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Cover Page Footnote

The author wishes to thank for the gift of their friendly insights, Linda Hirshman, Mortimer Adler, George Anastaplo, William Braithewaite, James Carey, Jim, Curtin, Donal Regan, and Ronald Sharp.

THE VALUE OF FRIENDSHIP IN LAW AND LITERATURE

MICHAEL J. KAUFMAN†

Once thought to be indispensable to a good life, the value of friendship has been swept away by the most recent trends in philosophical, literary, and legal thought. After tracing the subtle decline in the value of friendship, this Article employs these very trends to redefine and resurrect that value, particularly within American law.

A good work of art is one which elevates its own art-form by successfully channeling the anxiety of influence created by competing art forms. A good judicial opinion, therefore, is one which elevates the art of judging above strong competing arts such as philosophy and literature. Friendship can be seen as the relationship which is created among artists through their work. The judge who elevates the art of judging is a good friend to all other judges.

This redefinition of friendship has philosophical, political, and aesthetic value. Those past literary and legal works which have been considered to be "great" are indeed "great" precisely because they elevate their particular art forms above competing art forms.

Even our best judges today have been unable to channel the very real influences of contemporary philosophic and literary thought into an elevation of the art of judging. Professor Kaufman concludes by suggesting a strategy which contemporary judges may employ to channel these influences into an evaluation of the judicial art. Indeed, Professor Kaufman's Article is itself such a strategy.

"Without friends no one would choose to live, though he had all other goods."

- Aristotle*

"A friend can reduce me to misery with a single look."

- Duncan Kennedy**

THE language of antinomies,¹ contradictions,² and deconstruc-

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* Aristotle, *The Nicomachean Ethics* 192 (D. Ross trans. rev. ed. 1987).

** Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buffalo L. Rev. 209, 212 (1979).

1. See, e.g., R.M. Unger, *Social Theory: Its Situation and Its Task* 24-25 (1987)(attempting to overcome antinomies, the opposition of one law or rule to another, in liberal society by redefining community); R.M. Unger, *Knowledge and Politics* 104-44 (1975)(exposing fundamental contradictions in liberal thought); Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L.J. 1, 1-9 (1984)(exploring landscape of nihilism in contemporary legal theory).

2. See, e.g., Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L. Rev. 563, 576 (1982)(unearthing fundamental contradictory motives in contract and tort law); Kennedy, *The Structure of Blackstone's Commentaries*, 28 Buffalo L. Rev. 205, 213 (1979)(discovering fundamental tensions in the common law); Kennedy, *Form and Sub-*

tion³ floods the landscape of legal, philosophic, and literary discourse.⁴ The currents challenge not only traditional value structures, but also the human effort to erect those structures.⁵ Thus far, the backlash has been strong only in its rhetoric.⁶ If deconstruction does expose irreconcilable contradictions in our systems of value, however, then rhetoric alone cannot reconstruct those systems. Instead, the reconstruction of values in the wake of deconstruction's erosive impact must be accomplished by accepting, rather than rejecting, its fundamental tenets. This Article develops a strategy for the reconstruction of the particular value of friendship. Once thought to be indispensable to the good life, friendship is now absent from most meaningful discourse.⁷ Its resurrection requires more than a leap of faith.

The first step in the strategy of resurrecting the value of friendship is tracing its decline. This Article begins by charting that decline in literature, philosophy, and law. It shows that American law in particular has exploited the language of friendship, while debasing the value of friendship. Friendship apparently has no place in a legal system based upon a fundamental contradiction between the individual and the community.

Part II begins the effort to return friendship to that legal system by redefining friendship. In an epoch in which all distinctions between law, literature, and philosophy have been collapsed, the analysis of legal issues necessarily involves issues of literature, and philosophy. This Article uses literature and philosophy to create a definition of friendship. Friendship after the flood of deconstruction is not two people sipping decaffeinated coffee. Rather, friendship is a relationship that develops between two or more people through the medium of the texts which they write. It is a timeless relationship that exists among the authors of literature, philosophy, and law. The relationship between authors is revealed

stance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1685-86 (1976)(exposing antinomy of rules and standards in private law).

3. The usual starting place is Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 Yale L.J. 461 (1984).

4. The word "discourse" as used throughout this article encompasses all legal, philosophic, and literary writing. I use the term often because it is broad enough to include all form of written communication in the fields of law, philosophy, and literature.

5. See, e.g., J. Derrida, *Of Grammatology* 37-73 (Spivak trans. 1976)(exposing all logocentric value structures as the product of human engineering) [hereinafter Derrida, *Of Grammatology*]; Heller, *Structuralism and Critique*, 36 Stan. L. Rev. 127, 127-30 (1984)(displaying and critiquing fundamental structures in Western thought).

6. See, e.g., Carrington, *Of Law and the River*, 34 J. Legal Educ. 222, 226 (1984)(metaphorical attack on teachers of critical legal studies); Rosenberg, *Uproar in the Academy: Deconstruction's Corrosive Role in American Higher Learning*, Chi. Trib., Mar. 26, 1991, § 14, at 5, col. 1 (ethnocentric diatribe against deconstruction in American education). But see Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 Harv. C.R.-C.L. L. Rev. 301, 320-22 (1987)(arguing that abstract critical legal studies are unhelpful in solving practical problems).

7. See *infra* notes 13-64 and accompanying text. But see Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L.J. 1060, 1071-76 (1976)(arguing that a lawyer has a moral obligation to represent zealously a client as a limited-purpose public friend).

and even enriched through their literary, philosophic, and legal discourse. Friendship, as defined, is not an illusory horizon shaped around a false center. Instead, friendship is an ellipse which emanates from the focus of each friend. An ellipse is the coincidence of the hyperbolas created from two foci.

What coincides in the good friendship? The good friendship, it will be argued, is a coincidence of the love of each friend's *techne*.⁸ That which coincides in good friends is the desire to elevate each other's *techne*. Among creators of literary discourse, friendship is the coincidence of the love of the *techne* of literature. Among creators of philosophic discourse, friendship is the coincidence of the love of the *techne* of philosophy. And among creators of legal discourse (judges, scholars, and practitioners), friendship is the coincidence of the love of the *techne* of law.

Armed with this post-deconstructionist definition of friendship, we can begin to evaluate legal discourse. The "good" judicial opinion, for example, is one which elevates the *techne* of judging in particular and of law in general. A good judge befriends other judges by writing judicial opinions which elevate the art of judging. Part II concludes with an argument that this evaluative criterion is good, useful, and pleasant; it is philosophically sound, politically utilitarian, and even aesthetically pleasing.

In Part III, this strategy of redefinition and resurrection of friendship is put to the test. By comparing great literary creators with great judges writing in the same philosophic epoch, this Part discovers a common thread of greatness. I argue that the literary and legal works which we have perceived to be great in the past are those which display the highest forms of friendship. The argument begins with a juxtaposition of the work of two great novelists who, despite an apparently intense enmity, actually displayed in their novels the highest form of friendship—Samuel Richardson and Henry Fielding. The novels of Richardson and Fielding are considered great because they are beautifully developed arguments for the greatness of the art of literature in general and the art of the novel in particular. These novelists befriended each other and all literary creators by elevating the art of the novel and of literature. The novels of Richardson and Fielding are then compared with the decisions written by Justice Joseph Story, a great judge. Although he was not an exact temporal contemporary of these novelists, Justice Story wrote in an age flooded by similar philosophic influences. He employed devices comparable to those of Richardson and Fielding in his great opinions to demonstrate the supremacy of his particular art: the art of law and the art of judging.

8. The Greek word *techne* is used throughout this article because it embodies art, science, calling, role, and the *telos* or ends toward which each is directed. For style purposes, the word art is sometimes used in this Article in place of the word *techne*. When the word art is used, however, I intend it to carry the full measure of meaning housed in the Greek word *techne*.

