1990

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Recommended Citation
85 Nw. U. L. Rev. 388 (1990-1991)

Printed in U.S.A.
Vol. 85, No. 2

RHETORICAL PLURALISM AND THE DISCOURSE IDEAL: COUNTERING *DIVISION OF EMPLOYMENT V. SMITH*, A PARABLE OF PAGANS, POLITICS, AND MAJORITARIAN RULE*

*Richard K. Sherwin***

> . . . to secure these rights [of life, liberty, and the pursuit of happiness] governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of government becomes destructive of these ends it is the Right of the People to alter or abolish it, and to institute a new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.
>
> (Thomas Jefferson[1])

> If our sense of duty forbids [allowing slavery to spread], then let us stand by our duty, fearlessly and effectively. Let us be diverted by none of those sophistical contrivances . . . such as groping for some middle ground between the right and the wrong . . . . Let us have faith that right makes might, and in that faith, let us, to the end, dare to do our duty as we understand it.
>
> (Abraham Lincoln[2])

> Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly.
>
> (Martin Luther King[3])

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1 The Declaration of Independence para. 1 (U.S. 1776).

2 A. LINCOLN, *From an Address at Cooper Institute*, in ABRAHAM LINCOLN'S SPEECHES AND LETTERS 1832-1865, at 136 (1957).

3 King, *Letter from Birmingham City Jail*, in A TESTAMENT OF HOPE 290 (J. Washington ed. 1986).

> In the end, the only guarantee of human dignity is that we would, if pressed too far, be prepared to rebel, and, if we did so, would have right on our side. It would then be the duty of other members of our community to support us.
>
> (Tony Honore[4])

> If we are creating a permanent underclass in this country, we will sow the wind and reap the whirlwind.
>
> (Alistair M. Hanna[5])

I. INTRODUCTION

The chief task of democratic government is to mediate, in a world of discord, violence, and death, the insistent demands of liberty, community, and social justice.[6] The failure to accommodate any one of these demands can be fatal to the continued legitimacy of the political and legal system. Self or group identity is precarious if unprotected by legal rights; rights without an identity to protect are practically meaningless; and rights and identity taken together will become irrelevant if they cannot prevent sigificant economic, social, or political exclusion from the conventional practices of public life. Without adequate public guarantees securing legal rights, self or group identity, and social justice, the individual may lack sufficient reason to submit to the rule of law. Domination and the exercise of naked power are the natural offspring of unacceptable, and thus illegitimate, state action.

Today such a profound legitimation crisis lies before us. Liberal val-

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4 Honore, *The Right to Rebel*, 8 OXFORD J. LEGAL STUD. 34, 54 (1988).

5 N.Y. Times, Apr. 8, 1990, § 4, at 6.

6 The demands of liberty include the pursuit of private interest and the right to speak and think as one pleases; the demands of community include the need (and perhaps the duty) to cultivate and maintain norms of group identity; the demands of social justice include the obligation to avoid the creation of a perpetually alienated, or politically or economically disempowered out-class in society. Private property interests and individual autonomy within a free market system have been the traditional focus of the libertarian strain within classic liberal theory. *See, e.g.*, J. LOCKE, TWO TREATISES ON GOVERNMENT (1690); R. NOZICK, ANARCHY, STATE AND UTOPIA (1974). The communitarian critique of the libertarian view reflects a broader understanding of self and group identity and envisions a more expansive role for the state than the libertarian view allows. *See, e.g.*, J. ROUSSEAU, THE SOCIAL CONTRACT (1762); M. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982). Concern with inequalities of resource distribution, political empowerment and economic opportunity provide yet another ground for criticizing the libertarian's view of the autonomous individual and the minimal state. *See, e.g.*, R. HILDRETH, DESPOTISM IN AMERICA (1840); Dworkin, *What is Equality? Part 3: The Place of Liberty*, 73 IOWA L. REV. 1 (1987); Dworkin, *What is Equality? Part 4: Political Equality*, 22 U.S.F. L. REV. 1 (1987). The challenge modern liberals face is to syncretize these disparate views into a unified and relatively stable political and legal system. *See* A. WOLFE, WHOSE KEEPER? 10 (1989):

> Liberal democracies face discontents because they tend to rely on either individualistic moral codes associated with the market or collective moral codes associated with the state, yet neither set of codes can successfully address all the issues that confront society.... Neither [the market nor the state] puts its emphasis on the bonds that tie people together because they want to be tied together without regard for their immediate self-interest or for some external society having the power to enforce those ties.

ues are being challenged on many fronts—from post-modern deconstructionists on the one side, to pre-modern fundamentalists on the other.[7] Yet, it is not with the scholars where the greatest danger lies. It is in the public arena itself. So long as fear and uncertainty continue to becloud our national sense of identity and direction and to distort the discrete functions of government—a state of affairs that this Article claims currently exists within our polity—the future of liberalism in America will remain seriously troubled.

The liberal formula for success in the task of government combines tolerance and respect for difference (*viz.*, the autonomy and dignity of the individual) with a lively and broad acceptance of, and commitment to, shared fundamental ideals.[8] The story that liberalism can tell provides us with acceptable answers to the most fundamental questions of American life: What is the basis for our union? What is it we have a right to expect of government? And when does government act in violation of our rights?

Without widespread agreement on, and commitment to, the basic values to which these questions point, the authority of law and the order of our political and legal institutions cannot be securely maintained. To the extent that we fail to forge consensus on these matters, we face the prospect of an increasing resistance to the state's authority together with the violence and disorder that such resistance often entails.

The challenge, therefore, is not to seek order for its own sake[9]—although a threat of social disorder will tempt many toward this "solution."[10] Rather, it is a struggle for shared beliefs regarding the basic values that animate and constrain life in the public sphere. In short, we must rediscover the pulse of our higher law. And if officials—in legislatures and courtrooms across the land—mistake or deny that pulse, a committed citizenry will be forced to take its measure in their own sphere of action.

It is against this backdrop that I examine the perspective of rhetorical pluralism and the discourse ideal. This approach suggests at least one way in which we may begin to restore institutional order while also inspiring revitalized acceptance of, and commitment to, basic liberal ideals. The roots of rhetorical pluralism and the discourse ideal in the American legal culture can be traced to the "law as process" movement

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[7] *See* Sherwin, *Law, Violence and Illiberal Belief*, 78 GEO. L.J. 1785 (1990).

[8] *See* Macedo, *The Politics of Justification*, 18 POL. THEORY, 280 (1990); Waldron, *Theoretical Foundations of Liberalism*, 37 PHIL. Q. 127, 149 (1987).

[9] *See, e.g.*, F. HAYEK, THE ROAD TO SERFDOM 80 (1944) ("It may even be said that for the Rule of Law to be effective it is more important that there should be a rule applied always without exceptions than what this rule is.").

[10] *See, e.g.*, Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987).

initiated by Hart and Sacks,[11] the "dialogic liberalism" of Bruce Ackerman,[12] the "constitutive rhetoric" of James Boyd White,[13] and to Robert Cover's penetrating insights regarding the self and law constituting ("jurisgenerative") function of community and the unavoidable interplay between the law's narratives and violence.[14]

Specifically, I argue that the liberal formula for success in government requires a broad and active commitment not only to institutional competencies (which I describe in this Article under the rubric of rhetorical pluralism) and substantive constitutional norms (which primarily describe the realm of individual rights). Success also requires a broad and active commitment to maintain the cultural, political, and economic conditions necessary for the individual's acceptance of the state's power.

A major goal of this Article is to encourage increased critical reflection upon the dangers of continuing along the jurisprudential and sociopolitical track that we are currently on.[15] Above all, my hope is for an end to the politics of fear and a repudiation of strategies that seek unity through enmity.[16] In the end, we will pay for such practices in the cur-

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11 *See* H. HART & A. SACKS, *The Legal Process: Basic Problems in the Making and Application of Law* iii (tent. ed. 1958):

> These materials are concerned with the study of law as an ongoing, functioning, purposive process and, in particular, with the study of the various institutions, both official and private, through which the process is carried on. . . . The solution of specific legal problems constantly requires an understanding of the functions and interrelationships of more than one institutional process and frequently of several. Problems arising in a court call for a perceptive awareness not only of what courts are for but of what a legislature is for and sometimes also of what an administrative agency is for and of what matters can best be left to private decision. Problems arising in the course of the legislative or administrative processes call for the same awarenesses.

Professor Anthony A. Amsterdam is currently the leading analyst and educator along these lines. *See also* C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

12 *See* B. ACKERMAN, SOCIAL JUSTICE AND THE LIBERAL STATE 357-59 (1980); Ackerman, *Why Dialogue?*, 86 J. PHIL. 5, 8 (1989).

13 *See* J. WHITE, HERACLES' BOW (1985); J. WHITE, WHEN WORDS LOSE THEIR MEANING (1984).

14 *See* Cover, *The Bonds of Constitutional Interpretation: Of the Word, the Deed and the Role*, 20 GA. L. REV. 815 (1986) [hereinafter *Bonds*]; Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983) [hereinafter *Nomos*].

15 The role of subjective ideology and management efficiency in the Supreme Court's recent decisionmaking has been a source of concern to an increasing number of scholars. *See, e.g.*, Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185 (1983); Chang, *Discriminatory Impact, Affirmative Action and Innocent Victims: Judicial Conservatism or Conservative Justice?*, 91 COLUM. L. REV. (forthcoming 1991). The growing emiseration of the poor, especially poor blacks, also has not gone without notice. *See, e.g.*, Delgado, *Zero-Based Racial Politics: An Evaluation of Three Best-Case Arguments on Behalf of the Nonwhite Underclass*, 78 GEO. L.J. 1929, 1930 (1990) ("Every index of black and brown emiseration today warrants alarm. Measures of blacks' income, net wealth, educational attainment, life expectancy, infant mortality, rates of serious illness, drug addiction, and incarceration are worse than those of whites. On most of these measures, the black-white gap is increasing, and on some, blacks stand worse off today than they did ten or even twenty years ago."); Luban, *The Court and Dr. King*, 87 MICH. L. REV. 2152, 2161 nn. 21-22 (1989).

16 *See, e.g.*, F. KNIGHT, FREEDOM AND REFORM 370 (1947) ("Antagonism, war, and preparation for war between nations and allied groups can be viewed as the one psychological force capable

rency of our most cherished values.

Section II of this Article outlines the theory and practice of rhetorical pluralism and the discourse ideal. My contention here is that this approach offers a persuasive response both to illiberal critics, who would turn away from our liberal heritage altogether, and to liberal critics who, by pulling a single strand from the cloth of liberalism, risk leaving the whole in tatters. I maintain that neither a theory of interpretation,[17] normative deference to legislative deliberation[18] or judicial prophecy,[19] the revival of civic republicanism,[20] or the privatization of power through the proliferation of multiple local communities[21] will alone do justice to the complex vision that shapes and informs our constitutional democracy. That constitutional vision, I contend, embraces not just one type of knowledge and discourse (about law and power), but several. And its pragmatic institutionalization of discrete ways of thinking and speaking provides discursive guidelines not only for intra-institutional competencies, but also for our inter-institutional system of checks and balances.

Having set out in Section II criteria for intra-institutional competencies and inter-institutional checks and balances, Section III provides a specific case study in which these standards can be concretely applied. In

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of overcoming tendencies to conflict between interest groups within nations, groups formed chiefly along economic lines."); J. ROCHE, THE QUEST FOR THE DREAM (1963) (recounting the recurrent patterns of intolerance, nativism, religious prejudice, and racism that have stained our history); Brinkley, *Old Glory: The Sage of a National Love Affair* N.Y. Times, July 1, 1990, § 4, at 2, col. 1 (noting that "the salience of the flag issue in 1989 and 1990 [*i.e.*, efforts to amend the first amendment in order to constitutionalize the prohibition of flag burning] suggests other anxieties . . . similar to the anti-radical and nativist concerns that fueled earlier flag protection efforts.").

The country's obsession with drug control may be playing a significant role in this context, for it has been generating potent pressures against basic constitutional (higher law) values. *See, e.g.*, Hansen, *When Worlds Collide: The Constitutional Politics of* United States v. Salerno, 14 AM. J. CRIM. L. 155, 167 (1988); Sullivan, *"User-Accountability" Provisions in the Anti-Drug Act of 1988: Assaulting Civil Liberties in the War on Drugs*, 40 HASTINGS L.J. 1223 (1989); Wisotsky, *supra* note 10. The civil liberty implications of the drug war have not been lost on more popular commentators. *See, e.g.*, Wenner, *Drug War: A New Vietnam?*, N.Y. Times, June 23, 1990, § 1, at 23, col. 2; Treaster, *Is the Fight On Drugs Eroding Civil Rights?*, N.Y. Times, May 6, 1990, § 4, at 5, col. 4; Rosenthal, *The Drug Train*, N.Y. Times, Feb. 3, 1989, at A31, col. 1. Nevertheless, the perception of political gain in increased penalties for drug offenders seems to remain strong. *See, e.g.*, Shenon, *Administration Offers a Tough New Drug Bill*, N.Y. Times, May 17, 1990, at A21, col. 1 (describing Bush Administration's proposal, *inter alia*, to expand the list of drug crimes that could be punished by death and streamline procedures for deporting aliens convicted of drug crimes). In an effort to make the anti-crime bill more widely acceptable, House and Senate negotiators subsequently removed death penalty provisions and curbs on semiautomatic rifles. Liberals had generally opposed the former, and conservatives the latter. *See Congress Acts on Bills Embracing Several Major Issues*, N.Y. Times, Oct. 28, 1990, at 27, col. 3.

17 *See, e.g.*, R. DWORKIN, LAW'S EMPIRE 45-86 (1986).

18 *See, e.g.*, Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

19 *See, e.g.*, M. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS 98-101 (1982).

20 *See, e.g.*, Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986).

21 *See, e.g.*, Cover, *Nomos*, *supra* note 14.

this Section, I maintain that the Supreme Court's decision in *Division of Employment v. Smith*[22]—where the Court refused to exempt the plaintiff's religious use of peyote from criminalization by the state even if this meant depriving the Native American Church of its chief sacrament—reflects, and allows us to consider the effects of, the prevailing jurisprudence of deference to legislative/majoritarian interest accommodation and management efficiency. I contend that the majority's disregard for its interpretive obligations regarding higher constitutional law and for the Court's singular competency in principled discourse, reinforces the politics of fear and uncertainty that is coming to dominate public life. In this way, political bargaining increasingly displaces the unique virtues of principled judicial review. The net result in *Smith* is to allow popular prejudices, misunderstanding, or indifference to lawfully disembody a sincerely held, albeit pagan, belief system.

This Article maintains that profound distortions in the discursive practices of the judicial and legislative communities[23] are creating a deep-seated and complex crisis regarding the legitimacy of governmental authority. The need openly to confront and resolve this crisis requires an ongoing self-reflective critique of discrete institutional defects, and renewed affirmation of each institution's characteristic competencies. Absent corrective steps within those institutions, the burden will fall upon a mobilized citizenry to normalize errant governmental operations. Whether mass mobilization and struggle will advance this normalization process on the basis of a renewed value consensus,[24] or will instead produce even greater institutional dysfunctions, thus becomes one of the key political and legal questions of our time.[25]

II. RHETORICAL PLURALISM AND THE DISCOURSE IDEAL

A. Introduction

I begin with the paradigm of indictment—society's way of calling the other into question.[26] The indictment sets in motion a force that

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22 110 S. Ct. 1595 (1990).

23 *Cf.* A. MACINTYRE, AFTER VIRTUE (1984) (on the correlation between discourse/knowledge types and the creation and maintenance of discrete communities); S. TOULMIN, HUMAN UNDERSTANDING (1972).

24 *See, e.g.*, J. HABERMAS, COMMUNICATION AND THE EVOLUTION OF SOCIETY 86-90 (1979) (on ego development and the development of moral consciousness).

25 Success or failure will depend upon those who lead the debate and the terms that they provide for it.

26 *See* M. HEIDEGGER, NIETZSCHE VOLUME IV: NIHILISM 36-37 (1982):

> A *kategoria* is a word in which a thing is 'indicted' as what it is . . . *Kategoria* and kategorein arise from kata and agoreuein. Agora means a public gathering of people as opposed to a closed council meeting, the openness of deliberations of court proceedings, of the market, and of communication. Agoreuein means to speak openly, to announce something openly to the public, to make a revelation. . . . This kind of addressing and setting forth, of making public in words, is most emphatically present when charges are proferred against someone in open court proceed-

flows two ways at once. It activates values by which we judge the accused and ourselves in the selfsame act. For as common wisdom says, we often discover who we are in our condemnation (or acquittal) of someone else. Here, in the realm of public indictment, is where the law's power and normative authority converge.[27] I speak, therefore, of violence and the word. The ultimate instruments of law are war and poetry.

Legitimation "civilizes" violence through public consensus on basic principles of government and institutional processes of law making, law interpretation and law enforcement.[28] In this view, legitimation can neither be stabilized solely by formal definitions of rules[29] or by universal claims of right.[30] Rather, it operates dynamically. The shared values that legitimate governmental authority depend upon shifting tolerances and beliefs within society.[31]

Those who participate in the affairs of the state—whether as elected or appointed official or as ordinary citizen—are saying "yes," by their participation, to the state and its power.[32] They may argue with this or that governmental action, but like Socrates in the *Crito*, their dissent is a part of the participatory process. Dissent is a "no" writ small against the

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ings, stating that he is guilty of something or other. Addressing and setting forth has its most striking and therefore most common form in such open charges.

27 *See* Cover, *Bonds, supra* note 14.

28 The absence of either fair process or shared fundamental principles may suffice to unravel the legitimacy of the political and legal system. Conversely, it is difficult to conceive of securing legitimation unless it is rooted in both procedural and substantive justice.

29 *See* H.L.A. HART, A CONCEPT OF LAW (1961).

30 *See* B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 188 (1982) ("The sacred rights of mankind are not to be rummaged for among old parchments or musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of divinity itself, and can never be erased or obscured by mortal power.") (quoting Hamilton).

