

LAW AS STORY: A CIVIC CONCEPT OF LAW (WITH CONSTITUTIONAL ILLUSTRATIONS)

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ABSTRACT

This Article introduces a civic concept of law, which emphasizes that law is grounded in citizens. This view of law is consonant with the powerful themes of broad civic contribution in the recent political campaign of Barack Obama, and it challenges approaches to law, such as originalism, that emphasize tight control. Just as everyone can contribute to politics, everyone can contribute to law. And, as with politics, the more people who contribute, the richer and more resilient law becomes.

We use stories to organize our experiences and to create meaning from those experiences. Stories evolve over time to accommodate new experiences, and individual stories weave together into collective stories. Stories bind us together: Sharing a story means sharing an identity. In this sense, law—and the Constitution in particular—is our story. The law is a reflection of the people living under it, the same people who create it. The law represents our values and understandings of the world, and it changes as we change. As our story, law tells us who we are and how we are to be with each other—the political, social, and economic roles we are to play.

This Article explores the dynamic process that is law-as-story and the continual renewal, refreshment, renovation, and revolution of that story. In particular, it presents a sociological view of law

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as a complex social system in which doctrinal law emerges from collaborative communicative interactions among the many members of society.

This social constructionist understanding is the basis for a civic concept of law. If the law-story reflects the stories of a broad range of those for whom it purports to speak and acknowledges their agency in enacting it, it is more likely to be embraced by that community. An important aspect of this is preserving the multiple group identities that give our society resilience—the ability to adapt to an ever-changing world. The interactions between diverse individuals and groups allow society to test its values and laws, reinforcing societal strengths and marginalizing societal deficiencies.

In applying the law-as-story complex social system approach to law to the doctrinal issue of political gerrymandering, the Article explores the concept of voice—individuals making meaningful contributions to the law-story. In applying the approach to the doctrinal issue of race-based K–12 educational initiatives, the Article illuminates the idea of resonance, the complement of voice, which captures the process of the law-story coming back to the individuals within a community. This is the cycle of law-as-story.

The universe is made up of stories, not of atoms.
- Muriel Rukeyser¹

*'At the end of the day, what is it that we do in court? All of us, I mean.
Policemen, carabinieri, prosecutors, defence lawyers, judges?
We all tell stories. We take the raw material contained in the evidence,
gather it together, and give it a structure and meaning
in stories that present a plausible version of past events.'*
- Gianrico Carofiglio²

¹ *The Speed of Darkness*, in THE COLLECTED POEMS OF MURIEL RUKEYSER 465, 467 (Janet E. Kaufman & Anne F. Herzog eds., Univ. of Pittsburgh Press 2005).

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Lawyers don't talk much about stories. We hew to the analytical and the objective. Early in our careers we learn to "think like lawyers" and to embrace the idea of the "reasonable man." While we refer to a witness's "testimony," a client's "confidences," an advocate's "argument," a negotiated "contract," a judicial "opinion," a legislated "statute," we rarely acknowledge that each of these is either an individual or a collective story about what has happened or what should happen.³

Perhaps the closest we come to admitting how integral stories are to law, lawmaking, and our work as lawyers is in academic references to law as "narrative," though the word "narrative" has an emotional distance, a bloodless ring that is distinct from that of the word "story," which connotes engagement and immediacy. Stories reach not just our heads, but our hearts. Stories appeal to our humanity, rather than our intellect alone. Stories address the here and now of our lives by reaching past our defenses with humor, imagination, and understanding.

Story is a fundamental human enterprise. Story takes the raw material of our experience, enables us to navigate the world we encounter, and helps us discover the deeper meaning of our lives. Children make sense of the world through story.⁴ There is reason to believe that story is at the core of how we think—that it is the way our brains work.⁵ Story also provides a vehicle for forging collectives from individuals: our multi-faceted identities are formed by our association with multiple groups, societies, and cultures, each of which articulates its own distinctive stories.⁶

² GIANRICO CAROFIGLIO, *REASONABLE DOUBTS* 230 (2006) (Howard Curtis trans., Bitter Lemon Press 2007).

³ The story aspect of law is more likely to be acknowledged in fiction. *See, e.g., supra* note 2 and accompanying text. *See also* MICHAEL GRUBER, *BOOK OF AIR AND SHADOWS* 437 (William Morrow 2007) ("I am a lawyer and what is a lawyer but someone hired to produce a work of fiction, which, in court, will be compared with opposing counsel's work of fiction by a judge or jury, and they will decide which fiction most closely resembles the fictional picture of the world in their respective brains and decide for one or another side and thus is justice done.").

⁴ MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* 118–21 (Back Bay Books 2002).

⁵ MARK TURNER, *THE LITERARY MIND* (Oxford Univ. Press 1996).

⁶ *THE PSYCHODYNAMICS OF INTERNATIONAL RELATIONSHIPS* (Vamik D. Volkan, Demetrios A. Julius & Joseph V. Montville eds., Lexington Books 1990).

Law is one of these shared stories. Along with other stories, it tells us who we are and how to be with each other—the political, social, and economic roles we are to play. It is “part of the normative universe”⁷ that structures our social order. As a community-grounded story, law arises from its cultural context and sounds in that context. Whenever a law-story is “told,” the community responds with affirmation, amendment, or outright defiance. Law is thus the subject of a dynamic process, a cycle, and is continually in the process of renewal, refreshment, renovation, and revolution.

Law-as-story steers a course between traditional positivist and natural rights views of law by acknowledging the socially constructed nature of law while at the same time adhering to the conviction that law only makes sense if it is rooted in shared and ethically defensible traditions.⁸ We are thus responsible for law: like the positivists, we must acknowledge our agency vis-à-vis law, and like the natural rights theorists, we must affirm law’s grounding in morality.⁹ And so we can, and must, ask ourselves *how* the law-story is being socially constructed and *how we believe it should be*. Once we recognize that law is a story, we are faced with fundamental questions about how it is to be formulated, told, and revised.

One response, an authoritarian approach, is to clamp down on possible contributions to the story, to freeze it—to control what it is and who may interpret its meaning. The current trend of originalism in judicial interpretation, which may be characterized as importing a “creation myth” approach to the constitutional law-story, falls squarely into this camp. Here the “story about the story” is that it is outside

⁷ Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 4 (1983).

⁸ See *infra* note 120 and accompanying text.

⁹ See *infra* note 121 and accompanying text.

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of us in time and that it is the mission of those few with access to the tools of divining the story's true meaning to reveal it to the rest of us.

In this Article, I present an alternative response, which I call a *civic* approach. Civic here refers not to citizenship in the formal, legalistic sense, but to membership in a group or culture along with an awareness that one's fate is tied to the fate of the entire group—what might be called an awareness of the “good of the whole.” A civic approach to the story that is law is to welcome the broadest possible range of contributions to the story, to celebrate that it will evolve and adapt over time, and to facilitate the participation of the populace in its formulation and interpretation. Here, the “story about the story” is that it is *our story* and that it is the role and responsibility of all of us to contribute to the creation and sustenance of a story that has meaning in the context of our lives—as individuals and as compatriots.

This civic-social constructionist approach to law draws from an understanding of law in the sociological sense that is grounded in the unfolding field of complex adaptive systems, and of complex human social systems in particular. Complex adaptive systems are collections of individuals engaged in decentralized interactions at the individual level that lead to characteristics or patterns that emerge at the system level.¹⁰ These systems are referred to as complex because they appear to exist, in the world of physics and mathematics, between order and chaos. They are referred to as dynamic or adaptive because they change as conditions change or adapt to conditions they encounter. Perhaps most important, the patterns that these systems exhibit at the system level emerge from the decentralized interactions of individuals in a nonlinear fashion. These patterns are neither the linear result of the individualized

¹⁰ For good general discussions of complexity theory—the general study of complex systems—see ROGER LEWIN, *COMPLEXITY: LIFE AT THE EDGE OF CHAOS* (Macmillan Publ'g Co. 1992); M. MITCHELL WALDROP, *COMPLEXITY: THE EMERGING SCIENCE AT THE EDGE OF ORDER AND CHAOS* (Simon & Schuster 1992); STEVEN JOHNSON, *EMERGENCE: THE CONNECTED LIVES OF ANTS, BRAINS, CITIES, AND SOFTWARE* (Scribner 2001). Computer simulations are available from the *StarLogo* program at <http://education.mit.edu/starlogo>.

interactions nor traceable to any overarching or coordinating authority. Complex adaptive systems are thus self-organizing in the sense that patterns emerge from the “bottom up” or from the “inside out.” Moreover, while the patterns at the system level result from the interactions of individual members, the cause and effect is not linear, not simply additive.

Complexity theory blurs traditional disciplinary lines. Living organisms are seen as complex systems of individual cells and populations of those organisms as next-order systems.¹¹ Ecosystems are complex systems of plants and animals.¹² These complex systems, moreover, are understood to encompass not only the animal kingdom, but humans as well. Businesses are increasingly seen as complex systems of managers, employees, and customers.¹³ Cities are complex systems of myriad residents and business people.¹⁴ Markets are complex systems of producers and consumers.¹⁵ Overall, Adam Smith’s famous metaphor of the “invisible hand”¹⁶ captures the essence of how order emerges at the system level through the actions of many individuals without centralized coordination or command.

A civic-social constructionist approach sees law as a pattern that emerges from a human social system.¹⁷ More specifically, the story that is law emerges as a formalized norm from the communicative

¹¹ JOHNSON, *supra* note 10, at 82–86.

¹² WALDROP, *supra* note 10, at 308–13.

¹³ ROGER LEWIN & BIRUTE REGINE, *WEAVING COMPLEXITY AND BUSINESS: ENGAGING THE SOUL AT WORK* (Texere 2001); *THE BIOLOGY OF BUSINESS: DECODING THE NATURAL LAWS OF ENTERPRISE* (John Henry Clippinger III ed., Jossey-Bass Publishers 1999). *See also* ORI BRAFMAN & ROD A. BECKSTROM, *THE STARFISH AND THE SPIDER: THE UNSTOPPABLE POWER OF LEADERLESS ORGANIZATIONS* (Portfolio 2006); DEE HOCK, *BIRTH OF THE CHAORDIC AGE* (Berrett-Koehler Publishers, Inc. 1999).

¹⁴ MICHAEL BATTY, *CITIES AND COMPLEXITY: UNDERSTANDING CITIES WITH CELLULAR AUTOMATA, AGENT-BASED MODELS, AND FRACTALS* (MIT Press 2005). JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (Random House 1961); JOHNSON, *supra* note 10, at 38–52, 95–96.

¹⁵ WALDROP, *supra* note 10, at 34.

¹⁶ *See* ADAM SMITH, *WEALTH OF NATIONS BOOK IV* (Prometheus Books 1991) (1776). Economist Milton Friedman characterized the phenomenon as “cooperation without coercion.” *See* MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (Univ. of Chi. Press 2d ed. 1982) (1962).

¹⁷ Law is not the only system-level pattern to emerge from complex human social systems. While law is a *communicative* pattern—a “story”—there will also be emergent *physical* patterns such as a city’s configuration, the allocation of goods, or demographic patterns such as levels of safety, health, prosperity. *See, e.g.*, ASHUTOSH VARSHNEY, *ETHNIC CONFLICT AND CIVIC LIFE: HINDUS AND MUSLIMS IN INDIA* (Yale Univ. Press 2002) (documenting connection between forms of civic life and levels of violence in Indian cities).

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interactions of the system's individual members and is reaffirmed when it is enacted by them.¹⁸ This understanding of the processes by which the law-story comes to be articulated and enacted provides a way of understanding law's community grounding that turns the spotlight on civic interactions as well as the connections between the civic sphere and the law-story.

A civic approach to law has fundamental practical implications for our jurisprudence, especially our constitutional jurisprudence. That jurisprudence currently struggles with issues of identity, relationship, and relevance, which are facets of two fundamental aspects of a civic concept of law: *voice* and *resonance*. Voice is present when people's individual stories combine and collaborate in the creation of the law-story. Resonance occurs when the law-story is offered back to people in a way that invites them to reflect and respond. Voice and resonance provide yardsticks for measuring the degree to which the law-story's connection to the community manifests civic values of inclusion and broad contribution. I use the constitutional law examples of political gerrymandering and voluntary racial integration of K–12 public schools to derive these essential tools.

In Part I, I introduce the view of law as story, and in particular a story perspective on the U.S. Constitution. In Part II, I describe how a law-as-story doctrinal approach meshes with a sociological, complex system view of social norms and law as emerging from communication among individuals and, in turn, affecting the individual behavior that constitutes those norms. In this Part, I compare a civic social

¹⁸ In this view, the law that emerges from individual stories in a legal system may be seen as roughly analogous to the price of a good or service that emerges from individual transactions for the sale and purchase of that item in an economic system. JOHNSON, *supra* note 10, at 156. Both law and price emerge from the contributions of many individual actors; neither is the linear product of the contributing actions. Further, both system-level patterns—law and price—result not from individual actors operating on their own but from their *interactions*. In a legal system and in an economic system, communication is the key to the development of a shared norm, or price, as the case may be. Norms only become norms through a complex dance of communication and general acceptance. *See infra* notes 83–94 and accompanying text. Prices become prices through a similar process. These shared norms or prices, developed through individual interactions, in turn influence how individuals behave. The overarching story (norm or price) acquires potency through its enactment—enactment in the sense that individuals act upon it. Significant differences, of course, exist in terms of (for example) the mechanisms of aggregation, the degree to which the system is allowed to operate free of constraint, and the individual behaviors and interactions elicited.

constructionist approach to law with other, more authoritarian approaches. In Part III, I discuss two applications to constitutional jurisprudence of a civic concept of the law and derive from these applications specific criteria of importance to the concept. Finally, in Part IV, I point to further avenues for inquiry.

I. LAW (AND THE CONSTITUTION) AS STORY

When the story is in your mind, then you see its relevance to something happening in your own life. It gives you perspective on what's happening to you.

- Joseph Campbell¹⁹

After spending a year exploring the Constitution at the time of its bicentennial, journalist Eric Black used a story to convey the essence of what he found:

Ask yourself this.

Why did President Richard Nixon hand over the Watergate tapes containing evidence he must have known would end his presidency?

The first thing Nixon did when the tapes were subpoenaed was seek refuge in the mythic Constitution. He invoked “executive privilege,” a concept not mentioned in the document. The Supreme Court didn’t buy the argument and ruled he had to hand over the tapes.

So what? Nixon was the commander-in-chief of the greatest military power on the planet. The FBI, the CIA and the National Security Administration worked for him. The Supreme Court employed a few bailiffs, a few clerks, a few janitors.

...
Nixon presided over a population that *believes* the Constitution gives the Supreme Court the power to order the president to comply with a congressional subpoena and *believes* everyone—even a president who carried 49 states in an election two years earlier—must submit to the Constitution.

We believe in the Constitution. There is an enormous nationwide consensus that the Constitution is supreme and can answer our most troubling national questions. That gives it the power to bind us.²⁰

Constitutional order exists, that is, because we act so as to bring it to life. And we act this way because of our collective conception of the Constitution and what it requires of us. Law and the Constitution gain

¹⁹ JOSEPH CAMPBELL (WITH BILL MOYERS), *THE POWER OF MYTH 4* (Betty Sue Flowers ed., Anchor Books 1988).

²⁰ ERIC BLACK, *OUR CONSTITUTION: THE MYTH THAT BINDS US* xii–xiii (Star Tribune 1988) (emphasis in original). A decision of similar political magnitude was Al Gore’s acceptance of the U.S. Supreme Court decision in *Bush v. Gore*, 531 U.S. 98 (2000), as resolving the 2000 presidential election.

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their power from our belief in them, our internalization of them, and our actions in accordance with them, which then reinforce that belief. As Joseph Campbell, the great student and teacher of comparative mythology, might have said, the Constitution is “in our mind” and “relevant to something happening in our own lives.”²¹

This collective story or myth, according to Black, is the “bible of our national civic religion.”²² As such, it provides the grounding truth, the liturgy, and the ethical prescriptions that define us as a nation and that tell us how “we the people” should live together and govern ourselves. The Constitution is thus inextricably intertwined with our national identity: we are defined by the Constitution.

As Campbell observes, “in America we have people from all kinds of backgrounds, all in a cluster, together.” This diversity of backgrounds has resulted in the absence of a shared, historical *unstated* mythology or ethos, a vacuum that has been filled by the *stated* mythology and ethos of the Constitution.²³ Paul Kahn makes the point thus:

Our deepest politics, that which defines our political self-understanding, merges into our understanding of ourselves as a people under the rule of law. For the Constitution is law as an expression of popular sovereignty. This is the American political myth: through the Constitution we participate in a sovereign act of self-government.²⁴

Because of this, “law has become very important in this country. Law and lawyers are what hold us together.”²⁵

²¹ CAMPBELL, *supra* note 19, at 4.

²² BLACK, *supra* note 20, at 173.

²³ This accords with the view that the United States as a nation was created from the United States as a state and points in particular to the Constitution as the vehicle by which this has occurred. Paul W. Kahn, *American Exceptionalism, Popular Sovereignty, and the Rule of Law*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 198, 201 (Michael Ignatieff ed., Princeton Univ. Press 2005).

²⁴ *Id.* at 207.

