family that not only includes substance, consist, constancy, contrast, destiny, ecstasy, existence, hypostatize, obstacle, stage, state, status, statute, stead, subsist and system, but also includes constitution. The etymological root for this family according to Burke is *sta*, to stand

⁸⁵ Burke’s first discussion of the constitutional wish can be found already in the first edition of his *Philosophy of Literary Form* (1941), wherein he reveals his thoughts on dialectic and the U.S. Constitution. BURKE, *supra* note 13, at 109–11 n.26.

⁸⁶ ISER, *supra* note 19, at xii.

⁸⁷ E. H. GOMBRICH, ART AND ILLUSION 204 (1962).

⁸⁸ BURKE, *supra* note 76, at xv.

⁸⁹ *See id.* at 338.

⁹⁰ *Id.* at 340.

⁹¹ *Id.* at 21.

(Sanskrit, *stha*).⁹² Thus, “constitution” is derived from *con* (against) and “*statuere*, to place, set—which in turn is related to *stare*, stand.”⁹³ Therefore, after surveying a variety of ordinary dictionary usages of “constitution,”⁹⁴ Burke maintains that “constitution” is concerned with matters of substance and motive. Consequently, “a constitution is a *substance*—and as such, it is a set of motives.”⁹⁵ “‘Substance’ and ‘motivation’ are convertible terms.”⁹⁶

Appropriate to this discussion, one might note that Burke directly applies his pentad of dramatic terms that explain human motivation to law, precisely as he defines constitutions: “A legal constitution is an act or body of acts (or enactments), done by *agents* (such as rulers, magistrates, or other representative persons), and designed (*purpose*) to serve as a motivational ground (*scene*) of subsequent actions, it being thus an instrument, (*agency*) for the shaping of human relations.”⁹⁷ Note in the preceding that Burke is not concerned with the word “constitution” alone, but with its application in law. In this capacity, “law” can mean either the mere codification of custom or a device for the transformation of customs. “In a given instance, of course, it is difficult to decide exactly which of these functions, the conservative or the innovative, a given legal enactment or judicial decision is performing.”⁹⁸ This would seem to be a dialectic of Burke’s own invention, and one that will respectively match that of reading a constitution as an act of positive law and reading a constitution as the attitude of a wish.

Having completed the list of necessary terms and definitions, we are ready to consider what Burke has to offer lawyers in reading constitutions. In his analysis, the featured term of the dramatic pentad is *act*. When defining “act” or “action” one must keep in mind Burke’s definition of “human” as well, because for Burke “action is a term for the kind of behavior possible to a typically symbol-using animal (such as man) in contrast with the extra symbolic or non symbolic operations [motions] of nature.”⁹⁹ In developing and using this pentad, Burke’s use of drama is not as a metaphor; it is a “fixed form that helps us discover what the implications of the terms ‘act’ and ‘person’ *really are*.”¹⁰⁰

Not unlike Nietzsche’s shift in focus from being to becoming, a shift with which Burke was familiar, Burke’s early featuring of “act” in his own analyses eventually shifts to the featuring of “attitude,” once attitude is added to his network of dramatic terms. The form of the network is important in that eventually he decides that he can best explain human

⁹² See *id.* See also MARTIN HEIDEGGER, INTRODUCTION TO METAPHYSICS (Yale University Press 2000). See generally KENNETH B. SOUTHWELL, KENNETH BURKE & MARTIN HEIDEGGER: WITH A NOTE AGAINST DECONSTRUCTION (1987) for a comparison of the work of Burke and Heidegger.

⁹³ BURKE, *supra* note 76, at 323.

⁹⁴ *Id.* at 341.

⁹⁵ *Id.* at 342.

⁹⁶ *Id.* at 376.

⁹⁷ *Id.* at 341.

⁹⁸ *Id.* at 342.

⁹⁹ Burke, CONCEPTS AND PERSPECTIVES, *supra* note 83, at 335.