31 Throughout our history individuals and communities have tested within the public square, in both word and deed, their respective strengths—including the strength of their most cherished beliefs. At the birth of our nation Americans resisted with violence the colonial oppressor; in the war among the states, Americans fought over a union that could not continue half slave and half free; during the civil rights and anti-war protests of the 1950s and 1960s, Americans demonstrated with non-violence, and at times with violence, the unacceptability of certain domestic and foreign policies. In more recent times, Americans have expressed "pro-life" beliefs with bombs and acts of civil disobedience against abortion clinics; they have expressed "anti-war" beliefs with hammers and blood against nuclear warheads; and they have expressed "deep ecology" beliefs with acts of sabotage against loggers and mill workers.

For each of us there is a community of belief, and most often more than one. The community is ours because we claim it, or it claims us—perhaps because others claim it for us (because of our race, or religion or gender or sexual preference). *See* B. ANDERSON, IMAGINED COMMUNITIES 136 (1983) ("Niggers are, thanks to the invisible tar brush forever Niggers; Jews, the seed of Abraham, forever Jews, no matter what language they speak and read. [Thus for the Nazi, the Jewish German was always an impostor.]"). Whether acts of public protest prompt patriotic cries of "Love it or leave it," or are prompted in turn by love itself, may depend upon the group (or groups) to which we owe allegiance. *See* M. KING, A TESTAMENT OF HOPE 82 (1986) ("The greatest instrument [of resistance] is the instrument of love.").

32 *See* Holland v. Illinois, 110 S. Ct. 803, 812 (1990) (Kennedy, J., concurring) (referring to the "equal participation in civic life that the Fourteenth Amendment guarantees.").

backdrop of a "yes" writ large. Rebellion (or secession), by politics or by criminality, is a "no" writ large. It challenges the state's power and its right to make and enforce norms.

So we may well ask: Why say "yes" to the state's power? Am I to defer to a reasoning I cannot understand (but which I accept because I accept the *process* of lawmaking and law enforcement that spawned it)? Am I to disobey official policy because power belongs to the People? Or, at least, to my People, to my church, to my community? Am I to be ruled by your word, your community, your church?

For its part, the state cannot avoid exercising its power—if its norms are to be upheld. Domestically, we sanction, detain, imprison, and kill. We say "no" to the negators, the social "deviants" who have placed themselves "above the law." They are outsiders, enemies of the state. Even deviants *in speech* only may be penalized, if what they say overleaps the bounds of acceptability: the pornographer,[33] the fomenters of violence,[34] the defamers of character.[35]

Perhaps, then, we may agree: law talk involves us in no ordinary conversation. Its violence sets it apart from other kinds of speech. But if we accept the *force* of the law's word, what are we to make of its other aspect, which I have referred to as the law's *poetry*? What is the "poetics" of the law?[36]

Here we arrive at the heart of my theme, the stories of the law: stories of vision; stories of freedom and of freedom's obligations; stories

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[33] *See, e.g.*, Miller v. California, 413 U.S. 15, 23 (1973) ("Obscene material is unprotected by the First Amendment."). Consider the more recent controversies surrounding Robert Mapplethorpe's photography and the recordings of the rap group, 2 Live Crew.

[34] *See, e.g.*, Schenck v. United States, 249 U.S. 47, 52 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force.").

[35] *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940) ("Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."). *But see* New York Times Co. v. Sullivan, 376 U.S. 254, 283 (1964) ("We hold today that the Constitution delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct.").

[36] "Poetics" in this context carries the meaning of *mythos* or plot: it describes the arrangement of the incidents or the organization of the events. *See* ARISTOTLE, RHETORIC AND POETICS 232 (Modern Library 1954) ("[T]he first essential, the life and soul, so to speak, of Tragedy is the Plot."); F. HALLYN, THE POETIC STRUCTURE OF THE WORLD 14 (1990). Like a new hypothesis in science, before it is sufficiently validated and accepted, the *mythos* serves as a heuristic fiction. *Id.* at 13. In Hallyn's more expanded sense, a study of poetics

> is the program for the execution of a work, informed by presuppositions and exigencies whose traces one can locate, on the one hand, in explicit declarations, and on the other, in the work itself, to the extent that its completed form, with respect to other works, gives witness to the intentions that presided over its production.

Id. at 14-15.

of community, and of a community of communities; stories of equality and of social justice.

Lawyers, judges, and legal scholars differ on how to tell the stories of the law.[37] Some talk about substantive rights and prophecies,[38] some talk about fair process and the necessary inclusion of minorities in the channels of power,[39] some talk about common sense,[40] some talk about costs and benefits and maximizing utility.[41]

Today, jurists are in disarray over how to tell stories of legitimation. Liberal theory is under attack as never before: from pre-modernist fundamentalists who protest against the putative emptiness of liberal morality; from civic republicans who seek release in public life from the isolation of liberal atomism; from anarchists who reject the state for its lack of self-justification; from post-modern critics who look around only to find contradiction and unspoken ideology at every turn.[42]

I believe the liberal vision has the strength and vitality to counter or absorb these critics' claims. But to do so, its basic ideals and institutional requirements must be persuasively set out. It is against this backdrop of discord and disarray that I shall proceed to poeticize.

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37 Indeed, opinions differ not only on the kinds of stories about law and power that count in society—*i.e.*, the ones that are backed by force. They also differ on *who* should get to tell the story in the first place: We the People? *See, e.g.*, Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984). The Legislature? *See, e.g.*, Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 37, 41 (1985). The Courts? *See, e.g.*, Michelman, *The Supreme Court, 1985 Term—Foreward: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986). Or perhaps the Executive? *See, e.g.*, C. SUNSTEIN, INTERPRETING THE REGULATORY STATE (1990); Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 704 (1976). These are no mere formalities. Choosing the discourse of power helps determine not only who gets to speak, and *how*, but also how power gets distributed in society. *See* Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1985); Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J. LAW, ECON. & ORG. 81 (1985). *See generally*, Sherwin, *Dialects and Dominance: A Study of Rhetorical Fields in the Law of Confessions*, 136 U. PA. L. REV. 729 (1988) [hereinafter *Dialects*].

38 *See, e.g.*, R. DWORKIN, TAKING RIGHTS SERIOUSLY 82 (1978) (arguing in behalf of the fundamental right of all to "equal respect and concern"); M. PERRY, *supra* note 19, at 98 (referring to judicial review as the "institutionalization of prophecy").

39 *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST (1980).

40 *See, e.g.*, J. WHITE, WHEN WORDS LOSE THEIR MEANING, *supra* note 13, at 192 (arguing that the "ordinary-language practice of blaming" is the chief means by which to make sense of the criminal law). *But see* Bruton v. United States, 391 U.S. 123, 135 (1968) (holding that there are some intellectual functions which the lay jury simply cannot be expected to undertake, and others of which they are singularly capable); Jackson v. Dunno, 378 U.S. 368 (1964).

41 *See, e.g.*, Sulie v. Duckworth, 689 F.2d 128, 130-31 (7th Cir. 1982) (Posner, J.) (arguing that an appropriate measure for whether a constitutional right has been violated can be found in assessing whether the government's use of that right against the defendant would be sufficient to prevent the defendant from relying on it); R. POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1986). *See generally* Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1 (1987) (critiquing Justice Powell's "representative balancing" approach to jurisprudence).

42 *See generally* Sherwin, *supra* note 7.

There is a story of legitimation that I would like to tell. It is the story of rhetorical pluralism and the discourse ideal.

Rhetorical pluralism provides an account of structural constitutional norms which institutionalize a pluralist vision of human nature by creating separate roles in the public sphere for discrete forms of knowledge and discourse. These forms include the citizen's ordinary common sense about truth and justice, the legislator's deliberative and instrumental policymaking in the political bargaining process, and the judge's principled decisionmaking through the contextual application of text-based, inherited norms. Each of these discrete forms has its own particular community and its own characteristic virtues and defects. The virtues guide and inform each community's discursive competence in the public sphere. They are also necessary to check and balance the discrete defects of each community.

As a result of this checking and balancing process, no single community can impose with finality upon another its own way of speaking and thinking. At the same time, no single community is "deviant" with regard to another.[43] Awareness of the defects and unique advantages of each community induces a sense of mutual need and respect. For their part, like rhetorical (or structural constitutional) norms, substantive constitutional norms also delineate the powers and limits of the state. They do this by describing shared basic values which operate primarily in the sphere of individual rights. These values include the right to equal respect and political empowerment.

Broad and active commitment to structural and substantive constitutional norms is necessary to ensure the legitimation of the state's power. But, standing alone, this commitment is not enough. Legitimation also depends upon the socio-political conditions required for knowing and voluntary submission to the rule of law. I contend that the extralegal norms of socio-political legitimation are to be found in the ideal of discourse. This ideal describes the conditions necessary to sustain the living reality of discourse itself—namely, respect for the other; a willingness to listen to (and empathize with) the story she has to tell; and a commitment, within the framework established by mutually acceptable structural and substantive legal norms, to keep alive the process of give and take.[44] Each member of the polity must have a real stake in this

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[43] *Contrast* A. BICKEL, THE LEAST DANGEROUS BRANCH 16-23 (1962) *and* Minersville School Dist. v. Gobitis, 310 U.S. 586, 599 (1940) (Frankfurter, J.):

> Except where the transgression of constitutional liberty is too plain for argument, personal freedom is best maintained—so long as the remedial channels of the democratic process remain open and unobstructed—when it is ingrained in a people's habits and not enforced against popular policy by the coercion of adjudicated law.

overruled in West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

[44] This emphasis upon discursive exchange is consistent with the current cultural turn away from philosophical "metaphysics" (*i.e.*, the possibility of discovering some universal truth or transcultural or transcendental notion of validity). *See, e.g.*, Rorty, *Truth and Freedom: A Reply to*

process. Each must realize that her liberty is inextricably tied to the liberty of others.[45] And each must be assured that his or her participation will not cause her sense of self or group identity to unravel.[46] In short, if the demands of liberty, community, and social justice are not successfully mediated, no shared public community can come into being—much less flourish in the world of discord, violence, and death that we all must face.[47] Rhetorical pluralism and the discourse ideal suggests a way to make this mediation work both in theory and in practice.

Thomas McCarthy, 16 CRITICAL INQUIRY 633, 638 (1990). In this sense, the philosophical search for certainty (based on "self-evident" or "apodictic" truth) needs to give way to the more open and tolerant discursive practice of persuasive argumentation. *See id.* at 634. This takes us into the proper domain of "high rhetoric" (*i.e.*, not the disparaged sense of Enlightenment thinkers, following Descartes, whose search for certainty inspired repudiation of mere claims to argumentative persuasiveness). High rhetoric comports with Aristotle's and, more recently, Perelman's sense of arguing from probabilities rather than certainties. According to this view, reasoning from self-evident axioms is inappropriate to a proper understanding of human actions. *See, e.g.*, ARISTOTLE, *supra* note 36, at 19-24; C. PERELMAN, THE REALM OF RHETORIC 1-8 (1982); McKeon, *Dialogue and Controversy In Philosophy*, 17 PHIL. AND PHENOMENOLOGICAL RES. 143 (1956).

In the political sphere, if the metaphysical urge for certainty opens out to religious or ideological intolerance (whether in the Spanish Inquisition or the Stalinist gulag), commitment to persuasive argumentation fuels liberal tolerance and discursive exchange. According to this analysis, the dominant rhetorical style of the humanist Renaissance has more to do with the flourishing of liberalism than with the rhetoric that characterized Luther's apodictic break with the authority of the Church. *See* M. BOYLE, RHETORIC AND REFORM 113 (1983) ("As [Luther] declared to Erasmus, 'Truth and doctrine always, openly, and firmly are to be preached, and never uttered obliquely or concealed, for there is nothing scandalous in it.' "); *cf.* Ackerman, *Robert Bork's Grand Inquisition*, 99 YALE L.J. 1419 (1990) (on Bork's ideological conversion and subsequent inquisitorial search for heresy within the legal culture).

As I hope to make clear in this Article, however, I do not mean to embrace without exception Rorty's brand of liberalism. For example, in my view his insistence on the adequacy of freedom alone, as a basis for our "social glue," is insufficient: it cannot ensure the legal and political demands of social justice. *Compare* Rorty, *supra*, at 635 ("My own hunch, or at least hope, is that our culture is gradually coming to be structured around the idea of freedom—of leaving people alone to dream and think and live as they please, so long as they do not hurt other people—and that this idea provides as viscous a social glue as that of unconditional validity.") *and* R. RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 82-88 (1989) ("The social glue holding together the ideal liberal society . . . consists in little more than a consensus that the point of social organization is to let everybody have a chance at self-creation to the best of his or her abilities, and that that goal requires, besides peace and wealth, the standard 'bourgeois freedoms.' ") *with* McCarthy, *Ironist Theory as a Vocation: A Response to Rorty's Reply*, 16 CRITICAL INQUIRY 644, 648 (1990) ("[Rorty] nowhere provides a satisfactory analysis of free encounters or political freedom, for the simple reason that his account of freedom moves almost exclusively at the level of the isolated individual and scarcely thematizes structures of intersubjectivity or institutional arrangements.").

[45] *See* Habermas, *Morality and Ethical Life: Does Hegel's Critique of Kant Apply to Discourse Ethics?*, 83 NW. U.L. REV. 38, 49 (1989) ("In discourse ethics, the idea of autonomy is intersubjective. It takes into account the fact that the free actualization of the personality of one individual depends on the actualization of freedom for all."); *see also* King, *supra* note 3.

[46] *See* M. SANDEL, *supra* note 6, at 57-59.

[47] *See* Sherwin, *supra* note 7 (arguing that the creation of more private worlds—Cover's response to the contemporary lack of a common community—cannot help solve the legitimation problems of government).

Let the account begin with reference to the three matters about which a liberal theory of legitimation must present an acceptable understanding: (1) *human nature*; (2) *the institutionalization of power*; and (3) *shared normative ideals*.[48]

In what follows, I shall argue that the theory and practice of rhetorical pluralism in combination with the animating and constraining ideal of discourse, provide a persuasive and integrated account for all three of these matters. I can only indicate in broad outline here why I believe this to be the case. My hope is that even this sketch will suffice to prompt increased debate and move discussion further along rhetorical lines.[49]

B. Rhetorical Pluralism and Accounts of Human Nature

In the realms of law and politics, conceptions of human nature often reflect diverse, historically rooted understandings of what it takes for people to accept the power of the state. Consider, for example, the wholly *external sanctions* of absolute power which Hobbes deemed necessary in order to constrain man's unruly passions and appetites.[50] Or the wholly *internalized sanctions* of the general will authorized by Rousseau's moral vision of natural man.[51] Or consider the *rational normative choices* that emerge from beneath the veil of ignorance that Rawls imagi-

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48 Political philosophers, whether consciously or not, have endorsed particular understandings of what humans are like and what we can expact of them in the public sphere. This becomes particularly significant when issues of power are at stake. How power gets distributed in society—who gets to say what about what issues and with what effect—closely tracks the type of individual that a particular thinker either (descriptively) accepts or (normatively) privileges. *See* ARISTOTLE, POLITICS, Chapter IV (S. Everson ed. 1988) (correlating different types of "good citizens" with different types of constitutions); T. HOBBES, LEVIATHAN (E. Rhys rev. ed. 1914) (1st ed. 1651) (on human egoism and the need for the absolute sovereign in order to control human rapaciousness and aggression); R. NOZICK, *supra* note 6, at 18-19 (extolling Adam Smith on the basis that "every individual intends only his own interest" and is led "by an invisible hand" to promote an end that lies beyond his own intention); PLATO, REPUBLIC III, lines 413-15 (R. Sterling & W. Scott eds. 1985) (linking the ideal republic to the creation and maintenance of distinct social classes—rulers, warriors, and traders—each reflecting a particular type of soul); J. ROUSSEAU, EMILE (A. Bloom ed. 1979) (on moral virtues and the ability to order one's life with regard to others, not simply oneself alone); M. SANDEL, *supra* note 6 (criticizing John Rawls's *A Theory of Justice* on the ground that "what issues at one end in a theory of justice must issue at the other in a theory of the person," and that Rawl's theory of justice incorrectly requires that the person be an abstract agent of community or history—in short, a person deprived of meaningful identity).

49 For a fuller treatment of the rhetorical perspective as applied to law, see Sherwin, *supra* notes 7 and 37; *see also* C. PERELMAN, *supra* note 44; Burke, *Politics as Rhetoric*, 93 ETHICS, 45-55 (1982) (setting forth a "rhetorical" conception of politics); Rooney, *Politics of Pluralism*, 12 CRITICAL INQUIRY 550, 561 (1986) ("Persuasion is the central, though largely unarticulated category of critical pluralism.").

50 *See* T. HOBBES, *supra* note 48, at 74; B. BAILYN, *supra* note 30, at 60 (quoting Samuel Adams).

51 *See generally* J. ROUSSEAU, DISCOURSE ON THE ORIGIN OF INEQUALITY AMONG MEN 88 (M. Cranston rev. ed. 1984) (arguing that the key characteristic separating natural man from the "beast" is man's "faculty of self-improvement."); W. WILLOUGHBY, THE ETHICAL BASIS OF POLITICAL AUTHORITY 201 (1930).

natively drops over those [neo-Kantian] free agents who find themselves in the original position.[52] Or consider the *integrity* of *interpretive explanation* mastered by Dworkin's Herculean judge.[53] Or the inspired *anarchic vision* of Cover, according to which individuals are to be set free from state power to act within multiple local communities of meaning.[54]

Each of these approaches relies, either explicitly or implicitly, upon a particular understanding of what humans are like. Whether you believe that our intrinsically moral nature allows us to rise to the level of peaceful and ethical coexistence without externally imposed sanctions, or that reason will naturally triumph over passion, or that choices based on private interests ultimately will accrue to the benefit of all, will help you to determine the kind of political theory that appears most persuasive. Your preference will also say a good deal about the kind of person you are, or would like to be.