²⁵ CAMPBELL, *supra* note 19, at 9. Nor is this a bad thing. It just is. What it does mean is that the United States as a whole tends to be a “low context” rather than a “high context” culture. Entry is relatively easy; knowledge tends to be explicit and public; relationships take second place to tasks; and rules are important. See EDWARD HALL, *BEYOND CULTURE* (Anchor Press 1976).

The nature of the Constitution, however, means that law and lawyers can perform only two of the four functions of myth that Campbell identifies:²⁶

The first is the mystical function . . . realizing what a wonder the universe is, and what a wonder you are, and experiencing awe before this mystery.

The second is a cosmological dimension, the dimension with which science is concerned—showing you what the shape of the universe is, but showing it in such a way that the mystery again comes through . . .

The third function is the sociological one—supporting and validating a certain social order. And here's where the myths vary enormously from place to place . . .

But there is a fourth function of myth, . . . and that is the pedagogical function, of how to live a human lifetime under any circumstances.²⁷

The Framers were Eighteenth-century deists who based the Constitution's overall schema and specific provisions in Enlightenment beliefs of reason.²⁸ Notwithstanding a certain shared set of mystical and cosmological understandings, they explicitly disavowed any particular religious grounding and provided for freedom of religious belief and practice. While this approach removed an important source of passion and division in politics, it also limited the new nation's mythological horizons to Campbell's third and fourth functions of myth—the sociological and the pedagogical—concentrating to an even greater degree the importance of law and the Constitution.²⁹ This approach also severed, almost completely, the sociological and pedagogical mythology of our law and Constitution from its associated Eighteenth-century mystical and cosmological mythology, leaving legal mythology in many ways unmoored.

Religion historian and writer Karen Armstrong intertwines the functions of myth to a much greater degree than does Campbell and emphasizes its mystical and cosmological aspects. She

²⁶ At least, this limitation applies in our system. In other systems without the separation of the religious and the secular, the first two may be bound up with the last two.

²⁷ CAMPBELL, *supra* note 19, at 31.

²⁸ *Id.* at 25–29.

²⁹ And it means that our rituals are limited in this way as well. See Campbell's discussion of the funeral of President John F. Kennedy as a national ritual. CAMPBELL, *supra* note 19, at xiii–xiv.

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characterizes myth as being “nearly always rooted in the experience of death and the fear of extinction;” “usually inseparable from ritual;” going “beyond our experience;” showing us “how we should behave;” and speaking “of another plane that exists alongside our own world.”³⁰ Viewed this way, our legal mythology is a one-legged person trying valiantly to stay poised upright without the complementary balance or deeper grounding provided by mystical and cosmological mythology.

Our national identity, grounded in our shared myths, thus leans heavily toward law, and the Constitution is a key text in our collective story. This relationship is deeper than one in which we simply accept the Constitution and let it guide us. Instead, it constitutes us—not only our government—in the literal sense of the word: “We the People” are created by the Constitution.³¹

The Constitution is also entangled in how we act vis-à-vis each other. Black’s example highlights the connection between the Constitution and limitations on the power of our designated leaders. A more recent illustration of the same phenomenon is provided by the U.S. Supreme Court decisions limiting asserted executive power with respect to the detainees at Guantanamo Bay.³² Similarly, the Eighth Amendment proscribes “cruel and unusual punishment,” and the Court has specified “that the words of the Amendment are not precise and . . . their scope is not static. The Amendment must draw its meaning

³⁰ KAREN ARMSTRONG, *A SHORT HISTORY OF MYTH* 3–4 (Canongate 2005).

³¹ MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 181–82 (Princeton Univ. Press 1999); Robin West, *Katrina, the Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127, 1157 (2006). See also MARIO VARGAS LLOSA, *THE STORYTELLER* (Helen Lüne trans., Farrar, Straus & Giroux 1989). In Llosa’s novel, the narrator tells of the Machiguenga, a native Amazonian tribe. The Machiguenga are a dispersed group; they live in small bands throughout the jungle rather than in settlements or villages; they do not even encounter each other frequently. But they have a common language, a common set of creation stories, a common set of survival and social practices. The narrator tells of his discovery of a somewhat mysterious personage in the life of the Machiguenga. This person, described by the Spanish word *hablador* or “speaker,” appears to travel from band to band, spending several days talking with each. The visit of the *hablador*, it appears, is an important event in the collective life of the Machiguenga. Everyone attends when he speaks. The narrator draws the following conclusion: “‘They’re a tangible proof that storytelling can be something more than mere entertainment . . . [It can be] [s]omething primordial, something that the very existence of a people may depend on.’” *Id.* at 94. Llosa thus offers the idea that *it is shared stories that bind the separate bands into a cultural whole* that make the dispersed Machiguenga all Machiguenga nonetheless.

³² *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

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from the evolving standards of decency that mark the progress of a maturing society.”³³ Here the awareness of the connection between the Constitution and our collective character is explicit.

Our constitutional myth, as these examples demonstrate, is articulated as a matter of law and, more specifically, as judicially determined law. To the extent that we question this state of affairs, we do so, more frequently, by challenging judicial prerogatives or, less frequently, by questioning the Constitution’s status as law.³⁴ I take a distinct tack—that of exploring the implications for law and for the Constitution of understanding them both as story.

James Boyd White, whose work has been foundational in understanding the connections between law and literature, observes that “[t]he story is the most basic way we have of organizing our experience and claiming meaning for it,”³⁵ and that we adjust our stories, both individual and collective, to accommodate new events over time. According to White, “[t]he narrative is the archetypal legal and rhetorical form, as it is the archetypal form of human thought in ordinary life as well.”³⁶ What lawyers do—what the law is—is “telling and reading the stories of our clients and others we make active, in a way that renders them available for scrutiny, the suppositions of our culture.”³⁷ The law thus has an “openness to multiple stories,”³⁸ which is “not accidental but structural.”³⁹

Various stories, having been heard, are then forged into an accepted version—a new more authoritative public story. And, because of the authority of the story, actions based on that story gain

³³ *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958); *see, e.g., Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008) (applying this standard in reviewing application of the death penalty for rape).

³⁴ West, *supra* note 31, at 1154 (using the term “Constitutional skepticism” to refer to this “hypothetical creation” [reflecting its rarity]).

³⁵ JAMES BOYD WHITE, *HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 169 (Univ. of Wis. Press 1985).

³⁶ *Id.* at 175. *See also* TURNER, *supra* note 5 (the essential element of our cognitive processes is what Turner calls “parable”—simple stories that organize our experience). *See also* Howard Gadlin, Andrea Kupfer Schneider & Christopher Honeyman, *The Road to Hell Is Paved with Metaphors*, in *THE NEGOTIATOR’S FIELDBOOK* 29 (Andrea Kupfer Schneider & Christopher Honeyman eds., ABA Section of Dispute Resolution 2006) (discussing the importance of metaphor in people’s understanding of conflict).

³⁷ WHITE, *supra* note 35, at 175.

³⁸ *Id.* at 174.

³⁹ *Id.*

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authority as well.⁴⁰ Yet, ultimately, this more formalized story—this legal story—cannot stand without the continual validation by the community on its own terms. White concludes:

This is not a defect, as it might seem, but is, in my view at least, a great merit. The effect of this dependence upon the processes of ordinary life, like the dependence upon the jury at trial, is a validation of the ultimate authority of the community over its institutions and its instruments, an insistence upon the integration of legal speech with ordinary speech as a condition of its effectiveness. It is not that the legal judgment has no authority, but that its authority is not absolute and should always be defensible in other terms, in the language of the community itself.⁴¹

And so White describes a cycle,⁴² a loop in which multiple experiences and the understood stories they give rise to coalesce into an accepted, formalized, unified, public, *legal* story. This story receives deference from the community; it carries authority by virtue of its status as the legal story. As a legal, public story, it performs Campbell's sociological and pedagogical functions, and as such it enters into the cultural fabric and is manifested in individual and institutional action and interaction. But its authority is not absolute, for the community always retains the power to consider, alter, or even reject and replace this story as it is enacted with another one altogether.⁴³ At this point, the cycle begins again. In this view, then, law is continually informed by and informing distinct community views and actions, and stories are the medium through which this process occurs.

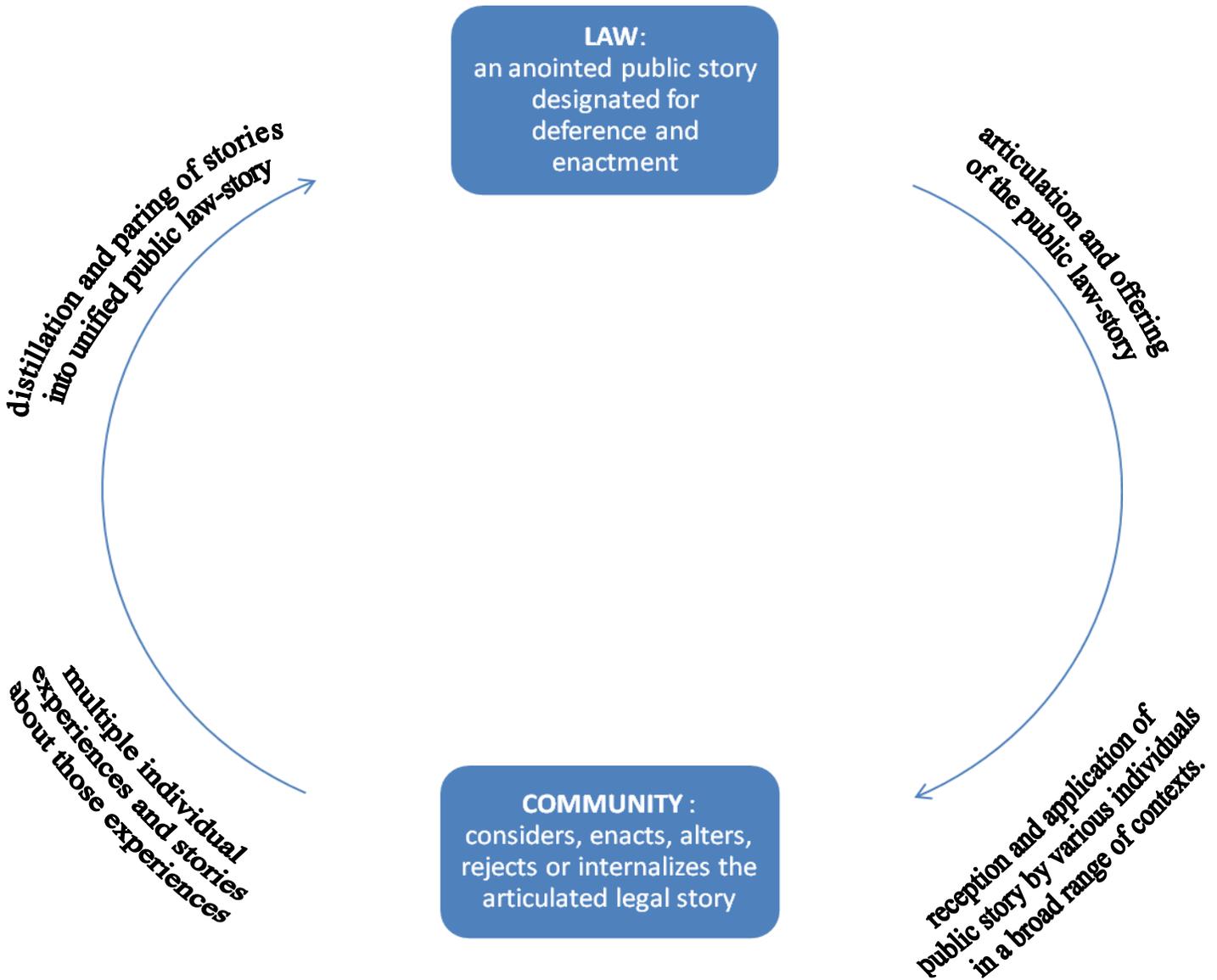
⁴⁰ *Id.* at 190.

⁴¹ *Id.* at 191.

⁴² See **LAW AS STORY** diagram.

⁴³ Even an entrenched and far-reaching power structure will ultimately fade away if its associated community shifts away from the story that supports it. As Mohandas Gandhi observed, "You can govern us only so long as we remain the governed." M. K. GANDHI, *NON-VIOLENT RESISTANCE (SATYAGRAHA)* 14 (Schocken Books 1951).

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A striking example of this is the legal and political treatment of gay and lesbian⁴⁴ relationships over the past several decades. Thirty years ago, the issue was less than a ripple politically; the criminalization of sodomy was uncontroversial; and gay marriage was not only unheard of, it was unimaginable as a political objective. Yet we have seen monumental shifts in the legal status of gay sex and gay relationships due to the social and political changes wrought by gay pride, the “coming out” movement, and the devastation of AIDS.⁴⁵ These shifts have, like multiple earthquake faults, led to slippages in different directions in different locales at different times. Common to all these shifts, however, are changes in the legal stories that have arisen from personal and group stories about who gay people are and how they should live. And these transformed legal stories have, in turn, led to community responses that have stimulated further legal initiatives.

Two aspects of the cycle described by White are important to note. The first is that in this cycle story is not only the vehicle for transforming many into one, it also connects theory and practice—what is said and what is done. People’s actual experiences provide the basis for the articulated stories that meld into the told legal story, and the story in turn serves as the grounding for further actions. If the community accepts the legal story, people internalize its lessons and act accordingly; in this case, a social norm grows along with and reinforces the legal story. If, however, the community does not accept the legal story, adjustments occur to bring word and deed into alignment.

⁴⁴ Actually, GLBTIQ—gay, lesbian, bisexual, transgendered, intersexed, and queer.

⁴⁵ This shift overall can be seen in the move from *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding a Georgia statute criminalizing sodomy) to *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a comparable Texas statute). This has not been a one-way, straight-line progression, however. The federal Defense of Marriage Act and state constitutional amendments defining marriage as exclusively heterosexual point in one direction. See, e.g., 1 U.S.C. § 7 (2004); California’s recent Proposition 8 (2008). Civil unions and gay marriages point in another. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); HAW. REV. STAT. §§ 560:2-102, 2-201–2-214 (2004).

The second noteworthy aspect of White's cycle is that the creation of legal stories from individual stories is a winnowing process in which the links to people's actual experiences attenuate as the articulated final product (law) emerges. Law is the result of a process in which stories are honed and simplified, pared away until a single story remains. And yet it is always the fate of this unitary story to be cast out again to all the different individuals to whom the law applies so that in its enactment and the experience of that enactment multiplicity is once again created. The law cycle is thus a continual process of the contraction and expansion of the number of stories.

Both of these aspects of White's cycle find echoes in Robert Cover's perspective of law as inevitably tied to story. Cover, who refers to law as both grounded in story and the necessary outgrowth of story, reaffirms the relationship between law and community norms more broadly.⁴⁶ Cover asserts that "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning."⁴⁷ "Law and narrative," he writes, "are inseparably related."⁴⁸ Specifically, "[e]very prescription is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral."⁴⁹ Cover thus confirms the role of law as a story that speaks to a shared grounding and calls people to certain views and behavior in accordance with that grounding.

Cover also focuses on the fact that law represents the selection and anointing of one story from many. He highlights the Constitution's freedom of association as "the social precondition"⁵⁰ for individuals joining together to develop and articulate alternative stories. In Cover's words, "[f]reedom of

⁴⁶ See generally Cover, *supra* note 7, at 4.

⁴⁷ *Id.* at 4.

⁴⁸ *Id.* at 5. Cover, a legal academic, uses the word "narrative." As discussed above, I use the word "story."

⁴⁹ *Id.* at 5.

⁵⁰ *Id.* at 32.

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association implies a degree of norm-generating autonomy on the part of the association. It is not a liberty to *be* but a liberty and capacity to create and interpret law—minimally, to interpret the terms of the association’s own being.”⁵¹ And this is not simply a question of internal governance or transformation but of the creation of a means for transforming the broader group—more modestly and superficially in terms of reforms within the existing order or more ambitiously and deeply in terms of the “transformation of the surrounding social world.”⁵² Especially with respect to the latter, there must be both a theory and a practice of change, of the conversion of the unconverted.⁵³

In terms of the fruition of this lawmaking process, Cover describes in unvarnished terms the paring of stories that leads to law. Judges, he asserts, are “people of violence [J]udges characteristically do not create law, but kill it Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest.”⁵⁴ In doing so, they “destroy the worlds that might be built upon the law of the communities that defer to the superior violence of the state, and they escalate the commitments of those who remain to resist.”⁵⁵ The stories of communities that accept the dismissal of their proposed stories thus disappear while the stories of those that do not acquiesce survive. It follows from this that civil disobedience may be seen as an act “not of justifiable disobedience, but rather of radical reinterpretation” by a “community that has created and proposed to live by its own, divergent understanding of law.”⁵⁶

⁵¹ *Id.* at 32 (emphasis in original).

⁵² Cover, *supra* note 7, at 34.

⁵³ This process is the person-to-person transformation achieved through organizing, which I see as the preeminent mode for initiating change from the bottom up in a law-as-story complex social system. This is a subject for another day, though one example of this phenomenon is the organizing of the Civil Rights Movement. *See* sources cited *infra* note 69. *See also* JOHNSON, *supra* note 10, at 225–26 (Seattle WTO protests); STARHAWK, *WEBS OF POWER: NOTES FROM THE GLOBAL UPRISING* 15–33 (New Soc’y Publishers 2002).

⁵⁴ Cover, *supra* note 7, at 53 (emphasis in original).