Part III then compares the contemporaneous work of German literary critic Walter Benjamin with that of Justice Holmes. Benjamin has become known not only for the genius of his literary criticism,⁹ but also for the genius of his friendships.¹⁰ By brilliantly elevating the art of literary criticism in his particular epoch, Benjamin actually befriended all literary critics. And, using similar strategies in the same epoch, Justice Holmes befriended all judges by subtly elevating his art: the art of judicial decision-making.

Part IV searches for contemporary literary and legal friendships. In our epoch, Jacques Derrida's writings masterfully elevate all literary artists and philosophers of language by elevating the play of language itself. The techne of literature thus has now become difficult to separate from the techne of law.¹¹ Not surprisingly, therefore, the art of literature has also become a threat to the supremacy of the art of law. Unlike our great judges of the past, however, who elevated the art of judging above the strong competing arts of their epochs, our best contemporary judges have failed to respond to the anxiety of influence from Derrida's elevation of literature with a successful counter-strategy for the elevation of law. Even United States Court of Appeals Judge Richard Posner, who has written extensively on the relationship between law and literature, has not yet developed a strategy for meeting the Derridean claims.

The unfortunate failure of contemporary judges to elevate the techne of law in their opinions is typified by the various judicial opinions in the *CTS Corp. v. Dynamics Corp. of America*¹² case. The opinions in that case, including Judge Posner's for the Seventh Circuit, denigrate their authors, denigrate great precursor judges, and fail to channel the anxiety

9. See, e.g., H. Arendt, *Introduction to W. Benjamin, Illuminations, Essays and Reflections* 1-2 (1968) [hereinafter Benjamin, *Illuminations*] (praising Benjamin's brilliance as a literary philosopher); P. Demetz, *Introduction to W. Benjamin, Reflections, Essays, Aphorisms, Autobiographical Writings* 1-3 (1986) [hereinafter Benjamin, *Reflections*] (similarly praising Benjamin's literary criticism).

10. See generally G. Scholem, *Walter Benjamin, The Story of a Friendship* (1975).

11. For excellent arguments for, and examples of, the linkage between law and literature, see Heilbrun & Resnik, *Convergences: Law, Literature, and Feminism*, 99 *Yale L.J.* 1913 (1990); Gemmette, *Law and Literature: An Unnecessarily Suspect Class in the Liberal Arts Component of the Law School Curriculum*, 23 *Val. U.L. Rev.* 267 app. 1 (1989) (Law and Literature courses offered at thirty-eight ABA approved law schools); Koffler, *Forged Alliance: Law and Literature* (Book Review), 89 *Colum. L. Rev.* 1374 (1989); Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 *Mich. L. Rev.* 2225 (1989); West, *Communities, Texts, and Law: Reflections on the Law and Literature Movement*, 1 *Yale J.L. & Hum.* 129 (1988); West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 *N.Y.U. L. Rev.* 145 (1985); Levinson, *Law as Literature*, 60 *Tex. L. Rev.* 373 (1982).

12. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69 (1987), reversing 794 F.2d 250 (7th Cir. 1986). The author represented Dynamics Corp. in the federal courts and in the Supreme Court. The views expressed in this Article are entirely those of the author. Dynamics Corp. will not be affected by those views. Indeed, this Article employs the various opinions in the *Dynamics Corp.* litigation merely as examples of contemporary styles of judicial decision making; it does not challenge the results of that litigation in any way.

of Derrida's influence. This Article concludes with a modest suggestion as to how the *Dynamics* opinion—and perhaps all judicial opinions—might be written so as to elevate the techne of law.

I. THE ABSENCE OF FRIENDSHIP

In this Part, I trace the decline of friendship in literature, philosophy, and law. Proving the *absence* of a value like friendship is difficult; it is like listening for dogs who do not bark. Accordingly, I rely upon literary critics and philosophers who themselves have searched in vain for signs of friendship in literature and philosophy. I trace the absence of friendship in law by suggesting that legal doctrine approaches the boundaries of that value, but never crosses them.

A. *The Absence of Friendship in the Art of Literature*

The topic of friendship is extremely difficult to find in twentieth century literature and criticism. In the *Kenyon Review*, Ronald Sharp, a former editor, asks: "Where do we turn for a first-rate treatment of friendship? Aristotle, Montaigne, Emerson, and many other names leap to mind; but where is the crowd of contemporary—even twentieth-century—figures clamoring for a privileged place on our list?"¹³ Sharp writes that the absence of the topic of friendship from every genre "has much to do with the fear of sentimentality."¹⁴ This fear is related in part to an unwillingness of modern thinkers to attach themselves to a moral value, or to locate their theories at a false "center."

Coincidental with the decline in the topic of friendship within literature is the decline in the use of friendship as a critical metaphor. Wayne Booth reminds us that the personification of books as friends in the nineteenth century was fashionable.¹⁵ In 1838, William Ellery Channing declared that "it is chiefly through books that we enjoy intercourse with superior minds. . . . In the best books, great men talk to us, give us their most precious thoughts, and pour their souls into ours."¹⁶ Martin Tupper's belief that "[a] good book is the best of friends"¹⁷ was not uncommon in the nineteenth century.

The metaphor of book as friend has been reversed, in the twentieth century, to friend as book. In the most recent literary criticism, the individual, sentient being is called a "text;" the text is not called an individual sentient being.¹⁸ Booth observes with cynicism the current

13. Sharp, *Friendship*, 2 *Kenyon Rev.* 1 (1980) [hereinafter Sharp, *Friendship*]. Professor Sharp has since written an outstanding book, tracing the decline of friendship in literature. See generally R. Sharp, *Friendship and Literature: Spirit and Form* (1986).

14. Sharp, *Friendship*, *supra* note 13, at 1.

15. See W.C. Booth, "The Way I Loved George Eliot:" *Friendship with Books as a Neglected Critical Metaphor*, 2 *Kenyon Rev.* 4, 6 (1980) [hereinafter Booth, *George Eliot*].

16. *Id.*

17. *Id.*

18. See *id.*

metaphors attached to books by Jacques Derrida, Roland Barthe, Frederick Jameson, and others: "the work as labyrinthine web, as one more cell-block in the prison house of language, as puzzle, as code, as *écriture* expressing itself."¹⁹ While those descriptions do not take animation away from books, they do strip literature of human warmth. Booth implies that modern criticism not only reverses the metaphor of friendship, but also denies any gradation of traditional moral values by which to judge literature; modern criticism suggests a popular relationship to a book that is based on the desire for pleasure, and it attempts the separation of elite and professional critics from society.

B. *The Absence of Friendship in the Art of Philosophy*

Although Booth and Sharp focus upon the decline of friendship as a topic in literature and as a metaphor in literary criticism, their observations extend to the philosophic landscape as well. Friendship is conspicuously absent in modern thought:

The neglect of friendship as a serious subject of inquiry in modern thought is itself a strange and wondrous thing; after millennia during which it was one of the major philosophic topics, the subject of thousands of books and tens of thousands of essays, it has now dwindled to the point that our encyclopedias do not even mention it.²⁰

Indeed, in his introduction to Plato's fundamental work on friendship, *The Lysis*, David Bolotin similarly observes, "[i]f we wish to find philosophic discussions of friendship, we are almost compelled to turn to the writings of classical antiquity[;] . . . in modern times, philosophers have rarely given it an explicit place in their moral teaching or in their treatment of social and political life."²¹

C. *The Absence of Friendship in the Art of Law*

Friendship is not just absent from philosophy and literature. As Sharp, Booth, and Bolotin suggest, it is absent from all modern thought, including modern legal thought. It is *noticeably* absent from American law. The absence of friendship in American law is noticeable because a subtle pattern has developed in the law within which the value of friendship implicitly is either ignored or rejected. By tracing the ways in which fundamental legal doctrines in property, torts, contracts, corporations, evidence, and constitutional law have implicitly ignored or rejected the value of friendship, we can fully appreciate the absence of that value.