I maintain that the federal Constitution embodies a particular, complex understanding of human nature and that by endorsing the basic structural and substantive norms set out in that foundational document, we accept (at least for purposes of maintaining a shared public world[55]) that understanding. For example, by breaking up the federal government into separate branches, the Constitution recognizes the "natural" human tendency toward domination. The constitutional diffusion of power evinces such an understanding by deliberately pitting ambition against ambition, and individual interests and beliefs against individual interests and beliefs, in an ongoing process of mutual checks and balances.[56]

At a deeper level, the Constitution's complex understanding of human nature translates into a requirement that diverse communities of power—each with its own characteristic knowledge—actively participate in public life. Here I will focus on three such communities of power—the Judiciary, the Legislature, and the Citizenry—with the aim of showing how their unique forms of knowledge and discourse contribute to an adequately pluralistic constitutional account of human nature.

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52 J. RAWLS, A THEORY OF JUSTICE 11-22 (1971).

53 R. DWORKIN, LAW'S EMPIRE 238-44 (1985).

54 Cover, *Nomos, supra* note 14.

55 *Cf.* Cuomo, *Excerpts from Address by Cuomo at Notre Dame*, N.Y. Times, Sept. 14, 1984, at A21, col. 2 ("Catholic public officials [who] take an oath to preserve the Constitution . . . do so gladly, not because they love what others do with their freedom, but because they realize that in guaranteeing freedom for all, they guarantee our right to be Catholics. . . ."); Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, 1 NOTRE DAME J. L. ETHICS & PUB. POLICY 13, 16 (1984)(reprinting full text of Cuomo speech). *But see* Kmiec, *Judicial Selection and the Pursuit of Justice*, 39 CATH. U. L. REV. 1, 20 (1990).

56 *See* THE FEDERALIST No. 47 (J. Madison); *see also* J. FREEDMAN, CRISIS AND LEGITIMACY 17 (1978) ("There can be little question that the theory of the separation of powers—born from a psychological understanding of the nature of man and adopted by the Framers as part of the nation's experiment in fashioning institutional defenses against tyranny—retains an enduring hold on the American imagination."); Chapman, *Voluntary Association and the Political Theory of Pluralism*, in NOMOS XI, VOLUNTARY ASSOCIATIONS 94 (1969).

1. On the Knowledge/Discourse of the Judiciary.—In the ordinary course of affairs, which is to say, aside from those relatively rare instances when constitutional politics dominates public life,[57] our legal and political decisionmaking processes are not designed to give common citizens the final word on matters of policy or principle.[58] While the citizen's ordinary common sense has a role to play in electing officials, voting on statewide initiatives or referenda, indicting, convicting or acquitting criminal defendants or imposing sanctions in civil suits, many other decisions are made on the basis of a different type of knowledge and discourse.[59] For example, judges respond to specific legal claims of right or interest in a context that presupposes technical knowledge about law (*e.g.*, how to find it, interpret it, and persuasively apply it to concrete controversies); about existing legal processes and institutions (arising from the basic structural and substantive constitutional norms that limit and empower governmental action[60]); and about the various cultural norms that guide judicial decisionmaking (such as the norms of stare decisis, respect for the authority of inherited legal texts and the norms of principled decisionmaking, and respect for the future authority of present judicial texts[61]).

In other words, whereas the citizen's ordinary common sense calls upon individual experience and the common knowledge of everyday life regarding such matters as who to trust with power, who is telling the truth, whether a particular action warrants condemnation or support, and what measures are in the individual's best interests, the judge's source of knowledge and form of discourse are quite different. It is not the judge's personal experience and common knowledge that authorizes

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57 *See* Ackerman, *supra* note 37.

58 *See* Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1521-23, 1538, 1550 n.201, 1559 (1990).

59 *See* Sherwin, *Dialects*, *supra* note 37, at 737-39, 749-55 (defining the characteristics of the discourse of ordinary common sense knowledge and its role in community representation); *see also* Kahn, *supra* note 41, at 49 (courts have no greater expertise than Congress to keep them in touch with community values); *id.* at 58:

> Representative balancing sets the wrong task before the Court. Instead of calling on legal argument and the unique virtues of the Justice, it calls upon the virtues of statesmanship. But a Justice is not likely, at least in our political order, to be able to compete successfully with other political decisionmakers in the domain of statesmanship.

60 *See* A. BICKEL, *supra* note 43, at 24. It is also notable that while *Marbury v. Madison* may not have been inevitable in our constitutional democracy, even Bickel concedes that judges are best suited for the kind of principled, text-based interpretive decisionmaking that characterizes their institutional role. *Id.* at 25-26.

61 *See* Kahn, *supra* note 41, at 35:

> The twin concepts of precedent and slippery slope remove the individual case from the ordinary course of political and social history. The case is seen as an ordering event that simultaneously recasts history and determines the future. In representative balancing, however, the case loses this atemporal quality; it becomes simply a moment within the ordinary course of time.

See also Sherwin, *Dialects*, *supra* note 37, at 769-95 (suggesting that the Supreme Court safeguards "inherited texts and principles" while searching for "current textual meanings").

judicial opinions. As Alexander Bickel has said, the Court, in deciding the case before it, must

> giv[e] reasons which rise to the dignity of principle and hence, of course, have a forward momentum and broad radiations. . . [T]he Court's peculiar capacity to enunciate basic principles inheres in large part in its opportunity to derive and test whatever generalization it proclaims in the concrete circumstances of a case.[62]

For Bickel, the judicial virtue of authoring principled decisions in concrete circumstances pointed up both the strength and limitation of the Court. For while the Court's scholarly and reflective capacity is not ordinarily duplicated among politicians and citizens, this strength is limited in that the principles the Court articulates may not legally extend beyond the context of their application.[63] Taking a step beyond Bickel's analysis, I would contend that the constraints upon judicial principled decision-making are not simply a matter of accepted institutional practices, but also a by-product of principled discourse itself.

When the citizen offers her opinion in the public sphere—by voting for an official, say, or for a criminal indictment—the opinion is self-operative. That is, the act of utterance performs a task.[64] Similarly, when a legislator finally casts a vote on a measure that is subsequently enacted into law, that vote performs a task. If the vote is on the winning side, the law that results is self-operative. Its word is power. This type of self-operative discourse may be described as a "performative." That is to say, the word carries within itself its own authority. It is to be obeyed *because* it is a rule or an indictment.[65] The manifest or intended meaning or purpose of the particular words uttered will determine what the law requires.[66] With principles, however, it is a different matter.

Principles are not performatives. Obedience, therefore, does not immediately flow from the text of the principle alone. Indeed, the authority of principles lacks actual content absent contextual application. Principles require interpretation in the full context of events in which they are to be applied before their demands can be properly understood. To speak of the obligations of "free speech" or "equal protection" or "due process" in isolation from concrete circumstances may be of philosophical interest. It may even be essential to the task of preparing for a contextualized interpretation. But standing alone, it cannot provide an adequate

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62 A. BICKEL, *supra* note 43, at 69-70.

63 *Id.*

64 *See* J. HABERMAS, *supra* note 24, at 50-59 (discussing the different types of action embodied in speech); *see also* J. SEARLE, SPEECH ACTS 50-53 (1969).

65 This goes to the heart of the legal positivist's concern with the validity of rules. For a famous debate on these issues, see Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

66 *Cf.* H.L.A. HART, *supra* note 29, at 12 (discussing the "central core of undisputed meaning" of some legal rules).

response to the question: What must I do, or refrain from doing? Only in the context of a real controversy, involving actual parties in a setting rich with concrete detail, can the normative requirements of an abstract principle be ascertained.[67] The contextualized act of persuasive interpretation gives substance to principle the way characterization and drama give substance to plot in a novel.

Principled decisionmaking requires a capacity both for abstract reflection and concrete contextualization. Principled judicial decisionmaking requires a two-step process: (1) persuasive analysis that explains and justifies why a particular principle is (or is not) relevant to a particular set of circumstances; and (2) persuasive interpretation that gives substantive content to the principle based on its application to particular circumstances.

This discursive account reaffirms the institutional norms that scholars like Bickel[68] have attributed to the courts. For example, the initial question judges face regarding the relevance of a claimed principle to a particular case involves general reflection upon inherited text-based interpretations.[69]

Judges and scholars who conflate legislative (performative) rulemaking and principled (persuasively interpreted and contextually applied) judicial discourse distort the Court's singular institutional competence.[70] Flattening out the Court's reflective and contextualized interpretation of applicable principles to the dimension of "self-evident" (or apodictic) or "intended" textual meanings distorts the Court's singular capacity to maintain a reciprocal relationship between abstract and concrete analysis.[71] The institutional dysfunction that results from substituting (principled) judicial discourse with (performative) legislative rulemaking

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67 *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943) (describing the court's task as that of "translating majestic generalities of the Bill of Rights" and of applying them to specific assertions of official authority).

68 *See* A. BICKEL, *supra* note 43; *see also* Fuller, *Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 365-72 (1978).

69 If no previous judicial constructions exist, then the initial question judges face involves general reflection upon an inherited principle within the concrete circumstances of the specific controversy before the Court.

70 Justice Rehnquist at times falls within this jurisprudential camp. *See* Sherwin, *supra* note 37, at 808-09.

71 Opposition to the Court's capacity for abstract reflection may be viewed as consistent with the Legal Realists' impatience with the "mystical" or "transcendent" or "natural justice" element in law, and their insistence upon functional or pragmatic discourse. Notably, the Realists' preference for instrumentalist decisionmaking reflects a general tendency in the culture at large. *Compare* K. LLEWELLYN, THE COMMON LAW TRADITION 446-47 (1960) (on adapting means to preferred ends) *with* Rorty, *supra* note 44, at 641-42 (discussing the contemporary anti-metaphysical/anti-theoretical move in Western philosophy).

To the extent that the Realists have strained out inarticulable, nonpersuasive "intuitive" or "mystical" grounds for judicial decisionmaking, they may certainly be credited with having made a significant contribution to the legal culture. However, to the extent that their exclusive preference for instrumentalist discourse simply replaces one inarticulate ground for apodictic certainty (natural law

presents a twofold danger: the danger of losing actual content as a result of insisting upon acontextual meaning (*i.e.*, treating principles as if they were general rules); and the reciprocal danger of flattening out principled discourse to the extent that concrete contexts alone contain their own answers—independent of both past and future (*i.e.*, treating principles as if they were no more than bundles of localized interests).[72]

2. On the Knowledge/Discourse of the Legislature.—For their part, legislators enjoy a different institutional competency, and face a different institutional dysfunction.[73] Unlike judges, legislators need not make use of the judicial forms of knowledge and discourse described above. Rather, the forms of knowledge and discourse best suited to their institutional role lie in the realm of pluralist bargaining (or interest accommodation), the general design and implementation of social planning (or comprehensive policymaking), and the effort to maximize preferred notions of the social good. Unlike judges, legislators need not apply their characteristic source of knowledge and form of discourse to specific claims of right or interest. Legislators need not adopt the principled and text-based knowledge/discourse of the judiciary, or for that matter the often unreflective, internally inconsistent, experience-based knowledge/discourse of the citizen's ordinary common sense. Rather, it is the knowledge/discourse of deliberative political compromise, and of expedient utility maximization, that most effectively serves the legislator's institutional role.[74] No matter how diverse, or even inconsistent, the motives

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principles, for example) with another (subjective social policy ideologies such as cost/benefit interest maximization, for example), their contribution may be questioned.

72 For a classic example of this critique, see Justice Black's opposition to the high court's case-by-case ("intuitive") jurisprudence regarding the meaning of due process in Adamson v. California, 332 U.S. 46, 74 (1947) (Black, J., dissenting); *see also* Kahn, *supra* note 41, at 4 (arguing that Justice Powell's jurisprudence, based largely on the goal of balancing competing interests in a community, and thus on an "intuition of justice" rather than on an "articulate argument," is indicative of the instrumentalist danger of case-by-case decisionmaking on intuitive grounds).

73 One such dysfunction occurs when the legislative process becomes paralyzed with fear and self-interest. Under such circumstances, there can be no planning—only drift and the scramble to mirror the polls. *See, e.g.*, Oreskes, *American Politics Loses Way as Polls Replace Leadership*, N.Y. Times, Mar. 18, 1990, at A1 & 22 ("We've tended to trivialize issues to the point where meaningful debate has become almost impossible." [Rep. Edward Mackey of Oklahoma]; "We've got a kind of politics of irrelevance, of obscurantism . . . ." [Former Vice President Walter Mondale]; "Bull permeates everything." [Lee Atwater, Republican Party chairman]; "[P]ublic opinion measurement has become a tool not only of modern politics but of government . . . . But the public is often not aware of the details of problems and polls are measuring emotional response, not thought-out views." [Sen. James McClure of Idaho]).

74 *See* Kahn, *supra* note 41, at 5, 9 (discussing how Powell's "balancing" approach to jurisprudence confuses judicial and legislative functions); *see also* Chemerinski. *The Supreme Court 1988 Term Forward: The Vanishing Constitution*, 103 HARV. L. REV. 43, 51-56 (1989) (discussing Supreme Court's abdication of principled, interpretive discourse obligations). As Kahn has noted, the institutional power of pluralist bargaining often reqires investigation, fact finding, and the testimony of experts. The legislature, not the courts, is best suited to accomplish these tasks. Kahn,

or interests behind voting a measure into law, the law's authority suffices in and of itself in determining what actions are required or proscribed. The law's word is its power. Unlike principled judicial discourse (concerning higher law values), the statute operates by the force of its own will.

3. On the Knowledge/Discourse of the Citizens.—Finally, in addition to channeling the ordinary common sense of citizens, the interpretive wisdom of judges, and the expedience-oriented, interest balancing and policymaking skills of legislators, the constitutional diffusion of power also contemplates the potential involvement of more profound competencies of citizens under special circumstances. For example, article V[75] attributes to the average citizen the ability to transcend, if necessary, local or private interests and to focus public discourse upon the higher plane of fundamental structural and substantive norms.[76] For here the Constitution recognizes that there are times when significant shifts in public tolerance and belief will require that such changes, following a process of mass public mobilization, shall be engraved by the

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supra note 41, at 22-29 (discussing how courts are not suited to handle matters involving empirical investigation and expertise).

75 Ackerman's "structural amendment" process, if this is to be accepted, imbues the average citizen with the same abilities. *See* Ackerman, *supra* note 37, at 1051-57.

It may be interesting to compare Ackerman's understanding of "constitutional politics" with Rousseau's understanding of the "general will." *See* W. WILLOUGHBY, *supra* note 51, at 208-09 (discussing the "public person" formed by the union of individual members of the body politic that constitutes what Rousseau calls the "general will"). Ackerman's description of disinterested, higher principle-based constitutional politics may turn out to correlate in some significant respects to Rousseau's conception of the unified ("true") will of the community, which may exist over and beyond the normal political will of interest-based, pluralistic bargaining. *See id.* at 209-11. Whether Rousseau in fact contemplated a distinction between legislative/ordinary politics and constitutional/higher principles is a question whose answer lies beyond the scope of this essay.

76 *Compare* Sen, *Individual Freedom as a Social Commitment*, The New York Review of Books 49-54 (June 14, 1990):

> If individuals do, in fact, incessantly and uncompromisingly advance only their narrow self-interests, then the pursuit of justice will be hampered at every step by the opposition of everyone who has something to lose from any proposed change. If, on the other hand, individuals as social persons have broader values and objectives, including sympathy for others and commitment to ethical norms, then the promotion of social justice need not face unremitting opposition at every move.

Affirming the individual's higher capacities, Sen adds: "[I]f the news of famines, published in newspapers, gets the public outraged and puts the government under pressure, then that is precisely because people take an interest in what is happening to others." *Id.* at 54.

The premise of legitimation in a liberal polity, encompassing the acceptability of shared public norms of public life, presupposes the existence of the individual's higher nature and the capacity to engage in disinterested public normative discourse. *See, e.g.*, Galston, *Liberal Virtues*, 82 AMER. POL. SCI. REV. 1277, 1281 (1988) (describing the liberal virtues that most citizens must possess in order that the liberal community may be preserved). That this ability may not be sustainable as a regular part of everyday life, and may need to be the concern of the judiciary during those times when the citizenry is not motivated to rise to a level of disinterest, reflects the sophistication and complexity of the Constitution's understanding of human nature.

public upon the supreme law of the land. This acknowledgement, together with the Constitution's articulation of substantive norms regarding basic individual rights, reflects a cautious, but profound commitment to the ultimate wisdom and authority of the people.[77] In the final reckoning of law and power, it is the people's experiential knowledge and discourse that will prevail. This insight comports not only with the theoretical demands of liberalism, but also with its practical political reality. I have described this reality as the union of power and the word. It is a union that is actualized in practice by a sufficient number of citizens sufficiently engaged by, or committed to, the law's word to have its force stick.[78]

In sum, the Constitution's structural diffusion of power, taken together with its substantive norms protecting individual rights, evince a pluralist understanding of human nature that effectively institutionalizes a variety of forms of knowledge and discourse in the ordinary (and extraordinary) practices of public life. To rely upon naked power or natural reason or Kantian categories of right or a preferred theory of interpretation or the spirit of public life or the private pursuit of interests *alone*, would thus suggest a naive approach to the complexities of human nature—and perhaps also an invitation to intolerance. In any event, strict adherence to the theories of Hobbes or Rousseau, Kant or Hume, Bentham or Dworkin, will fail to capture the complex understanding of human nature that our constitutional framework may be said to embody.

C. Rhetorical Pluralism and the Institutionalization of Power

To paraphrase Richard McKeon: If the increase and concentration of knowledge gives rise to an increase and concentration of power,[79] the antidote to the danger of state tyranny becomes clear. We must diffuse the power of the state and provide a distinct role for diverse forms of knowledge. This may be achieved by institutionalizing a discrete separation among the functions of government. Such diversification thus serves not only as an antidote to tyranny, but also, and no less importantly, as a means of maximizing participation in public life by diverse communities of power.

This pluralist approach thus combines confidence in (limited) insti-

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[77] *See* Chisolm v. Georgia, 2 U.S. 419, 448 (1793) ("A state does not owe its origin to the government of the United States, in the highest or in any of its branches. It was in existence before it. It derives its authority from the same pure and sacred source as itself: the voluntary and deliberate choice of the people.").