⁵⁵ *Id.* at 60.

⁵⁶ *Id.* at 46.

Cover's observations point toward two important conclusions to be drawn from an awareness of the relationship between law, story, and social norms. First, while law-stories may begin with individual stories, they are generally woven into smaller collective stories before the choice of the official law, the unitary public story, is made. This is the function of the associations Cover describes. This is a political description of law by whatever process it is formulated (judicial, legislative, administrative). The important point here is that law comes about, not by the interaction of isolated individuals, but by individuals acting in small groups (associations) that serve as the vehicle for the winnowing of multiple individual stories and the articulation of collective stories. In a law-as-story view, then, freedom of association is the loom on which our constitutional myth is woven and must be jealously protected.

Second, if even outright civil disobedience can be understood as radical reinterpretation, we owe it to ourselves to be very sure that suppressing a particular interpretation makes sense before we do so. The virtues of obedience, authority, and uniformity should not always trump the potential contributions of challenging points of view. If law is a dynamic process, challenges are integral and should be welcomed (if not always acceded to). Furthermore, we should take care not to erect too-high hurdles to reversing any official law-story.⁵⁷

Cover's perspective is that of law looking back toward narrative, of law as the outgrowth of narrative. As Cover notes, judicial decision-making chooses from alternative stories and ensconces one as the reigning vision. Similarly, legislation can be seen as a law-story that pulls together multiple stories in

⁵⁷ This view supports a wariness of judicial review of constitutional questions as currently configured—not because there is anything problematic about courts resolving constitutional *cases*, but because letting courts have the final say without another institutional entity being in a position to continue the conversation as a coequal may seriously stymie constitutional *story-building*.

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multiple ways—through the different perspectives of legislators who are elected by voters with varying perspectives and who consider a number of proposals set forth for action.

In both situations, the raw fodder of law is provided by the experienced realities—and the stories that capture those realities—of ordinary people. These stories are then molded into a more formal, aggregate form and finally pulled together into the public articulation: law. Losses of loved ones coalesce into the tort of wrongful death. Devastating acts committed by desperate people with substance addictions lead to “three strikes and you’re out” drug statutes. Women’s experiences in the workplace become sexual harassment. In each of these instances, the law weaves together individual stories into a particular unified (and far from predetermined) story.

Michael Klarman’s exploration of the relationship between *Brown v. Board of Education* and civil rights⁵⁸ provides an in-depth case study of the phenomenon described by Cover—in particular how the overarching legal story contained in *Brown* emerged from the social context, individual actions, and legal initiatives that preceded it.⁵⁹ But Klarman’s work also explores the other arc of White’s cycle, with an examination of what happened when the legal story of *Brown* returned to the community at large.⁶⁰ As to this second part, Klarman’s work offers striking documentation of the messy process of rejection, tumult, and eventually uneasy adoption of *Brown*’s story—though not its full and unquestioning enactment.⁶¹

Looking at the aftermath of *Brown*, Klarman documents its tenuous direct effects in terms of actual school desegregation—except in northern states that had already begun to desegregate or border

⁵⁸ MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (Oxford Univ. Press 2004).

⁵⁹ *See id.* at 8–289. *See also* Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323 (2006) (providing a sociological description of Supreme Court jurisprudence regarding equality for women).

⁶⁰ KLARMAN, *supra* note 58, at 290–344.

⁶¹ There is generally less attention paid (and less importance assigned) to the community-grounding part of White’s cycle than to the law-creating part. Klarman’s work reflects this in that three-fourths of his book is devoted to the former.

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states where “*Brown* pushed against an open door.”⁶² In the Deep South states, there was essentially no desegregation at all until 1957.⁶³ Token desegregation in those states then began, but at a glacial pace. In 1963 only about one percent of southern black students attended desegregated schools.⁶⁴ There were numerous reasons for these delays: local school boards experienced political pressure to resist; court orders required black parents to serve as plaintiffs; there was limited funding for NAACP lawyers; and the federal judiciary did not uniformly support implementation of *Brown*.⁶⁵

Nor did *Brown* shift public opinion in support of school desegregation. Klarman notes that “[s]lightly more than half of the nation supported *Brown* from the day it was decided.”⁶⁶ Southern whites, however, did not share this view: “Southern whites were not educated by a decision that they believed ignored precedent, transgressed original intent, indulged in sociology, infringed on the reserved rights of states, and usurped Congress’s authority.”⁶⁷

What *Brown* did do, according to Klarman, was raise black expectations regarding racial rights, convince southern blacks (given *Brown*’s disappointing effects) that litigation might not be the most effective strategy to achieve racial justice, and engender intransigence and eventually violence on the part of southern white officials. When the civil rights movement turned to direct action, a shift that began in the 1950s but accelerated with the student sit-ins in 1960, it was met with a level of reactive violence that the rest of the country refused to countenance. *Brown* may not have been far ahead of the nation as a

⁶² KLARMAN, *supra* note 58, at 345. Even in these states, however, desegregation led to only minimally integrated schools. *Id.* at 346–348.

⁶³ *Id.* at 348. (“No desegregation at all occurred until 1957, other than in two school districts in Tennessee (one of which, Oak Ridge, had federally operated schools), five in Arkansas with few blacks, and roughly one hundred in West and South Texas, which contained about 1 percent of the state’s black schoolchildren.”).

⁶⁴ *Id.* at 349.

⁶⁵ *Id.* at 349–60.

⁶⁶ *Id.* at 310. Note that this was not uniform across all subpopulations. For example, seventy-three percent of college graduates supported *Brown*, while only forty-five percent of high school dropouts did. *Id.* at 309.

⁶⁷ *Id.* at 367. In fact, “[a] 1959 Gallup poll showed that only 8 percent of southern whites supported *Brown*, down from 15 percent in earlier polls.” *Id.*

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whole, but it was far ahead of the Deep South, and it took the tumultuous events of the early 1960s—direct action and southern white backlash—to unleash a northern “counterbacklash” that led to the Civil Rights Act of 1964 and the Voting Rights Act of 1965.⁶⁸

Klarman thus presents an almost textbook example of a situation in which law was presented to the community for validation—for the testing and proofing of a public story that law had crafted. The law-story was clear, but the community, or in this case the Deep South part of the national community, balked at enacting it. It was only when southern white violence mobilized northern support, which empowered southern blacks, that the issues of civil rights generally, and of school desegregation in particular, were joined in a way that began to weave the threads of a new national story on race and race relations.

And here the circle closes. For it was freedom of association, the organizing that was the backbone of the Civil Rights Movement, that enabled the emergence and articulation of that new alternative story and the growth in acceptance of that story from a small cadre, to the thousands who marched on Washington in 1963, to the millions who today view Dr. Martin Luther King, Jr.’s “I Have a Dream” speech as part of the American political canon. *Brown*’s story prevailed in the next round because of the interactions, the organizing and the story work that took place within the community during the next circuit of the cycle.⁶⁹

⁶⁸ KLARMAN, *supra* note 58, at 368–442. It was only after the Kennedy administration had introduced civil rights legislation in 1963 that the pace of school desegregation accelerated. *Id.* at 362.

⁶⁹ *See, e.g.*, ALDON D. MORRIS, *THE ORIGINS OF THE CIVIL RIGHTS MOVEMENT: BLACK COMMUNITIES ORGANIZING FOR CHANGE* (The Free Press 1984); CHARLES M. PAYNE, *I’VE GOT THE LIGHT OF FREEDOM: THE ORGANIZING TRADITION AND THE MISSISSIPPI FREEDOM STRUGGLE* (Univ. of Cal. Press 1995); BARBARA RANSBY, *ELLA BAKER AND THE BLACK FREEDOM MOVEMENT: A RADICAL DEMOCRATIC VISION* (Univ. of N.C. Press 2003). Note that though the story of *Brown* carried the day via the Civil Rights and Voting Rights Acts, schools were to a great degree left segregated due to segregated housing and such second-generation decisions as *Milliken v. Bradley*, 418 U.S. 717 (1974) (denying interdistrict busing as a desegregation remedy) and *Washington v. Davis*, 426 U.S. 229 (1976) (requiring discriminatory intent to find Equal Protection violations).

In contrast to Klarman's case story of *Brown*, most attention to law focuses on a very short segment of the full cycle here described—the immediate input to the final formalization of the legal story, the formulation of that story (legislative, judicial, regulatory), and its actual articulation. The doctrinal, jurisdictional, public policy, and interpretive aspects of law are dissected and examined in minute detail. Very little attention is paid, in contrast, to what happens in the rest of the cycle, from the formal articulation of doctrine back around to the last leg of input before the next revision to law. There is little exploration of how the formal legal part of the cycle fits with the rest of the picture, or even acknowledgement that there is more to the cycle.

This truncated perspective limits our view of law in important ways. It severely constrains lawyers' understanding of our appropriate social role overall, in particular the processes by which law is generated from multiple experiences understood through story (Cover's emphasis) and through which law is tested by enactment and the sowing of a new crop of stories (Klarman's post-*Brown* focus). This blinkered view has major ramifications for what happens in the small, legal segment of the cycle, which is seen as a linear progression to a finite end rather than as movement along an arc that is one segment of a large-scale circle. But it has even more fundamental effects on the parts of the cycle where ordinary people are located and the connections of those parts to the legal part. These parts, where people interact and associate and where their stories build to and then unfold from the formal legal story, are ignored and discounted by law and lawyers. When this happens, law runs the risk of forgetting that its strength derives from secure community roots.

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II. LAW AS STORY: A CIVIC APPROACH

[A] democratization of knowledge [is] based on both a desire to give greater significance to individual understandings of the world[] and a recognition that such understandings arise only in social processes.

- Wade Mansell, Belinda Meteyard & Alan Thomson⁷⁰

I start with a clarification of terms. The word “law” may denote either formalized social norms—rules, principles, standards, regulation (characterized as “law-stories” above)—or the system that creates and is created by such norms in a particular society.⁷¹ “A law” generally refers to the former meaning, “the law” to the latter.

Dragan Milovanovic distinguishes these two senses of law as “jurisprudence” in the former case and the “sociology of law” in the latter.⁷² Milovanovic notes that the latter understanding, “[r]ather than taking rules, forms of law, rights and abstract notions of the legal subject . . . as a given, . . . examines the evolution of these forms and how they become the dominant factors in legal thinking and in the resolution of conflicts in society.”⁷³ According to Milovanovic, sociologists of law view jurists as operating within a “pre-constituted” horizon of thought and as “uncritically accepting categories generated from historically-specific socio-economic relations.”⁷⁴ Jurists respond by asserting “that law can be analyzed on its own terms and not as a reflection of other societal institutions.”⁷⁵

⁷⁰ WADE MANSELL, BELINDA METEYARD, & ALAN THOMSON, *A CRITICAL INTRODUCTION TO LAW* 186 (Cavendish Publ’g Ltd. 2d ed. 1999) (summarizing HILARY WAINWRIGHT, *ARGUMENTS FOR A NEW LEFT: ANSWERING THE FREE-MARKET RIGHT* 108–10 (Blackwell Publishers 1994)).

⁷¹ In the first sense, law is “a binding custom or practice of a community; a rule of conduct or action prescribed or formally recognized as binding or enforced by a controlling authority.” In the second sense, law is “the whole body of such customs, practices, or rules.” Merriam-Webster Online Dictionary: Law, <http://www.merriam-webster.com/dictionary/law>.

⁷² DRAGAN MILOVANOVIC, *AN INTRODUCTION TO THE SOCIOLOGY OF LAW* 1–5 (Criminal Justice Press 3d ed. 2003).

⁷³ *Id.* at 4.

⁷⁴ *Id.* at 5.

⁷⁵ *Id.*

A. LAW AS A COMPLEX SOCIAL SYSTEM

Milovanovic highlights a relatively new understanding of the sociology of law, “*legal semiotics*, [that] is beginning to unfold.”⁷⁶ Semiotics is the study of linguistic codes and how language constructs subjectivity and reality. A legal semiotics related to jurisprudence and the sociology of law views legal consciousness as a “collective construction” that “is not merely ‘reducible to what individuals think about the law.’”⁷⁷ This view is based on the understanding that “‘even the most personal story relies on and invokes collective narratives—symbols, linguistic formations, structures, and vocabularies of motive—without which the personal would remain unintelligible and uninterpretable.’”⁷⁸

In this view, the legal, collective story comes from, but is more than, the sum of individual stories. Concurrently, and conversely, individual stories refer to and incorporate the collective. The example from the prior section of the Constitution as a sociocultural myth or story that grows from experience and is in turn embodied in individual and collective behavior illustrates this phenomenon. The cycle described in Part I is mirrored in Milovanovic’s description of law as a collective but not simply summative creation and personal encounters with law as shaped in turn by the collective understanding.

A sociology that sees societies as complex social systems and that is thus understood as the study of such systems accommodates these observations of law. As described above,⁷⁹ complex systems are characterized by decentralized interactions at the individual level that lead, in a non-linear manner, to patterns emerging at the system level. These systems are self-organizing and dynamic. They respond to changing conditions through changes in interactions between the individuals that comprise the system.

⁷⁶ *Id.*

⁷⁷ *Id.* at 258 (quoting PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 247 (Univ. of Chi. Press 1998)).

⁷⁸ MILOVANOVIC, *supra* note 72, at 257–58 (quoting EWICK & SILBEY, *supra* note 77, at 243).

⁷⁹ See *supra* notes 10–18 and accompanying text.

Bird flocks and ant colonies are relatively simple and familiar examples of this kind of pattern or order. In neither flocks nor colonies is there a “lead bird” or a “head ant;” the coordination of birds and ants is accomplished by individual-level decisions based on a few internalized criteria governing behavior vis-à-vis other birds and ants—criteria that have enabled the replication of observed bird and ant behavior when applied in computer simulation models. Individual birds, for example, seek to fly in a certain position relative to others; a flock emerges when a number of birds maneuver similarly vis-à-vis each other.⁸⁰ Individual ants are guided by simple distance criteria in placing garbage and bodies of dead ants; the geography of the colony emerges from many, many decisions by a host of individual ants.⁸¹ Simple “rules”—generated from within rather than imposed from above—thus result in birds that fly together in formation and ants that collectively handle the food, waste, and reproduction of the colony. Finally, the essential condition of flocks and colonies is change and adaptation. Flocks part and swerve; birds join and others shear off; the bird in front shifts. Ant colonies shift their behavior in response to fluctuations in their environment; colonies appear to have a life cycle of their own.⁸²

Understanding human societies as complex systems highlights ways in which human social systems are similar to bird flocks and ant colonies as well as important ways in which they are different. As to the similarities, Keith Sawyer observes that a sociology based on a complex-systems understanding is “fundamentally concerned with emergence, component interactions, and relations between levels of analysis.”⁸³ Here are the essential elements of complex systems generally: the system-level characteristics of such societies emerge from the decentralized interactions of individuals; those characteristics are not

⁸⁰ JOHNSON, *supra* note 10, at 166–67; WALDROP, *supra* note 10, at 241–42 (criteria confirmed with computer simulation).

⁸¹ JOHNSON, *supra* note 10, at 29–33.

⁸² *Id.* at 80–82.

⁸³ R. KEITH SAWYER, *SOCIAL EMERGENCE: SOCIETITES AS COMPLEX SYSTEMS* 22 (Cambridge Univ. Press 2005). Sawyer refers to this view of sociology as a “third wave” of sociology. *Id.* at 20. See also MILOVANOVIC, *supra* note 72, at 258.

simply the linear sum of what the society's individuals do; and they change over time as the society's conditions change. This type of sociology thus focuses on the crucial questions of why individual people relate to each other as they do ("component interactions"), how those individual interactions lead to group- or system-level phenomena ("relations between levels of analysis"), and what system-level patterns can be observed ("emergence").⁸⁴

Our communicative mode of interaction and our self-awareness, however, make human social systems unique. Sawyer describes communicative interaction in a complex social system as follows: "During conversational encounters, interactional frames emerge, and these are collective social facts that can be characterized independently of individuals' interpretations of them. Once a frame has emerged, it constrains the possibilities for action. Although the frame is created by participating individuals through their collective action, it is analytically independent of those individuals, and it has causal power over them."⁸⁵ Sawyer thus describes a process of emergence involving individuals who interact in ways that lead to ephemeral and then increasingly stable social frames.⁸⁶ Though Sawyer regards law as more permanent and fixed, he acknowledges that these frames can eventually solidify into formalized social structures such as jurisprudential law. Through this theory, which Sawyer terms "The Emergence Paradigm," he seeks to "move beyond various undeveloped conceptions of emergence in sociology, which

⁸⁴ Such a sociology is thus unlike more traditional sociological perspectives that highlight either individual agents or collective structures. See SAWYER, *supra* note 83, at 73–87. This difference in emphasis between individual agents and collective systems is echoed in political philosophy, which tends to oscillate between the individualistic and the communitarian. Complexity theory has a place for both as well as offering some potential for understanding the relationship between the two.

⁸⁵ *Id.* at 210–11. Sawyer calls this "collaborative emergence."

⁸⁶ Sawyer's critique of classical microeconomics thus takes a different tack than most:

Sociologists have focused their critiques of microeconomics on its inadequate model of the individual rather than on its simplistic approach to interaction and aggregation—exchange of goods, price, and the interaction between demand and supply. Rather than focus my critique on the assumptions of rational action, I think economics has a more significant weakness vis-à-vis sociology: The forms of symbolic interaction that give rise to the emergence of social phenomena are not amenable to study using economic concepts.