1. Gifts

The law of property has flirted with, but never embraced, friendship.

19. *Id.*

20. *Id.*

21. D. Bolotin, Plato's Dialogue on Friendship 9 (1979) [hereinafter Bolotin, Plato's Dialogue].

Lewis Hyde has written that gift-giving is a primary aspect of true friendship.²² He surveys tribal myths and finds in them a common understanding of gift-exchange among friends. Gifts are defined in direct contrast to capital. The "gift is to the giver, and comes back most to him."²³ Aristotle similarly reasons that in friendships based on virtue, it is the intention of the donor rather than the value to the recipient that is critical.²⁴ When a gift is transferred to a higher-valued use, it loses its quality as a gift.

The body of property law protects some aspects of gift-giving, but it effectively equates gifts with capital. Gifts are generally enforced, but only where a court finds evidence of donative intent and actual or constructive delivery.²⁵ American law is unique in failing to enforce *promises* to make a gift.²⁶ Not even equity will aid the enforcement of a gift which is executory or conditional.²⁷

Because donative intent is not sufficient to establish a gift, the gift is not to the giver. Rather, the focus of gifts in American law is upon the delivery of a commodity to the donee.²⁸ The requirement of delivery is justified in part because it *deters* gift-giving:

The *wrench* of delivery[,] . . . the little mental twinge at seeing his property pass from his hands into those of another, is an important element to the protection of the donor.²⁹

American law protects the donor from the "thoughtless and hasty"³⁰ decision to give the gift.³¹ Ironically, American law presumes that gifts are "thoughtless."³²

22. See Hyde, *Some Food We Could Not Eat: Gift Exchange and the Imagination*, 1 Kenyon Rev. 32 (1979) [hereinafter Hyde, *Some Food*].

23. *Id.* at 41 (citing Walt Whitman's "A Song of the Rolling Earth").

24. See Aristotle, *The Nicomachean Ethics* 216-17 (D. Ross trans. rev. ed. 1987) [hereinafter Aristotle, *The Nicomachean Ethics*]; see also J. Cropsey, *Political Philosophy and the Issues of Politics* 269 (1977) ("it is the intention of the donor rather than the estimation of the recipient that is decisive").

25. See R. Brown, *The Law of Personal Property* §§ 7.1-7.9, at 76-105 (W. Raushenbush ed., 3d ed. 1975) [hereinafter *The Law of Personal Property*]; E. Clark, L. Lusky & A.W. Murphy, *Gratuitous Transfers: Wills, Intestate Succession, Trusts, Gifts and Future Interests* 408-11 (2d ed. 1977) [hereinafter *Gratuitous Transfers*].

26. See *Gratuitous Transfers*, *supra* note 25, at 408-11.

27. See *The Law of Personal Property*, *supra* note 25, § 7.13, at 119-26.

28. See Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 Ill. L. Rev. 341, 348-49 (1926) (describing the rationale underlying the delivery requirement of gifts).

29. *Id.* at 348.

30. *Id.*; see also *The Law of Personal Property*, *supra* note 25, § 7.12 ("There must be an absolute and unequivocal intention by the donor").

31. See also Gulliver & Tillson, *Classification of Gratuitous Transfers*, 51 Yale L.J. 1, 5-13 (1941) (finding that compliance with all formalistic requirements of the statute of wills serves a protective, evidentiary and ritualistic function).

32. Not only does American law implicitly deter gift-giving, it explicitly taxes gift-giving. See I.R.C. § 2501 (West Supp. 1991). The federal gift tax purports to compensate the government for the loss of estate taxes paid on property given before death. See 1 Fed. Est. & Gift Taxes (P-H) ¶ 125,001. But the tax is *not* imposed upon exchanges of

2. Guests and Helpers

Tort law similarly devalues friendship. One of the greatest gifts which friends give to each other is the gift of opening up their homes—inviting each other to be guests in their respective houses.³³ The body of tort law has long imposed upon owners or occupiers of land a duty to use reasonable care for the protection of those who are invited to enter the land.³⁴ Historically, social guests and hence friends were placed among the class of invitees to whom an inviter owed such a duty.³⁵

But although tort doctrine has generally retained its special protection for the class of invitees,³⁶ it has gradually removed friends from that class. Courts first began to conclude that the duty of care did not run to friends of the landowner unless the landowner's invitation could be said to carry with it an implied representation that the premises were safe.³⁷ Courts, in other words, were unable to infer—from the mere fact that a friend invited another friend to his house—a representation that the inviting friend had taken care to assure the house's safety. Furthermore, when the First Restatement of Torts was published, the basis of landowner liability to guests shifted completely—from an implied representation of safety to the implied consideration which the invitee receives in exchange for the economic benefit which his visit necessarily brings to the landowner.³⁸ Under this regime, no duties run between friends who are guests in each other's homes unless the friends each derive some economic benefit from the visit.³⁹ Even those courts which have been liberal in their definition of economic benefit or have abandoned the element altogether have concluded that the landowner's duty should run only to

property for valuable consideration, or in the ordinary course of business. *See id.* Rather, the tax is precisely levied on donors who give something of value without asking for the same in exchange. The I.R.S. taxes acts of friendship in situations where it does not tax value-maximizing transfers of assets to highest valued users. *See id.*

33. *See also* Restatement (Second) of Torts § 314A(2) (1965)(innkeeper has a duty to guests to protect them from unreasonable risk of physical harm, to give first aid after injury, and to care for ill or injured guests).

34. *See generally* Prosser, *Business Visitors and Invitees*, 26 Minn. L. Rev. 573 (1942)(owner of business premises has an affirmative obligation of reasonable care for the protection of those invited on to the premises); *Allgauer v. Le Bastille, Inc.*, 101 Ill. App. 3d 978, 428 N.E.2d 1146 (1981)(business owner has a common-law duty to invitees to exercise ordinary care and maintenance to have premises in a reasonably safe condition).

35. *See, e.g.,* March, *The History and Comparative Law of Invitees, Licensees and Trespassers*, 69 L.Q. Rev. 182, 188-89 (1953)(summarizing the historical decline in legal protections afforded visitors).

36. *See* Prosser & Keeton, *The Law of Torts* § 62, at 433 (5th ed. 1984).

37. *See* Prosser, *Business Visitors and Invitees*, 26 Minn. L. Rev. 573, 604 (1942).

38. *See* Restatement of Torts § 332 comment a (1934); *see also* Prosser & Keeton, *The Law of Torts* § 61, at 420 (5th ed. 1984)(possessor's duty of care is derived from economic benefit expected from visitors).

39. *See, e.g.,* Bohlen, *The Duty of a Landowner Towards Those Entering his Premises of Their Own Right*, 69 U. Pa. L. Rev. 142, 144-45 (1920)(owners of land with some business interest in guest's visit have a duty to inspect the condition of the premises and give warning of any dangerous conditions; owners of land have no duty to a visitor pursuing personal objectives).

“public invitees.”⁴⁰ Friends are not public invitees; they are private ones. Thus, the tort law duty running to invitees which sprung from a strong desire to encourage people to open their homes in friendship now excludes friendships from its protections.

Moreover, tort law actually discourages acts of friendship. Absent a recognized relationship between persons, tort law imposes no affirmative obligations on anyone to protect another from harm.⁴¹ Although various commercial relationships are given special status from the law of torts, friendships are not among them.⁴² A friend has no obligation to protect a friend from danger. He can never be liable for his failure to help a friend. But if a person does decide to help his friend and, despite his best efforts, increases the risk of harm to that friend, tort law renders him liable not only to the friend⁴³ but also to third parties whom he may have injured in the process.⁴⁴ Together, these fundamental tort law principles say to friends the following: (1) your relationship is insignificant relative to commercial relationships; (2) you have no obligation to keep each other from harm; and (3) your efforts to keep each other from harm may cost you money.