[78] In the absence of broad commitment to shared basic legal principles and processes, the state may command obedience, but not respect. Without respect, although the state's ability to enforce rules may continue, its right to rule—*i.e.*, its legitimacy—will have ceased.

[79] *See* R. MCKEON, FREEDOM AND HISTORY 22 (1952) ("Knowledge, together with all the goods of living and life itself, is threatened with extinction by the arbitrary use of power, and the chief source and concentration of power is knowledge.").

tutional functions with a more skeptical conviction regarding the necessity for complementary institutional interactions. Since no single institution can reasonably be expected equally to master multiple tasks, the natural capacities of particular institutions must be harnessed and enhanced by establishing opportunities for complementary institutional strengths to come into play. In short, role diversification checks characteristic institutional dysfunctions by encouraging discrete institutional capacities. In addition, by maximizing the involvement of diverse communities in the public sphere, role maintenance and inter-institutional checks and balances foster legitimation. For as we have seen, to maximize participation is also to maximize acceptance of the official norms that guide public action,[80] and to maximize acceptance is to ensure governmental legitimacy.[81]

The Constitution's institutionalization of power through diverse discursive communities suggests intrinsic guidelines for the exercise of power in public life. For example, if public acceptance of judicial power ultimately turns upon the Court's ability to persuade, unprincipled, arbitrary, or subjective exercises of judicial power will ultimately fail to gain the legitimacy it needs for purposes of effective enforcement. Citizens disappointed in their search for a principled basis for the Court's denial of basic rights may gain the warrant they need to protest the Court's exercise of power. If their commitment is deep enough, they may also gain the warrant they need to translate their protest into more direct forms of action, such as acts of civil disobedience in defiance of the Court's word.

In addition to the generation of institutional discursive guidelines based upon discrete intra-institutional virtues, however, we also see the generation of guidelines for the operation of inter-institutional checks and balances based upon discrete institutional dysfunctions. For example, if the people ultimately serve as a check upon the Court's abdication of its role in leading the persuasive articulation of the basic principles of government, judicial review serves as a check upon legislative dysfunctions, such as the willingness to risk enduring values for the sake of immediate political gains. Obversely, while the courts may be institutionally ill-suited to the tasks of selective interest accommodation,

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80 *Cf.* Sherwin, *Dialects, supra* note 37, at 781, n.181 (arguing that the reading of rights to an accused criminal mandated by the Supreme Court in *Miranda v. Arizona* helps maintain a "relationship of respect and equality between the accused and the agents of the state").

81 *See* Waldron, *supra* note 8, at 128 (arguing that "liberals are committed to a conception of freedom and of respect for the capacities and the agency of individual men and women, and that these commitments generate a requirement that all aspects of the social order should either be made acceptable or be capable of being made acceptable to every last individual."); *see also* Macedo, *supra* note 8, at 280 ("In Court, it is not the fact of power but the display of reasons and evidence that counts."); *id.* at 295 ("The aim of liberal public jusitification is to respect diversity while forging a framework of common moral principles that all can understand, accept, and openly affirm before one another.").

information gathering,[82] and policy setting, these tasks are consonant with the legislature's chief institutional virtues. For their part, while citizens may elect representatives to act in their best interest, the citizen cannot partake in the investigative, deliberative, or bargaining practices that characterize legislative activity. However, to the extent that legislators simply defer to local interests without undertaking the tasks of prudent deliberation and compromise, the legislative function may be stymied. Comprehensive policymaking cannot be achieved without the exercise of legislative virtues.[83]

To be sure, there are other mechanisms of checks and balances that the Constitution explicitly establishes.[84] But it is equally important to recognize the less explicit constitutional guidelines for intra-institutional competencies, inter-institutional checks and balances, and governmental legitimation that flow from the constitutional diffusion of power through, and the necessary participation of, diverse communities and their respective forms of knowledge/discourse. The institutionalization of power thus directly dovetails with the Constitution's complex (pluralist) understanding of human nature.

It may be conceded that what I have described so far represents an idealized account of a plurality of discursive functions. To be sure, discursive overlap among diverse institutions of power exists, and should exist.[85] Yet I believe that the ideal types that I have described identify the singular virtues each of these constitutionally institutionalized discursive communities of power should aspire to realize in practice: *the virtues of judicial integrity and candor* (explicitly and persuasively explaining and justifying principled, text-based interpretive judgments, tempered by specifically contextualized equity and public compliance concerns); *the virtues of legislative bargaining, deliberation, and comprehensive planning* (realizing selectively preferred policy goals through compromise, based in part upon relevant data, and tempered by the practical constraints of politics and public compliance); and *the virtue of the citizen's common sense* (reflecting local experience and knowledge concerning whom to trust with power (*e.g.*, in the election of officials), whom to blame (*e.g.*, in

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82 *See* Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366, 379 (1984).

83 *See* Oreskes, *supra* note 73; Sen. J. Leach, *Who Robbed the Thrifts? Congress*, N.Y. Times, Aug. 2, 1990, at A21, col. 1 (describing the savings and loan debacle of the 1980s as a "criminal transfer of wealth"— from the Midwest and the Northeast to the Southwest and the West that occurred "because legislative bodies abandoned the national interest and represented regional and industry concerns.").

84 For example, Presidential impeachment by the Senate, approval of executive appointments, the executive veto, the legislature's purse string check upon the executive's marital powers, and so on.

85 *See, e.g.*, Sherwin, *Dialects, supra* note 37, at 787-90, 796-99 (discussing, in the context of Miranda v. Arizona, 384 U.S. 436 (1966), how judicial expedience in the form of prudence may complement principled decisionmaking, but also risks seriously undercutting principle).

the adjudication of an accused's guilt or innocence) and, in rarer periods of intense debate and discord over shared fundamental values, reassessing basic principles of government (via constitutional amendment or civil disobedience)). Intra-institutional competencies and inter-institutional checks and balances can be effectively maintained to the extent that the norms of institutional practice constrain each institution from extending a particular form of knowledge/discourse beyond its proper range of competence.

D. The Discourse Ideal and Shared Public Values

Turning from the interconnected issues of human nature and the nature of the political and legal institutionalization of power, I next address the final matter about which liberalism must present a persuasive understanding: the matter of *shared normative ideals.* I maintain that the theory and practice of rhetorical pluralism and the discourse ideal provide a persuasive understanding of this matter by articulating the compelling normative force embodied in the ideal of discourse itself.[86]

If structural constitutional norms address issues of institutional competency and legitimation, the question remains, how do these diverse institutional functions hold together? In the name of what substantive norms do officials, or "We the People," authorize or constrain individual and state action?

Part of the answer lies in the ongoing interpretations of substantive values (particularly with respect to individual rights) that are to be found in our constitutional higher law. This response alone, however, is insufficient. For absent the social and political conditions necessary for an individual's (or group's) knowing and voluntary submission to the rule of law, while the *existence* of substantive constitutional norms may go unquestioned, their *authority* will not. The discourse ideal thus not only addresses the need for persuasive rights talk, but it also accounts for the normative preconditions necessary to legitimate the constitutional order.

In what follows, I shall argue that fulfillment of the discourse ideal requires ensuring the conditions necessary to initiate and maintain the discursive process. That commitment includes the following inter-related elements: (1) Respect for the autonomy and dignity of the other; (2) a willingness to listen to (and empathize with) the story that the other has to tell; and (3) a commitment, within the framework established by mutually acceptable structural and substantive legal norms, to keep the process of give and take going. Commitment to the discourse ideal thus requires not only shared *constitutional* norms, but also, and no less importantly, establishing and maintaining *social and political* conditions regarding the minimum tolerance and beliefs necessary for one to submit to

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[86] *See* Sherwin, *supra* note 7; *see also* B. ACKERMAN, *supra* note 12; W. BOOTH, CRITICAL UNDERSTANDING: THE POWERS AND LIMITS OF PLURALISM 259 (1979).

the rule of law. In practical terms, this political requirement means that every participant in a shared normative world must perceive (and have) a real stake in the process and outcome of his or her participation. Professor Tribe has eloquently addressed an important aspect of this concern:

> One must be able to express oneself to protect the violation of other rights, but to express oneself one needs at least a decent level of nourishment, shelter, clothing, medical care, and education. To have those things, one needs either employment or income support. Too easily government may purchase the silent acquiescence of the deprived in their own constitutional undoing. People who cannot buy bread cannot follow the suggestion that they eat cake; people bowed under the weight of poverty are unlikely to stand up for their constitutional rights.[87]

I believe Tribe is also correct in linking these "indispensable conditions of an open society" to the "much larger enterprise of identifying the elements of being human."[88] For, in essence, the political conditions necessary for voluntary and knowing submission to the rule of law address a profound concern for individual identity.

At a minimum, then, knowing and voluntary submission to the rule of law presupposes a guarantee of secure and supportive conditions for the development and flourishing of individual identity. This includes a sense of identity in the pursuit of personal interests, in association with others (including family and religious or political communities), and with regard to the individual's expectations of equal respect and political empowerment in public life generally. Social, political, legal, or economic conditions that clash severely enough with the individual's sense of identity to threaten its very existence may provide a warrant for the individual to reject the authority of the rule of law. To paraphrase Tribe, subjecting an individual to conditions of profound social alienation,[89]

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87 L. TRIBE, AMERICAN CONSTITUTIONAL LAW 573-74 (1978).

88 *Id.* at 574; *see also id.* at 953 (discussing the individual's entitlement to a fair opportunity to realize her identity in a chosen vocation).

Jurgen Habermas's words are also relevant here: "[I]n discourse ethics, the idea of autonomy is intersubjective. It takes into account the fact that the free actualization of the personality of one individual depends on the actualization of freedom for all." Habermas, *supra* note 45, at 49. Amartya Sen has written:

> A social commitment to individual freedom must involve attaching importance to enhancing the capabilities that different people actually have; the choice of social arrangements must be influenced by their ability to promote human capabilities. . . . Shifting the emphasis from primary goods and resources to capabilities and freedoms can make a substantial difference to the empirical analysis of social inequalities. . . . The modification of emphasis is relevant also to other related matters, such as the choice of criteria for assessing deprivation and poverty, *e.g.*, whether to see poverty in terms of low income (a failure of resource), or in terms of insufficient freedom to lead adequate lives (a failure of capability).

Sen, *supra* note 76, at 54.

89 *Cf.* Trop v. Dulles, 356 U.S. 84, 101 (1958) ("[U]se of denationalization as a punishment is barred by the Eighth Amendment. There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development."); *see also* City of Cleburne v. Cleburne Living Center,

political disenfranchisement[90] or economic servitude[91] makes a mockery of the legal privilege to engage in discourse about rights.[92]

In this high rhetorical account,[93] then, the liberal discourse ideal envisions a complex reality of multiple public and private roles, and an ability to exercise appropriate discursive constraints when shifting from one role to another.[94] This vision also comports with our post-modern situation. For it describes (and sanctions) multiple forms of reason, multiple discourses, multiple forms of knowledge, and multiple communities of power as essential constituents of our shared normative world.[95] But

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726 F.2d 191, 199 (5th Cir. 1984) (holding local zoning ordinances unconstitutional on the ground that, inter alia, state sanctioned isolation, the stigma of illiteracy, and exclusion from normal community patterns would keep a group of mildly to moderately retarded men and women from adequate social adaptation), *aff'd on other grounds*, 473 U.S. 432 (1985); Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) ("What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion, it is only practices having that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community."); Furman v. Georgia, 408 U.S. 238, 272-73 (1972) (Brennan, J., concurring):

> The barbaric punishments condemned by history, 'punishments which inflict torture, such as the rack, the thumbscrew, the iron boot'. . . and the like, are, of course, 'attended with acute pain and suffering'. When we consider why they have been condemned, however, we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded.

(quoting O'Neill v. Vermont, 144 U.S. 323, 339 (1892) (Field, J., dissenting)); United States v. Marion, 404 U.S. 307, 331 (1971) (Douglas, J., concurring) ("[T]he protection underlying the right to a speedy trial may be denied by clandestine innuendo and never given the chance promptly to defend himself in a court of law. Those who are accused of crime but never tried may lose their jobs, or their position of responsibility or become outcasts in their communities."); Trop v. Dulles, 356 U.S. 86, 101, 111 (1958) (Brennan, J., concurring) ("The uncertainty, and consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgement.").

See also M. SANDEL, *supra* note 6 (contrasting traditional liberal notions of individual autonomy and freedom of choice (the "unencumbered self") with the demands of religious conscience ("the encumbered self")); Bobo & Gilliam, *Race, Sociopolitical Participation, and Black Empowerment*, 84 AMER. POL. SCI. REV. 377 (1990) (suggesting that socio-political disempowerment discourages participation in various aspects of public life).

90 *See* Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allright, 321 U.S. 649 (1944); United States v. United States Klans, 194 F. Supp. 897 (M.D. Ala. 1961).

91 *See* L. TRIBE, *supra* note 87, at 574 (on the false distinction between economic and personal rights).

92 *See* THE FEDERALIST No. 78, at 470 (A. Hamilton) (C. Rossiter ed. 1961) (describing the universal distrust and distress that would result upon the court's failure to adhere to constitutional rights in a uniform and inflexible manner).

The matter may be put bluntly: can it reasonably be denied that the deprivation of a meaningful sense of self and social reality (which may well include the opportunity to obtain decent work, decent housing, and adequate health and child care) undercuts the individual's participation in public life in a less significant way than do unequal educational opportunities? *Cf.* Brown v. Board of Educ., 347 U.S. 483 (1953).

93 *See supra* note 44; A. MACINTYRE, *supra* note 23, at 211-18.

94 *See generally* J. HABERMAS, *supra* note 24; *see also* Ackerman, *Why Dialogue?*, 86 J. PHIL. 5, 20-21 (1989).

95 In other words, according to rhetorical pluralism, the good of the republic requires the preser-

in this way the discourse ideal also calls to mind the necessity for constraint, for freedom *under law*, if legitimation through participation is to be effectively maintained.[96]

To be sure, this account of the constitutional and political requirements for legitimation lacks guarantees.[97] It is rooted neither in the universal demands of reason, natural law, or history.[98] It is as uncertain, perhaps, as knowledge and power. It is rhetorical. And like all rhetorical knowledge and discourse it depends upon persuasion and belief. Without a critical mass of popular acceptance at any given moment the state's power may not hold. The ultimate fate of government hinges on our sense of union—our common belief in shared principles of public order and our perception of the political conditions necessary for the secure cultivation of identity.

E. An Admonition

Institutional failure is hard to contain. When one institution fails to deal with the tasks delegated to it, this may induce other institutions to fill the void. For example, when political leaders fail to provide clear policy goals for the nation, or when courts fail to stand by enduring constitutional values, it may fall upon We the People to raise their voices—through legal and extra-legal forms of action. Here, too, lies a danger. For when local communities end up taking over the main judging or planning tasks of the state, when substantive principles and policy goals, based on local forms of knowledge and experience, dominate public discourse, broad principles and comprehensive planning may become impossible to attain.[99]

When a discrete power base comes to dominate the political and legal scene, its unchecked discursive incapacities take on greater significance. Judges act on impulse, or ideology, without reference to inherited legal authorities or principles. Legislators mandate rigid rules of conduct for all, according to popular demand, heedless of local beliefs of socially unpopular groups. Citizens demand quick answers to pressing problems,

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vation, and active public involvement, of local knowledge (in the form of ordinary common sense), collective policy making (in the form of interest-based deliberation and cost/benefit instrumental analysis), and interpretive principles (textually based and contextually applied—even if they appear counter-intuitive.) *Cf.* Burke, *supra* note 49.

Contrast this cognitive/rhetorical pluralism with Rawls's and Greenawalt's (among others') tendency to attribute one form of reason to human nature. K. GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 11-12, 56-57 (1988); J. RAWLS, *supra* note 52, at 236.

96 *See* E. LEVINAS, COLLECTED PHILOSOPHICAL PAPERS 17 (1986) ("[W]e must impose commands on ourselves in order to be free . . . it must be an exterior law, a written law, armed with force against tyranny.").

97 *See* Sherwin, *supra* note 7, at 1815-29.

98 *See* Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233, 235 (1989).

99 *See* Sherwin, *Dialects*, *supra* note 37.

regardless of long range effects or compromised principles. Government action becomes suspect. Internal disputes and disarray increase among communities and institutions which compete with increasing intensity for more authority to pursue a subjectively preferred set of ends or values.

This scenario portrays a drama of disunion. It reflects the dangers of a legal system struggling to continue in the absence of a shared vision, without consensus on shared normative ideals. It tells the story of a legal system in possession of the common tools of war but without a common sense of poetry.

Thus we return once again to the rhetorical vision of the discourse ideal. It is here that we find a larger framework to contain our diversity. It is in the hope of rediscovering the persuasive force of this liberal discursive vision that I am telling this story of legitimation.

I submit that at this critical juncture in our history prudent reflection upon the requirements of legitimation should persuade us to accept the following:

(1) that liberal ideals be understood in a high rhetorical sense, and that rhetorical pluralism and the discourse ideal be viewed as integral to liberal theory and practice; this normative framework for individual and state action in the public sphere encourages officials and citizens alike[100] to accept a view of liberty for all under law, where acceptance of the law's constraints includes:

(2) that the discrete discursive practices of various governmental and nongovernmental institutions of power be properly maintained in order effectively to diffuse power, encourage active participation by multiple communities, and check and balance particular institutional discursive capacities against their characteristic dysfunctions; and

(3) that "We the People" ensure that every member of the polity has a real stake in the process and outcome of his or her participation in the public arenas of power, and that this guarantee be maintained through widely accepted structural and substantive constitutional norms (which provide safeguards against majoritarian dominance) and through broad public acceptance of the social and political conditions necessary to justify and explain each member's knowing and voluntary submission to the rule of law.

This account of legitimation seeks to provide a persuasive rendering of the three matters about which liberalism must offer an acceptable understanding: human nature, the institutionalization of power, and shared normative ideals. I believe it also provides additional clarity and guidance with regard to the chief task of democratic government: to mediate the insistent demands of liberty, community, and social justice.