Id. at 227.

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try to make too large a jump from the individual to the structural level.”⁸⁷ He denotes this process “*collaborative emergence* to distinguish it from models of emergence that fail to adequately theorize interactional processes and emergence mechanisms.”⁸⁸

Sawyer’s model also accounts for “downward causation” based on communication. The various levels of social emergents all constrain individual choices, though “[s]ocial encounters are often improvisational, and in improvisational encounters there is always contingency and actions are never fully constrained.”⁸⁹ These constraints thus operate on interactions between individuals,⁹⁰ a phenomenon that reflects the cyclical nature of complex social systems.⁹¹

⁸⁷ *Id.* at 211.

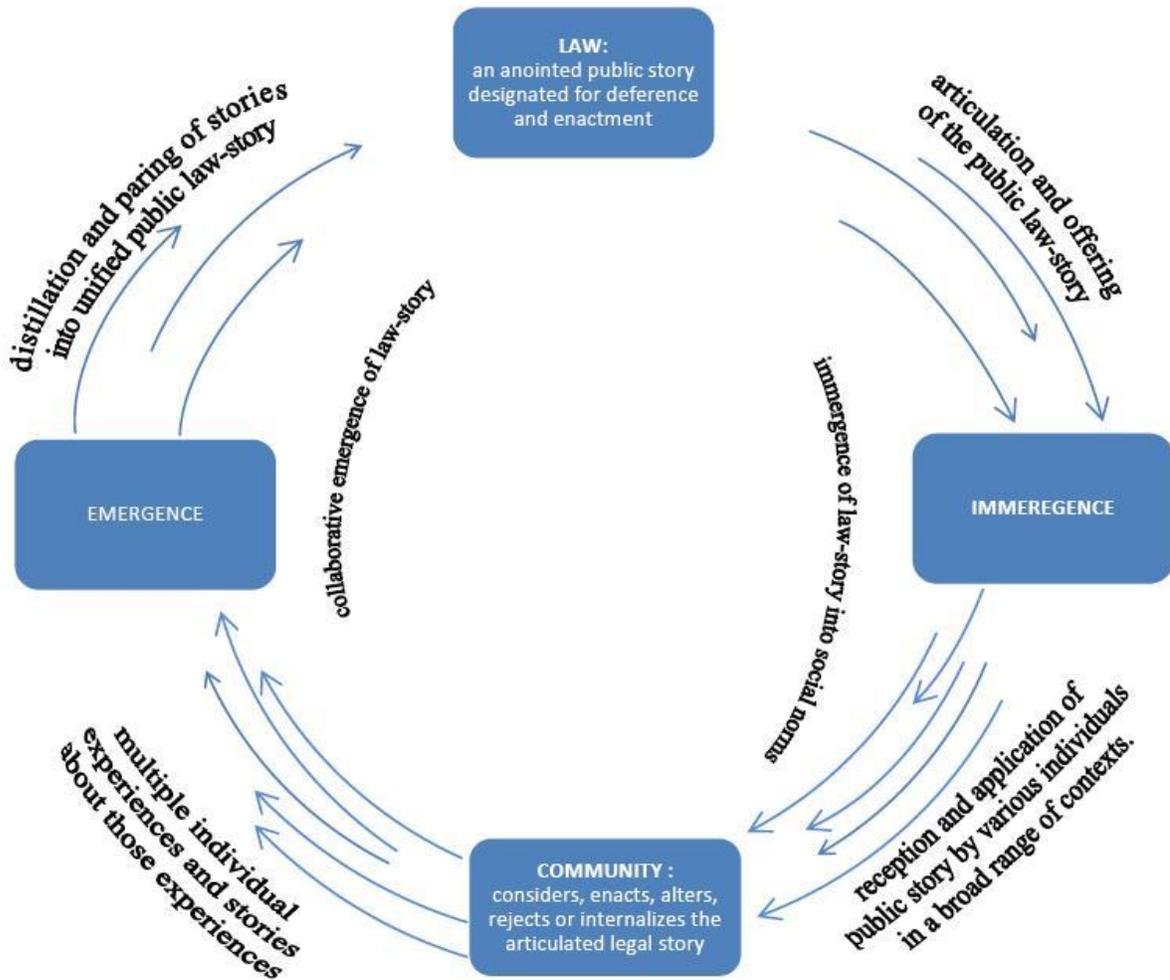
⁸⁸ *Id.* (emphasis in original) (citation omitted).

⁸⁹ *Id.* at 217.

⁹⁰ SAWYER, *supra* note 83, at 218 (“Emergents constrain the kinds of discursive patterns that can occur, and this is a strictly semiotic, interactional phenomenon, independent of human agency.”).

⁹¹ See LAW-AS-STORY COMPLEX SOCIAL SYSTEM diagram.

LAW-AS-STORY COMPLEX SOCIAL SYSTEM



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This “downward causation,” which occurs concurrently with emergence, is sometimes referred to as “immergence.”⁹² Because humans in a complex system have the cognitive ability—the self-awareness—to recognize the social frames and formal structures that emerge, immergence may lead to recognition of norms of behavior or even identification of such norms as norms.

[A] norm emerges *as a norm* only when it emerges *into the minds* of the involved agents, not only *through* their minds. The mind is an integrated system for storing and manipulating representations to achieve goals. In other words, it works as a norm only when agents *recognise* it as a norm. Norm emergence implies its *immergence* in the agent’s mind.⁹³

In practical terms, these frames, norms, and structures create social *roles*. And it is through actors being “assigned” to specific roles that social frames, norms, and structures are transferred to and internalized by individuals and that institutions are created.⁹⁴ This accords with work in psychology that ties individual behavior to sociocultural roles.

Developmental and systems psychologist Urie Bronfenbrenner defines a role as “a set of activities and relations expected of a person occupying a particular position in society, and of others in relation to that person.”⁹⁵ Bronfenbrenner proposes that the more well-established a role in the structure of a society, the stronger the expectations and the more likely those expectations are to evoke behavior, attitudes, and relationships consistent with them. This accords with the idea that frames, norms, and eventually formal structures emerge from communicative interactions. Bronfenbrenner calls this connection the “embeddedness” of roles in the larger culture or society. A role, he suggests, “functions as

⁹² SAWYER, *supra* note 83, at 172–73 (“[The] emergence processes in systems of cognitive agents are qualitatively different than in reactive agent systems because cognitive agents are capable of observing and internalizing emergent macrofeatures of the system.”). See also Rosaria Conte, Giulia Andrighetto, Marco Campenni & Mario Paolucci, *Emergent and Immergent Effects in Complex Social Systems* (Ass’n for the Advancement of Artificial Intelligence Fall Symposium 2007), available at www.aaai.org.

⁹³ Conte, Andrighetto, Campenni & Paolucci, *supra* note 92 (emphasis in original) (citations omitted). Note the ambiguity in this passage as to whether the agent is simply aware *of* the norm or is also aware that it *is* a norm.

⁹⁴ Martin Neumann, *Cognitive Architectures of Agent Systems and Social Mechanisms of Emergence and Immergence* (Soc’y for the Study of Artificial Intelligence & the Simulation of Behaviour Convention 2008), available at www.aisb.org.uk.

⁹⁵ URIE BRONFENBRENNER, *THE ECOLOGY OF HUMAN DEVELOPMENT: EXPERIMENTS BY NATURE AND DESIGN* 85 (Harv. Univ. Press 1979).

an element of the microsystem, [but] actually has its roots in the higher-order macrosystem and its associated ideology and institutional structure.”⁹⁶ Roles are thus the tangible, concrete manifestations of the society’s ideology—its myths or stories. Members of a social system understand this embeddedness: They carry the ideology, myths, and stories in their minds and internalize the definition of and expectations for certain roles.⁹⁷ Knowledge of these roles, as Sawyer might say, constrains how people behave.⁹⁸

More specifically in terms of law, Wade Mansell, Belinda Meteyard, and Alan Thomson affirm that the “order” of a society “comes not primarily from rules, from law, and from sanctions,” but from “shared reality . . . which in turn depends upon a world of institutions, each with a history, each the product of human society, and each of which in turn appears objectively real to the members of that society, and by that fact coerces them.”⁹⁹ Though the use of the word “law” is somewhat confusing, given that it refers here to law in the jurisprudential sense, the key insight is that it is the fact that such law represents a shared reality or story that gives it potency: “[T]he legal institution is created and maintained by people but then in turn acts upon people as though it had an existence independent of those who created it.”¹⁰⁰ Law emerges from the community and immerges back into the community.

⁹⁶ *Id.* at 86.

⁹⁷ An awareness of the importance of roles and the norms that underlie them leads to a deeper understanding of social structure and social institutions. Power, for example, can be seen as less a tangible “thing” than a relationship between individuals, a prescribed interaction, a designation of roles situated within a larger framework of roles. IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 30–33 (Princeton Univ. Press 1990). This perspective on power helps to explain, in part, why feminist and critical race theorists have been at the forefront of developing a sociology of law and thereby understanding the sources and functioning of a jurisprudence associated with norms that perpetuate gender and racial inequity. See MILOVANOVIC, *supra* note 72, at 120–53. Conversely, resistance to a story view of law may correlate to resistance to changes in the social structure, including to its power relationships. See *infra* notes 123–135 and accompanying text.

⁹⁸ Cf. BARBARA ROGOFF, *APPRENTICESHIP IN THINKING: COGNITIVE DEVELOPMENT IN SOCIAL CONTEXT* (Oxford Univ. Press 1990) (noting that how people think and view the world is culturally contingent and develops through interactions with others).

⁹⁹ MANSELL, METEYARD, & THOMSON, *supra* note 70, at 26.

¹⁰⁰ *Id.* at 26–27.

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Because of the power of the shared reality created by our stories, including our law-stories, it can be difficult to see them as stories and to be aware of the process Mansell, Meteyard, and Thomson describe. This is particularly true when one is inside a stable system, and so it may be more likely for this phenomenon to be observed and/or imagined when a system is in flux.

Stanley Diamond, for example, observes the unsettling intrusion of external law into a society governed by “custom.”¹⁰¹ In such a society, customs are obeyed “because [they are] intimately intertwined with a vast living network of interrelations, arranged in a meticulous and ordered manner.”¹⁰² Here the kind of formalized, written story that is law is not necessary for norms and roles to be created, known, and followed. Similarly, the current transition in the international sphere from custom to law has engendered a conversation about custom and law in which custom and law again are seen as distinct modes of governing behavior.¹⁰³ This conversation reveals the transition from one shared reality to another, but for the most part overlooks the idea that because law is effective only to the extent that it becomes an internalized social norm, it may be understood either as an organic transition from custom or as simply another form of custom.

What we see here, then, are systems in which norms and roles emerge through the collaboration and communication of individuals by way of increasingly formalized shared “texts” or “frames,” which then immerse into the minds of the system’s individuals. Those norms and roles, in turn, ground the

¹⁰¹ Stanley Diamond, *The Rule of Law Versus the Order of Custom*, in *THE RULE OF LAW* 115 (Robert Paul Wolff ed., Simon & Schuster 1971).

¹⁰² *Id.*

¹⁰³ *Cf.* ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* (Cambridge Univ. Press 1999) (describing the social constructivist theory of international law).

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emergence of the system-level social patterns described above.¹⁰⁴ These norms and roles then become the “criteria for behavior” that govern the interactions of cognitive agents in a complex social system.¹⁰⁵

The norms and roles of a complex social system sociology of law bring us back to stories. Stories provide a way to understand jurisprudential law that is consistent with a complex social systems sociology of law, and it is thus not surprising that literature/narrative-based views of law have grown concurrently with new sociological perspectives. Stories are a communicative vehicle sufficiently sophisticated to capture and impart the full range of nuances about human behavior. They have been doing so for millennia, and they continue to do so today. Stories allow for the articulation of experiences; the distillation of meaning from those experiences; the mutual creation of frames, norms, roles, and formal prescriptions; and the collaborative development and communication of guidance for action.

John Forester’s description of how stories are important to city planners documents how stories do this work:

The point is not that planners tell stories, for everyone tells stories. Rather, in planning practice, these stories do particular kinds of work—descriptive work of reportage, moral work of constructing character and reputation (of oneself and others), political work of identifying friends and foes, interests and needs, and the play of power in support and opposition, and, most important . . . deliberative work of considering means and ends, values and options, what is relevant and significant, what is possible and what matters, all together. The staff do not assess means and strategies alone, as if values and ends were just given, to be presumed. The staff try to explore and formulate what matters and what is doable too.¹⁰⁶

In probing more deeply how these practice stories help planners decide how to proceed in actual, specific, and complex situations, Forester draws the analogy to how stories are told and used between

¹⁰⁴ See Rosaria Conte, Directions of Emergence: Reputations and Social Norms, Presentation at the Society for the Study of Artificial Intelligence and the Simulation of Behaviour Convention (Apr. 1–4, 2008).

¹⁰⁵ See generally CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES (Basic Books Classics) (1977); CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY (Basic Books Classics) (1985). See also DANIEL QUINN, ISHMAEL (Bantam Books 1992). According to Quinn, a culture is “a people enacting a story;” “enacting” means “liv[ing] so as to make the story a reality;” and a “story” is “a scenario interrelating man, the world, and the gods.” *Id.* at 41.

¹⁰⁶ JOHN F. FORESTER, THE DELIBERATIVE PRACTITIONER: ENCOURAGING PARTICIPATORY PLANNING PROCESSES 29 (MIT Press 1999).

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friends. He explicitly connects, but at the same time distinguishes, the friendship within which practice stories arise from the friendship of social intimates. The former is “not the friendship of long affection and intimacy, but the friendship of mutual concern, of care and respect for the other’s practice of citizenship, their full participation in the political world.”¹⁰⁷ In either context of friendship, stories acknowledge contexts as well as construct problems and issues. For a story to do the work he describes, it must be relevant; it must pertain to the position and stance of those for whom it is told. It must be “appropriate to us and to the situations we are really in.”¹⁰⁸

Forester’s account of how city planners use stories documents how a group takes multiple stories and collaborates in the process of articulating from them a single story. The constituent stories here do not have a single, clear-cut meaning. They help to illuminate possible paths, but there may be more than one path possible, and the stories do not indicate which one is the right path to choose. Because the connections are suggested rather than spelled out, the stories invite puzzling, grappling, and struggling. In the process Forester describes, stories may diverge from or even contradict each other, but that does not mandate any story’s invalidation. Thus, they allow for the collaborative emergence described by Sawyer, for the planners appear to acknowledge that different stories—even about the same events—arise from different stances, look in different directions, and offer different interpretations and prescriptions. Stories can intersect; they need not be identical. Stories thus provide the individual threads from which a collective fabric can be woven.

The practice stories Forester describes go beyond our intellect and reason. “They help us to understand . . . how we are vulnerable, dependent, connected, haunted, attached, guilty, esteemed, or

¹⁰⁷ *Id.* at 36.

¹⁰⁸ *Id.* at 32.

perhaps loved, and so in many ways how we are related to the world not simply physically but significantly, in ways that matter to us and to others.”¹⁰⁹ Such stories

engage our emotions and passions, allowing us to learn through whatever emotional sensitivity we have. These accounts help us to consider “how I might have felt in that situation,” to explore feelings we might not have recognized as relevant. They develop our repertoires of emotional responsiveness and attentiveness. They teach us through empathy and identification.¹¹⁰

And they are messy. “That messiness of practice stories, defying our expectations, is an important part of their power. . . . That messiness is important because it teaches us that before problems are solved, they have to be constructed, formulated in the first place. The rationality of problem solving, and the rationality of decision making too, depend on the prior practical rationality of attending to what ‘the problem’ really is If we get the story wrong, the many techniques we know may very well not help us much at all.”¹¹¹

Stories thus offer an intimate relationship to and guidance vis-à-vis action. They are not theoretical, abstract constructs; they are grounded in the real world we live in and address the choices we must make. Stories embody values and understandings about the world that meld together into norms, roles, or touchstones—themes that recur in the stories, providing not only explanations for what has already occurred, but guidance for how to move forward and which roles to assume.

Relating to this, Forester’s stories indicate a direction. They do not point or beckon indiscriminately. And the direction results from values, goals, and ends that resonate. Stories help us “to sort out what really matters to us;” moreover, these stories provide guidance—not in the predictable, formulaic sense of a road map, an instruction booklet, or a “technical fix”—but in the sense of “help[ing]

¹⁰⁹ *Id.* at 33.

¹¹⁰ *Id.* at 35–36.

¹¹¹ *Id.* at 37.

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us to see more clearly, to remember what we need to, to see in new ways, perhaps to appreciate aspects of others, or ourselves, or our political situations, to which we have been blind.”¹¹² Stories are to be wrestled with rather than followed unthinkingly, a characterization that echoes Sawyer’s description of the improvisational nature of the enactment of norms.

In a law-as-complex-social-system sociology, jurisprudential law-stories have much in common with the shared stories of Forester’s city planners. Multiple constituent experiences and perspectives are captured in individual stories. Ephemeral frames are created through collaborative communication, leading to a unified story emerging over time. A similar process occurs with law, though it is more ritualized and the processes of aggregation more formalized—in large part because of the greater numbers of individuals involved. Both judge-made and statutory law begin with individual experiences channeled into collective forms and eventually synthesized into a unitary story.