3. Obligations

The messages underlying contract law are no different. The language of contract law is replete with images of friendship. Courts endeavor to find a meeting of the minds, offers, acceptances, promises, and even consideration.⁴⁵ Out of the context of contract law, each of those concepts conjures a personal relationship in which empathy (a meeting of the minds), giving (offers), understanding (acceptances), trust (promises), and genuine caring (consideration) take place. But in the context of contract law, this language and those sentiments are both transformed.⁴⁶ A meeting of the minds is not found unless there is objective evidence of a bargained-for exchange. A bargained-for exchange, in turn, is not found absent consideration. And consideration is not present unless something of value is contemporaneously exchanged between the parties. Because an obligation recognized by contract law cannot be formed absent an exchange of value between parties, contract law, by definition, does not recognize obligations among friends unless they exchange something of

40. Prosser & Keeton, *The Law of Torts* § 61, at 422 (5th ed. 1984).

41. *See generally* Restatement (Second) of Torts §§ 314, 314A (1965)(special relations between actor and another may impose a duty upon the actor to take affirmative precautions for the aid or protection of the other).

42. *See id.* Generally, the law of fiduciary duties imposes upon individuals duties of care and loyalty, but only in situations where a special commercial relationship exists between them.

43. *See id.* § 323.

44. *See id.* § 324A.

45. *See generally* A.L. Corbin, *Corbin on Contracts* 37-336 (1952).

46. *See, e.g.*, R. Posner, *Economic Analysis of Law* § 4.1, at 79-85 (3d ed. 1986)(the function of contract law is to deter opportunistic behavior between contracting parties).

value.⁴⁷ This is not to criticize contract law's protection of commercial exchanges. It is rather to observe that the law of contracts exploits the language of friendship in order to define those obligations which it deems significant, and then to exclude, from the class of obligations it deems significant, those among friends.

4. Acting on Behalf of Others

In a similar vein, the law has developed economic immunities which protect a host of relationships, none of which involves friendship. For example, it is a fundamental tenet of agency law, and thus of corporation law as well, that an agent who enters into a contract with the authority of a disclosed principal cannot be liable for the breach of that contract.⁴⁸ Where the principal is a corporate enterprise, this tenet has the effect of immunizing the agents of the corporation, including its officers and directors, from the contractual obligations of the enterprise.⁴⁹ The fictitious enterprise is liable for the contractual breach, not the people who manage the enterprise. This immunity is justified in part because it encourages the creation of commercial enterprises by qualified persons who will become managers of those enterprises without fear of individual liability from contractual obligations.⁵⁰ The immunity demonstrates the high esteem in which the law holds commercial relationships.

Suppose the law had instead developed the following immunity: no person shall be liable for a contractual breach where the contract was entered on behalf of a friend. The suggestion may seem laughable. Yet, the act of the agent on behalf of a principal cannot be distinguished on a principled basis from the act of friend on behalf of friend. Both the principal and the friend assent to and benefit from the actor's contracts, and both have some measure of control over the actor.⁵¹ If the suggestion that acts of friendship should receive immunity seems laughable, therefore, it may be because the goal of encouraging productive commercial relationships seems so much more important than does the goal of encouraging personal relationships. Even if we know in our hearts that

47. This conclusion is entirely consistent with Clare Dalton's deconstruction of contract law, through which she discovers that the entire doctrine is based on an irreducible tension between the needs of the individual and those of society. See Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 Yale L.J. 997, 1094-95 (1985).

48. See, e.g., 3A W. Fletcher, *Cyclopedia of the Law of Private Corporations* § 1118, at 209 (rev. perm. ed. 1986)(corporation, not corporate officer, is liable on contracts made by corporate officer within its authority).

49. See *id.* §§ 1117-18, at 209.

50. See, e.g., Veasey, Finkelstein, & Bigler, *Delaware Supports Directors with a Three-Legged Stool of Limited Liability, Indemnification, and Insurance*, 42 Bus. Law. 399, 401-04 (1987)(justifying limited director liability because it encourages qualified managers to take business risks).

51. Cf. Restatement (Second) of Agency § 1 (1957)(one who asks a friend to perform a service may inadvertently create an agency, since all that is required is conduct by the parties manifesting that one is willing to act for the other subject to the other's control).

personal relationships of friendship are more important than commercial ones, the law of enterprise liability and immunity teaches us otherwise.

5. Privileged Communications

The lesson is reinforced by the law of evidence. The law of evidence reflects social values that are even stronger than the strong social value in the resolution of civil and criminal disputes on their merits. The prohibition on the admissibility of evidence regarding subsequent remedial measures even where that evidence would have substantial probative value, for example, demonstrates a perception that society values remedial measures above merits resolution.⁵² Similarly, rules of evidence which shield from discovery and admissibility communications between attorney and client, doctor and patient, and husband and wife⁵³ display a sense that society values the sanctity of those relationships above the resolution of a civil or criminal action on its merits. The relationships which the law in various states has valued enough to protect with an evidentiary privilege have recently expanded greatly to include the litigant-agent, the counselor-victim, the accountant-client, the parent-child, the guardian-ward, the school counselor-student, the teacher-student, and the social worker-patient.⁵⁴

Despite this recent expansion, the relationship among friends is still absent. While the absence of friendship from the list of sacred relationships may be justified because of the difficulty of defining and limiting the friend-friend relationship, the absence nonetheless devalues that relationship. The unspoken message is that the communications between friends are not as important as are those between, for example, an accountant and a client. While a free and open exchange of information and opinions between accountant and client is apparently vital, a free and open exchange of information and opinions between friends is apparently less so.

6. Constitutional Law and the "Private Association"

This sense of the insignificance of friendship in the law of property, torts, contracts, agency, corporations, and evidence is manifest at the constitutional level as well. Most simplistically, there is of course no right to friendship expressly stated in the Federal Constitution. Nonetheless, a statute which somehow banned all friendships would surely be declared unconstitutional. But, on what basis would such a statute be invalidated? Two primary constitutional arguments could be made. First, the statute's ban on friendships could be challenged as a violation

52. *See, e.g.*, Fed. R. Evid. 407 (if subsequent remedial measures were not excluded, individuals would be dissuaded from taking necessary safety precautions, and so long as the relevance of the activity is not great, courts do not wish to sanction procedures which punish praiseworthy behavior).

53. *See* Fed. R. Evid. 501.

54. *See* 2 Weinstein, Weinstein's Evidence ¶ 501[09], at 501-107 to 501-134 (1991).

of the judicially recognized right to privacy. Second, the statute's ban on friendships could be challenged as a violation of the First Amendment's right to freedom of association. Incredibly, however, neither the right to privacy nor the right to freedom of association, as each has been interpreted, recognizes the value of friendship.

The right to privacy, as it has been interpreted by the Supreme Court, protects two kinds of interests: "the individual interest in avoiding disclosure of personal matters" or in autonomously "making certain kinds of important decisions."⁵⁵ It is debatable whether the Supreme Court would place friendship among the "personal matters" or "important decisions" which the right of privacy apparently protects. The debate, however, is irrelevant. For, even if friendship were among the "personal matters" or "important decisions" contemplated by the Court's privacy decisions, those decisions would not protect friendship itself. Rather, the logic of the Court's dual line of cases presumably would protect only unwanted publicity about a friendship or an individual's independence in deciding whom to befriend. Because friendships, however, necessarily involve two people, the right to privacy cannot protect one friend from publicity about the friendship disclosed by the other. Nor can that right truly protect autonomy in the decision to befriend another, because that decision is, by its very nature, dependent on the other's decision to return the friendship. Because friendship is not a purely private act, it should not be surprising that the judicial development of the right to privacy would bypass friendship entirely.