Those outside the realm of meaningful discursive participation may or may not obtain the warrant they need to deny the state's legitimacy—

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100 *See* Sherwin, *Opening Hart's Concept of Law*, 20 VAL. U.L. REV. 385 (1986) (arguing that, contrary to Hart, citizens as well as officials need to accept fundamental values for legitimation purposes).

and to back their denial with force (if need be). If they have been *forced* outside the avenues of meaningful participation by unacceptable state action—such as racist legislation or unjustified state interference with religious conscience—then the proper warrant for resistance may be at hand.

Those armed with a proper warrant to resist state power may, of course, fail to achieve their goals. At a certain point, however, their numbers and resources might grow large enough significantly to curtail or interrupt law enforcement. This is one way of precipitating a legitimation crisis,[101] as a result of which constitutional transformations may or may not flow.

Ordinarily, the criminal outclass does not obtain a similar warrant to reject the state's legitimacy. (Indeed, they are often needed by the state for it (forcibly) to reaffirm and publicly underscore its legitimacy.) However, while criminal punishments usually do not embody illegitimate power, it is conceivable that this, too, could precipitate the creation of a critical mass of opponents to the state (a permanent outlaw under-class, say) whose power of resistance suffices significantly to curtail or interrupt law enforcement.[102]

This scenario presents a drama of domestic chaos and of the state's reactive compromising of fundamental principles in an effort to secure social order. Under these circumstances, the nemesis of compromised principle once again threatens the republic with disruption and violence.[103] For example, if criminal prosecutions belie profound (widely perceived) social injustices, the agency of state power becomes one with injustice itself—at least, in the minds of the oppressed or the disadvantaged. For these people, it is by the state's power that injustice is "legitimated" under the authority of existing laws. In the criminal outclass context, all that is missing for such a legitimation crisis to take shape is a unifying ideological/political thematization which persuasively translates and consolidates the criminal outclass situation into an acceptable idiom of legitimation discourse.[104]

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101 Consider the abolitionist movement against slavery: spearheaded spiritually by Garrison and spiritually as well as violently by John Brown.

102 *See* Morris, *The Decline of Guilt*, 99 ETHICS 62 (1988) (noting a shift in the criminal process, from justice, individual rights and due process on the one hand, to fear and cost/benefit ideology on the other, which has the effect of diluting respect for the law's norms and of external values generally).

103 Other examples of such ill-fated compromises include the constitutional enshrinement of slavery (making slaves 3/5 human and 2/5 chattel), *see* U.S. CONST. art. I, § 2, cl. 3; the decision in Dred Scott v. Sandford, 60 U.S. 393 (1857) (nullifying federal law designed to prevent slavery's spread to certain national territories); and the decision in Plessy v. Ferguson, 163 U.S. 537 (1896) (deferring to majoritarian will and local customary preferences favoring segregation in lieu of providing a principled interpretation of the demands of equality). Each of these profound compromises of principle precipitated protracted, and sometimes bloody, protest.

104 Consider, for example, the self-empowering rhetoric of Malcolm X and the separatist rage-inspired (and rage inspiring) rhetoric of Louis Farrakhan.

What this scenario describes is a political, not a constitutional, crisis. As we have seen before, however, today's political crisis might well become tomorrow's constitutional change. Consider: What *legal* authority empowered the American revolutionaries, or the Northern antislavery fighters acting in the face of *Dred Scott*, or the post-Depression era supporters of the New Deal acting in the shadow of *Lochner*'s laissez-faire constitutionalism, or the civil rights protesters in the South acting in the face of "legalized" segregation?

These are examples of a mobilized citizenry, sometimes acting at great personal risk, and almost always out of profound commitment to higher principles, who succeeded in changing America. But they did not always start out by framing their concerns in constitutional terms. In any event, the fact remains that whether or not we credit such mass movements with constitutional authority[105] makes no difference with regard to their political authority. These movements effectuated shifts in the minimum tolerance and beliefs necessary to justify and explain the individual's knowing and voluntary submission to the rule of law. Since this political reality is an essential determinant of the conditions for legitimation, we should not be surprised to find that it alone can alter the nature of our polity. Put simply, if officials fail to recognize the political prerequisites to legitimation, their ability to make their words stick will diminish—perhaps to the vanishing point.

The price of such failure may be paid in the currency of social cohesion and domestic order. To avert so profound a crisis, it may become necessary for courts and legislatures actively and persuasively to reconstrue the meaning of our higher law. Whether inner city violence, for example, will rise to the level of political authority for legal change, depends on the circumstances and individuals involved. It is difficult to predict whether the current official response to inner city frustration, alienation, and violence will alter the minimum tolerance and beliefs necessary for political legitimation. So long as violence remains associated with criminality, and in particular with individual participation in counter-cultural markets provided by the drug trade (unlike the inner

105 *Cf.* Ackerman, *supra* note 37 (describing the New Deal as a "structural amendment"). That popular capture of all three branches of government provides a persuasive indication that the People's voice has sounded may perhaps be accepted. However, more often the mass mobilization in question is not as sweeping. At such times, persuasive argumentation in principle is the court's, and an engaged citizenry's, most reliable strength. It is in the common public arena of law and politics that the differences between these two institutions will have to be worked out. If more direct public confrontation must be risked, at times, by the court, we may at least take solace from the knowledge that this is one of the ways in which a constitutional democracy works. Consensus on basic principles of government—a minimum requirement of legitimation in a liberal polity—carries no less a price than periodic public contention and strife—and at times, even violence.

That the price of commitment to principle is so high offers the additional consolation that only infrequently, and for good cause, will enough people risk placing their bodies on the line, if need be, for the sake of a minimum of political tolerance and belief or of shared constitutional values.

city violence in the 1960s) it may never gain sufficient principled support in other communities of power to change existing conditions. Public indignation and official repression may therefore continue to mask its complex political, economic, and social dimensions. Nevertheless, denial of the deeper political nature underlying this violence (on both sides of the conflict), like denial generally, may well culminate in a characteristic paradox. Denial often helps to actualize the very fears that fuel our urge to deny in the first place.[106] At any rate, that the political potential contained in the current cycle of criminality and official repression may eventually be politicized as a legitimate resistance to official repression remains an everpresent and potent possibility.

The account of the law and the law's legitimation that I have narrated here may or may not be acceptable. But some such tale of law's normative ideals and institutional safeguards, and of the political and legal conditions necessary for accepting the rule of law, must be broadly and actively embraced. Otherwise, what is "America?" Why do we say "yes" to her power? Why do we not protest or revolutionize—politically or criminally?

The premise that the law's ultimate instruments are war and poetry now lays down its claim. It is a claim of ethical responsibility: to self and group identity (to the extent that certain socio-political conditions must be met prior to the individual's submission to the rule of law),[107] to others (to the extent that our liberty cannot be guaranteed except under law), and to a commonly shared public world (to the extent that our individual fate is inextricably connected to the fate of our nation, and to the structural, substantive, and social justice norms that we take for our own).[108]

When our stories of law and power break apart or grow confused, there is the danger of war without poetry. And that prospect, history teaches, is the classic invitation to tyranny. Only when our stories of legitimation find a common ground can there be union amid diversity. Only then can difference be civilly contained, which is to say, kept within

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106 *See generally* Wurmer, *Blinding the Eye of the Mind*, in DENIAL, A CLARIFICATION OF CONCEPTS AND RESEARCH 178 (E.L. Edelstein, D. Nathanson & A. Stone eds. 1989):

> In denial the subject shifts his focal attention from disturbing stimuli emanating either from himself or from the environment to less disturbing stimuli, fantasies or ideas. Denial, then, is the collective term used for all forms of defense directed against perception . . . such defense may remove from focal attention specific cognitive meaning (or significance) and affective tones that could arouse pain or anxiety.

107 The responsibility to cultivate and maintain identity includes both the classic liberal understanding of individual autonomy (the "unencumbered self") and what Sandel has referred to as group based identity (the "encumbered self"). *See* M. SANDEL, *supra* note 6.

108 *Cf.* Dworkin, *Liberal Community*, 77 CALIF. L. REV. 479, 501 (1989):

> [The integrated liberal] will count his own life as diminished—a less good life than he might have had—if he lives in an unjust community, no matter how hard he tries to make it just. That fusion of political morality and critical self-interest seems to me to be the true nerve of civic republicanism, the important way in which individual citizens should merge their interest and personality into political community.

the bounds of discourse rather than cast outside: in the silent terror of naked violence. Only when we find and accept the civilizing ideal that unites us will the bow and lyre of the liberal state become one.[109]

With this account of rhetorical pluralism and the discourse ideal in mind, let us now turn to a specific test case. How do the foregoing discursive criteria for intra-institutional competencies and inter-institutional checks and balances affect our understanding of the Supreme Court's decision in *Division of Employment v. Smith*? Are the legal and political requirements for legitimation met by that decision? And if not, what is to be done?

III. COUNTERING *DIVISION OF EMPLOYMENT V. SMITH*: A PARABLE OF PAGANS, POLITICS, AND MAJORITARIAN RULE

Let us begin with a legal story, one of the innumerable narratives that pass through our court system every day. For purposes of our analysis, let the story unfold at the outset through the voice of the claimant. With the aid of this dramatic device, we may begin our exploration of this case with heightened sensitivity to its *human* reality. For it is, after all, human voices that precipitate and pervade every legal and political drama that unfolds in the public sphere. The plaintiff speaking here is in the position of Alfred L. Smith, whose story is told in *Division of Employment v. Smith*.[110] He begins his tale this way:

> I've lost my job. I was fired when I admitted to having used an illegal drug. When I subsequently tried to collect unemployment benefits, the government refused to pay. Officials at the Division of Employment told me that I didn't qualify because of my "misconduct." But I didn't think my use of the drug was wrong. So I initiated a lawsuit challenging the government's position. The state court eventually concluded that I was right, that it was unconstitutional under the particular circumstances of my case for the Division of Employment to refuse to provide me with unemployment compensation. But the United States Supreme Court disagreed. Here's how this controversy got started.
>
> I'm an American citizen; I am also a religious person. My religious beliefs and practices, however, are not particularly familiar to most Americans. I am a member of the Native American Church.
>
> I understand that in the religious ceremonies of Christians and Jews, wine is consumed as a sacrament. In my church, the sacrament is a sacred mushroom. It is called peyote. That's the illegal drug that I have used. And it is that use that got me fired without unemployment benefits.
>
> My religion has been misunderstood. It also has been deliberately dis-

[109] Until then, the struggle between persuasive discourse and mute violence will continue. *Cf.* Cover, *supra* note 14.

[110] The factual account that follows draws from Smith v. Employment Div., Dep't of Human Serv., 301 Or. 209, 721 P.2d 445 (1986).

torted by those who oppose it.[111] So let me say a few words about its ceremonies, and the values that it seeks to uphold in everyday life.[112]

Like just about all religions, my religion has a doctrine, an ethic, and specific rituals.

The doctrine includes belief in the existence of power, spirits, and incarnations of power. "Power" is the Native American equivalent to what the Greek New Testament calls "pneuma" or "Holy Spirit" or "Holy Ghost." It refers to an invisible force that produces characteristic effects in things that are influenced by it. Members of my church believe that power is necessary to human health and success. "Spirits" are immaterial personifications of power. For example, we call God "the Great Spirit." He is the ultimate source of all power. For some, there are other spirits, including Jesus, who intercedes between God and man, and the Holy Ghost, which cannot be described, or Waterbird, who brings rain, and peyote itself, which is personified as "Peyote Spirit." Eating peyote allows one to absorb the power inherent in it. It is a sacrament that is consumed in order to absorb the Holy Spirit.

My religion's ethical code requires that I follow "the Peyote Road." This ethic has four main parts: brotherly love, care of family, self-reliance, and avoidance of alcohol. The code is learned from elders and by ethical revelation, received by eating peyote. Peyote sensitizes the conscience. There is a maxim that says: "Peyote enlightens your heart and mind."

The ritual practices of my religion are highly structured. The central rite takes place during an all-night meeting, from about 8:00 p.m. on Saturday until 8:00 a.m. the next day. There are many ritual devices that are used and specific roles to be played during the ceremony, but I will not detail them here. Suffice it to say, there are basically four sequential phases to the ceremony: prayer, song, eating peyote, and quietly contemplating.

Now, the criminal laws of my state say that eating peyote is a crime, like taking LSD or heroin. But I've never been charged with, much less convicted of, any criminal act. And in any event, the Division of Employment says that the state's criminal laws had nothing to do with its decision to keep me from getting unemployment benefits after my discharge. They say that the Division has to "protect the unemployment fund from depletion by those who are undeserving." But I just don't see how my religious practices jeopardize that fund.

By denying me unemployment compensation the state seems to be saying that I don't deserve what other people have a right to expect from the government. I guess I just don't see why I should be penalized because of my religious beliefs. Who am I harming? Why don't I have a right to prac-

111 Opposition to Native American religious practices dates back to 1571, when the Spanish Inquisition was introduced into Mexico. By 1620, Spanish officials had declared that since the use of peyote was the work of the devil, all Christians were also prohibited from using it. *See* E. ANDERSON, PEYOTE, THE DIVINE CACTUS 6, 162 (1980) (citing an edict issued in 1629 by the Inquisition which barred the use of peyote by any person ("of whatever rank or social condition") and subjected the law breaker to various punishments, including the charge of "heresy to our Holy Catholic Faith.").

112 The account that follows, describing the Native American Church's religious practice of peyotism, draws from J. SLOTKIN, THE PEYOTE RELIGION 68-77 (1975).

tice my religion in private without being made to feel like an enemy of society? It just doesn't seem right. Not in America.

That, as far as I can tell, is the essence of Smith's claim. A few more background facts are in order, however, before we trace how his lawsuit fared in the courts.

In addition to being an active member of the Native American Church, the 66-year-old Smith was also an ex-alcoholic. He stopped drinking in 1957, and had no subsequent alcohol problem. Before being fired, he worked as a counselor to alcoholics. When he accepted the job he also accepted his employer's policy regarding drug and alcohol abuse. Since counselors were regarded as role models, they were not to abuse alcohol or use mind-altering substances.

When his employer learned that Smith's religious practices included the ingestion of peyote, Smith was informed that this violated the employer's policy and, consequently, that Smith would have to be fired. Smith rejected the employer's offer to stay on provided that he submit to medical or psychological treatment, because he did not feel that he needed the help offered.

When the Oregon Employment Division subsequently denied Smith unemployment benefits, on the ground that he was discharged for "misconduct," Smith appealed. Following a hearing, the referee concluded: "[Because] there is no evidence in the hearing record to indicate that granting benefits to claimants whose unemployment is caused by adherence to religious beliefs would have any significant impact on the [state's unemployment] trust fund, it cannot be held that the alleged state interest warrants interference with the claimant's freedom of religion."

The Employment Appeals Board reversed the referee's finding. It reasoned that since the state had a "compelling interest in proscribing illegal drugs," the denial of benefits was justified.

Smith subsequently took the case to the Oregon courts, and won. The Oregon Supreme Court conceded that Smith's employer had a right to fire him when he violated an order, based on a valid employment policy, to at least seek drug counseling for his peyote use. However, the court went on to conclude that the state's denial of employment benefits unduly burdened Smith's right to worship as he sees fit.

The Oregon court based its analysis on the free exercise clause of the federal Constitution's first amendment. The leading case in the area is *Sherbert v. Verner*.[113] In *Sherbert*, the Court held that a Seventh-Day Adventist need not agree to work on Saturday in order to be eligible for unemployment benefits. To require her to do so, the Court said, would constitute an impermissible pressure upon her to forego her religious

[113] 374 U.S. 398 (1963).

practice:[114]

> [Such a requirement] forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship. . . . It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.[115]

The *Sherbert* court felt compelled to create an exemption to the state's Unemployment Compensation Act based on the claimant's religious beliefs, unless the government could show that some "compelling state interest" justified "the substantial infringement" of her first amendment right.[116] In addition, the government was obliged to show that it was using the least restrictive means to achieve its interest.

Since *Sherbert*, this analysis—at least as it applies to unemployment benefits—has been repeatedly reaffirmed by the Court.[117] In this line of cases the protection of the free exercise clause extends even to incidental or unintended effects of government action. The underlying principle may perhaps be framed this way: When majoritarian rule results in laws that reflect ignorance, hostile presuppositions, or indifference toward another's religious beliefs and practices, the authority of those laws must give way before the higher law obligations of freedom of religion.[118] At least, such was the Supreme Court's general understanding before *Smith*.

Given *Sherbert* and its progeny, it is hardly surprising that Smith won when his case came before the Oregon Court of Appeals and Oregon Supreme Court. As in *Sherbert*, and more recently in *Thomas v. Review Board* and *Frazee v. Illinois Department of Employment Security*, here too the plaintiff was denied unemployment benefits because of his religious practice. The Oregon courts found that such a denial constituted a

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114 *Id.* at 410.

115 *Id.* at 404.

116 *Id.* at 406.

117 *See, e.g.*, Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989); Hobbie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); Thomas v. Review Bd., 450 U.S. 707 (1981). As Michael McConnell has noted, however, outside the narrow context of unemployment benefits, the Court has rejected every claim for a free exercise exemption that has come before it. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410, 1417 (1990). McConnell has also strongly opposed, on historical grounds, the Court's interpretation of the meaning of the free exercise clause. *Id.* at 1420, 1516 ("Rather than try to foster an ecumenical spirit, the state allows each sect to promote its own cause with zeal. The Madisonian perspective points toward pluralism, rather than assimilation, ecumenism, or secularism, as the organizing principle of church-state relations."). McConnell concludes that the Court "should extend its protection to religious groups that, because of their inability to win accommodation in the political process, are in danger of forced assimilation into our secularized Protestant culture." *Id.*

118 *See* McConnell, *supra* note 117, at 1418.

significant and impermissible burden on Smith's free exercise rights.[119] Nor were government officials able to show a compelling interest to justify the burden that it imposed. For example, the Division of Employment conceded that "the legality of [claimant's] ingestion of peyote has little direct bearing on this case."[120] The Oregon Supreme Court therefore concluded that "the state's interest is simply the financial interest in the payment of benefits from the unemployment insurance fund to this claimant and other claimants similarly situated."[121] Accordingly, the state had no greater interest than the one articulated in *Sherbert*. And that interest, when weighed against the plaintiff's right, could not be considered compelling. "The state has not shown that the financial stability of the fund will be imperiled by claimants applying for religious exemptions if this claimant receives benefits."[122]

On certiorari, the United States Supreme Court took a different tack. For the majority, the legality of Smith's peyote use raised an essential question. According to the Court, if Oregon's criminal laws provided no exception to Smith's religious use of peyote, Smith would have no "legitimate" claim to the free exercise of religion.[123] In that event, the *Sherbert* analysis simply would not apply. The Court remanded the case to the Oregon Supreme Court for an opinion on the legal status of Smith's religiously motivated use of peyote.