¹⁰⁰ *Id.* at 337.

motivation not through the static nature of the act (or through the static nature of any of the other four terms alone—scene, agent, agency or purpose), but through what he calls “attitude.” Burke references the notion of attitude found in the work of his New Criticism colleague, I. A. Richards, who asked, “What gives the experience of reading a certain poem its value?”¹⁰¹ and answered in a manner consistent with Latour’s discontent with explanations in criticism (mentioned above)¹⁰² that “[t]o excite a serious and reverent attitude is one thing. To set forth an explanation is another.”¹⁰³

Burke reports that in his concept of attitude, “the attitude or incipient act is a region of ambiguous possibilities.”¹⁰⁴ Attitudes are considered by Burke to be ambiguous because they can substitute for an action or lead to an action.¹⁰⁵ Wayne C. Booth later mobilizes the term “attitude” when, in “The Scholar in Society,” he rejects the notion of the ivory-tower professor engaged in inquiry for its own sake and, instead, proposes the scholar who acknowledges his or her public role through a set of five habits that eventually includes the attitude of intellectual virtue.¹⁰⁶ As has been noted by Laurence Musgrave, “A rational habit or intellectual virtue then is similar to Burke’s notion of attitude as the manner of one’s performance, but Booth goes further by proposing five specific scholarly traits.”¹⁰⁷

His sense of dialectic, coupled with the idea of attitude, gives Burke the operative term “the constitutional wish.”¹⁰⁸ Over the course of his writing, he not only shifts the focus of his analysis from acts to attitudes, but also tells the reader how and why he has done so. In the history of reading in the law, and particularly in the reading of constitutions, there has been a historic focus of analysis on the comparison of acts or persons and their attendant motivations. Burke points to what might happen if we focus upon attitude, and also introduces the idea that while we focus on one part of the network, we may not ignore the other five explanatory terms in the network, in this case including act. In “Dissolution of Drama,” Burke notes that one of the four ways in which drama is dissolved is “by the turn from dramatic *act* to lyric *state*. This is not to be considered dissolution in the full sense, since *status* is a reciprocal of *actus*.”¹⁰⁹ One need not stretch the imagination far to see the correlation between *status* and attitude in this dialectical pair. (This dialectical pairing of dramatistic terms into ratios—scene-act, scene-agent, and so on, is one way in which Burke keeps the analytic help of the network flowing while focusing on just one term.) In this sense, the attitude of the reader, not the intention of the writer, becomes

¹⁰¹ I. A. RICHARDS, *PRINCIPLES OF LITERARY CRITICISM* 2 (1925).

¹⁰² See discussion *supra* notes 5–7 and accompanying text.

¹⁰³ *Id.* at 286.

¹⁰⁴ BURKE, *supra* note 76, at 242.

¹⁰⁵ See *id.* at 236.

¹⁰⁶ WAYNE C. BOOTH, *The Scholar in Society*, in *THE VOCATION OF A TEACHER: RHETORICAL OCCASIONS 1967–1988*, 45–75 (1988).

¹⁰⁷ Laurence E. Musgrave, *Attitude for ‘Coming to Terms,’* 87 *ENGLISH JOURNAL* 85, 86 (1998), available at <http://english.sxu.edu/musgrove/engjrn1.htm>.

¹⁰⁸ BURKE, *supra* note 76, at 323.

¹⁰⁹ *Id.* at 441.

a conscious place of meaning creation. In twentieth century literary texts, the connections within the text are left with so many gaps, according to Iser,

that one's attention is almost exclusively occupied with the search for connections between the fragments; the object of this is not to complicate the 'spectrum' of connections, so much as to make us aware of the nature of our own capacity for providing links. In such cases, the text refers back directly to our own preconceptions—which are revealed by the act of interpretation that is a basic element of the reading process.¹¹⁰

The relevance of the idea of attitude to legal reading and the construction of legal meaning is not limited to Burke's literary perspective, nor is it limited to constitutions. From the historical perspective, Atiyah and Summers in *Anglo American Legal Reasoning in Forms and Concepts* emphasize the supreme importance of attitude in the additional example of adjudication and opinion-writing when they compare the U.S. and the U.K.:

The version of stare decisis which prevails in England today is somewhat less strict than the version which operated earlier in this century, but is still very strict by modern American standards. The actual rules (if they are rules) governing which courts are strictly bound to follow precedents of which other courts are not on the face of it very different in the two countries, but the differences in practical operation of stare decisis are nevertheless very great. Thus it seems that the difference between the two versions of stare decisis lies not so much in any formal rules as in the general attitude of the judges to a number of key issues. This difference of attitude could also be seen as a difference in the general vision of law to which the judges adhere.¹¹¹