If friendships are too public to enjoy the protections of the right to privacy, they are too private to enjoy the protections of the freedom of association. The Supreme Court has gleaned from the First Amendment's explicit protection of the "right of the people peaceably to assemble" an implicit protection of the freedom of individuals to associate with others.⁵⁶ It seems beyond peradventure that this freedom of association would protect friendships as such. But, as it has developed in the Supreme Court, the freedom of association actually debases friendship. The Supreme Court cases do not recognize freedom of association in the abstract. Instead, the freedom has been justified in every case as an effective means of ensuring that *other* constitutionally protected activity freely takes place.⁵⁷

The Court will protect the freedom of association where that freedom is thought indispensable either to speech or to privacy.⁵⁸ Ever since Justice Harlan observed the "close nexus between the freedoms of speech and assembly," the right of association drew protection to the extent that it facilitated the exercise of other First Amendment rights such as the advocacy and advancement of political, economic, religious, or cultural

55. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

56. *See NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958).

57. *See Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984).

58. *See id.* at 617-18.

beliefs.⁵⁹ It follows that associations such as friendships which are not necessarily based on the accomplishment of political, economic, religious, or cultural objectives are excluded as too insignificant for First Amendment protection.

At the same time, the Supreme Court has found associational rights where the association reflected a personal decision otherwise protected by its privacy cases.⁶⁰ In *Roberts v. United States Jaycees*, the Court declared generally that the "Bill of Rights . . . must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State."⁶¹ Despite this sweeping pronouncement, however, the freedom of association thus far has only been held to protect the right to choose one's spouse⁶² or to live with one's extended family.⁶³ The relationships which the Court has found worthy of protection in this area have been limited to familial ones. The Court has never suggested that the freedom of association is broad enough (or narrow enough) to protect a non-filial and non-political association of friends.

Professor Rhode has astutely observed that the Supreme Court's treatment of fundamental associations as either an extension of the "home or of the marketplace . . . leaves many affiliations occupying an awkward middle ground; where any particular association will fall on a particular court's continuum is inevitably indeterminate."⁶⁴ The relationship of friendship occupies such an awkward middle ground. A constitutional regime in which the recognition, much less the protection, of friendship is only "indeterminate" is a regime in which friendship is absent.

II. A STRATEGY FOR THE RENEWED PRESENCE OF FRIENDSHIP

A. *The Strategy Developed*

1. The Need for a Strategy

The causes of the absence of friendship in law, philosophy, and literature may be difficult—even impossible—to isolate.⁶⁵ Professor Sharp sees friendship's absence from literature as symptomatic of a modern "fear of sentimentality."⁶⁶ Professor Bolotin explains that friendship does not "fit into any of the modern systems of thought."⁶⁷ At one pole of modern philosophy, "[t]here is no room for the generosity of true

59. *NAACP*, 357 U.S. at 460.

60. See, e.g., *Roberts*, 468 U.S. at 617-18 (choices to enter into and maintain certain intimate and human relationships must be secured against undue intrusion by the state).

61. *Id.* at 618.

62. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

63. See *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977).

64. Rhode, *Association and Assimilation*, 81 Nw. U.L. Rev. 106, 117 (1986).

65. See, e.g., R.M. Unger, *Law in Modern Society* 8-11 (1976)(questioning the ability of a purely causal analysis to explain social phenomena).

66. Sharp, *Friendship*, *supra* note 13, at 2.

67. Bolotin, *Plato's Dialogue*, *supra* note 21, at 9.

friendship in those doctrines which begin from the premise that man is naturally selfish."⁶⁸ Yet, at the "other pole of modern thought, our hopes for universal, or even national, brotherhood tend to make us lose sight of so private and exclusive a relationship."⁶⁹

Contemporary legal scholars, as well, are beginning to diagnose a fear of sentimentality throughout American law.⁷⁰ They also have attempted to expose and dissolve the irreconcilable polarities in law and legal thought between individualism and community.⁷¹ If the individual and the community are antinomies throughout American law, then it is not surprising that relationships such as friendship which are neither purely individualistic nor purely communal occupy an awkward middle ground.

Perhaps the law should respond to the absence of friendship from contemporary discourse by developing doctrine which expressly protects that relationship. The Supreme Court, for example, might instantly recognize a right to friendship. The law of gifts would promote, rather than discourage, gift-giving among friends. The law of torts would reward rather than punish the person who helps the friend in need. The law of contracts would assign value to non-monetary consideration among people. The law of agency and corporations would recognize duties of care and loyalty among friends, rather than merely between principals and agents. And the law of evidence would privilege communications between friends.

Even if we agree that friendship should receive the highest social respect and protection, however, it may be that the best way for the law to promote that respect and protection is to leave friendship alone. The absence of friendship from law, by this view, is not necessarily a denigration of the value of friendship. It is conceivable that the law neglects friendship because that relationship is so natural or fundamental to

68. *Id.*

69. *Id.*

70. See, e.g., Hirshman, *The Virtue of Liberality in American Communal Life*, 88 Mich. L. Rev. 983, 992 (1990)(brilliantly arguing for a return of the classical virtue of liberality found wanting in American communities); Areen, *A Need for Caring*, 86 Mich. L. Rev. 1067, 1068 (1988)(finding a lack of caring legal decision-making); West, *Submission, Choice and Ethics: A Rejoinder to Judge Posner*, 99 Harv. L. Rev. 1449, 1450 (1986)(criticizing Judge Posner's attack on compassion); West, *Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory*, 60 N.Y.U. L. Rev. 145, 203 (1985)(finding a lack of sentimentality in patterns of legal thought).

71. See, e.g., R.M. Unger, *The Critical Legal Studies Movement* 63 (1988)(crystallizing critical legal critiques of dualities in liberal thought); R.M. Unger, *Knowledge and Politics* 81 (1975)(exposing liberal polarity between individual and community); Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1718 (1976)(exposing liberal duality between individualism and altruism); K. Karst, *Belonging to America: Equal Citizenship and the Constitution* 196 (1989)("The very idea of community implies at least that members are equal in their membership."); Michelman, *Law's Republic*, 97 Yale L.J. 1493, 1495 (1988)(responding to criticisms of duality in liberal society); M. Sandel, *Liberalism and the Limits of Justice* 60-61 (1982)(arguing for communitarianism).

Americans that it need not be regulated.⁷² Indeed, despite the apparent assault on friendship from law, philosophy, and literature, we still cherish our friendships. It is possible, therefore, that the legal regulation of friendship would itself debase that relationship.

While this view reminds us that law is neither the source of all of our values nor the cure for all of our value crises, it is incomplete. The inverse relationship between the legal recognition of friendship and the social value in friendships which the view assumes is belied by the legal recognition of many rights which society continues to hold dear. The law's protection of the right to privacy, for example, has hardly stripped society of its natural affection for privacy. Nor can we dismiss the Supreme Court's failure to opine on the issue of friendship by suggesting that that issue is simply *too* fundamental to Americans. To ignore the decline of friendship in legal discourse would be to ignore the real role which the law does play in shaping and reflecting our values.⁷³ If the law does not create values, it at least inculcates or reinforces them. Similarly, those values are shaped by literature and philosophy. If law, philosophy, and literature continue to denigrate friendship, it cannot be long before each of us denigrates friendship as well.

The resurrection of friendship, therefore, does require a strategy, but that strategy must be more subtle than mere advocacy of the judicial protection of friendship. Because friendship is absent from most contemporary literary, philosophic, and legal thought, the renewal strategy must draw upon, and include within its scope, literature, philosophy, and law.