In compliance with the Supreme Court's request, the Oregon Supreme Court addressed the legality of Smith's peyote use and concluded that while Oregon's law against possession of controlled substances, including peyote, made no exception for the sacramental use of peyote, its prohibition of such use by members of the Native American Church "would violate the First Amendment directly and as interpreted by Congress."[124]

When the case came before the Supreme Court on certiorari a second time, a majority of the Justices concluded that the Oregon Supreme Court had gotten it wrong. The first amendment's free exercise clause does *not* protect religious practices that are in violation of "an otherwise valid law prohibiting conduct that the State is free to regulate."[125] The anti-exemption, previously dissenting perspectives of Justices Rehnquist and Stevens had now won the day.[126] Under their view, since the state's

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119 *See* Smith v. Employment Div., 301 Or. 209, 721 P.2d 445 (1986).

120 *Id.* at 220, 721 P.2d at 450.

121 *Id.* (Smith was never charged with criminal possession of drugs).

122 *Id.* at 220, 721 P.2d at 451.

123 Employment Div. v. Smith, 485 U.S. 660, 671-72 (1988).

124 Smith v. Employment Div., 307 Or. 68, 73-75, 763 P.2d 146, 148-49 (1988) (referring to 1965 and 1978 congressional acts exempting religious use of peyote from criminal sanctions).

125 *Smith*, 110 S. Ct. at 1600.

126 *See* McConnell, *supra* note 117, at 1417-18:

> Chief Justice Rehnquist has contended that when "a State has enacted a general statute, the purpose and effect of which is to advance the State's secular goals, the Free Exercise clause does

criminal laws can indirectly *prohibit* Smith's religion altogether, the State Employment Division could certainly impose the lesser indirect penalty of denying Smith unemployment benefits. But how can this be right? How can the state prohibit a disapproved religion?

For Justice Scalia, who wrote the majority opinion in *Smith*, the first key move came in returning to an understanding of the free exercise clause that the Court embraced in 1879. In *Reynolds v. United States*,[127] the Court ruled that the defendant's religious beliefs provided no defense against state polygamy laws. The Court reasoned that while the state lacked the authority to interfere with "mere religious belief and opinions," it could make laws that regulate religious "practices."[128] And that, Justice Scalia concluded, is precisely what Oregon had done here. Moreover, since the criminal law in question was a "valid and neutral law of general application," and since Smith's religion was only indirectly affected, he could not complain about the law's effect—even if that "effect" was to prohibit his religion altogether.[129]

According to Scalia, the free exercise of religion is a right that has never carried very much weight. It is only when the free exercise clause is connected with *other* first amendment rights, such as freedom of speech and of the press, or the right of parents to direct the education of their children, that the application of a neutral, generally applicable law, like the criminal law at issue in *Smith*, could be barred.[130] But in Smith's case, no such "hybrid situation" existed.[131] So given that the state is authorized to regulate a general class of activities that happens to include the religious practice in which Smith had engaged,[132] and given that the free exercise right, standing alone, cannot impede a law of this kind, Smith had no constitutional right to challenge the law's effect. And if the free exercise right didn't come into play, how could *Sherbert*'s balancing test apply?

Commentators have questioned the correctness of the way that *Reynolds* split off religious belief from religious practice,[133] and with

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not . . . require the State to conform that statute to the dictates of religious conscience of any group," (citing *Thomas v. Review Board*, 450 U.S. at 723 (Rehnquist, J., dissenting)). Justice Stevens has stated that there is "virtually no room for a constitutionally required exemption on religious grounds from a valid. . .law that is entirely neutral in its general application," (citing *United States v. Lee*, 455 U.S. at 263 (Stevens, J., concurring)).

127 98 U.S. 145 (1879).

128 *Id.* at 166-67.

129 This analysis closely tracks the discredited analysis of Justice Frankfurter in Minersville School Dist. v. Gobitis, 310 U.S. 586 (1940), and the view of four Justices in Bowen v. Roy, 476 U.S. 693 (1986). *See* Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987) ("Five Justices expressly rejected this argument in *Roy*. . . . We reject the argument again today.").

130 *Smith*, 110 S. Ct. at 1601-02.

131 *Id.* at 1602.

132 *See, e.g., id.* at 1600 (on "incidental effect").

133 *See, e.g.*, Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty*, 37 CASE W. RES. L. REV. 674, 736 (1987); Currie, *The Constitution and the Supreme Court: Full Faith*

good reason. Does it make sense simply to tell a person in Smith's position, "Sure, go ahead and believe in your religion, just cut out its sacrament and ceremonies." Does anyone seriously believe that a religious life can be led on such terms? Surely some further explanation must be in order. When the state forces a person to cease exercising her religion in the way that she sees fit, surely some additional justification is due.

But my purpose here is not to revisit this familiar complaint against *Reynolds*. Instead, I want to apply the criteria for legitimation that I offered in Section II to Justice Scalia's majority opinion and Justice O'Connor's concurring opinion in *Smith*. I will first assess the *discursive competency* of each opinion. The structural constitutional norms that maintain institutional checks and balances, and the legal criteria they generate, will come into play at this stage of the analysis. Next, I will address the *substantive norms* involved in the *Smith* case. The legal and political criteria for legitimation implicit in what I have referred to as the *discourse ideal* will inform this second stage of the analysis.

A. Structural Constitutional Norms of Discursive Competency

1. Justice Scalia's Majority Opinion: The Discursive Dysfunction of Abdicating Judicial Review to the Political Process of Majority Rule.— Principled discourse, the contextualized application of text-based inherited norms, is the singular competency of the judiciary. In Justice Scalia's majority opinion in *Smith*, however, two closely interrelated discursive dysfunctions displace the court's ordinary virtues. Instead of reflectively providing explanation of, and justification for a particular contextualized interpretive encounter with an applicable text-based principle—namely, the right freely to exercise one's religion—the majority speaks a language of fiat, redolent with a fear of social disorder. In this way, the Court emulates the performative rhetoric characteristic of legislation. Indeed, the majority in *Smith* not only abandons principled discourse, but explicitly defers to the political process and its dominant discourse of pluralist bargaining among competing interests. The institutional role of judicial review thus blends into legislative policy management. As a result, the judiciary's check upon the legislature is lost. The passions of the majority—in this case, fueled by fears of drug abuse and criminality—rule without principled restraint. The discursive dysfunctions at work here encompass two interconnected strategies: first, the Court's deconstitutionalization of basic aspects of the freedom of reli-

and the Bill of Rights, 1889-1910, 52 U. CHI. L. REV. 867, 868 n.10 (1985); Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753, 778-79 (1984); Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 291 (1989); Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 937-42, 963 (1989); Note, *Developments in the Law—The Religion and the State: V. Free Exercise Accommodation of Religion*, 100 HARV. L. REV. 1703, 1736 (1987).

gious conscience; and second, its deference to majority rule over principled discourse. Let us examine each of these moves more closely.

According to Justice Scalia, "a free exercise claim unconnected with any communicative activity or parental right" is insufficient to challenge the authority of a "neutral, generally applicable law."[134] Consequently, the state need not articulate a compelling interest or employ the least restrictive means for realizing its preferred goals.[135] The reason for this distinction between free exercise and other first amendment values thus becomes of great interest. Scalia's account of the distinction, however, is based upon a simple, unexplained assertion: protecting the free exercise right does not "produce" a "constitutional norm."[136]

In Scalia's analysis, the first amendment rights that trigger close judicial scrutiny and require a "compelling government interest" to trump the protections they afford, are rights that lead to "equality of treatment" and "an unrestricted flow of contending speech." These purposes embody "constitutional norms."[137] In contrast, the "purpose" being advanced by someone like Smith fails to embody any norm at all; indeed, it is "a constitutional anomaly."[138] Why? Because in this case, the Court sees the free exercise right producing anarchy. As Scalia puts it, Smith's claim represents "a private right to ignore generally applicable laws."[139]

This is an odd formulation. To begin with, it is strange to speak of individual rights in terms of their "purposes." One would think it more apt to speak in terms of the values the right embodies, not what it advances—as if the content and effect were somehow distinct and exclusive. But this rhetoric is useful. Once the *content* of the right is occluded by its *effect*, the importance of addressing the former seems to fade. Thus, instead of addressing the value of protecting an individual's religious belief and practice, the Court discusses an entirely different matter: how an individual's religion can threaten the social order. In this way, the key *public* values of law and order displace "private" rights.[140]

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134 *Smith*, 110 S. Ct. at 1601-02.

135 *See id.* at 1603-04 (on the inapplicability of *Sherbert*'s balancing test). Again, in tracking Justice Frankfurter's analysis in *Gobitis*, it is curious that Justice Scalia makes no reference to the fact that *Barnette* overruled *Gobitis* two years after it was decided.

136 *Id.* at 1604.

137 *Id.*

138 *Id.*

139 Laws. . .are made for the government of actions, and while they cannot interfere with mere [sic] religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religion belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.

Smith, 110 S. Ct. at 1600 (citing Reynolds v. United States, 98 U.S. 145, 166-67 (1879)).

It is noteworthy that *Reynolds* equates legislative enactments with the "law of the land." But what of the *supreme* law of the land embodied in constitutional principles of higher law?

140 *Cf.* Barker v. Wingo, 407 U.S. 514, 519 (1972) (where Justice Powell, writing for the majority, assesses the right to a speedy trial in terms of public ("societal") interest, rather than as an individual

The phrase "constitutional anomaly" seems to stem from Scalia's implicit assumption that the Constitution exists to protect the social order, not threaten it. Simply put, values or purposes that threaten the social order cannot be "constitutional."[141] This assumption may be correct, but not in the terms Scalia uses. The social order is, after all, founded upon fundamental shared principles of government that both enable and constrain state action. These basic principles of government are antecedent (and normatively superior) to the laws enacted through pluralist bargaining and majority will. In Scalia's "flattened" analysis, however, to threaten the dictates of majority rule—as expressed through normal, self-operative legislative enactments—is equivalent to threatening the social order itself. Thus Scalia uses the word "private" to modify the "right" to freely exercise one's religion, but not the rights to "equal treatment" or "unrestricted speech." The latter rights, presumably, are "public" rights. That is, they serve society's general interests; they do not subserve the individual at the expense of the social order. They do not, in Scalia's terms, turn "each conscience [into] a law unto itself."[142]

One of the problems with Scalia's analysis is that the free exercise right may readily turn out to mean nothing if it is parasitic upon majority rule.[143] As Justice Jackson suggested in *Board of Education v. Barnette*,[144] the key feature of fundamental constitutional rights is that they transcend the felt needs or interests that a legislative majority happens to articulate at a particular point in time.[145] Scalia may be correct in saying that the free exercise clause protects a domain that is profoundly private, but this in itself offers no reason to alter (and effectively nullify) the pub-

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(private) right, thus making it easier for the Court to reject the defendant's claimed waiver of the right).

141 *Contrast* W. DOUGLAS, THE RIGHT OF THE PEOPLE 18 (1958) ("There is no free speech in the full meaning of the term unless there is freedom to challenge the very postulates on which the existing regime rests.").

142 *Smith*, 110 S. Ct. at 1606.

143 *See* Board of Educ. v. Barnette, 319 U.S. 624, 634, 644 (1942):

> If official power exists to coerce acceptance of any patriotic creed, what it shall contain cannot be decided by the courts, but must be largely discretionary with the ordaining authority, whose power to prescribe would no doubt include the power to amend. Hence validity of the asserted power to force an American citizen publicly to profess any statement of belief or engage in a ceremony of assent to one, presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question . . . The ceremonial, when enforced against conscientious objectors, more likely to defeat than to serve its high purpose, is a handy implement for disguised religious persecution.

144 319 U.S. 624 (1943) (overruling Minersville School Dist. v. Gobitis, 310 U.S. 486 (1940)).

145 *See id.* at 638:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

This states the dual track (higher law/normal politics) distinction articulated by Ackerman and conflated by Scalia in his majority opinion in *Smith*.

lic constitutional dimension of the right itself. After all, it was largely in order to carve out a private sphere, free from state regulation, that the Bill of Rights was adopted in the first place.[146] In this respect, it is Scalia's discourse that seems anomalous.[147] If the constitutional guarantee against state prohibition of the free exercise of religion represents higher law, then elevating the individual above the "law of the land" is precisely what the Bill of Rights requires. For it is a *supreme* law of the land that does so, and in the process protects individual freedom against impermissible governmental encroachment.

Of course, to say that the value content of the free exercise right exists independently of its effect upon the social order is not to conclude that that right is absolute. However, for a court to determine its limits it must explicitly articulate the meaning of the principle at issue, and the bounds beyond which that principle will not extend. The right may not cover certain regions of the public sphere described by other fundamental rights. By expressly and persuasively articulating the value content of the right in this way, the judiciary exercises its characteristic discursive competency, namely, principled discourse. In contrast, by defining the free exercise clause solely in terms of its effects upon the social order, Justice Scalia empties that text of any content except that which the majority's will gives it.[148] According to Scalia, in the area of the individual's exercise of religion, the state's police power subordinates constitutional principle.

Once it becomes clear that the Constitution does not protect religious practices from an indirect legislative prohibition that is "neutral and uniform in its application," the question becomes, what then *does* the free exercise clause protect? According to Scalia, the answer is readily discernible, but difficult to fathom. If other first amendment norms constrain the majority's interference with (unfamiliar or unpopular) ideas or beliefs, and religion entails no more than merely holding a belief, this suggests that protecting the "free exercise" of religion is superfluous. On this analysis, it is hardly surprising that Scalia insists the free exercise clause must be "connected" to some other first amendment right in order effectively to oppose majoritarian domination. In short, if the practice of

146 *Cf. Smith*, 110 S. Ct. at 1613 (O'Connor, J., concurring) ("In my view, however, the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as Jehovah's Witnesses and the Amish."); *see also* McConnell, *supra* note 117.

147 *Cf. Smith*, 110 S. Ct. at 1612 (O'Connor, J., concurring) ("Although the Court suggests that the compelling interest test, as applied to generally applicable laws, would result in a 'constitutional anomaly,'. . . the First Amendment unequivocally makes freedom of religion like freedom from race discrimination and free of speech, a 'constitutional nor[m],' not an 'anomaly'.").

148 Simply alluding to the past win/loss record of plaintiffs before the Court provides no more principled basis for the majority's conclusion than defining away the free exercise clause's value. *See Smith*, 110 S. Ct. at 1610 (O'Connor, J., concurring).

religion was once believed to be a constitutional right immune to ordinary politics,[149] on Scalia's analysis that right now seems to have become vestigial, or at most a "luxury."[150] As Scalia says, in a society as religiously diverse as ours, for the courts to assess every religious objector's claim of right in terms of countervailing government interests "of the highest order" would be "courting anarchy."[151] On the heels of this fear (of social disorder), Scalia's deconstitutionalization of the free exercise right opens the way to the supremacy of majority rule.

Scalia concedes that the Court's deference to the political bargaining process "will place at a relative disadvantage those religious practices that are not widely engaged in."[152] However, he "rationalizes" this risk of majoritarian dominance by asserting that it is simply an "unavoidable consequence of democratic government."[153] The reasons why we should accept this pronouncement are not forthcoming. In fact, the exact opposite of Scalia's axiomatic claim may be more persuasive. That is, accepting that the right to exercise one's religion as one sees fit embodies a basic shared norm regarding the acceptable powers of government, it may follow that this constraint upon the state may lead to multiple, independent, and conflicting normative worlds.[154] While the late Professor Robert Cover may have admired such a proliferation of communities, others are less sanguine about its anarchical implications.[155] Yet, it may be said that it is precisely *this* risk of anarchy—favoring the individual's privacy and freedom over the state's police power—that represents an "unavoidable consequence of democratic government." It is not the danger of the state's losing control over the social order that is of greatest constitutional concern, but rather its *gaining* control over individual beliefs and associations.

Whichever judicial interpretation obtains, however, the institutional competency of judicial review requires that it be persuasively defended.[156] Unfortunately, Scalia's selective de-elevation of a particular higher law principle (such as free exercise, but not other first amendment rights) to the realm of pluralist bargaining within the ordinary political

149 *See* McConnell, *supra* note 117.

150 *Smith*, 110 S. Ct. at 1605.

151 *Id.*

152 *Id.* at 1606.

153 *Id.*

154 *See* Cover, *Nomos*, *supra* note 14.

155 *See* Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1, 62-63 (1989); Sherwin, *supra* note 7.

156 The availability of an equal protection argument, triggering heightened judicial scrutiny, may also warrant consideration. *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 472 n. 24 (1985) (Marshall, J., concurring in part and dissenting in part) ("By invoking heightened scrutiny, the Court recognizes, and compels lower courts to recognize, that a group may well be the target of the sort of prejudiced, thoughtless, or stereotyped action that offends principles of equality found in the Fourteenth Amendment. . . . The political powerlessness of a group may be relevant. . . .").

process lacks adequate explanation and justification in principle.[157] And in this respect, the inadequacy of Ely's *Carolene Products*-based, "equal access" jurisprudence becomes clear.[158] Equal access to the political bargaining process cannot ensure that constitutional limits upon governmental power will be maintained.[159]

If anarchy properly names the underlying fear that motivates the majority decision in *Smith*, the anxieties and passions that attend the federal government's highly publicized war on drugs name the forces to which the Court has surrendered.[160] And if institutional abdication of principled judicial review names the majority's central discursive dysfunction, these forces take on a significant, perhaps even dominant (albeit silent) role in Justice O'Connor's concurring opinion. Here a different discursive dysfunction comes to the fore: namely, the court's institutional incompetence at "balancing."