Given that Burke himself featured the act in his early analyses of human motivation, just as the history of reading constitutions has done, it is insightful to note why he shifted his focus to attitude. Burke's dramatic analysis of human motivation brought him to the conclusion that an analysis of motivation which begins with an act will result in scapegoating and victimage.¹¹² Thus, in reflexively applying his own dramatic analysis to his own profession of writing and criticism, he recognized the danger of writing calls to action, or even diatribes of his own which themselves would constitute action, and in turn, result in victimage. Consequently, he discarded action and arrived at a new term to feature in his dramatic analysis, one that would not gravitate back to act as a featured term in his network of terms. Hence, he features attitude. A very good example of this analysis which features attitude, and one that fits current cultural concerns as well as an analysis of reading constitutions, is Burke's own attitude on ecology.

¹¹⁰ Iser, *supra* note 19, at 280.

¹¹¹ P. S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 119 (1987).

¹¹² Kenneth Burke, *Dramatism*, 7 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 445, 450 (1968).

Despite having recognized the dangers of technological pollution in the 1930s, Burke refrained for the most part from attacking the identified sources of pollution with his very effective pen or otherwise. Instead, he satirized the situation in “Why Satire, with a Plan for Writing One”¹¹³ and “Towards Helhaven: Three Stages of a Vision.”¹¹⁴ Burke talks about satire as a soothing comportment toward the nuisance of technological pollution. After being asked in an interview to disclose the secrets of his longevity (at the age of eighty-eight), he first counted Prohibition as having changed his drinking habits sufficiently to avoid cirrhosis of the liver,¹¹⁵ and then added,

another thing I think I learned, a trick just in writing: I began to develop, when I was writing my novel . . . I had a high blood-pressure style. I learned how to change my style. I had to take it easy, take it easy . . . I think what Nietzsche’s *Will to Power* amounts to is that he wrote one letter to the editor after another and didn’t ship them to the editors, just a bunch of unsent letters to the editor. They all had this fury in them. It’s a tough thing to take, you know; you can’t do that. You can’t turn that stuff around . . . a lot of that stuff you can get around by writing burlesques of it rather than taking it seriously; turning it into fun.¹¹⁶

Burke in turn heeds his own advice regarding technological pollution and ecology:

[T]he aim [of a satire] would be to sustain the theme of pollution not directly, but like the drone, the fixed continuous note emitted by a bagpipe, while the emphasis was upon whatever melody was being played above it. In this way, ideally, the nagging theme of pollution would never let up, yet the developments built atop it would call for attention in their own right. The result would be a compromise insofar as the antics of the satire would not make necessary the abandoning of the theme.¹¹⁷

And so the dramatistic attitude of satire can work to analyze a problem like ecology rather than using an analysis of acts of pollution, regulation of pollution, prevention of pollution, and so on. One can use the analytic tools of dialectic and attitude to define and understand “constitution,” and apply them to the U.S. Constitution, as Burke does. A further test of the general usefulness of the dramatistic tools is to extend the application to a state constitution.

IV. CLEAN ENVIRONMENT AS EXAMPLE OF THE CONSTITUTIONAL WISH

In the spirit of Burke’s connection of literature to life, as noted by Booth above, I note that in teaching international law, I am presented with the opportunity to connect legal theory to legal practice. In this case, I am even given the opportunity to demonstrate not just a need for theory, but for a philosophy of law. Especially given the events of current world politics,

¹¹³ Kenneth Burke, *Why Satire, with a Plan for Writing One*, 13 MICH. Q. REV. 307 (1974).

¹¹⁴ Kenneth Burke, *Towards Helhaven: Three Stages of a Vision*, 79 SEWANEE REV. 11 (1971).

¹¹⁵ Kenneth Burke & Malcolm Cowley, *A Conversation*, 6 PRE/TEXT Nos. 3–4 181, 199 (1985).

¹¹⁶ *Id.* at 199–200.