2. A Suggested Strategy: Literature's Return to Aristotelian Philosophy

In order to obviate the perceived evil in the absence of friendship in literature, Wayne Booth has developed a strategy—albeit limited—for the literary resurrection of friendship. In his article, *The Way I Loved George Eliot: Friendship with Books as a Neglected Critical Metaphor*,⁷⁴ Booth appeals to Aristotle's particular categorization of the types of friendship as a method of categorizing literature. The literary critic, Booth suggests, should treat books as the philosopher treats friendships, evaluating them based upon the strength of the friendship which is created between the implied author and the implied reader.⁷⁵ The litera-

72. I am indebted to Professor George Anastaplo for this insight and this argument that the law's neglect of friendship may indicate tremendous social respect for that relationship.

73. See, e.g., R.M. Unger, *Law in Modern Society* 56-57 (1976)(regarding the societal beliefs which belie a society's commitment to the rule of law).

74. Booth, *George Eliot*, *supra* note 15, at 4.

75. See *id.* at 5. In contrast, Emerson treats friends as he treats his books. "I do not wish to treat friendships daintily, but with roughest courage. When they are real, they are not glass threads or frostwork, but the solidest thing we know." R.W. Emerson, *Friendship*, in *The Norton Book of Friendship* 519 (F. Welty & R.A. Sharp eds., 1991) [hereinafter Emerson, *Friendship*].

ture-friend, or literature-critic, can befriend three different types of books: the useful, the pleasant, and the good.⁷⁶

The "useful" book, like the useful friendship, is narrow in purpose and short in duration. Aristotle writes that friendships based on "use" are easily dissolved, as people's needs are easily changed.⁷⁷ The reader of a merely useful book, similarly, does not appreciate the work as a work, but only as a vehicle toward a short-term end. Cookbooks and diet books are modern examples of useful works, which are loved only so long as they are useful. Interestingly enough, these two types of books are the best-selling books in the Western world today.⁷⁸

Not far behind in popular sales are works that are loved for the "pleasure" they offer. Friendships that are based purely on pleasure, Aristotle teaches, are common among young people.⁷⁹ Like the friendships based on use, those based on pleasure are ephemeral, as the sources of pleasure change. A good mystery, pornography, and harlequin romances are examples of books which provide a kind of immediate pleasure for their readers. That pleasure, however, does not last. Rarely, for example, will an individual read a mystery story more than once, for the ending—the true source of pleasure—has been revealed. The story which gives immediate pleasure to the reader provides little long-term fulfillment.

The relationship of author to reader created by the useful book and the pleasurable book is a limited friendship.⁸⁰ The reader of the cookbook appreciates the book only as a means of some other end, such as feeding the family. Reciprocally, the implied author of the cookbook does not wish the reader well, apart from the immediate preparation of food. The reader of the pleasure-book, in comparable fashion, appreciates the book because it activates pleasurable desires for a short time. The implied author of the pleasure-book, meanwhile, wishes no good upon the reader, only excitation. In neither the pleasure-book nor the useful-book, then is the book loved as a book, then, as an end in itself.⁸¹

The good book, by contrast, like the good friend, should be loved in proportion to its high worth.⁸² Good friends, Aristotle claims, resemble each other in virtue.⁸³ The fullest friendship, in classical thought, is a sharing of the quality of virtue between two virtuous individuals. The

76. See Booth, *George Eliot*, *supra* note 15, at 7-9; see also Aristotle, *The Nicomachean Ethics*, *supra* note 24, at 194-99 (discussing three objects of love and corresponding kinds of friendship).

77. See Aristotle, *The Nicomachean Ethics*, *supra* note 24, at 195.

78. See, e.g., *Paperback Best Sellers*, N.Y. Times, Feb. 16, 1992, § 7, at 32, col. 2 (advice, how-to, and miscellaneous); *Best Sellers*, N.Y. Times, Jan. 28 1990, § 7, at 32, col. 1 (advice, how-to, and miscellaneous); Booth, *George Eliot*, *supra* note 15, at 7 ("members of gourmet cooking clubs—stop being friends as soon as the pleasure-giving stops").

79. See Aristotle, *The Nicomachean Ethics*, *supra* note 24, at 196.

80. See Hyde, *Some Food*, *supra* note 22, at 54.

81. See *id.* at 36-38.

82. See *id.* at 48-49.

83. See Aristotle, *The Nicomachean Ethics*, *supra* note 24, at 197.

best friend, of course, will be useful and pleasant. But these qualities stem from the inherent use that a good man can be to others through his example of wisdom and the inherent pleasure that a good man gives to those who delight in his company. The pleasure and use that a good man provides are not ephemeral; rather, they realize well-wishing for a lifetime. Good friends wish well to each other by giving each other everlasting pleasure and utility. The good friend, however, is loved for his virtue. In loving a good friend for his virtue, Aristotle suggests, the lover becomes a good friend in his simultaneous love of virtue. In this respect, the good friend loves his friend as he loves himself. The love of virtue is the bond that unites the good friendship.⁸⁴

In the best book, Booth proclaims, the love of virtue should unite implied-author with implied-reader. The good literary critic appreciates the pleasure and utility that the best books bring. That critic, in addition, should love the book as a book. The book should be loved in proportion to its ability to wish the reader well over a lifetime, for its ability to order the reader's values in a virtuous manner and for the inherent utility and pleasure that it provides. The good critic will thereby meet the good writer in good friendship.

This formula for the return of friendship to literary discourse, however, is limited. Booth's attempt to recapture a hierarchy of moral values by which to judge literature belies his nostalgia and sentimentality for a centered universe. The recognition of Aristotelian friendship, in its pure form, is kerygmatic; it reveals Booth's false hope in the ability of man to find a unique word, a master name, or an ultimate concern.⁸⁵ Yet, even if Booth's attempt to resurrect friendship was philosophically sound, the scope of his resurrection would be limited. Confined to the author-reader relationship, Booth's application of Aristotle brings friendship to the literary forefront only after the work has been written. Friendship is the *telos* that he desires between critic and writer. As a critic, Booth is concerned with bringing friendship to the critic, thereby linking him with the literary creator. Although Booth's work is pleasant and useful, it neglects the vacuity of friendship actually within discourse. The restoration of friendship as a literary topic—and not a critical one—is difficult to accomplish short of telling each writer what to write about. In addition, filling the void of friendship within discourse is difficult to accomplish short of returning to a center no less false, or a concept no less kerygmatic, than Booth's Aristotelian friendship.

84. *See id.* at 196.

85. It therefore falls victim to the deconstructionist's very real attack on false structures of value. *See, e.g.,* J. Derrida, *Speech and Phenomena and Other Essays on Husserl's Theory of Signs* 159 (1973) [hereinafter *Derrida, Speech and Phenomena*] ("There will be no unique name, not even the name of Being. It must be conceived without *nostalgia*; that is, it must be conceived outside the myth of the purely material or paternal language belonging to the lost fatherland of thought.").

3. The Literary Renewal Strategy Refined: Aristotle After Deconstruction

Despite these difficulties in returning friendship to discourse, it nonetheless may be possible to request of literary, philosophic, and legal writers that they "display" friendship. If the writer-reader relationship cannot resurrect friendship in discourse, perhaps the writer-writer relationship can. Booth claims that every writer, through his work, engages in a relationship with the reader. While that relationship is idealized improperly by Booth in the form of friendship, the existence of a relationship is nonetheless plausible. The same writer who is capable of carrying on a relationship with a reader must also be capable of carrying on a "relationship" with another writer. Indeed, readers often write about their readings, and writers often read about their writings.