B. CIVIC IMPLICATIONS OF A LAW-AS-STORY COMPLEX SOCIAL SYSTEM VIEW

As Frederick Schauer observes, our “concept of law”—what might be termed “the story about the story”—is not immutable.¹¹³ It is thus worth considering not only what concept of law describes how things are, but what concept of law moves things closer to how we think they should be.¹¹⁴ This is the case because our concept of law itself creates roles for us to play.

A law-as-story complex social system concept of law bespeaks different—and more normatively appealing—roles than other concepts of law. The most obvious quality of stories and the most significant implication of a law-as-story jurisprudence is accessibility. While legal discourse may occur in a

¹¹² FORESTER, *supra* note 106, at 34.

¹¹³ Frederick Schauer, *The Social Construction of the Concept of Law: A Reply to Julie Dickson*, 25 OXFORD J. OF LEGAL STUD. 493, 497–500 (2005).

¹¹⁴ *Id.*

specialized language, the substantive content of a story and its ultimate ratification lie with the community. Stories by definition are available to everyone—everyone has a story to tell, and the meaning or relevance of a story ultimately lies as much with the listener as with the teller.¹¹⁵

Moreover, in a law-as-story complex social system sociology, all the individuals in the society are responsible for the content of law—through the collaborative emergence of frames and laws and through the eventual immergence of norms and roles. The concept of law developed in this Article is thus *civic* in nature. It envisions an important role vis-à-vis law for *all* members of a society. Recognizing this leads to a heightened awareness of the importance of providing avenues for communication and enactment for everyone.

Hilary Wainwright articulates this view in terms of “democracy” (her quotation marks), the character of which she asserts can be “significantly altered by a new approach to knowledge. . . . Tom Paine made the need for a form of government which awakened human capacities that normally lie unutilized, central to his polemic for representative government and the political rights that should go with it.”¹¹⁶ Wainwright’s call envisions a type of civic participation in knowledge-creation, story-telling, and law-making that includes rather than excludes, and embraces rather than marginalizes. This “third way”¹¹⁷ is to be found in the social knowledges, such as that of justice or the common interest, that arise when people, bringing their own particular experiences to bear, actively co-operate and communicate in response to the common problems of living together.¹¹⁸

¹¹⁵ See, e.g., Paul Costello, *Story as the Shape of Our Listening: The Lessons Learnt from Listening Teams*, CTR. FOR NARRATIVE STUDIES, available at http://www.storywise.com/Key_Writings/Key_Writings-Listening.htm.

¹¹⁶ HILARY WAINWRIGHT, ARGUMENTS FOR A NEW LEFT: ANSWERING THE FREE-MARKET RIGHT 108 (Blackwell Publishers 1994).

¹¹⁷ The third way lies “between on the one hand knowledges, such as Marxist socialism, making universal truth claims, and on the other hand the fragmentation of individual knowledges characteristic of the market.” MANSELL, METEYARD, & THOMSON, *supra* note 70, at 186.

¹¹⁸ *Id.* at 186–87 (summarizing WAINWRIGHT, *supra* note 116).

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A law-as-story complex social system concept of law thus leads to the intertwined conclusions that everyone has something to offer and that everyone's contributions matter.¹¹⁹ Furthermore, because our stories constitute law and law in turn constitutes us and our stories, a law-as-story complex social system view of law is civic in that it provides a social constructivist view that places the responsibility for the choices made under law squarely on our collective shoulders: "[L]acking any foundational principles, we must be prepared to give good ethical reasons for why we have conducted ourselves as we have."¹²⁰ *We* must shoulder the responsibility for our choices and the consequences of our actions. Blaming "the law" will not do.

As Schauer notes, a social constructionist view of law is positivist in that it acknowledges that law is contingent on human agency.¹²¹ A social constructionist view also, however, shares common ground with the natural rights conviction that positivism poses the danger of obedience to law unmoored to underlying morality. The civic concept of law described here addresses that challenge with the observation that in a complex social system any law-story, though arising from human interaction, will ultimately also be tested through human interaction in enactment. The traditional polarity between positivism and natural rights, in fact, may be seen as yet another example of the near-exclusive focus on the rising-to-doctrine arc of the law-cycle.

This social constructionist civic concept of law thus departs from the current mainstream concept of law.¹²² In contrast to the accessibility of a law-as-story civic concept of law, inaccessibility is, arguably,

¹¹⁹ See *infra* notes 160–165 and accompanying text.

¹²⁰ John Shotter, *The Social Construction of Our 'Inner' Lives*, J. OF CONSTRUCTIVIST PSYCH. (1997), available at <http://www.massey.ac.nz/~alock/virtual/inner.htm>.

¹²¹ Schauer, *supra* note 113, at 495.

¹²² There are some similarities with current jurisprudential thinking, though that thinking tends to focus on only the up-to-doctrine arc of the cycle. See RONALD DWORKIN, *LAW'S EMPIRE* 228–38 (Harv. Univ. Press 1986) (describing judges as writers of "chain novel" writing *seriatim*); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 220–44 (Harv. Univ. Press 1990).

a fundamental characteristic of modern, Western jurisprudential law *precisely because it characterizes itself as not being a story*. Peter Fitzpatrick offers the following analysis:

Modern law . . . shares origins and a sustaining dynamic with the general mythology of modernity and it is a key character in that mythology. The mythic composition of law can be made out in its contradictory attributes. Law is autonomous yet socially contingent. It is identified with stability and order yet it changes and is historically responsive. Law is a sovereign imperative yet the expression of a popular spirit. Its quasi-religious transcendence stands in opposition to its mundane temporality. It incorporates the ideal yet it is a mode of present existence.¹²³

According to Fitzpatrick, therefore, law exhibits the classic characteristics of myth as described in Part I.

But this myth, in Fitzpatrick's view, is of a particular quality. The nature of the mythology of (Western) modernity

is formed in the comprehensive denial of the "other"—in assertions of universal knowledge, imperious judgment and encompassing being. Since it is constructed in negation, in terms of what it is not, this being is unbounded and able mythically to reconcile its particular and contingent existence with its appropriation of the universal.

The mythology of modernity is sustained in the experience of imperialism. Nowadays, imperialism is usually seen as something marginal, exceptional and evanescent, whereas in my argument it is central, ordinary and enduring.¹²⁴

Modernity consists of a myth that validates itself by denying the validity of other myths. Its mode is "denying the relevance of myth to itself."¹²⁵ For modernity, and for modern law, "the denial is the myth."¹²⁶

Fitzpatrick's conclusion that modernity and modern law are imperialistic at their core rests on the insight that modernity and modern law render themselves invulnerable to alternative stories through the acceptance of a concept of law—a story about the story—in which law is not a story at all. As a "not-story," the story of law rises above the jumble and jostle and stimulation of multiple, overlapping,

¹²³ PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* x (Routledge 1992) (Preface).

¹²⁴ *Id.*

¹²⁵ *Id.* at 14.

¹²⁶ *Id.* at ix (Preface).

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possibly challenging or contradictory stories. Modern law reigns supreme by using a strategy of undermining alternative stories by pointing out their “story-ness” while denying its own.

A concept of law that recognizes all law as story cuts through this camouflage to the underlying dynamic. A useful current example is the originalist approach to constitutional interpretation.¹²⁷ Seen as a law-story, this approach is nothing more than a “creation myth” about the Constitution that has the effect of removing the constitutional story from the realm of stories that will evolve over time and that are directly grounded in the populace.¹²⁸ But because this creation myth portrays itself as not a story but a truth divivable from the documents of the founding, it neutralizes challenges from those who offer alternative stories: they are stories and it is not. The effect is a concentration of power in the hands of those who successfully assert that their story is not a story, as well as an abdication of accountability for the use of that power: “I can do only this because ‘the law (read ‘the Constitution’)’ requires it.”¹²⁹

Because a not-story brooks no alternative stories, it cannot coexist with other stories. Change can only occur when the not-story itself changes, but even *as its content changes, its not-story status remains*. And because of not-story resistance to the fluidity of a story, change is infrequent and traumatic—like an 8.0 magnitude earthquake when pressure has built up on a fault. So even when people succeed in wresting admissions of change from a not-story, they are denied the crucial additional step of acknowledgement that it is in fact a story.

As alternative stories are silenced through a not-story concept of law, so are storytellers excluded. This phenomenon has been highlighted by nontraditional storytellers—especially people of color and

¹²⁷ See, e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 859–78 (Scalia, J., dissenting) (advocating interpretation of Eighth Amendment that looks back to Blackstone); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

¹²⁸ Especially with respect to the idea that the Constitution evolves, compare the explicit acknowledgement of constitutional transformation (though not couched in terms of “story”) offered in 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 7 (Harv. Univ. Press 1998).

¹²⁹ Justice Samuel Alito, Speech at the Creighton Law School Annual Dinner, Sept. 19, 2008 (paraphrase of endorsed concept of law).

women—who have historically been excluded from the role of legal storyteller by the not-story’s self-declared status. These others are tellers of other stories that the not-story designates as lesser than itself by characterizing them as stories, while it itself is not.¹³⁰

So it is no accident that Ralph Ellison’s masterpiece *Invisible Man* describes a Black man who is not seen by the White world in which he lives:¹³¹ “I am invisible, understand, simply because people refuse to see me. . . . That invisibility to which I refer occurs because of a peculiar disposition of the eyes of those with whom I come in contact. A matter of the construction of their *inner* eyes, those eyes with which they look through their physical eyes upon reality.”¹³² The Critical Race Theory approach to law, which supports the recounting of individual experiences of people of color, challenges the prevailing norms of the legal establishment in much the same way.¹³³ And a standard response is to marginalize the importance of those stories, in part by designating them “narratives,” in contradistinction to dominant legal standards, principles, and discourses, which are not so designated.¹³⁴ Stories and not-stories.

One of the beauties of how the not-story works is that it convinces others to do its work for it. Over time, other storytellers self-censor; they come to doubt the grounding and the validity of their own stories. Moreover, they refrain from offering “big stories”—the stories that encompass and weave together the many disparate threads. These stories are, in our culture for example, still very much the

¹³⁰ The most evident example of this phenomenon in U.S. history may be the way law was employed to negate the humanity of American Indians and consequently to deny their claims to the land, though there had been continued ambivalence over whether Indians have the capacity to change—to acquire full humanity. See PETER FITZPATRICK, *MODERNISM AND THE GROUNDS OF LAW* 161–75 (Cambridge Univ. Press 2001).

¹³¹ The phenomenon Ellison describes is related to, but distinct from, “colorblindness.” Ellison’s invisibility envisions a situation in which race is so salient that a person who is Black is not “seen” as a person at all. “Colorblindness” envisions a situation in which a person who is Black may be “seen,” but only partially: to the extent that being Black is an important part of his or her identity, there is a degree to which he or she is still not “seen.” See *infra* discussion of colorblindness at text accompanying notes 184, 194–200.

¹³² RALPH ELLISON, *INVISIBLE MAN* 3 (Random House 1995) (1952).

¹³³ MILOVANOVIC, *supra* note 72, at 147–53.

¹³⁴ See, e.g., MICHAEL J. GERHARDT, THOMAS D. ROWE, JR., REBECCA L. BROWN & GIRARDEAU A. SPANN, *CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES* 395–404 (LexisNexis 2000). See also MILOVANOVIC, *supra* note 72, at 138–53 (“Fem-Crits” and “Critical Race Theory”).

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province of white men—the not-story griots. How many philosophers or religious figures or, in the legal field, seminal constitutional law theorists, are people of color? How many are women? Do many of us dare to enter and participate—at least to some degree—but not to transform?

Though these challenges to not-story law have come primarily from women and people of color, the exclusion and denigration of story that they describe is by no means confined to them.¹³⁵ These groups have historically been excluded as groups from the law process, so it is not surprising that members of these groups have challenged the contours of those exclusions. But the not-story view of law's posture of indifference to many stories applies much more broadly than to just the stories of excluded groups.

Compared to this indifference is a civic concept of law's recognition of the value of affirmatively eliciting stories from as many people as possible. In general, while the starting point of a not-story view of law is exclusion, the starting point of a law-as-story concept of law is universal inclusion. Under a not-story view of law, for example, citizenship is a question of proving that one should be allowed to "join the club"—though the membership list has expanded dramatically over the centuries. Citizenship under a civic concept of law, in contrast, flows automatically from the fact that one participates in the society in question.

In the next section, I give two specific examples related to current issues of importance in constitutional law. The first is related to the question of voice, how the experiences and stories of individuals merge collaboratively to form an overarching legal story. The second relates to the effects of

¹³⁵ In fact, one perspective is that people of color and women are merely the most susceptible to injustices and oppression that apply much more broadly. See, e.g., LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (Harv. Univ. Press 2002).

legal rules on resonance, the enactment of the legal story by the body politic. These are the “upward,” emergent, and “downward,” immergent, parts of the cycle.

III. ELABORATION OF A CIVIC CONCEPT OF LAW THROUGH TWO CONSTITUTIONAL EXAMPLES

I think what the framers had in mind was to rise above their own injustices. It would serve no purpose to have a Constitution which simply enacted the status quo.

- Anthony Kennedy¹³⁶

As mentioned previously, current jurisprudence tends to limit its focus to a small arc of the complex legal cycle described in the prior section—the small segment in which the formal story of doctrinal law is articulated. In this Part, I consider how a civic concept of law affects our understanding of the parts of the cycle that lead into and come out of that segment. The exploration of these arcs does not complete the cycle, as it does not explore in depth the dynamics of the interactions within the civic sphere. It does, however, offer a useful perspective on the creation and enactment of jurisprudential law-stories.

A. POLITICAL GERRYMANDERING AND THE ISSUE OF VOICE

The issues related to the gerrymandering of political districts have been with us since the early 1700s.¹³⁷ In the 1960s, *Baker v. Carr*¹³⁸ and *Reynolds v. Sims*,¹³⁹ interpreting the Equal Protection Clause, established the principle of one-person/one-vote for political districts, while the Voting Rights Act¹⁴⁰ set limits on racial vote dilution and racial districting. However, though held justiciable by the U.S. Supreme

¹³⁶ *Nomination of Anthony M. Kennedy to Be Associate Justice of the Supreme Court of the United States: Hearing Before the Comm. on the Judiciary*, 100th Cong. 152 (1987) (response to Sen. Arlen Specter).

¹³⁷ *Vieth v. Jubelirer*, 541 U.S. 267, 274–75 (2004) (plurality opinion).

¹³⁸ *Baker v. Carr*, 369 U.S. 186 (1962).

¹³⁹ *Reynolds v. Sims*, 377 U.S. 533 (1964).

¹⁴⁰ The Voting Rights Act, 42 U.S.C. § 1973 (1965).

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Court in *Davis v. Bandemer* in 1986,¹⁴¹ political gerrymandering has not progressed beyond a theoretical claim.¹⁴² This is not due to any apparent decline in the prevalence of political gerrymanders. In fact, various observers have noted that such gerrymanders have become, if anything, more effective and entrenched—a trend facilitated by better census data and improved computer technology.¹⁴³ Rather, the tenuous status of *Davis* may result from the substantive standard articulated by the plurality opinion—a standard that is at the same time slippery and steep: “[U]nconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter’s or a group of voters’ influence on the political process as a whole.”¹⁴⁴

This standard has drawn criticism both from those who would provide no judicial review of districting decisions on political gerrymandering groups, and thus set no standard at all,¹⁴⁵ and from those who see it as not assertive enough in the face of overt political maneuverings by state legislatures.¹⁴⁶ Justice Anthony Kennedy in particular, the swing vote in the recent gerrymandering cases of *Vieth v. Jubelirer* and *League of United Latin American Citizens v. Perry* (“*LULAC*”), has been castigated for his unwillingness to jump one way or the other: he has cautiously insisted on preserving justiciability¹⁴⁷ while at the same time declining either to find an Equal Protection violation on the merits, even in the beyond-

¹⁴¹ *Davis v. Bandemer*, 478 U.S. 109, 113–27 (1986) (majority opinion). In the interests of full disclosure, I should reveal that I was Justice White’s law clerk the term that *Davis v. Bandemer* was decided, and I worked on his opinion in the case. See also *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 414 (2006) [hereinafter *LULAC*].

¹⁴² *Vieth*, 541 U.S. at 279–81 (plurality opinion), 312–14 (Kennedy, J., concurring). Some, such as the members of the plurality in *Vieth*, regard this as evidence of a fundamental problem with the Court’s entrance into this area. *Vieth*, 541 U.S. at 278–81. Others are more tolerant. Bernard Grofman, for example, suggests that the jurisprudence in this area is akin to a “toddler” still learning how to walk. Bernard Grofman, *An Expert Witness Perspective on Continuing and Emerging Voting Rights Controversies: From One Person, One Vote to Partisan Gerrymandering*, 21 STETSON L. REV. 783, 793 (1992). See also *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring) (“[B]y the timeline of the law 18 years is rather a short period.”).

¹⁴³ *Vieth*, 541 U.S. at 345–46 (Souter, J., dissenting).

¹⁴⁴ *Davis*, 478 U.S. at 132 (plurality opinion).

¹⁴⁵ *Id.* at 144–61 (O’Connor, J., concurring in the judgment); *Vieth*, 541 U.S. at 281–306 (plurality opinion), *LULAC*, 548 U.S. at 413–14.