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157 *Cf. Smith*, 110 S. Ct. at 1612 (O'Connor, J., concurring):

> The Court today gives no convincing reason to depart from settled First Amendment jurisprudence. There is nothing talismanic about neutral laws of general applicability or general criminal prohibition, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion.

158 Indeed, the lesson should have been clear from Plessy v. Ferguson, 163 U.S. 537, 544 (1895) (where the Court *interpreted* the fourteenth amendment as ensuring equality of the races before the law, but left the content of the law to majority rule—thus retreating from unitary constitutional principle to localized customary practices: "Laws permitting, and even requiring, [racial] separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power."). *But see id.* at 560 (Harlan, J., dissenting):

> The present decision . . . will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the Constitution, by one of which the blacks of this country were made citizens of the United States and of the States in which they respectively reside, and whose privileges and immunities as citizens, the States are forbidden to abridge.

See also Ayers v. Allain, 893 F.2d 732, 746 (5th Cir. 1990):

> The *Plessy* Court abandoned its constitutional duty to influence the folkways of the South to comport with the mores now enshrined in the fourteenth amendment; mores irreconcilable with the separate but equal rule announced by the Court. This rule reinforced the social stigmatization of blacks with racial separation by force of law. Stereotypes of racial inferiority were perpetuated by galvanizing instead of transforming the perception that whites are superior. The Court stated that it was the perceptions of blacks that created any badges of inferiority, when in fact it was Mr. Plessy who was imploring the Court to bridle the racial beliefs of the white majority that he so painfully endured. . . . Plessy is thus a decision that maintains the status quo of a prejudiced society. The Court failed to begin to bring these perceptions in line with the message that blacks were equal to whites. The constitutional rights of the minority did not animate the Court's analysis.

159 *Cf.* Ackerman, *supra* note 37.

160 *See Smith*, 110 S. Ct. at 1620-21 (Blackmun, J., dissenting); *cf.* Minersville School Dist. v. Gobitis, 310 U.S. 586, 595 (where Frankfurter elevates "national security" to a position that is "inferior to none" in the hierarchy of legal values and asserts that "national unity is the basis of national security."). Whereas Frankfurter was writing at the outset of World War II, Scalia writes in the midst of a different "war," namely, the war on drugs. *See also* Wisotsky, *supra* note 10, at 890.

2. Justice O'Connor's Concurring Opinion: The Discursive Dysfunction of Unexplained and Unjustified "Balancing."—In her concurring opinion,[161] Justice O'Connor argues that the majority "dramatically departs from well-settled First Amendment jurisprudence."[162] At the outset, she rejects the idea, repudiated in cases far more current than *Reynolds*, that one can meaningfully split off religious belief from religious practice. For example, she states that: "[b]ecause the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must therefore be at least presumptively protected by the Free Exercise Clause."[163] O'Connor also notes that, contrary to Justice Scalia's majority opinion, the free exercise clause "does not distinguish between laws that are generally applicable and laws that target particular religious practices."[164]

In this way, Justice O'Connor re-establishes the link between *Smith* and recent Supreme Court decisions holding that generally applicable laws that significantly (albeit indirectly) burden a religious practice require strict judicial scrutiny. According to O'Connor, "religious liberty is an independent liberty" and as such it occupies "a preferred position."[165] This is far from the superfluous role assigned to it in the majority's analysis. The key question becomes whether the state can justify, by a "compelling state interest" and by "means narrowly tailored to achieve that interest," the burden it has imposed upon Smith's religious conduct.[166] Put differently, the crucial question is whether Oregon's incidental prohibition of Smith's religious use of peyote is "essential to accomplish an overriding governmental interest?"[167]

According to O'Connor, this question requires a case-by-case analysis "sensitive to the facts of each particular claim."[168] Notwithstanding this requirement, however, out of the ten pages of her concurring opinion, Justice O'Connor takes just two paragraphs to arrive at the conclusion to which her balancing leads. That conclusion holds that the burden upon Smith's exercise of religion is "essential" to accomplish the state's "overriding interest" in preventing physical harm to its citizens and in

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161 Which was joined by Justices Brennan, Marshall, and Blackmun as to Parts I and II (addressing the constitutional interpretation of the free exercise clause as applied to the *Smith* case, but not as to the subsequent balancing of that right against the state's interest in drug control).

162 *Smith*, 110 S. Ct. at 1606.

163 *Id.* at 1608 ("Belief and action cannot be neatly confined in logic-tight compartments.") (citing Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)).

164 *Id.*

165 *Id.* at 1609 (quoting *Yoder*).

166 *Id.* at 1608.

167 *Id.* at 1611 (citing *Cantwell*, 310 U.S. at 304).

168 *Id.* ("[W]e cannot assume, merely because a law carries criminal sanctions and is generally applicable, that the First Amendment *never* requires the State to grant a limited exemption for religiously motivated conduct.").

preventing trafficking in controlled substances.[169] The reasons justifying and explaining this conclusion, however, are not forthcoming. For example, O'Connor cites no facts to suggest that a limited quantity of peyote, used in a carefully constrained religious ceremony, actually presents a health risk to the religious observer.[170] Moreover, while preventing drug trafficking may be a worthy social goal, she cites no evidence to link the religious use of peyote to trading in illicit drugs.[171]

The impression this acontextual policy analysis leaves is that Justice O'Connor simply does not wish to go against the current national tide, or risk sending a message of "softness" on drugs.[172] The Court's "symbolic" gesture in this case may be consistent with an instrumentalist concern with maximizing the efficiency of a preferred policy goal (*i.e.*, controlling the illegal drug trade). But it remains fundamentally inconsistent with the Court's institutional obligation to do justice in each case that comes before it. The courts may not use individual plaintiffs to send deterrence-reinforcing messages to others.[173]

I submit that O'Connor's balancing in this particular case points up a discursive dysfunction that generally attends the Court's use of this type of rhetoric.[174] Balancing represents an institutional incompetency for the judiciary because it typically fails to provide persuasive reasons for the court's outcome.[175] This omission is crucial, given that principled persuasion provides the key to the judiciary's legitimate

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169 *Id.* at 1614.

170 *Id.* at 1618 (Blackmun, J., dissenting) (discussing lack of facts regarding peyote's health risk and the Native American Church's careful limitations on peyote use). Note also that the Church's endorsement of "morality" and "sobriety" suggests a general abhorrence of nonreligious use of mind-altering substances. *See* E. ANDERSON, *supra* note 111.

171 As the dissent points out, there is "practically no illegal traffic in peyote." *Smith*, 110 S. Ct. at 1620 (citing statistics including: Drug Enforcement Agency's seizure of 19.4 pounds of peyote for the period 1980-87 compared to 15 million pounds of marijuana seized during the same period).

172 *See id.* at 1616 (Blackmun, J., dissenting) ("One hopes that the Court is aware of the consequences, and that its result is not a product of overreaction to the serious problems the country's drug crisis has generated.").

173 *Cf.* Sulie v. Duckworth, 689 F.2d 128, 130 (1982) (Posner, J.) (assessing defendant's right against compelled self-incrimination in terms of the effect of its violation upon future exercise). *Contra id.* at 131, 132 (Cudahy, J., dissenting) ("[A]n analysis based on balancing deterrence of the constitutional right to counsel against the state's interest in testimony about seeking a lawyer is an approach clearly foreclosed to us by the Supreme Court. . . . The relevant question is whether the particular defendant has been harmed . . . not . . . for persons generally.").

174 *See generally* Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 1005 (1987):

> Balancing was a liberating methodology at the outset. It took blinders off judges' eyes and let them openly take into account the connections between constitutional law and the real world. Preaching a pragmatic, realistic approach to constitutional law, it promised doctrine arrived at objectively and grounded in the facts of the society to which it applied. But balancing, whatever it merits as a way out of formalism, has itself become rigid and formulaic. It gives answers, but fails to persuade.

175 *Id.* at 983 ("No conviction, no belief in the justness of the result informs the opinion. Balancing has become mechanical jurisprudence. It has lost its ability to persuade.").

authority.[176]

It may be said that the balancing style reflects the dominance of the Legal Realist's instrumental approach to judicial decisionmaking,[177] which identifies preferable policy goals and seeks to ensure that those goals are maintained.[178] Axiomatic assertions based on "self-evident" (which is to say, unexplained and unjustified) preferences, typify that effort. The balancing approach tends to level principled discourse to the ordinary political plane of interest accommodation. But as we have previously noted, while the apodictic style may characterize the citizen's ordinary common sense, or the legislator's pragmatic, interest-accommodation skills, it does not comport with the judge's unique institutional obligations.[179] Thus Justice O'Connor's use of a legislative style of decisionmaking, like Justice Scalia's abrogation of principled judicial review in favor of deference to the political process, also undercuts the legitimacy of the Court's authority. For whether the Court engages in rhetorical distortions at the initial stage of identifying and interpreting an applicable text-based principle, or later on, in the stage of contextual application, the result is the same. The Court's exercise of unauthorized power provides a public warrant to challenge its authority. This conclusion may be expressed in the following general terms: When a particular institutional discourse, suited to one branch but ill suited to another, is taken beyond its proper bounds, one should not be surprised to witness the legitimation crisis that follows.

In Justice O'Connor's "balancing," the state's incidental prohibition of Smith's religion is deemed to be essential. But does this naked assertion inspire belief in the justness of the result reached?[180] The answer may come down to this: Would you forsake your religious liberty, or a similarly fundamental right, for the type of abstract social policy reasons

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176 *Cf.* Kahn, *supra* note 41, at 59 ("[U]ltimately, a Court dedicated to constitutional adjudication cannot exercise power unjustified by principle.").

177 *See* Aleinikoff, *supra* note 174, at 955-63. Averting any trace of "mysticism" in the law may have been taken a step too far by the Realists. That is, their quest for objectivity amidst facts and social conditions cast a shadow over values or principles that oftentimes operate in the law independent of policy interests.

178 *See* Kahn, *supra* note 41, at 5:

> Balancing cannot provide an adequate foundation for judicial review because the Court must explain and justify its results. Articulate argument, not silent intuition is the only source of legitimacy for judicial review. Without such an explanation at the heart of the judicial decision, the court is open to the charge that it usurps the functions of the political institutions of government.

179 *See* Alienikoff, *supra* note 174, at 991:

> Constitutional law provides a set of peremptory norms—a checking power—that is basic to the American notion of a government of limited powers. . . . Balancing undermines the checking and validating functions of constitutional law. This is most apparent in opinions that adopt a legislative voice, openly weighing costs and benefits in order to maximize social welfare.

180 *Cf. id.* at 972-76 ("A frequent criticism of balancing is that the court has no objective criteria for valuing or comparing the interests at stake.").

that Justice O'Connor identifies here?[181] This basic query goes to the heart of the distinction between higher law principles (regarding the basic powers and limitations of government) and ordinary political bargaining (through which local interests are accommodated and preferred policies are legislatively enacted).

In *Smith*, only the dissenters manage expressly to address not only the plaintiff's substantive right to practice his religion without unwarranted governmental interference, but also significant facts that Justice O'Connor's concurring opinion silently passes over. Regarding the former, the dissenters' principled interpretive discourse concerning the textual meaning and contextual reach of the free exercise clause puts Justice O'Connor's balancing act to the test. It specifically invites an explicit explanation of why the principle that lies at the heart of this case should be limited in its normative force. According to the dissenters, without persuasive reasons explaining and justifying why the state's policy interests should limit the plaintiff's free exercise of religion, that freedom should prevail. Yet, as we have seen, Justice O'Connor provides no persuasive, factually based grounds for her conclusion. Indeed, the dissenters' factual refutation of O'Connor's reliance upon the state's general interest in preserving the health of its citizens and in curtailing the illicit drug trade remains unanswered by her opinion. Those facts indicate that there is no serious illicit trading in peyote and that no harmful effect has been shown regarding the health of those individuals who consume small amounts of peyote in the course of the Native American Church's ceremonially and spiritually disciplined religious service.[182]

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181 Or, conversely, would you be willing personally to coerce a person like Smith to give up his religious beliefs and practices on these grounds? *Cf.* Cover, *Bonds, supra* note 14, at 822-25 (describing federal district court judge's refusal to sentence a defendant where he could not be sure that the West German penal system would extend proper constitutional guarantees). For Cover, this refusal portrays the close connection between the word of judicial interpretation and the deed of enforcement.

182 Blackmun's dissent, which was joined by Brennan and Marshall, starts by placing the *Smith* case in the line of free exercise cases that the Court has considered in this century. *Smith*, 110 S. Ct. at 1616. By locating the issues and principles involved in a historical stream, the dissent conforms to the ideal of the Court as an interpreter of tradition and principle, not policy. This reflects a judicial discourse as opposed to a legislative one.

The bulk of the dissent is taken up by an analysis of the specific facts of the *Smith* case as seen in the light of the principles articulated from the history of free exercise cases. Again, citing both academic and case authority, Blackmun first articulates the principles that determine the state interest and the criteria for that interest. *Id.* at 1617. He measures the claimed state interests against those principles and against the uncontroverted reality concerning the specifics of peyote use. *Id.* at 1618-21.

Besides integrating factual and historical principle, another noteworthy rhetorical feature of the dissent is the respect the discussion extends to both the state's and the citizens' claims. Each party's argument is articulated and measured against historical principle and the responding argument of the other. It is only after this is done that a judgment is announced. The participants are involved in the process of judicial decisionmaking by this rhetorical strategy. Even claims that are defeated are respected. The opinion in this regard is inclusive, not exclusive. This inclusionary aspect is reiterated

By adhering to the institutional constraints of principled judicial discourse, the dissenters in *Smith* show respect for the structural constitutional norms of rhetorical pluralism. Unlike the majority, they resist the temptation to emulate the "apodictic" (self-evident) and "performative" (rule-like) rhetoric of legislators. As a result, instead of conflating judicial and legislative competencies, the dissenters would effectively check majoritarian policy preferences that unjustifiably trench upon expressly interpreted and contextually applied constitutional values. Thus, the dissenters uphold both intra-judicial discursive competencies and inter-institutional checks and balances. In substantive terms, the dissenters' unwillingness to sacrifice principle (in defense of a pagan religious practice) to majoritarian interests in crime control (for the sake of deterring harmful and illicit drug use or marketing—at least in *other* cases, if not in the *Smith* case itself) also reflects the dissenters' adherence to basic liberal values.

Ordinarily, a democratic republic that is secure in its national identity, and confident of its basic principles, should not feel the need to violate its commitment to individual autonomy, social standing and group based identity for the sake of public order alone. But these may not be ordinary times. Today, fear and uncertainty becloud our sense of national identity and distort the intra-institutional discursive competencies and inter-institutional checks and balances necessary to ensure the continued legitimation of state power.

It is at this point, then, that we turn to the next stage of our analysis of the Court's decision in *Smith*. Here we will ask: How might the discourse ideal help to inform and guide our understanding of the substantive norms that are at issue in this case?

B. Substantive Norms and the Discourse Ideal

1. The Legal Dimension of Legitimation.—I have argued that the theory and practice of rhetorical pluralism and the discourse ideal provide an integrated account of the three matters concerning which liberalism must provide an acceptable understanding: human nature, the institutionalization of power, and shared basic ideals. So far, as a matter of structural constitutional construction, I have sought to show that the *Smith* majority operates in a discursively dysfunctional fashion. Rather than maintain the Constitution's pluralist view of human nature, the *Smith* majority substitutes a different vision. Under the view expressed by Justice Scalia, the ordinary judicial virtue of principled discourse collapses into the ordinary legislative virtue of pluralist bargaining in the political process. As a result, majority rule subordinates interpretively

in its penultimate section, *id.* at 1621-22, in which Blackmun places special emphasis on the minority nature of the citizens' claims.

persuasive and contextually applied principle.[183] At the same time, popular passions and the legislative clamor for law and order attendant upon the nation's declared "war on drugs" increasingly overcome the ordinary virtues of both legislative policymaking and constitutional principle.

I turn now to the third matter concerning which liberalism must provide a persuasive account, namely, the matter of shared public values. This shifts our focus from structural constitutional norms, which guide institutional competencies, to the substantive norms that make up the liberal discourse ideal.

In the face-off between state coercion and individual liberty, much depends upon whether the choices made and the actions undertaken in the public sphere are based on what we fear or what we cherish most.[184] If Justice Scalia's chief concern in *Smith* rests with the former (*i.e.*, his fear of social disorder in the face of the individual's religious conscience), a central concern of the discourse ideal lies with the latter (*i.e.*, the normative force of fundamental beliefs that must coexist within a shared public community). Consider, first, the discourse ideal's requirement of respecting individual dignity in the context of the *Smith* case.

Subjecting a right to majority rule—*i.e.*, to the usages, customs, and traditions of local communities[185]—places it in the grip of fluctuating popular preferences and interests. This is inconsistent with a conception

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183 The Court's message in *Smith*—of cultural dominance over practitioners of "pagan" faiths like the Native American Church—remains implicit, and perhaps even unwitting. *Cf.* State v. Big Sheep, 243 P. 1067, 1072 (1926) ("It was clearly within the power of the Legislature to determine whether the practice of using peyote is consistent with good order, peace, and safety of the state. We do not find peyote or any like herb mentioned by Isaiah, or by Saint Paul in his epistle to the Romans, nor does it seem from the language employed that Saint John the Divine had any such in mind."). *Contra* People v. Woody, 61 Cal. 2d 716, 721, 394 P.2d 813, 818, 40 Cal. Rptr. 69, 74, (1964) (where the State Attorney General argued that since "peyote could be regarded as a symbol, one that obstructs enlightenment and shackles the Indian to primitive conditions, the responsibility rests with the state to eliminate its use." This argument was rejected by the court: "We know of no doctrine that the state, in its asserted omniscience, should undertake to deny to defendants the observance of their religion in order to free them from the suppositious 'shackles' of their 'unenlightened' and 'primitive conditions.' ").