The relationship between two authors through their works certainly is not a novel subject of inquiry. In *Tradition and the Individual Talent*, T.S. Eliot argues that a "really new" work of art alters every work that came before it in the ideal order that is literary tradition.⁸⁶ Each book, Eliot suggests, affects and is affected by other books.⁸⁷ The relationship of one book to the next is based on a shared role in the tradition. A more specific kind of relationship between authors develops every time an allusion is made. Auden's poem, *In Memory of W.B. Yeats*,⁸⁸ for example, is dependent not only upon the existence of Yeats as a great poet, but upon the existence of many of Yeats's poems as well. A relationship develops between Yeats and Auden that is not sentient, but that is nonetheless a relationship. If friendship is to be returned to discourse, then this "relationship" between authors should be based on friendship. In particular, if friendship is to return as a value in legal discourse, then the relationship between authors of that discourse should be based on friendship. The authors of judicial decisions, for example, should write those decisions as if they were friends to other authors of judicial decisions.

B. *The Renewal Strategy Defended*

The return of friendship to legal discourse in this manner may be accomplished because of, not in spite of, the modern world's inability to accept a locus of value. This type of friendship is philosophically good, politically useful, and aesthetically pleasing.

1. The Philosophic Argument: Friendship Is Good

The history of philosophic thought, which seems to denigrate gradually the value of friendship, unconceals the very question of friendship.

86. C.H. Smith, T.S. Eliot's Dramatic Theory and Practice: From *Sweeney Agonistes* to *The Elder Statesman* 6 (1977).

87. *See id.*

88. *See* W.H. Auden, *In Memory of W.B. Yeats*, in *Collected Poems* 197 (E. Mendelson ed. 1976).

The unconcealment of the problem or question of friendship in discourse can lead to an exploration of the various philosophic definitions of friendship throughout time. The return of friendship, on this philosophical level, can be accomplished through interlinear criticism of philosophic works about friendship. From this viewpoint, friendship can be discerned as a means toward truth.

The question of friendship, unfolded throughout the history of philosophic thought, finds an answer in the notion of *coincidence*. The history of friendship in philosophic thought is the history of *coincidence*. As Booth's essay⁸⁹ suggests, Aristotle held friendship to be a sharing of the quality of virtue between two virtuous individuals. That which coincides in two friends, therefore, is the love of the *techne* of virtue. For Aristotle, virtue is the ultimate concern, the unique name, or the universal signified. "[T]he truest form of justice," he writes, "is thought to be a friendly quality."⁹⁰ Friendship for the Greeks, then, is the coincidence of the love of the ultimate signified—Virtue—among friends. Friendship is a concern of political philosophy.⁹¹

Montaigne, who writes on friendship with the aplomb of Aristotle, posits that the soul is purified by the practice of friendship. Friendship is the consonance of wills.⁹² Perfect friendship, Montaigne suggests, is indivisible; the wills of individuals share a spiritual wholeness. That spiritual wholeness is the ultimate concern of Montaigne and his sixteenth century philosophic epoch.⁹³ Hence friendship in his era is the coincidence of spirit among friends. Friendship is the concern of religion.

When the ultimate philosophic concern for the spirit shifted to nature, the definition of friendship shifted as well. In Rousseau, perfect friendship can only be recalled from a pre-societal condition. Friendship is a "sentiment" which requires reciprocity; it is the refinement through education of natural pity.⁹⁴ To be a friend, therefore, is to share sentiment or passion with another human being. Friendship is the coincidence of passion in two individuals; "compassion" is Rousseau's ultimate signified. In like manner, Emerson views friendship as a coincidence of tenderness and love in two human beings.⁹⁵ An appreciation for the underlying quality of nature among individuals is perfect friendship. From a world-view which upholds nature and sentiment emanates a defi-

89. See Booth, *George Eliot*, *supra* note 15, at 7-9.

90. Aristotle, *The Nicomachean Ethics*, *supra* note 24, at 193.

91. See J. Cropsey, *Political Philosophy and the Issues of Politics* 272-73 (1977). According to Aristotle, friendship "repairs the imperfection in man arising out of the discord of body and soul-but on the level of philosophy, not of nobility; or between two men, not among a multitude; or dialectically, not politically." *Id.* at 272.

92. See M. Montaigne, *Of Friendship*, in *The Complete Works of Montaigne* 135 (D. Frame trans. 1958).

93. See *id.*

94. J. Rousseau, *Emile or On Education* 214 (A. Bloom trans. 1979).

95. See Emerson, *Friendship*, *supra* note 75, at 520.

nition of friendship in which natural sentiment and a sentiment for nature coincide. Friendship is the concern of natural philosophy.

The coincidence in two individuals of the value of history unmasks friendship for Engels and Marx.⁹⁶ The spiritual or natural wholeness gives way to history, and friendship becomes comradeship: the coincidence in two producers of the faith in the progress of history. The ultimate coincidence—the species-being—is the coincidence of the individual and society in producers. Friendship becomes the concern of the historian.

Kant's definition of friendship, as well, is based on coincidence. Perfect friendship is rooted in both love and respect. Kant writes that love draws individuals together, while respect drives them apart.⁹⁷ Friends are deferential; they admire the reasoning capabilities in each other. Yet friends are also giving of love and of insight. Friendship for Kant is fellowship.⁹⁸ the coincidence of the love and respect of reason among individuals. The center of the philosophical universe has shifted from virtue to reason; friendship thus is the coincidence of deference to and sameness of the love of reason in friends. Friendship is the concern of the scientist.

The final stage in the unconcealment of friendship as a question for philosophic discourse is headlined by Jacques Derrida. "Within a language," Derrida writes, "within the *system* of language, there are only differences."⁹⁹ As a linguistic being, man is the *play* of differences. Friendships, to the extent that Derrida even recognizes their existence, would appear to admit little coincidence. Yet, even Derrida, with his play of differences, suggests that there is a coincidence in the relationship between linguistic-beings. "Differance," he writes, "is neither a *word* nor a *concept*;" it is the "juncture" of "what has been most decisively inscribed in the thought of what is . . . called our 'epoch.'"¹⁰⁰ Not only is *differance* juncture, but it is also sameness. "The same," Derrida writes, "is precisely *differance*."¹⁰¹ In fact, the sameness of difference is unconcealed in an historical manner. "It is out of the unfolding of this 'same' as difference that the sameness of difference . . . is presented."¹⁰² That which coincides in linguistic-beings, Derrida suggests, is difference. Despite their claims to objectivity, Derrideans still find wholeness in language. Thus coincidence is prior even to *differance*. Friendship in the contemporary world can be defined as the coincidence of difference in linguistic-beings. Friendship now can be the concern of the linguistic philosopher or the literary critic.

96. See K. Marx & F. Engels, *The Communist Manifesto* 14 (1964).

97. See E. Kant, *Selections* 308-09 (T. Greene ed. 1957); H. Arendt, *Introduction to Benjamin, Illuminations*, *supra* note 9, at 4-5.

98. See *id.*

99. Derrida, *Speech and Phenomena*, *supra* note 85, at 140.

100. *Id.* at 130.

101. *Id.* at 148 (emphasis added).

102. *Id.* at 149.

Friendship is coincidence.¹⁰³ In each epoch, friendship is the coincidence of the love of that epoch's ultimate concern (unique word) among friends. Derrida claims to liberate himself and mankind from the belief that there is a unique word. What, then, should *coincide* in the "good" friendship? Although he is not explicit, Derrida does hint that the unnameable is the "play that brings about the nominal effects,"¹⁰⁴ and he does tease that "[b]eing/speaks/through every language;/everywhere and always/."¹⁰⁵ That with which Derrida is ultimately concerned is the play of language (both spoken and written). The good friendship is the coincidence of the love of the play of language among creators of discourse. This definition of friendship is universal in philosophic, literary, and legal discourse to the extent that Derrida's concerns are universal; it retains epochal value to the extent that Derrida's concerns are epochal.