¹¹⁷ Burke, *supra* note 113, at 324.

both the conservative wag and the neophyte find it simple to ask whether there is indeed such a thing as international law. The answer to this question, I maintain, depends upon one's legal philosophy. Rear-looking interpreters of the nation-state as the final and permanent chapter in legal history find comfort in exercising, if not naming, their philosophy of legal positivism—the command of the sovereign (backed by a threat of force).¹¹⁸ That said, they go on to add that with no international sovereign and no court of supra-national, mandatory jurisdiction, if there are any international rules of conduct, they are not law, are they? This reasoning ignores other philosophies of law, however; most notably, natural law.¹¹⁹ Even without a consideration for divine intervention or a world-wide shared sense of right and wrong, there are other and far simpler examples of human behavior that cannot be explained by equating human motivation in the law with legal positivism, descriptively or prescriptively. For instance, diplomacy, politics in general, paying taxes for which there is no chance of audit, or waiting for the red traffic light to change even when there is no one around at three o'clock in the morning also contribute to what we know as the law. In current discussions of the accession of Turkey to the European Union, one of the characterizations of what it means to be European is to have an attitude toward the rule of law that is not simply a reaction to the threat of force. All of these examples help us to understand the law not as acts, in Burke's conception, but as attitude. And as I have laid out above, attitude—at least per Burke's intricate literary "fixed form" of analysis—is vital to understanding the rules, the grammar of human motivation, including the law.

Ecology serves as a synthesis of Burke's theory, and to bring it up-to-date in application. Ecology has only relatively recently been made an explicit concern of constitutions. It may best be understood not when analyzed as permitting or prohibiting acts, but for the attitude that a reader may adopt in making meaning from a constitution.¹²⁰ In his own work, Burke characterizes the problem of environmental pollution as the drone of the bagpipe that, due to the nature of its play, always continues on in the background. He addresses it not with action, but with the attitude of satire:

[I]t goes on nagging me. Consequently, as I hope to make clear, my thoughts on satire in this connection come to a focus in plans for a literary

¹¹⁸ As announced by JEREMY BENTHAM, INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789) and echoed by JOHN AUSTIN, LECTURES ON JURISPRUDENCE, OR THE PHILOSOPHY OF POSITIVE LAW (1863), and continued, with revisions, in the twentieth century by HANS KELSEN, THE GENERAL THEORY OF LAW AND THE STATE (1945).

¹¹⁹ Cf. H. L. A. Hart, *Legal Positivism*, in THE ENCYCLOPEDIA OF PHILOSOPHY (Paul Edwards ed., 1967); Richard Wollheim, *Natural Law*, in THE ENCYCLOPEDIA OF PHILOSOPHY.

¹²⁰ Treaties may work the same way—not as positive law, because there is no sovereign. French political journalist Anne-Elisabeth Moutet has made the point that the Americans and English have the international reputation among political journalists of taking the attitude that treaties are like statutes, and that signing one or ratifying one binds one with all the penalties for breach that one could expect for breach of contract or violation of statutory duty. By comparison, French and other continental diplomats see signing treaties as "wishes." Thus one need not take the attitude that without mathematical certainty of compliance, one cannot enter, or should withdraw from a treaty. This attitude would seem to have spelled a different outcome for the Bush administration regarding the Kyoto Protocol withdrawal. Correspondence from Anne-Elisabeth Moutet, to Kirk Junker (Oct. 18, 2002) (on file with author).

compromise whereby, thanks to a stylistics of evasion, I both might and might not continue with the vexatiousness of this *idée fixe*, this damned committed nuisance.¹²¹

The U.S. Constitution, which Burke used as his example for constitutional analysis from the perspective of attitude, does not explicitly address the natural environment, ecology, or pollution. But one constitution in the U.S.—that of Pennsylvania—does. In approaching a constitution not as proscriptions or commands to act, but as enabling attitudes, one can understand a constitution as wishes that nevertheless have legal effect. That effect cannot be understood through a contemplation of the act, but through a contemplation of the attitude: “Now, owing to technology’s side-effect, pollution, mankind clearly has one unquestionable purpose, namely to seek for ways and means (with corresponding global attitudes) of undoing the damage being caused by man’s failure to control the powers developed by his own genius.”¹²²

Article I, Section 27 of the Pennsylvania Constitution reads as follows:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.¹²³

This example lends itself to the present discussion because of the crucial point that Burke makes through his notion of a constitution behind the Constitution.¹²⁴ What lawyers refer to as the “living constitution,” that is, one able to adapt to a changing culture, Burke accounts for by saying:

Since, by reason of the scene-act ratio, the quality of the Constitutional enactment must change *pari passu* with changes in the quality of the scene in which the Constitution is placed, it follows that a complete statement about motivation will require a wider circumference, as with reference to social, natural, or supernatural environment in general, the Constitution behind the Constitution.¹²⁵

In Burke’s analysis, “constitution” is related to all five terms of the pentad,¹²⁶ but it loses its a priori privilege when one dialectically considers the scene from which a constitution emerges. While Burke sees the emergence of the U.S. Constitution as originally having been against a political scene, he sees its continuation as positive law in dialectic with the broader circumference of business. He states that with the exception of the Thirteenth Amendment, constitutional guarantees protect only against the “possibility of abuse of governmental power and not against the possibility

¹²¹ Kenneth Burke, *Why Satire*, *supra* note 117, at 337.

¹²² Kenneth Burke, *Rhetoric, Poetics and Philosophy*, in *RHETORIC, PHILOSOPHY AND LITERATURE: AN EXPLORATION* 15, 33 (Don M. Burkes ed., 1978).

¹²³ PA. CONST. art. I, § 27.

¹²⁴ See BURKE, *supra* note 76, at 362–63.

¹²⁵ See *id.* at 362, 366.

¹²⁶ See *id.* at 342.

of capitalist exploitation.”¹²⁷ Already in 1935, he asks “is not Business but the secularization of futurism, inherent in our turn from *status* to *contract* as the basis for our productive order?”¹²⁸ Burke goes on to recognize the distinctions among constitutional pronouncements which amount to expressions of wish, of ideal, and of command.¹²⁹ He finds, however, that American law’s environment of positive law “has tried to uphold the fiction that the Constitutional enactment itself is the criterion for judicial interpretations of motive. . . . In effect, therefore, the theory of ‘positive law’ has given us courts which are the representatives of business in a mood of mild self-criticism.”¹³⁰

Burke’s characterization of the courts is in some ways startling and in other ways disturbing, in that noticeably absent from such courts is a primary focus on justice. Richard H. Weisberg and others maintain that a contribution of the study of law and literature is the re-insertion of justice in the study and practice of law.¹³¹ When Burke says that it is only mild self-criticism, he is suggesting that for instance, in the present example of Section 27, the constitution behind the Constitution effectively is thwarting real environmental concern, which is inherently detrimental to business concerns, by enacting weak expressions of criticism which are nevertheless sufficient to placate those injured by environmental destruction at business’s profit. This is an insightful, serious, and difficult-to-test proposition.¹³² Given Burke’s opinion on rational epistemologies in social science, one might be tempted to say that any attempt to “test” his hypothesis is misguided. Some of the legal community may agree. In an essay prepared for a symposium on the twentieth anniversary of the ratification of Section 27, Donald A. Brown writes that “[o]bviously any conclusions about NEPA’s [National Environmental Policy Act] meaninglessness would have to take into consideration NEPA’s efficacy in

¹²⁷ *Id.* at 363. It is interesting to note here that in Aristotle’s *Constitution of Athens*, which Burke studied, Aristotle gives a chronological narrative of the history of Athens’ fourteen governments in sections 1–41, and then discusses the then-present one. In that presentation, he sets up the history as one of constant struggle (dialectic?) between the Aristocracy and “the people.” Rights to vote and participate in government are unashamedly based upon the acquisition of property and material wealth.

Of minor but relative interest is a comment by the drafter of Article I, Section 27, Franklin L. Kury, regarding the first case in Pennsylvania in which a party attempted to use that section, *Commonwealth v. Nat’l Gettysburg Battlefield Tower, Inc.*, 302 A.2d 886, *aff’d*, 311 A.2d 588 (1973): “Anyone who has been to Gettysburg and other Civil War battlefields, knows that Gettysburg is by far the most commercially exploited of the Civil War battlefield sites. It is easy to see how a judge could rule that the tower was not a major incursion into historic and environmental values.” FRANKLIN L. KURY, NATURAL RESOURCES AND THE PUBLIC ESTATE: A BIOGRAPHY OF ARTICLE I, SECTION 27 OF THE PENNSYLVANIA CONSTITUTION n.24 (Reed Smith Shaw and McClay 1985).

¹²⁸ KENNETH BURKE, PERMANENCE AND CHANGE 186 (1954).

¹²⁹ See BURKE, *supra* note 76, at 373.