¹⁴⁶ *Davis*, 478 U.S. at 161–85 (Powell, J., dissenting); *Vieth*, 541 U.S. at 346–55 (Souter, J., dissenting).

¹⁴⁷ *Vieth*, 541 U.S. at 306–17 (Kennedy, J., concurring in the judgment).

egregious Texas redistricting at issue in *LULAC*,¹⁴⁸ or to articulate a clear standard for what would constitute a violation.¹⁴⁹

These judicial struggles with political gerrymandering illuminate specific aspects of the practice that render it difficult to address under current doctrine. Such difficulties stem from the fact that current doctrine embodies a concept of law that fails to account for the acknowledged realities of people participating in the creation of the law-story. These deep realities point in the direction of a civic concept of law based on a law-as-story complex social system view.

First is the problem of *relevance*, which raises—and complicates—the question of scale. Political gerrymandering claims go to statewide decisions rather than to the configuration of individual districts.¹⁵⁰ Yet it is in individual districts that people feel they can make a difference—through voting or by influencing their elected representative.

But simply maximizing the number of competitive districts to optimize voter influence at the individual district level can lead to problems in representation at the state level. In particular, a large number of close, competitive districts can result in greater volatility and thus less sustained influence of a party over time at the state level. This result can occur if a large number of competitive districts leads to wide swings at the state level from one party to another due to small but decisive shifts in voter alignment.¹⁵¹ Here there could be more responsiveness at the individual level but massive disproportionality (and thus lowered responsiveness) at any given time at the state level. In contrast, though gerrymandered districts may relegate voters in a particular district to representation by someone

¹⁴⁸ *Id.* at 313–16 (Kennedy, J., concurring in the judgment); *LULAC*, 548 U.S. at 414–23 (Kennedy, J., opinion).

¹⁴⁹ *LULAC*, 548 U.S. at 414–23.

¹⁵⁰ *Davis*, 478 U.S. at 110–11 (plurality opinion). See also *Vieth*, 541 U.S. at 327–328 (Stevens, J., dissenting).

¹⁵¹ *Davis*, 478 U.S. at 130 (plurality opinion); *Vieth*, 541 U.S. at 359 (Breyer, J., dissenting).

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not of their political affiliation, they do ensure a rough proportionality of representation of those same voters at the state level.

The issue of voter influence, of relevance, operates at both the individual and system scales. Existing electoral arrangements promote one type of relevance at the expense of the other. Competitive districts look to enhance the salience of individual votes in individual districts at the possible expense of relevant statewide representation; gerrymandered districts stabilize statewide representation, but tolerate a cost in terms of meaningful individual influence at the district level. The fundamental problem consists of an imperfectly developed conviction that both scales matter, a lack of understanding of the connection between the two scales, and an actual relationship between the two scales that is not linear.

Second is the question of *relationship*. Representation is not a simple matter of voters electing legislators and sending them off with partisan (or other) instructions to be carried out to the letter. Long ago, Edmund Burke staked out the opposite extreme of legislators who operate according to the dictates of their own consciences.¹⁵² James Madison, in a view that can be located between these two, contemplated more of a process of give-and-take between those who are represented and those who represent them.¹⁵³

Echoing Madison, the *Davis* plurality articulated a more dialogic view of representation:

[T]he mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm. This conviction, in turn, stems from a perception that the power to influence the political process is not limited to winning elections. An individual or a group of individuals who votes for a losing candidate is

¹⁵² Edmund Burke, *Speech to the Electors of Bristol*, 1 THE WORKS OF THE RIGHT HONOURABLE EDMUND BURKE 446–48 (Henry G. Bohn 1854), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html>.

¹⁵³ Larry D. Kramer, “The Interest of the Man”: James Madison, *Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697 (2006).

usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district.¹⁵⁴

It is this conviction that underlies the holding that proportionality in partisan representation at the system level is not required. Representatives can adequately represent constituents who are not of the same party.

Representation thus involves a textured and evolving relationship between voters and those they elect. The damage to these relationships may be the most tangible problem caused by the loss of competitive districts resulting from partisan gerrymandering: “safe” districts provide little incentive for maintaining dialogue with and thus truly representing those voters who hold a minority view.¹⁵⁵ The results are voters who feel disenfranchised at the district level and increasingly polarized legislative bodies at the state or higher level.

Third is the issue of *identity*. The apportionment cases of *Baker v. Carr*, *Reynolds v. Sims*, and their progeny addressed claims that arose when an individual voter had more or less ability to influence the political process than another. The individual basis of these claims and its linear connection to a quantifiable effect at the group level led to the practically applicable one-person/one-vote standard.

Gerrymandering claims, in contrast, are by their nature *group*-based.¹⁵⁶ They are brought not by voters as individuals but by voters as members of one or the other political party, claiming injury through an injury to their party. This is consistent with a view of individual identities as constructed by group membership: I am who I am because of the groups I am a part of and the roles I am assigned and play as a

¹⁵⁴ *Davis*, 478 U.S. at 131–32 (plurality opinion).

¹⁵⁵ Walter Dellinger, “Partisanship Was the Only Thing,” in *The Breakfast Table: A Supreme Court Conversation*, SLATE, June 27, 2006, available at <http://www.slate.com/id/2144476/entry/2144637>.

¹⁵⁶ *Davis*, 478 U.S. at 144 (O’Connor, J., concurring in the judgment).

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member of those groups.¹⁵⁷ This is a prickly dilemma for our jurisprudence, which is framed in terms of individuals.

To make matters even more challenging, political gerrymanders are based on groups of which the membership varies over time. Voters are not immutably marked as belonging to one political party or another. In fact, a significant goal of the parties is attracting voters who may either not identify generally with either party or who identify weakly with the other party. Political gerrymandering thus focuses on the advantages accruing to voters as groups and in particular groups with memberships that fluctuate over time.¹⁵⁸ Unlike the case of racial gerrymandering, individual voters and their relevant political affiliation cannot be conflated. Political affiliation is not fixed over time.

These three aspects of political gerrymandering—relevance, relationship, and identity—can all be understood as characteristics of the emergent arc of a law-as-story complex social system. Both individual and system scales are important, and the relationship between the two is not linear, which can obscure the underlying issue of how individuals relate to the system. The stories of individuals combine through the communicative, relational medium of representation into a formalized, unified, and, in this case, legislative legal story. And the collaborative emergence process through which this occurs involves interaction and communication in the formation of group along with individual identity. All of these, moreover, are grounded in story. Our stories are relevant; we are in relationship with those who create the aggregate law-story, and we have a part in constructing the social stories that in turn shape our identity.¹⁵⁹

¹⁵⁷ YOUNG, *supra* note 97, at 43–46, 160–73.

¹⁵⁸ See, e.g., *Davis*, 478 U.S. at 135 (plurality opinion).

¹⁵⁹ For more on the connection between identity and story, see *IDENTITY AND STORY: CREATING SELF IN NARRATIVE* (Dan P. McAdams, Ruthellen Josselson, & Amia Lieblich eds., Am. Psychological Ass'n 2006).

With a civic concept of law the fundamental issue presented by partisan gerrymandering—which encompasses all three of these characteristics and their story foundation—is one of *voice*.¹⁶⁰ Voice, as described by John Paul Lederach, “is about meaningful conversation and power. *Meaningful conversation* suggests mutuality, understanding, and accessibility. *Power* suggests that the conversation makes a difference: Our voices are heard and have some impact on the direction of the process and the decisions made.”¹⁶¹ In addition, as Bernie Mayer notes, “people want their voice to be expressed and heard in a way that reinforces their sense of who they are and is congruent with their values.”¹⁶²

My own civic engagement work in local communities echoes Lederach’s conclusions from international peace-building and Mayer’s insights into conflict resolution. The touchstones of voice I have identified are civic conversation, inreach, and civic governance.¹⁶³ Civic conversation acknowledges the importance of authentic communication, of relationship. Inreach¹⁶⁴ responds to the awareness that groups and the identities created by groups are important in the expression of voice. Civic governance recognizes that participants seek to make a difference, to contribute, to ensure that what they do helps to make meaning—to be relevant.¹⁶⁵

¹⁶⁰ See Michelle Maiese, *Voice*, BEYOND INTRACTABILITY, June 2005, available at <http://www.beyondintractability.org/essay/voice/?nid=5216> (“Of course, it is impossible for hundreds or thousands of people to be directly involved in negotiations or key decisions. Being adequately represented in the decision-making process is typically sufficient to give parties a sense of voice.”).

¹⁶¹ JOHN PAUL LEDERACH, *THE MORAL IMAGINATION: THE ART AND SOUL OF BUILDING PEACE* 56 (Oxford Univ. Press 2005) (emphasis in original).

¹⁶² BERNARD S. MAYER, *BEYOND NEUTRALITY: CONFRONTING THE CRISIS IN CONFLICT RESOLUTION* 24 (Jossey-Bass 2004). See also MAYER, *supra*, at 23–24, 27.

¹⁶³ MELINDA D. PATRICIAN & PALMA J. STRAND, *ARLINGTON’S CHANGING STORY* (2003) (on file with author); PALMA J. STRAND, MELINDA D. PATRICIAN, & MARY H. HYNES, *CIVIC ENGAGEMENT: A GUIDE FOR COMMUNITIES* (2006), available at http://www.umtpri.org/documents/handbooks/Civic_Engagement.pdf.

¹⁶⁴ Inreach describes the process by which groups, organizations or institutions reach within themselves to their members to increase. Inreach is acknowledging the civic, public role within our everyday lives and the institutions within which we operate. As an example, inreach refers to the process of a group or organization looking inward to strengthen its mission, the way it marshals its resources, and the ties between its members. An example would be the staff in a school undergoing a collective planning process, developing new ways to allocate their time and energy to best use, and paying attention to cultivating supportive and creative relationships amongst themselves. Inreach does not preclude effective outreach; outreach, in fact, may only be effective to the extent that effective inreach creates and sustains a vigorous organization. Palma J. Strand, *Forced to Bowl Alone?*, *THE NATION*, Feb. 10, 2003, at 25, 29, available at <http://www.thenation.com/doc/20030210/strand>.

¹⁶⁵ See also MARY E. CLARK, *IN SEARCH OF HUMAN NATURE* 57–59 (Routledge 2002) (describing bonding, autonomy, and meaning as the three fundamental human propensities). See generally VIKTOR FRANKL, *MAN’S SEARCH FOR MEANING* (Wash. Square Press 1985) (1959).

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Voice encompasses relevance—the connection between the individual and the system. Voice means that individuals have the opportunity to engage with others—those like them and those in positions of authority—in ways that are authentic and genuine. Individuals are listened to and their stories heard.¹⁶⁶ And this is documented by the fact that their stories, their conversation, the engagement, make a difference—not that their positions prevail, but that their stories are woven into the overall story.¹⁶⁷ When people can see themselves in the final decision, “winning” matters less.

But individuals do not exercise voice in isolation. Voice is a collaborative enterprise, consistent with Cover’s emphasis on freedom of association and Sawyer’s observations about complex social systems and the communicative relationships that characterize those systems. Voice occurs when individuals coalesce into groups or organize within groups that already have social and thus individual meaning. Yet, as political scientist Iris Marion Young has observed:

Political philosophy typically has no place for a specific concept of the social group. When philosophers and political theorists discuss groups, they tend to conceive them either on the model of aggregates or on the model of associations, both of which are methodologically individualist concepts. . . .

But “highly visible” social groups such as Blacks or women are different from aggregates, or mere “combinations of people.” *A social group is defined not primarily by a set of shared attributes, but by a sense of identity* . . . identification with a certain social status, the common history that social status produces, and self-identification¹⁶⁸

Groups are real as forms of social relations, which in turn shape individual identities. Individual stories contribute to group stories, and group stories in turn contribute to the larger overarching public jurisprudential story.

¹⁶⁶ Cf. JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICAN’S BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* 239 (Cambridge Univ. Press 2002) (stating that though “American people do not want to play an active role in the shaping of public policy . . . they do want to be assured that if an occasion should arise when they are moved to participate, their participation would be welcome and meaningful”).

¹⁶⁷ Compare this approach to the standard “stakeholder” view in which people are defined by what they are looking to *get*. Here, people are defined as “contributors,” by what they can *offer* or *give*.

¹⁶⁸ YOUNG, *supra* note 97, at 43–44 (emphasis added).

And so the question that a civic concept of law poses vis-à-vis political gerrymandering is this: How does it affect—for good or ill—the manifestation of voice? This perspective suggests an avenue for rethinking the practice that begins with revisiting the issue of proportionality. The Supreme Court has been well aware that the practice of political gerrymandering results from a system of single-member, winner-take-all or “first past the post” electoral districts,¹⁶⁹ and that such a system by its nature does not ensure proportional representation along party (or racial or other salient group) lines,¹⁷⁰ and that proportional results are not constitutionally mandated.¹⁷¹ There are legitimate reasons for choosing a districting approach over proportional representation,¹⁷² and the Court has been unwilling to presume that a representative of one party cannot represent constituents with other-party membership or diverse characteristics. Disproportionality alone, that is, has not given rise to a presumption of constitutionally flawed representation.

But the increasing sophistication of partisan gerrymandering and safe districts may have undermined the validity of these historical conclusions. And so the time may have come to move toward a new paradigm,¹⁷³ to reconsider the relationship between individuals and groups at the grass-roots level and their chosen representatives at the system level. Under the current system, is the typical relationship sufficient for individuals, within their social groups, to believe that their stories make a difference to the overall story? The electorate certainly perceives a lack of representative responsiveness, as evidenced by the wave of term-limit provisions enacted over recent decades.¹⁷⁴ Rather than dismissed as inappropriate

¹⁶⁹ *Davis*, 478 U.S. at 145 (O’Connor, J., concurring in the judgment).

¹⁷⁰ *Id.* at 130 (plurality opinion).

¹⁷¹ *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971); *Davis*, 478 U.S. at 130 (plurality opinion).

¹⁷² *See Vieth*, 541 U.S. at 355–68 (Breyer, J., dissenting).

¹⁷³ *See infra* note 243 and accompanying text.

¹⁷⁴ *See, e.g., U.S. Term Limits, Inc., v. Thornton*, 514 U.S. 779 (1993) (invalidating congressional term limits of twenty-three states); *see also* HIBBING & THEISS-MORSE, *supra* note 166, at 93–94.

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and ill-guided, such provisions may be viewed as an important sign that all is not well between citizens and their representatives.

Asking the question this way opens up the conversation about how to proceed—a conversation in which there are already promising offerings. Should inadequate representation be presumed once certain factors are demonstrated?¹⁷⁵ Should the parameters and meaning of the First Amendment’s freedom of association be developed so as to articulate what a meaningful right would entail in this context?¹⁷⁶

Or, looking beyond purely judicial remedies, should more serious attention be paid to alternative voting structures such as choice and cumulative voting¹⁷⁷—semi-proportionality approaches to voting that may offer the possibility of restructuring representation to increase the ability of individuals-in-groups (as Young describes them) to articulate their stories and to have them contribute to the public conversation in meaningful ways? Both choice and cumulative voting provide for a slate of candidates in a multi-member district with a mechanism for voters to express the intensity of their preferences—not just the binary preference allowed in a single-member district. Choice enables this result by allowing voters to rank the candidates, cumulative voting by giving voters multiple votes that they may “stack” with a candidate if they choose.

Both of these approaches facilitate group voice as well as allow for a clearer and more dynamic connection between individuals and the system. By pushing more decision-making down to the level of voters, they facilitate self-organizing along interest and identity lines and adaptation and shifts as changes

¹⁷⁵ See, e.g., *Vieth*, 541 U.S. at 343 (Souter, J., dissenting).

¹⁷⁶ See *Vieth*, 541 U.S. at 314–315 (Kennedy, J., concurring in the judgment); see also *supra* note 51 and accompanying text.

¹⁷⁷ See generally *Limited Voting, Cumulative Voting, and Choice Voting: A Comparison of Three Voting Systems*, CVD FACTBOOK SERIES, available at www.fairvote.org/factshts/comparis.htm; see also LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (The Free Press 1995).

occur. This may well be less cumbersome, more flexible, and more responsive than the current process.¹⁷⁸ And, most importantly, it may remove the false choice between enhancing individual contribution and providing greater system-level reflection of the range of opinions presented by current structures. With these different structures of representation, both may be possible.

B. RACE-BASED K–12 EDUCATIONAL INITIATIVES AND THE ISSUE OF RESONANCE

Brown v. Board of Education,¹⁷⁹ the cases that followed it in the Supreme Court, and the wave of enforcement lawsuits that brought it to local school districts¹⁸⁰ eventually ended *de jure* segregation in U.S. public schools.¹⁸¹ *De facto* school segregation, however, remains—a phenomenon that many ascribe primarily to continuing high levels of racial segregation in housing.¹⁸² And so, absent affirmative measures to create integrated school environments, many K–12 students attend schools without significant racial diversity.¹⁸³

Educational institutions, including those that were never or are no longer subject to court orders mandating desegregation, have sought to increase racial diversity in a variety of ways including race-based pupil selection and assignment criteria. These initiatives have been challenged in court by white plaintiffs arguing reverse discrimination and asserting a “colorblindness” theory of the Equal Protection

¹⁷⁸ They may also be less susceptible to control and more likely to give voice to those groups that have traditionally had little. *See* source cited *supra* note 177.

¹⁷⁹ 347 U.S. 483 (1954).