184 *Compare* Minersville School Dist. v. Gobitis, 310 U.S. 586, 595 (Frankfurter, J.):

> [T]he question remains whether school children, like the Gobitis children, must be excused from conduct required of all the other children in the promotion of national cohesion. We are dealing with an interest inferior to none in the hierarchy of legal values. National unity is the basis of national security.

with Board of Educ. v. Barnette, 319 U.S. 624, 634-642 (Jackson, J.):

> [T]he asserted power to force an American citizen publicly to profess any statement or belief or to engage in any ceremony of assent to one, presents questions of power that must be considered independently of any idea we may have as to the utility of the ceremony in question. . . . Compulsory unification of opinion achieves only the unanimity of the graveyard. . . . If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.

185 *Cf.* Plessy v. Ferguson, 163 U.S. 537, 550 (1895) ("In determining the question of reasonableness [of a statute which segregated the use of public conveniences based on race, the state] is at liberty to act with reference to the established usages, customs and traditions of the people. . . .").

of enduring values constituting the supreme law of the land.[186] Yet, it is this sacrifice of basic principles to interest-based politics that Justice Scalia carries out in *Smith*.[187]

Under Justice Scalia's view, so long as Oregon's applicable criminal law is neutral on its face and makes no direct reference to religion, its incidental affect upon a religion will not prompt constitutional concern. This view, however, presupposes a sense of "neutrality" that is based on a majoritarian perspective. To many people, perhaps even a majority, the law in question may seem neutral, but from the perspective of Smith it is anything but that. Indeed, its enforcement effectively outlaws his religion.[188] By failing to take into account Smith's perspective, and by subjecting his deeply held beliefs to the will of the majority, the Court violates his dignity and autonomy.[189] It is as if his view did not count. And it is this indifference that leads the Court to ignore the second requirement of the discourse ideal.

The Court's majoritarian perspective reflects a failure to listen to, and empathize with, the story Smith has to tell. Understanding his claim requires that conventional or subjective presuppositions be suspended in order that the claimant's own idea of self and community and the beliefs that are essential to it, can be heard.[190] Without this, discourse cannot meaningfully proceed. Judgment, absent inter-subjective understanding, is coercive. It reaches no one except the already persuaded, for whom no persuasion is needed. If this were a matter for self-operative rules, the

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186 *See* A. BICKEL, *supra* note 43 (on the role of judicial review in discerning and upholding enduring values); *cf. Plessy*, 163 U.S. at 561-62 (Harlan, J., dissenting):

> State enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat the legitimate results of the [civil] war, under the pretence of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned.

187 *Smith*, 110 S. Ct. at 1606.

188 *See* McConnell, *supra* note 117, at 1419.

189 *See* Wallace v. Jaffree, 472 U.S. 38, 52-53 (1985):

> [T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful.

But see M. SANDEL, *supra* note 6, at 609-10 ("[T]he image of the unencumbered self, despite its appeal, is inadequate to the liberty it promises. In the case of religion, the liberal conception of the person ill equips the Court to secure religious liberty for those who regard themselves as *claimed by* religious commitments they have not chosen.") (emphasis added).

190 *Cf.* C. GEERTZ, LOCAL KNOWLEDGE 59 (1983) ("Rather than attempting to place the experience of others within the [western] framework . . . understanding them demands setting that conception aside and seeing their experience within the framework of their own idea of what selfhood is."); *see also* R. WINDES & A. HASTINGS, ARGUMENTATION AND ADVOCACY 22-23 (1966):

> Rational decision-making emphasizes the fact that wise decisions ordinarily require time and patience,time to investigate problems thoroughly, the time to analyze alternatives carefully, and the time to prepare cogent arguments for and against each; the patience to listen to opposing points of view, the patience to suspend judgment until all pertinent arguments have been heard.

performative style may suffice. But principled judicial discourse must proceed differently. In *Smith*, it does not.

This is not to say that the claimant's perspective, once heard, must prevail over the state's. What it does mean is that the plaintiff's claim of right must be persuasively assessed in the context of the state's countervailing interests. This calls into play the third requirement of the discourse ideal: a commitment to keep in play the discursive process of give and take. This commitment requires persuasive reasoning. For example, it may be reasonably argued that there are circumstances under which the freedom of religion may be limited. The existence of a clear and present danger to others,[191] or the need to protect society as a whole from grave and pressingly imminent harms,[192] or the obligation to maintain basic services[193] are illustrative.

The question thus becomes: Is there good reason to conclude that the social order will survive, without significant detriment to basic values, if the Court creates an exemption from the obligation to follow an applicable law because of an individual's religious conscience? In this respect, the discourse ideal's commitment to reasoned "give and take" between opposing parties may parallel the high Court's requirement that the state justify imposing a burden on a plaintiff's religious beliefs by persuasively showing that it is "essential" to accomplish an "overriding governmental interest."[194] In short, the force of the state's countervailing interest must be carefully assessed in light of the specific facts of the case in question as well as the history and depth of commitment to the principle that is being challenged.

Absent facts on the record expressly showing the tangible harms or dangers that would flow from the requested exemption, the claimant's freedom of religion should prevail. As we have seen, however, in *Smith* the State expressed no more than a general interest in fighting drug trafficking and protecting the health of its citizens.[195] But the State's "war

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191 *See Barnette*, 319 U.S. at 634.

192 *Id.* at 643-44.

193 *See, e.g.*, United States v. Lee, 455 U.S. 252 (1982) (disallowing religious exemption for Amish citizens who refuse to pay taxes that fund social security benefits is not an impermissible free exercise burden because those benefits represent an essential social interest and uniform participation is important for tax system to function); Prince v. Massachusetts, 321 U.S. 158 (1944) (governmental purpose of protecting children from burdensome and exploitative labor carries greater value to society than parental religious claim); *see also* Jehovah's Witnesses v. King County Hosp., 390 U.S. 598 (1968) (affirming a district court finding that a statute permitting the administration of blood transfusions to children over parents' objection was constitutional).

194 *Lee*, 455 U.S. at 257-58.

195 *Smith*, 110 S. Ct. at 1617-18 (Blackmun, J., dissenting) (arguing that the record shows that trafficking in peyote is not a serious social problem and that there is no empirical data to support the assertion that a limited quantity of peyote, ingested under the carefully controlled circumstances of the Native American Church's religious ceremony, represents a health hazard); *see also* People v. Woody, 61 Cal. 2d 716, 722-23, 394 P.2d 813, 819, 40 Cal. Rptr. 69, 74 (1964):

The record, however, does not support the state's chronicle of harmful consequences of the use

on drugs" cannot persuasively justify or explain the prohibition of Smith's sincere religious practice in this particular case.[196] Justice Scalia's fear that granting Smith's claim will open a floodgate[197] similarly lacks any firm empirical grounding.[198] As another court has aptly stated: "Justifications founded only on fear and apprehension are insufficient to overcome rights asserted under the First Amendment."[199]

In sum, unlike the dissenters, the majority in *Smith* ignores each of the substantive requirements essential to the liberal discourse ideal, namely: respect for the other, empathy for the story she has to tell, and a commitment to provide intelligible justifications that are or can be made acceptable in principle to every member of society. The difficult questions that the Court's failure in *Smith* raises are the following: What consequences ensue if the liberal framework of shared normative principles, including the plaintiff's right to be heard, and his claim to social belongingness, are no longer being observed by the Court? What if the value of his liberty under these circumstances cannot remain on par with the liberty of other members of the polity? These questions take us from the legal to the political dimension of legitimation in the context of the *Smith* case.

2. The Political Dimension of Legitimation.—To the extent that an individual or a group of individuals experience (or reasonably anticipate)

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of peyote. The evidence indicates that the Indians do not in fact employ peyote in place of proper medical care; and, as the Attorney General with fair objectivity admits, 'there was no evidence to suggest that Indians who use peyote are more liable to become addicted to other narcotics than non-peyote-using Indians.' . . . Finally, as the Attorney General likewise admits, the opinion of scientists and other experts is 'that peyote . . . works no permanent deleterious injury to the Indian. . . .' Indeed, as we have noted, these experts regard the moral standards of members of the Native American Church as higher than those of Indians outside the church.

See also Olsen v. Drug Enforcement Admin., 878 F.2d 1458, 1463 (D.C. Cir. 1989); Frank v. State, 604 P.2d 1068, 1074 (Alaska 1979).

196 *Smith*, 110 S. Ct. at 1617. Indeed, Smith's ceremonial practice might actually advance policy interests underlying drug control. For example, the founding Charter of the Native American Church explicitly states that the Church seeks to promote "morality" and "sobriety."

197 *Id.* at 1605 ("Any society adopting such a system [of granting exemptions where no compelling interest exists to counter it] would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them.").

198 *Cf. Woody*, 61 Cal. 2d at 723, 394 P.2d. at 818, 40 Cal. Rptr. at 74 (" '[T]here is no proof whatever to warrant such fears of malingering or deceit as those which the respondents now advance.' ") (quoting Sherbert v. Verner, 374 U.S. 398, 407 (1963)). That the courts have not been hampered by a "proliferation" of religious exemption claims is fairly evident. That they have not had difficulty in handling the cases that have come before them is also manifest. *See, e.g.*, Olsen, 878 F.2d at 1462-64 (where the court articulates, on empirical and well reasoned grounds, the tangible social harms that would flow from exempting marijuana use from legal constraint on religious grounds); Town v. State *ex rel* Reno, 377 So. 2d 648, 651 (Fla. 1979) (same); *see also* Leary v. United States, 383 F.2d 851 (5th Cir. 1967) (affirming jury instruction that acquittal was appropriate if jury found that defendant's marijuana use was part of sincere religious belief), *rev'd on other grounds*, 395 U.S. 6 (1969).

199 *Frank*, 604 P.2d at 1074.

the destruction of a sense of self identity, or of a shared normative reality among others, the warrant necessary to reject the authority of the state may be at hand. In the context of the *Smith* case, then, the question becomes: Why should someone in Smith's position submit to the rule of law as embodied in the Court's decision, given that the rhetoric of that ruling and its practical effect might well threaten the very existence of his sense of self and community? If Smith, and others similarly affected by the Court's ruling, are thrust beyond the margins of society, what stake in public life is left to them? Are the conditions of conventional social life sufficient to allow for the flourishing of Smith's sense of self? If the answer is no, how can he reasonably be expected to submit to his own demise? Indeed, what is the basis for freedom of choice absent a coherent sense of self and normative reality? If this is the case, what distinguishes the state's coercive prohibition of Smith's religious worship from the exercise of naked violence? And why shouldn't the state's violence against Smith and his community warrant a response in kind?

Now it may be that Smith's commitment to the principle of freedom of religion, or to the demands of his religious scruples, is not strong enough to lead him personally to risk direct confrontation with the police power of the state (*e.g.*, by engaging in acts of civil disobedience). He may, therefore, simply acquiesce to the law's prohibition.[200] On the other hand, he may also proceed against the state in a fashion that does not force him to "put his body on the line." For example, he could seek a favorable court ruling on state constitutional grounds.[201] Or he could lobby state legislators and speak out publicly to voters concerning the injustice of the state's action.

But what if these efforts were to fail?

Tony Honore provides, in my view, the correct response: "In the end, the only guarantee of human dignity is that we would, if pressed too far, be prepared to rebel, and, if we did so, would have the right on our side. It would then be the duty of other members of our community to support us."[202] If the other is deemed by a majority to have strayed beyond society's bounds, may we then act against her without constitutional constraint?[203] And what of the political requirements of legitima-

200 It should be noted that mere acquiescence does not offer a source of legitimacy to the state's exercise of power. *See* Sherwin, *supra* note 100, at 404-06 & n.83 (on *de jure* v. *de facto* authority and the fall of the Marcos regime).

201 Oregon's Supreme Court expressly avoided this ground, preferring instead to interpret the first amendment of the federal Constitution. *See* Brennan, *The Bill of Rights and the States*, 61 N.Y.U. L. REV. 535, 546-53 (1986) (on state constitutional defenses of basic rights in the face their federal deconstitutionalization); Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983).

202 *See* Honore, *supra* note 4, at 54.

203 *Cf.* United States v. Verdugo-Urquidez, 110 S. Ct. 1056, 1060 (1990) (limiting the reach of the fourth amendment proscription against unreasonable searches and seizures to "the people" of the United States). According to Justice Rehnquist, " 'the people' protected by the Fourth Amendment

tion? Our answer to these questions may depend upon our vision of America: does it allow us to turn someone like Smith into a legal and political exile?

The response that we offer, in silence or otherwise, is perhaps the most important part of the stories we tell about law and power, and about ourselves and our community. These are stories of legitimation. They constitute the poetics of law. The account offered here of rhetorical pluralism and the discourse ideal is one such story, awaiting response.

IV. CONCLUSION

The ultimate security of the social order depends upon more than the use of the state's police power. Of even greater importance is a broad and active commitment, by officials and citizens alike, to shared basic principles of government. This normative commitment should be capable of making the use of force acceptable (in principle) to every member of society. Confusion about the basic values that constrain and empower the state not only tends to erode the social order, it also tends to distort institutional practices. If left uncorrected, these distortions increasingly threaten the legitimacy of state authority.

Current uncertainties about the meaning and value of liberalism, taken together with potent fears and uncertainties surrounding our national sense of identity and direction, have allowed serious institutional distortions to go unchecked. The approach of rhetorical pluralism and the discourse ideal seeks to counter this trend. It attempts to do so by providing a revitalized understanding of basic liberal ideals and by articulating the standards for intra-institutional competencies and inter-institutional checks and balances that those ideals generate in the context of our constitutional democracy.

Absent broad and active acceptance of the basic principles of government, the power to rule may exist, but the right to rule may not. The legal dimension of the legitimation of state power involves the structural and substantive norms that make up our constitutional framework. The political dimension goes to the individual's or group's commitment to a way of life—independent of what others, including officials, may say about what the constitutional framework permits or prohibits.[204] The

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. . . refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Id.* at 1061 (Rehnquist, C.J., majority opinion).

204 *See, e.g.*, Cover, *Nomos, supra* note 14, at 28-29:

> In this realm of meaning—if not in the domain of social control—the Mennonite community creates law as fully as does the judge. First, the Mennonites inhabit an ongoing *nomos* that must be marked off by a normative boundary from the realm of civil coercion, just as the wielders of state power must establish their boundary with a religious community's resistance and autonomy. . . . The Mennonites are not simply advocates, for they are prepared to live and do live by their proclaimed understanding of the Constitution.

See also id. at 32 ("Freedom of association implies a degree of norm-generating autonomy on the

politics of legitimation cannot be separated from constitutionalism. Indeed, political legitimation remains an essential prerequisite to constitutional legitimacy. It describes the circumstances under which a particular constitutional reality is created and maintained, modified or abandoned.

Since submission to the rule of law must be knowing and voluntary, informed choice presupposes an autonomous chooser. That which threatens the coherence of the chooser's self, or of the normative world in which self-identity is to be found, threatens the very basis for a shared public world. It is for this reason that the liberal discourse ideal carries such persuasive force. For it acknowledges the ultimate supremacy of popular sovereignty, and the need for state officials to participate in public debate with others concerning the basic norms of public life. This discursive process is necessary to sustain the living pulse of normative consensus.

Without this kind of broad discursive engagement, the normative basis for a shared public community may be lost. Private normative worlds may then proliferate, but the clash of beliefs that will inevitably ensue will find no common place for peaceful resolution. Since public indictments are inescapable in any social reality, it is incumbent upon the community at large to ensure that the response of violence is carefully contained. The need for the rule of law and a public arena in which reasoned public articulation of indictment-activated values may proceed must therefore be met. Legal discourse, guided by acceptable norms of institutionalized power, may complement private norm-based self and group identities. In any event, the relationship between the rule of law and private identity remains reciprocal. When law operates to crush identity, there is no reason to submit to the state's force.

Thus, when it comes to shared public values, an attitude of indifference, prejudice, or misunderstanding concerning the other's basic needs, beliefs, or claims of right may place the state's legitimacy at risk. By casting her out, the state may hand the political, social, or legal exile a public warrant for resistance. The Supreme Court's opinion in *Division of Employment v. Smith*, read in this light, becomes a parable of pagan religious practices being subordinated to the ordinary (interest-accommodating) politics of majority rule. On this reading, *Smith* provides a warning concerning the Court's disregard for the legal and political requirements of legitimation. The majority's unexplained and unjustified de-elevation (to the realm of political bargaining) of the individual's right freely to exercise his religion, and the concurring opinion's equally unexplained and unjustified "balancing" in favor of a preferred state interest in the "war against drugs," again at the expense of the plaintiff's free

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."); *id.* at 67 ("The statist impasse in constitutional creation must soon come to an end.").

exercise right, illustrate two separate discursive dysfunctions to which the judiciary is prone. The contribution of each of these dysfunctions to a legitimation crisis in the public sphere suggests the need for corrective action.

When courts shirk their institutional responsibility to provide a principled check upon the ordinary political process of pluralist bargaining (in which majority rule prevails), and legislatures subordinate their characteristic institutional virtue (of deliberatively developing comprehensive policy goals) to a dysfunctional appetite for selfish political gain, including deference to popular passions—or stoking them by targeting "the enemy within," it falls upon the people to reassert their sovereign power to rediscover and actuate within the public sphere the pulse of our higher law.

The clash of conflicting principles thus comes to be seen as an inescapable part of our constitutional democracy, even if it means embracing the possibility that, at times, active resistance to another's (including the state's) normative commitment may be necessary. At the same time, however, the divisiveness and strife of opposition, and the danger of domestic violence, should persuade us all to accept an unceasing commitment to seek out normative consensus.

Locating and protecting the proper bounds between private and public worlds requires the rule of law. The rule of law in turn requires broad and active commitment to a shared narrative of legitimation, such as the account of rhetorical pluralism and the discourse ideal that this Article provides. How else—and with what hope of success—is democratic government to mediate, in a world of discord, violence, and death, the insistent demands of liberty, community, and social justice?