¹³⁰ *Id.* at 362–63.

¹³¹ See Richard H. Weisberg, *20 Years (or 2000?) of Story-Telling on the Law: Is Justice Detectable?* Keynote Address at Cardozo School of Law, New York (Apr. 18, 2004).

¹³² Bruce Ledewitz notes the further application of Article I, Section 27 in the case of *Payne v. Kassab*, 361 A.2d 263 (Pa. 1976) in a manner not inconsistent with what Burke terms “attitude.” Bruce Ledewitz, *Establishing a Federal Constitutional Right to a Healthy Environment in Us and in Our Posterity*, 68 MISS. L.J. 565, 598 (1998). By comparison, Ledewitz later finds weak constitutional support for environmental concerns when measured against capitalism, consistent with Burke’s “mild self-criticism” characterization. Bruce Ledewitz, *The Constitutions of Sustainable Capitalism and Beyond*, 29 B.C. ENVTL. AFF. L. REV. 229 (2002).

making agencies avoid even more destructive environmental projects that might be chosen *in the absence of NEPA*, something that is difficult if not impossible to measure.”¹³³

Quite relevantly, Brown refers to Serge Taylor’s *Making Bureaucracies Think* in his discussion. According to Brown,

Taylor concluded [after reviewing federal Environmental Impact Statements] that the amount of scientific rigor that went into an analysis of environmental impacts was not determined by the nature and difficulty of the environmental questions but by such non-scientific factors as the amount of money that had been budgeted in the project after the environmental assessment analyst negotiated a budget with the project officer.¹³⁴

Franklin L. Kury, the drafter of Section 27, which has become referred to as the “environmental amendment,” writes that “[o]n April 21, 1969, House Bill 958 [which became Section 27] was introduced in the Pennsylvania House of Representatives. Sponsored by thirty Representatives, this bill proposed a major policy change in Pennsylvania government’s *attitude* toward the natural environment of the state.”¹³⁵ This, in Kury’s own words, is law in the form of the constitution, understood as *wish*. It is distinct from law as command, especially in the sense of positive law. As an expression of wish, Section 27 reflects more than the attitude of the Pennsylvania government in 1970. Kury reports that “[l]ittle more than two years later, May 18, 1971, the bill, having passed two sessions of the General Assembly as required by the Constitution, was overwhelmingly approved by the voters at a referendum . . . by a vote of 1,021,342 to 259,979.”¹³⁶

By contrast, when one looks to act rather than attitude in the law, one finds the use of the word “act” as a term of art to refer to proposed legislation. Acts in like spirit of Section 27 are those known as Pennsylvania’s Surface Mining Act, Air Pollution Control Act, Clean Streams Law, Solid Waste Management Act, Scenic Rivers Act, and the Land Water Conservation and Reclamation Act. In the sense of positive law, these acts are “effective;” that is, when lawsuits have been brought by the government, and the government has cited these Acts as authority, the government has often won. Burke would be quick to point out that this is an example of act (in two senses) producing the inevitable scapegoating. Article I, Section 27 has been completely ineffective in the strict positivistic sense of law in that when the government has cited it as its authority to act, it has almost invariably lost twenty years of lawsuits. Kury nevertheless writes that “[a]lthough most of the lawsuits based on Article I, Section 27 have not been successful, the amendment has greatly succeeded in one respect—now a project’s impact on the environment is considered

¹³³ DONALD A. BROWN, A COMPARISON OF THE DEVELOPMENT OF THE PENNSYLVANIA ENVIRONMENTAL RIGHTS AMENDMENT WITH PUBLIC TRUST LAW, THE NATIONAL ENVIRONMENTAL POLICY ACT, AND STATE ENVIRONMENTAL POLICY ACTS 14 (Pennsylvania Dep’t of Env’tl. Res. 1990) (emphasis added).

¹³⁴ *Id.* at 13.

¹³⁵ KURY, *supra* note 127, at iii (emphasis added).

¹³⁶ *Id.* at iii, 6.

and evaluated in advance of the project's commencement."¹³⁷ Kury admits that as a positive prescription or proscription, his amendment is an act of what Burke calls "business in a mood of mild self-criticism."¹³⁸ But as a constitutional wish, Section 27 provides a statement of attitude in the legal scene, just as satire is a statement of attitude in Burke's journalistic scene. Section 27 should therefore be measured against other expressions of attitude and their motivations, not against the positive commands of law, which function on a landscape of business in a mood of mild self-criticism.