¹⁸⁰ *See, e.g.*, JACK BASS, UNLIKELY HEROES (Univ. of Ala. Press 1990).

¹⁸¹ *See generally* Gary Orfield, *Segregated Housing and School Resegregation*, in GARY ORFIELD, SUSAN E. EATON & THE HARVARD PROJECT ON SCHOOL DESEGREGATION, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN V. BOARD OF EDUCATION* 291, 291–330 (The New Press 1996).

¹⁸² *See id.*

¹⁸³ *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. #1*, 127 S. Ct. 2738, 2801–02 (2007) (Breyer, J., dissenting) (“Between 1968 and 1980, the number of black children attending a school where minority children constituted more than half of the school fell from 77% to 63% in the Nation (from 81% to 57% in the South) but then reversed direction by the year 2000, rising from 63% to 72% in the Nation (from 57% to 69% in the South). Similarly, between 1968 and 1980, the number of black children attending schools that were more than 90% minority fell from 64% to 33% in the Nation (from 78% to 23% in the South), but that too reversed direction, rising by the year 2000 from 33% to 37% in the Nation (from 23% to 31% in the South). As of 2002, almost 2.4 million students, or over 5% of all public school enrollment, attended schools with a white population of less than 1%. Of these, 2.3 million were black and Latino students, and only 72,000 were white. *Today, more than one in six black children attend a school that is 99–100% minority.*” (emphasis added)).

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Clause. This harkens back to the first Justice Harlan's dissent in *Plessy v. Ferguson*: "Our constitution is colorblind, and neither knows nor tolerates classes among citizens."¹⁸⁴ The Supreme Court has upheld the consideration of race as one of a number of factors in graduate school admission,¹⁸⁵ but in 2007 rejected the intentional use of race in pupil assignment to increase racial integration in the Seattle and Louisville public K–12 schools.¹⁸⁶

Parents Involved in Community Schools v. Seattle School District #1 opens with an opinion by Chief Justice Roberts¹⁸⁷ that speaks unequivocally of the disfavored status of race-based classifications: "[D]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."¹⁸⁸ But Justice Kennedy, concurring in part and concurring in the judgment, limits the reach of the Chief Justice's dogmatic opinion:

The plurality's postulate that "[t]he way to stop discriminating on the basis of race is to stop discriminating on the basis of race" is not sufficient Fifty years of experience since *Brown v. Board of Education* should teach us that the problem before us defies so easy a solution.¹⁸⁹

In dissent, Justice Breyer outlines three primary justifications for the challenged initiatives:¹⁹⁰ (1) addressing the consequences of prior segregation in various contexts; (2) overcoming the adverse education effects of segregated schools; and (3) promoting the democratic element of providing "an educational environment that reflects the 'pluralistic society' in which our children live."¹⁹¹ As with partisan gerrymandering, the Court's struggles with the appropriate standard for reviewing these

¹⁸⁴ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896).

¹⁸⁵ *Grutter v. Bollinger*, 539 U.S. 306 (2003); see also *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

¹⁸⁶ See *Parents Involved in Cmty. Schs.*, 127 S. Ct. at 2767.

¹⁸⁷ This opinion was joined by Justices Scalia, Thomas, and Alito in its entirety but as to certain parts only by Justice Kennedy. Parts of it thus speak for the Court; parts of it do not.

¹⁸⁸ *Id.* at 2767 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 214 (1995)).

¹⁸⁹ *Id.* at 2791 (citations omitted).

¹⁹⁰ *Id.* at 2820–22.

¹⁹¹ *Id.* at 2821. See also *Grutter*, 539 U.S. at 330 ("[S]tudent body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals.'").

initiatives may be seen as symptoms of a concept of law that is incapable of addressing the issue of continuing racial disparities decades after *Brown*.

First is the question of *identity*, as to which Justice Kennedy offers the following enigmatic observation:

The idea that if race is the problem, race is the instrument with which to solve it cannot be accepted as an analytical leap forward. And if this is a frustrating duality of the Equal Protection Clause it simply reflects the duality of our history and our attempts to promote freedom in a world that sometimes seems set against it. ***Under our Constitution the individual, child or adult, can find his own identity, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin.***¹⁹²

What lurks in these words is the awareness that race as a group identity is a social construct¹⁹³ and that changing the salience of race is a matter of allowing for more flexibility both in how individuals self-identify and in changing the power relationships between individuals as members of socially-defined groups.

Young's work on difference and oppression, introduced above, embodies an understanding of race that speaks to the issues raised but not developed by Justice Kennedy. Young views groups as integrally related to the formation of identity, and this is true of Blacks¹⁹⁴ as well as Democrats or Republicans: "What defines Black Americans as a social group is not primarily their skin color; some persons whose skin color is fairly light, for example, identify themselves as Black."¹⁹⁵ What makes someone Black,

¹⁹² *Id.* at 2797 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added). *See id.* at 2796–97 ("Who exactly is white and who is nonwhite?").

¹⁹³ *Race—The Power of an Illusion* (PBS 2003), online companion available at http://www.pbs.org/race/000_General/000_00-Home.htm.

¹⁹⁴ YOUNG, *supra* note 97, at 43–46, 160–73. Young uses "Black" to describe Black or African-Americans. I follow her convention, noting that the term, capitalized, is also used by Beverly Daniel Tatum, psychologist, writer on issues of racial identity, and president of Spelman College. BEVERLY DANIEL TATUM, "WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?" AND OTHER CONVERSATIONS ABOUT RACE: A PSYCHOLOGIST EXPLAINS THE DEVELOPMENT OF RACIAL IDENTITY 15 (Basic Books 1997).

¹⁹⁵ YOUNG, *supra* note 97, at 44.

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rather, is his or her “sense of history, affinity, and separateness, even the person’s mode of reasoning, evaluating, and expressing feeling, [which are] constituted partly by her or his group affinities.”¹⁹⁶

The point is that both groups and identity are generally relatively fluid, and that the issue with oppression is not the existence of socially salient groups—which are in fact germane to people’s very identities—but that people are constrained in their choice of group identity and, more importantly, that some groups are treated differently—are oppressed via exploitation, marginalization, powerlessness, cultural imperialism, and/or violence.¹⁹⁷ This means that “colorblindness,” rather than a leap toward equity, actually represents a denial of an integral part of what constitutes identity in our racially-constructed society.¹⁹⁸ It also means that overcoming oppression “sometimes requires different treatment for oppressed or disadvantaged groups.”¹⁹⁹

There is much to this analysis, which dovetails with the reasoning and conclusions of the dissenting *Seattle* Justices. But Justice Kennedy suggests another aspect to this identity issue—the idea that even racial identity may not be fixed. While his expression of this insight is individualistic (“find[ing] one’s] own identity”), it acknowledges that one aspect of the current racial conundrum is that race itself is changing. Its very definition—once rigidly defined by formal legal enactment—is now mutating as more

¹⁹⁶ *Id.* at 45. This, in turn, grows from a shared narrative or story. See Kenneth J. Gergen, *Narrative, Moral Identity, and Historical Consciousness: A Social Constructionist Account*, in *NARRATION, IDENTITY, AND HISTORICAL CONSCIOUSNESS* 99 (Jürgen Straub ed., Berghahn Books 2006).

¹⁹⁷ YOUNG, *supra* note 97, at 48–63. Blacks in our society historically have been and still are subject to all of these forms of oppression.

¹⁹⁸ It also denies the relevance of the racial identity of “whiteness,” which has been a group membership accorded privilege in our society. Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, *PEACE & FREEDOM*, July/Aug. 1989, at 10; TIM WISE, *WHITE LIKE ME: REFLECTIONS ON RACE FROM A PRIVILEGED SON* (Soft Skull Press 2005).

¹⁹⁹ YOUNG, *supra* note 97, at 158, 156–183 & 183–191 (discussion of group representation relevant to gerrymandering discussion).

and more people identify themselves (as the lifting of strict governmental definitions allows them to do) as “biracial,” “multiracial,” or as members of more than one racial group.²⁰⁰

Relationship is a second key piece of the racial puzzle faced by the Court in *Seattle*. Justice Kennedy draws a distinction between situations in which *de jure* racial segregation existed in the past and situations in which it did not.²⁰¹ This approach at one wave of the judicial hand renders irrelevant or effectively casts in concrete much of the vast institutional framework through which social oppression of groups occurs. It does so by presuming that prohibiting affirmative discrimination by the government or governmental entities against individuals strikes at the heart of racial oppression. The assumption is one of atomistic, acontextual individuals interacting one-on-one with a unitary government.

Yet oppression occurs within and across an institutional web consisting of some institutions that are formally “private” and some that are formally “public.” These institutions, moreover, are tightly interwoven. Power, again according to Young, is a relationship and set of relationships through which a set of people support a particular kind of interaction—often a primary dyadic interaction that is supported by a host of others.²⁰² For example,

[a] judge may be said to have power over a prisoner, but only in the context of a network of practices executed by prison wardens, guards, recordkeepers, administrators, parole officers, lawyers, and so on. Many people must do their jobs for the judge’s power to be realized, and many of these people will never directly interact with either the judge or the prisoner.²⁰³

²⁰⁰ See, e.g., NEW FACES IN A CHANGING AMERICA: MULTIRACIAL IDENTITY IN THE 21ST CENTURY (Loretta I. Winters & Herman L. DeBose eds., Sage Publ’ns, Inc. 2002).

²⁰¹ YOUNG, *supra* note 97, at 58–59. Remedies that involve racial classifications are available to address *de jure* segregation while not available to address *de facto* or societal discrimination. This conclusion takes an enormous step beyond holding that the Constitution cannot *force* remedies with racial classifications to address *de facto* or societal discrimination to holding that such remedies are *prevented*.

²⁰² *Id.* at 31; see also MARY PARKER FOLLETT—PROPHET OF MANAGEMENT: A CELEBRATION OF WRITINGS FROM THE 1920S 103–09 (Pauline Graham ed., Harv. Bus. Sch. Press 1995) (distinguishing “power-with” from “power-over”).

²⁰³ YOUNG, *supra* note 97, at 31.

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Racial oppression in the United States historically was and is today a matter not only of governmental discrimination but also of mixed private and public economic exploitation, political marginalization, perpetuation of relationships of domination, disrespect for cultural traditions, and overt violence. Racial differences today arise from the workings of all of these relationships—public and private, personal and institutional. Separating out individuals and “state actors” simplifies the dynamics of the situation beyond recognition.

Finally, there is also the question of *relevance*. As delineated by Klarman’s history of the immediate aftermath of *Brown*, described above,²⁰⁴ any unified, formalized legal story faces the populace for which it purports to speak. Once it speaks *for* that populace, it must also speak *to* that populace. For the legal story to hold sway, it must be accepted by the various constituencies to which it relates.

After *Brown*, the most resistant constituency was white southerners.²⁰⁵ White southerners knew of *Brown*, but continued to operate within their own spheres and institutions as if *Brown* had not been decided.²⁰⁶ The white parents in *Seattle* who asserted “colorblindness” were offering a diluted version of the post-*Brown* resistance: a government body had restricted their access to the form of education they preferred for their children, and they were seeking to negate that decision. In both contexts, the public law-story did not resonate with a particular white sub-group of those affected. What *Seattle* interrupted, then, was the next turn of the cycle, which (as after *Brown*) would have normally played out in the context of the institutions close to people’s lives.

²⁰⁴ See *supra* notes 58–69 and accompanying text.

²⁰⁵ See *supra* note 67 and accompanying text.

²⁰⁶ This exemplifies the political science observation that institutions are more than formal declarations. Institutions are people accepting certain standards for behavior and acting accordingly. See, e.g., *INFORMAL INSTITUTIONS AND DEMOCRACY: LESSONS FROM LATIN AMERICA* 1–28, 274–81 (Gretchen Helmke & Steven Levitsky eds., Johns Hopkins Press 2006).

What *Seattle* cost us, then, was the opportunity for a school community to take the offered law-story and either make it real or work it over. And by “making it real” I do not mean just external indicators, such as formal pupil assignment and selection criteria in choice schools, but the internalization of the proffered law-story of the importance of racial interaction and eradication of racial disparities in academic achievement through the process of dialogue, misunderstanding and understanding, and political persuasion, disagreement, and acquiescence that makes those results stick. For it is in classrooms, hallways, PTAs, and school board meetings that a law-story becomes relevant and real as people talk to each other and work through the issues they face in a way that has the potential for changing the social norms that at this point in time tolerate vast racial disparities in academic achievement regardless of the termination of *de jure* racial segregation.

As with partisan gerrymandering, all three of these aspects characterize the immergent arc of a law-as-story complex social system. Public law-stories are an important part of what structures groups and shapes group relationships, which provide the templates for our roles and norms, for our very identities. These law-stories permeate our lives, public and private, and affect our social relationships and experiences across the board. It is through these localized relationships, interactions, roles, and institutions that the law-story is reaffirmed or transformed. And all of these are, again, grounded in story: the law-story is part of what shapes our identity; the law-story is conveyed through communicative relationships; and through its enactment we determine its relevance.

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With a civic concept of law, the fundamental issue presented by *Seattle*—which again encompasses all three of these characteristics and their grounding in story—is that of *resonance*.²⁰⁷ Resonance can be understood as the complement of voice. Voice captures the arc of a law-as-story complex system in which individuals contribute to an overarching story. Resonance describes the arc in which the overarching story comes back to the individuals within the community.

The key question that determines resonance is whether a particular story matters to the individual hearing it.²⁰⁸ The elements of resonance are relevance, acceptance of articulated goals or values, and power. A story resonates if it relates to the listener's life and situation, if it beckons in a direction consistent with the listener's inclination or world view, and if its message is such that the listener has the ability to act on it. Because of this, an overarching law-story is more likely to resonate if it has been formulated through a process to which a broad range of the affected community made meaningful contribution, or had voice.

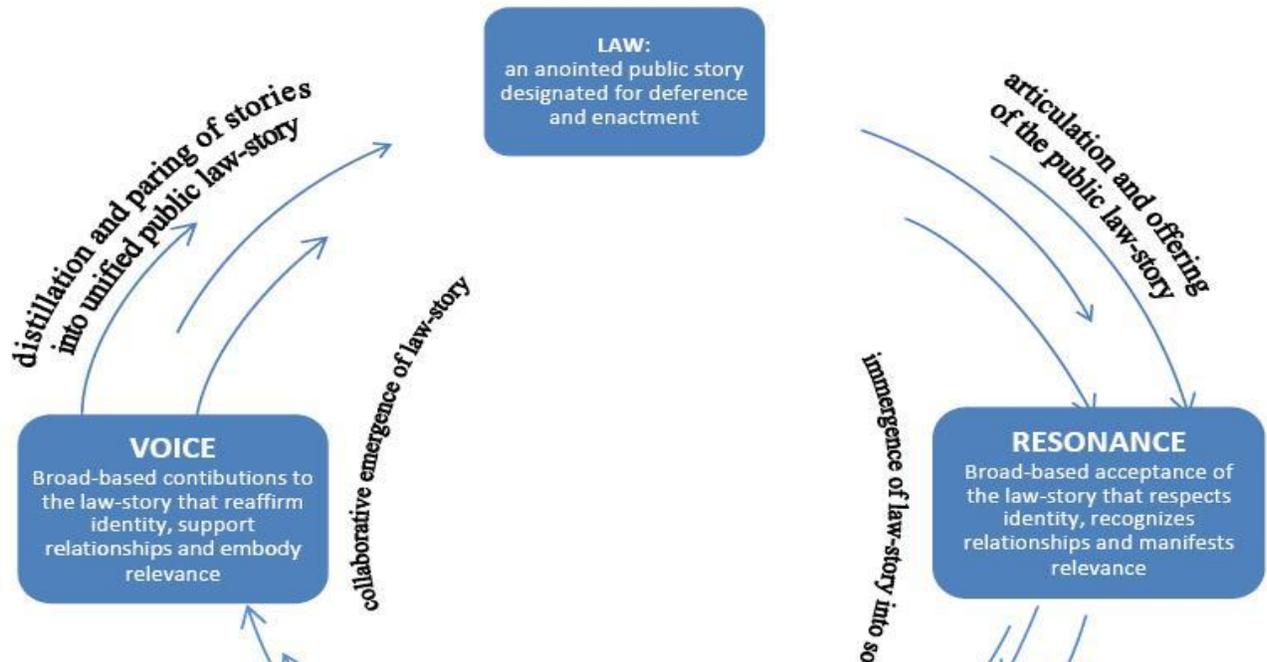
Resonance acknowledges the importance of the listener's identity—and of his or her multiple identities as befit overlapping groups—to how and whether the law-story will relate to his or her life. Resonance recognizes that the relationships and roles already occupied by a listener will affect whether he or she hears the overarching story as harmonious or dissonant. Resonance means that individuals have the power of enactment, that they can move with, further, or change the story.²⁰⁹

²⁰⁷ John Paul Lederach, Conversation with Author and Others at Werner Institute for Conflict Resolution, Creighton Law School (March 27, 2008).

²⁰⁸ As the ARIA (“Antagonism, Resonance, Invention, Action”) approach to conflict resolution suggests, if a situation strikes a nerve, “gently ask yourself, ‘Why do I care so much about this situation?’ Take a few moments to analyze why this issue is so important to you.” See The ARIA Group, The ARIA Solo, www.ariagroup.com/solo/html.