V. CONCLUSION: DOES READING CONSTITUTIONS FORMULATE US?

Iser concludes *The Implied Reader* with the observation that:

[Our] need to decipher gives us the chance to formulate our own deciphering capacity—i.e., we bring to the fore an element of our being of which we are not directly conscious. The production of the meaning of literary texts . . . entails the possibility that we may formulate ourselves and so discover what had previously seemed to elude our consciousness. These are the ways in which reading literature gives us the chance to formulate the unformulated."¹³⁹

If we extend the insights gained from a study of reading in literature to the study of reading in law, we may also discover what had previously seemed to elude our consciousness.

While reading a legal text and reading *belles lettres* may be a different experience (mercifully!), they are not wholly discrete either. American law already touts the recognition that constitutions are to be general documents so that they remain meaningful over time and subject to new interpretations as social circumstances change. (Even this assertion is questionable when one considers the 448 paragraphs of the Treaty Establishing a Constitution for Europe.) Even if only that bit of flexibility is granted in the law, then there is room for lessons to be learned from how literary studies make and analyze meaning from texts that are far more given to readers' interpretations. Burke provides us with an example of one of those lessons when he inserts the notion of "attitude" into his analytical tool of the dramatic pentad of terms seeking to explain motivation. The fact that he does so in explicit reference to constitutional interpretation would seem to suggest a solid, if conservative, place to begin such considerations.

In application of this literary insight then, one can see that the value of Article I, Section 27 of the Pennsylvania Constitution, for example, lies in its expression of attitude. Within the legal structure of constitutional governments, there is a certain elegance to broad expressions of attitude in a constitution ontologically and temporally prior to any legislation enacted to carry out the attitudinal expression. If law is to be capable of accounting for human motives at all, in the Burkean sense, it does so by expression of

¹³⁷ *Id.* at iii.

¹³⁸ *Id.*

¹³⁹ ISER, *supra* note 19, at 294.

attitude, not by acting. Legislation itself is “en-acted” and produces, for the community, a pronouncement of law by which to begin a “cause of action.” In both senses, a dramatic act occurs. As Burke demonstrates through his own personal shift from featuring act to featuring attitude, and in his shift in his emphasis in his work from act to attitude, he finds attitude to be a superior term to act. Article I, Section 27 is an expression of attitude.

While it can be viewed as “business in a mode of mild self-criticism”¹⁴⁰ when looked upon as a self-executing wish, it is also an attitude, a secular prayer. Business in a mode of self-criticism is evident in cases and causes of action interpreting Section 27 and in legislation enacted. Those acts ultimately arrive at scapegoating according to Burke, and it is then that the scapegoats must react; that is, they must take action to defend themselves, which sometimes is as subtle as mild self-criticism.

In the foregoing, I have taken Burke’s literary theory and extended it from the federal to a state constitution, and in particular, to a state constitutional provision that had considerable interest for Burke, as evidenced by his own extra-constitutional criticisms of our treatment of the natural environment. One could go further to test the traction of Burke’s theory to other areas that were subject to his criticism and review. A next step would be to extend Burke’s literary theory to other forms of legal texts outside of constitutions, or to constitutional provisions that discuss other concerns.

A question that remains is whether the reading of literature as described by literary history and theory also describes reading texts that are not considered to be literary texts. It would seem that if there really are spirits of the ages, then there are dominant cultural forms of reading that permeate other areas. In a scientific age, for instance, we might read all texts more or less in a scientific mode, perhaps most often looking for information and trying to establish consistent readings of the same text by different people, and of the same text by the same people when read a second and third time. When dominant forms of reading permeate, then are we describing or prescribing reading in other modes? To the considerable extent that we remain unconscious of how we acquired reading and of our current reading habits, we would seem to be very susceptible to applying reading modes loosely, without attention to whether the mode of reading should be different for a different type of text. Certainly one would not suggest that there is one mode of reading that is appropriate to all types of texts, any more than one would suggest that there is one set of meanings that a particular text must produce among different readers, or even for the same reader at a different reading. The question remains how one decides upon the appropriate mode for a particular text at a particular time.

¹⁴⁰ BURKE, *supra* note 76, at 363.