²⁰⁹ See **A CIVIC CONCEPT OF LAW** diagram.

A CIVIC CONCEPT OF LAW



And so the civic concept of law question for race-based K–12 integration is this: How does it affect—for good or ill—the presence of resonance? The starting point for considering this question is colorblindness because the disquiet that underlies judicial responses to race-based educational initiatives such as those formulated in Seattle and Louisville can be traced to a conviction that the ultimate goal is for colorblindness to prevail, for race to disappear altogether.²¹⁰ We know, of course, that as a society we are nowhere close to colorblindness from a *descriptive* point of view.²¹¹ And because of this, the current

²¹⁰ Varying views between Supreme Court Justices may be viewed as depending on how rapid this should/can be and how much of a push the Court should give. The most explicit discussion of this is in *Grutter*, 539 U.S. 306.

²¹¹ See Shankar Vedantam, *See No Bias*, WASH. POST (Magazine), Jan. 23, 2003, at W12 (describing Harvard Implicit Association Test). To take the test, go to www.understandingprejudice.org/iat.

constitutional approach that goes by the term “colorblindness” is more accurately described as “colormuteness.”²¹²

Acknowledging this allows us to reach the question of whether getting to a state of colorblindness would in fact be a good thing. As to this, eliminating differences is part of the individualistic, assimilationist project, the idea that the way to ensure equality between individuals is to do away with the features that distinguish them. But in a society in which groups and group identity remain salient (ours, for example), the assimilationist goal itself perpetuates oppression. Assimilation is always a matter of admitting previously excluded groups into an existing “mainstream,” like admitting new members to a club with preexisting rules rather than disbanding that club and starting a new one with rules based on everyone’s input. This approach allows privileged groups to continue to view themselves as the norm rather than as another, situated group.²¹³ Such a dynamic denigrates the contributions of the group to be assimilated, a devaluation that is often internalized by the members of that group.²¹⁴

An alternative to accepting the assimilationist goal of colorblindness is embracing the existence of groups and working to eliminate power differentials among groups.²¹⁵ This involves a recognition of the value of difference, of diversity (including racial diversity), which is a hallmark feature of complex systems.²¹⁶ From a complex systems point of view, that is, diversity or difference is the raw material that provides the variations that enable the system to adapt to changing conditions—that provide the quality of *resilience*. Biological diversity makes for more resilient ecosystems.²¹⁷ Genetic diversity makes for more

²¹² MICA POLLOCK, *COLORMUTE: RACE TALK DILEMMAS IN AN AMERICAN SCHOOL* (Princeton Univ. Press 2004).

²¹³ Perpetuation of privilege; relationship of this to resistance in Seattle and Louisville of white parents, who are the ones challenging what the local school boards have put in place (similar but less intense than reaction of white southerners to *Brown*).

²¹⁴ YOUNG, *supra* note 97, at 164–65.

²¹⁵ *Id.* at 156–91.

²¹⁶ *Cf. Grutter*, 539 U.S. at 306.

²¹⁷ *See* KEVIN J. GASTON & JOHN I. SPICER, *BIODIVERSITY: AN INTRODUCTION* (Blackwell Science Ltd. 1998).

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resilient organisms.²¹⁸ A diversity of intellect and viewpoint makes for more resilient decisions and designs.²¹⁹ In particular, cultural, experiential, and story diversity make for a more resilient law-story and legal system.

Resilience in this context may result from the generation of creative solutions to unprecedented challenges. And creativity has been described, in the *intrapersonal* context, as the integration of polarities, of contradictory extremes, of complexity, of *difference* in one's personality. Mihaly Csikszentmihalyi asserts:

[Creative people] show tendencies of thought and action that in most people are segregated. They contain contradictory extremes—instead of being an “individual,” each of them is a “multitude.” Like the color white that includes all the hues in the spectrum, they tend to bring together the entire range of human possibilities within themselves.²²⁰

In the *interpersonal* and intergroup contexts, the creativity that grounds resilience may flourish when difference (and even the tension and outright conflict that may arise from difference²²¹) is allowed to generate constructive innovation rather than be stifled as threatening or destructive. Colorblindness, in contrast, seeks to devalue difference.

This insight offers a way out of Justice Kennedy's dilemma. Race as a social construct in the United States has historically been characterized by two qualities: immutability of membership and fixed power differentials. Rather than attempting to eliminate the construct entirely, which may in fact provide resilience-related advantages to our culture as a whole, perhaps we should focus on making group

²¹⁸ See JOAN ROUGHGARDEN, *EVOLUTION'S RAINBOW: DIVERSITY, GENDER, AND SEXUALITY IN NATURE AND PEOPLE* (Univ. of Cal. Press 2004).

²¹⁹ See SCOTT E. PAGE, *THE DIFFERENCE: HOW THE POWER OF DIVERSITY CREATES BETTER GROUPS, FIRMS, SCHOOLS, AND SOCIETIES* (Princeton Univ. Press 2007); ERIC S. RAYMOND, *THE CATHEDRAL AND THE BAZAAR: MUSINGS ON LINUX AND OPEN SOURCE BY AN ACCIDENTAL REVOLUTIONARY* (O'Reilly & Assocs., Inc. 1999); JAMES SUROWIECKI, *THE WISDOM OF CROWDS: WHY THE MANY ARE SMARTER THAN THE FEW AND HOW COLLECTIVE WISDOM SHAPES BUSINESS, ECONOMIES, SOCIETIES AND NATIONS* (Doubleday 2004).

²²⁰ MIHALY CSIKSZENTMIHALYI, *CREATIVITY: FLOW AND THE PSYCHOLOGY OF DISCOVERY AND INVENTION* 57 (HarperCollins Publishers 1996).

²²¹ Mary Parker Follett's emphasis on the possibility of “integration” as a solution to conflict is an early example of the idea that different views can, if handled well, lead to creative, innovative solutions. See Mary Parker Follett, *Power*, in *DYNAMIC ADMINISTRATION: THE COLLECTED PAPERS OF MARY PARKER FOLLETT* 66, 66–87 (Elliot M. Fox & L. Urwick eds., Hippocrene Books, Inc. 1973) (1925).

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membership a matter of affinity and addressing directly race-related manifestations of power and privilege. As noted above, the first is already occurring.²²² Achieving the second, I believe, calls for a quite different Equal Protection jurisprudence than *Seattle* suggests, one which has the ability to look at interlocking causality.

The racial disparities in public K–12 education are typical in that they result from a complex constellation of causes—past and present. For example, public education is geographically based—not only at the district level, but traditionally at the individual school level as well. What this means is that any salient group concentrations in residential areas are reflected in individual school and district demographics. Thus, schools reflect racially (and socioeconomically) segregated housing, as well as districting and even jurisdictional lines that reflect and preserve that segregation.²²³

Yet these concentrations did not arise spontaneously or exclusively through individual preference and private agency.²²⁴ It is, in fact, uncontroverted that the federal government itself was a, if not the, primary actor in instigating, effecting, and perpetuating racial housing segregation as it exists today. It did so through redlining mortgage-underwriting policies and practices, an interstate highway program that facilitated white flight and destroyed existing neighborhoods, and urban development programs that created the black ghetto.²²⁵ The effects of that concerted effort of not so many decades ago are with us today and are reflected in public school demographic patterns. So to say that *de facto* segregated schools today result from “societal discrimination” is at worst dishonest and at best less than useful. It is more

²²² See *supra* note 200 and accompanying text.

²²³ *Milliken v. Bradley*, 433 U.S. 267 (1977).

²²⁴ This is not to deny the contribution of such actions. See, e.g., MARK BUCHANAN, NEXUS: SMALL WORLDS AND THE GROUNDBREAKING SCIENCE OF NETWORKS 185–86 (W. W. Norton & Co. 2002); SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 117–23 (Public Affairs 2004).

²²⁵ CASHIN, *supra* note 224, at 102–17. Cashin points to actions of state and local governments encouraging the creation of homogenous communities as an additional cause. See also DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (Harv. Univ. Press 1993).

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accurate to say that they result from an amalgam of past and present institutional and individual actions—some of which were/are formally private, but many of which were/are formally public.

Law-as-story and a complex social system understanding of law comprehend the idea of complex causation based on multiple, interlocking factors.²²⁶ Traditional judicial decision-making does not do a good job of accommodating this insight.²²⁷ This is not so much of a problem unless courts decide that their own institutional limitations necessarily constrain the actions of other bodies that do not have those same limitations.²²⁸ One of the strengths of local school boards is that they are in a position to consider a complex and specific historical, factual, and political landscape and to chart a path across that landscape. This is not to suggest that local school boards should be immune from judicial review; it does suggest that that review should be cognizant both of its own institutional posture and of the underlying policies at issue.²²⁹

And so perhaps one function of these local institutions should be to struggle with the question of when to use race. With all the paeans to local government, especially local school systems, that the Supreme Court has offered at key points in the jurisprudential history of school desegregation,²³⁰ perhaps it makes sense to charge them with the task of engaging their constituents on this issue—and certainly to allow them to continue where they have already undertaken to do so.

²²⁶ See, e.g., Sidney W.A. Dekker, *Just Culture: Who Gets to Draw the Line?*, COGNITION, TECHNOLOGY & WORK, DOI 10.1007/s1011-08-0110-7 (2008).

²²⁷ See, e.g., Palma J. Strand, *The Inapplicability of Traditional Tort Analysis to Environmental Risks: The Example of Toxic Waste Pollution Victim Compensation*, 35 STAN. L. REV. 575 (1983).

²²⁸ Compare the political question doctrine. There, courts simply decline to accept jurisdiction due to their self-determined institutional limitations with respect to certain issues. Here, in contrast, courts impose restrictions based on their own institutional limitations on other bodies without comparable limitations.

²²⁹ Let me reiterate that carving out a leading role for local school boards does not mean a complete *laissez-faire* Equal Protection review. But some key questions that help situate current efforts to address institutional racism or racial disparities are ignored under current approaches. Who is challenging the initiative—those who have traditionally enjoyed power and privilege or those who haven't? Have various constituencies had the opportunity to engage with decision-makers in a meaningful way? And, most fundamentally, is the local entity seeking to promote *de facto* equity as well as *de jure* equality and has it considered nonracial approaches as well as race-based ones?

²³⁰ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (denying relief for interdistrict funding disparities); *Milliken v. Bradley*, 418 U.S. 717 (1974) (denying interdistrict desegregation relief).

The fact that institutionalized racism and racial disparities are grounded in the actions of a multitude of individuals—often unintentionally discriminatory—provides an even more fundamental reason for allowing local entities to take the lead in this area. People often carry the baggage of implicit racial bias,²³¹ which can result in unintentional but devastating racism-reproducing acts when they act in their institutional roles of teacher, principal, or administrator. I believe that the most promising strategy for the individual transformations that will lead to institutional transformations is to reach people personally, because our racial stories and our denial of those stories are very deeply seated. Local institutions, such as school systems, are in the best position to instigate and sustain the kind of dialogic and creative processes that will engage people in rethinking the shared reality that reproduces current racial disparities in attendance and achievement. It is when individuals change their stories, their roles, and their interactions that the system-level pattern—here racial disparities—that emerge from those interactions will change.

IV. CONCLUDING THOUGHTS AND FUTURE DIRECTIONS

This Article has been an initial attempt to introduce the essential contours of a civic concept of law, to explicate such a concept, and to illustrate how such an approach might illuminate two challenging jurisprudential issues of current import. There remain numerous avenues of inquiry revolving around this concept of law. I note four of them here.

First, it is apparent that the honed historical focus on the doctrinal apex of the law-as-story cycle has been accompanied by an almost complete lack of attention (at least in the legal world) to the community part of the cycle situated between resonance and voice. In a law-as-complex-social-system

²³¹ See *supra* note 211 and accompanying text.

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view, this is where resonance does or does not occur—where individuals hear, process, and either enact or resist the public law-story. It is thus where norms do or do not grow from that story, where the next round of individual interactions takes place, and where the resulting perspectives and experiences create the story threads that lead to the expression of voice. Mapping the dynamics of these processes and interactions is thus essential to a deeper understanding of a civic concept of law. What kinds of individual interactions are consistent with the values that underlie a civic concept of law? What aspects of these interactions further illuminate voice and resonance?²³² How do individuals act to initiate change, to resist authoritarian forms of power, to create not just a civil society but *a civic society*?²³³

Second, there is the question of whether a civic concept of law provides criteria according to which any particular system can be said to be “functional.” One way to evaluate this may be to look at the system itself. For example, it appears that one relevant system-level quality identified by complexity theory is resilience, which in turn results from a certain level of internal difference²³⁴—from the energy, creativity, and flexibility engendered when multiple approaches are able to communicate,²³⁵ generate “fusion” innovations, and take the best from any given constituent group. Another way to consider this may be by evaluating the system-level patterns that emerge. Is a society healthy, happy, and prosperous?²³⁶ What does it mean for a society as opposed to an individual to fall into this category? Does

²³² See, e.g., BENJAMIN BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* (Univ. of Cal. Press 1984); HARRY C. BOYTE, *COMMONWEALTH: A RETURN TO CITIZEN POLITICS* (The Free Press 1989); CORNEL WEST, *DEMOCRACY MATTERS: WINNING THE FIGHT AGAINST IMPERIALISM* (Penguin Press 2004).

²³³ I believe that an active citizen approach that calls for citizens to engage in civic organizing—the creation of social networks consisting of civic relationships—is a promising way to counter concentrations of power, to preserve important social differences, but to build bridges across those differences as well. See, e.g., Strand, *supra* note 164.

²³⁴ See PAGE, *supra* note 219.

²³⁵ See PETER CSERMELY, *WEAK LINKS: STABILIZERS OF COMPLEX SYSTEMS FROM PROTEINS TO SOCIAL NETWORKS* (Springer 2006).

²³⁶ See, e.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 287–363 (Simon & Schuster 2000); RICHARD G. WILKINSON, *THE IMPACT OF INEQUALITY: HOW TO MAKE SICK SOCIETIES HEALTHIER* (The New Press 2005).

the society elicit the best from its members or trigger their worst? And by what values do we ultimately make these judgments?

Third, what is the relationship between a civic concept of law and traditional views and legal doctrines related to democracy?²³⁷ In loose terms, our constitutional system may be seen as acknowledging and ensuring a functioning law-as-story complex social system: voice through representation; law-story creation through relatively transparent and reproducible process; resonance through the rule of law applied across the board; and the civic life that grounds it all protected by First Amendment rights.²³⁸ But could the fit be better? Are there ways in which the Constitution actually impedes the health of a legal complex social system? And, given the current emphasis on “democracy building” abroad,²³⁹ how transferable is a system that has evolved in one context to others?

The fourth and final area concerns doctrinal or jurisprudential law—the segment of the arc between voice and resonance in which the law-story is forged. There has been a significant amount of discussion recently about the institutional configuration that is appropriate for determining constitutional meaning, especially whether judicial review should be augmented by a more “popular constitutionalism.”²⁴⁰ This is, I believe, an important discussion, but I would expand it to include broader systemic questions. Should there be a way for those who have not been included in the constitutional conversation to date (the creation and shaping of the fundamental myth) to not only be assimilated to the

²³⁷ Because it is based on a civic concept of law, this inquiry is likely to differ substantially from current critiques such as those offered in ROBERT DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* (Yale Univ. Press 2003) and SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (Oxford Univ. Press 2006).

²³⁸ GABRIEL A. ALMOND & SIDNEY VERBA, *THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS* (Sage Publ'ns, Inc. 1989); MATTHEW A. CRENSON & BENJAMIN GINSBERG, *DOWNSIZING DEMOCRACY: HOW AMERICA SIDELINED ITS CITIZENS AND PRIVATIZED ITS PUBLIC* (Johns Hopkins Univ. Press 2002); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Harvey C. Mansfield & Delba Winthrop trans. & eds., Univ. of Chi. Press 2000) (1835 (I), 1840 (II)); Strand, *supra* note 164.

²³⁹ See, e.g., THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* (Carnegie Endowment for Int'l Peace 1999); AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* (Doubleday 2003).

²⁴⁰ See, e.g., LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (Oxford Univ. Press 2004); TUSHNET, *supra* note 31, at 181–82.

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historical conversation, but to participate in reinventing it?²⁴¹ Even more fundamentally, do we want our collective myth and norms to be limited to a constitutional story or do we want to open ourselves up to the creation of a collective story that goes beyond, and lies deeper than the Constitution?²⁴²

Overall, I believe that there is growing awareness that traditional approaches to the issues raised by these questions do not any longer meet the demands of circumstances that must be addressed and decisions that must be made. It is time to seek a new paradigm.²⁴³ A civic concept of law resting on law-as-story and law-as-complex-social-system understandings provides a promising and intriguing possibility.

²⁴¹ Compare TUSHNET, *supra* note 31, at 183 (“The project for populist constitutional law is to continue and extend the narrative of the thin Constitution.”).

²⁴² West, *supra* note 31, at 1154. See also TUSHNET, *supra* note 31, at 9–14 (contrasting the “thick” and “thin” Constitutions).

²⁴³ Cf. THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (Univ. of Chi. Press 3d ed. 1996) (arguing that new scientific paradigms emerge when old paradigms do not meet changed evidence). In the current context, increased awareness both domestically and internationally that formal (legal) democracy does not, without more, result in an actual functioning democracy calls for a new understanding of the importance of the civic and the relationship between the civic and law.