2. The Political Argument: Friendship Is Useful

Even if only epochal, however, the notion of friendship among authors gains support from its utility in a regime that values free thought and discussion.¹⁰⁶ The artifice under which a society exists—its value-system—is a bond that unites all members in a shared purpose. In a society whose "fiction" is the sanctification of free thought and discussion, the evolution of that thought plays a great role in shaping the character and relationships of its people.¹⁰⁷ Those people in a modern liberal democracy are bound by the shared value in freedom *and* by the shared legal, philosophic, and literary thought of each epoch.¹⁰⁸ It is essential, therefore, that the legal, philosophic, and literary thought of an age not wholly destroy the bonding agents themselves.

The recent attitude toward friendship is an example of dangerous attack on this need for bonds among individuals in a society. The attack is two-dimensional. In practical terms, individuals do not engage in free discussion with friends, as much as with acquaintances or "texts." The actual interaction, the bond between two individuals, is diminished. Furthermore, from a theoretical standpoint, the value in bonding is diminished. Friendship is among the most effective bonding mechanisms available to a society. Aristotle went so far as to suggest that "[f]riendship seems to hold states together, and lawgivers to care more

103. The word coincidence, though, differs from itself. Temporally, coincidence is a "happening together" of two or more different events at a common juncture. Spatially, coincidence is the "coming together" of two or more different figures in a common area. In coincidence, the juncture or area of commonness is meaningless without its inherent disjunction or disarray. Furthermore, both temporal and spatial coincidence is accidental. Coinciding is a coincidence; it is arbitrary.

104. Derrida, *Speech and Phenomena*, *supra* note 85, at 159.

105. *Id.* at 160.

106. See J. Cropsey, *Political Philosophy and the Issues of Politics 2* (1977).

107. See *id.* at 14-15 (brilliantly arguing that the United States is a regime which incorporates in its institutions and its individuals the thought of each epoch).

108. See *id.*

for it than justice."¹⁰⁹ In this respect, the current denigration of friendship in the philosophical, literary, and legal discourse of a free society is harmful. Those societies whose existence depends upon the perpetuation of the horizon of the belief in free thought and discussion have a utilitarian interest in the rehabilitation of friendship in discourse.

3. The Aesthetic Argument: Friendship Is Pleasant

Thus the existence in discourse of the coincidence of the love of the art of discourse among its creators has both philosophical and political value. Friendship, however, may have very little aesthetic value. The expression of the value of friendship is worthless if the expression itself is deplorable. There is no immediate assurance that discourse which displays good friendship among writers will be aesthetically pleasing. In fact, there is a pleasant and useful argument to the contrary.

In *The Anxiety of Influence*, Harold Bloom argues that the best discourse is the product of anxiety, not friendship.¹¹⁰ "Poetic history," Bloom claims, "is held to be indistinguishable from poetic influence, since strong poets make that history by misreading one another, so as to clear imaginative space for themselves."¹¹¹ Influenced himself by Nietzsche and Freud,¹¹² Bloom asserts that each individual manifests his will to power in a struggle to overcome nature. Discharging one's strength over nature, on the most fundamental level, means overcoming natural decay: death. The desire to achieve immortality, therefore, is an expression of the will to power. This desire, Bloom claims, is sublimated by the poet through poetry. In order to achieve immortality, the poet must establish a significant place among the history of poets. The poet, however, is thwarted in that goal by his precursors, and particularly by his most immediate precursor. The previous great poet influences the younger poet; the latter poet cannot avoid the "flood" of the elder's words. This flood of influence, though, must be avoided if the youthful poet is to clear imaginative space for himself.

The young poet, therefore, develops six mechanisms of facilitation by which creatively to negate his precursor, and to avoid the anxiety of influence. The struggling poet can misread and swerve (*Clinamen*), complete (*Tessera*), deflate (*Kenosis*), generalize away (*Daemonization*), curtail (*Askesis*) or transfer (*Apophrades*) the precursor so as to assert his own self.¹¹³ Bloom provides examples of each of these defense mechanisms in order to demonstrate that a good poem *is* anxiety. Without

109. Aristotle, *The Nicomachean Ethics*, *supra* note 24, at 192.

110. See H. Bloom, *The Anxiety of Influence* (1973). For an interesting, wholesale application of Bloom's work to First Amendment doctrine, see Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 *Yale L.J.* 857 (1986).

111. *Id.* at 5. See also H. Bloom, *The Breaking of the Vessels* 63 (1982) ("Freudian usurpation as a literary pattern is uniquely valuable to critics because it is the modern instance of poetic strength, of the agonistic clearing-away of cultural rivals.").

112. See H. Bloom, *The Breaking of the Vessels* 43-70 (1982).

113. See *id.* at 95.

anxiety, literature would be dormant. "Influence is *Influenza*," Bloom writes, "an astral disease. If influence were health, who could write a poem? Health is stasis."¹¹⁴ Bloom suggests that the poet engages in "facilitation:" the Freudian act of delayed gratification, whereby the pleasure principle gives way to the reality principle. The poem for Bloom, however, is not the facilitation of anxiety; it is anxiety itself.

Because Bloom's theory applies to the forces of all human creation, it applies to the process of creating legal discourse as well. Thus, according to Bloom, the judge, like the poet, endeavors to avoid the anxiety of influence created by prior judicial opinions. The judicial opinion, therefore, like the poem, can be understood as anxiety itself. Bloom suggests that authors of legal discourse such as judicial opinions do indeed have a relationship with each other. But, if the opinions are any good, that relationship is built on anxiety and disease, not trust and friendship. If Bloom is correct, then the suggestion that judges treat each other as friends is an invitation to bad judicial opinions.

But Bloom is not entirely correct. Although Bloom operates within the system of literature itself, that system has its center in criticism. In his *Interchapter: A Manifesto*, Bloom states the logical implication of his theory: "Poets' misinterpretations of poems are more drastic than critics' misinterpretations of criticism, but this is only a difference of degree and not at all in kind . . . all criticism is prose poetry."¹¹⁵ From one perspective, this statement can be viewed as a noble admission that Bloom and his fellow literary critics are victims of the same disease as are their poetic counterparts.

Yet, from another perspective, this "admission" can be seen as an exaltation of criticism above the level of poetry and philosophy. Bloom's theory assumes that art comes from other art; the elder poem is the parent of the younger poem. Art is not derived from nature or from reality. Criticism, too, is an offspring of artifice. But, after Bloom, criticism is conscious of its indebtedness. Thus, not only is criticism a prose poem, but it is a *better* poem than the poets can write. Bloom, in fact, admits that "[t]here are no interpretations but only misinterpretations, and so all criticism is prose poetry."¹¹⁶ *The Anxiety of Influence*, therefore, is a creative misprision of art in order to clear imaginative space for criticism. As a critic, Bloom has an interest in the value assigned to criticism by those who are responsible for *his* immortality.

But Bloom also has an interest in the negative value assigned to philosophy by his survivors. As sources of influence, Nietzsche and Freud are threats to Bloom's space in history.¹¹⁷ Bloom was flooded by Nietzsche's suggestion that philosophers create rather than discover reality. If reality is a creation, then the artist, not the philosopher, is the best determi-

114. H. Bloom, *The Anxiety of Influence* 95 (1973).

115. *Id.* at 94-95.

116. *Id.* at 95.

117. *See id.* at 43-58.

nant of that reality. Bloom elevates the artist above the philosopher; the artist is a successful truth-seeker. The artist creates truth from other art, without "knowing." Alas, it is the critic who knows where and how to find truth. Bloom, semiconsciously, claims that the critic is superior to the poet and the philosopher, because he can attain truth.

Explicitly, Bloom claims that creators of discourse desire a space for themselves in immortality. Yet, in what he actually does, Bloom shows that the greatest creators of discourse care about *how* they are remembered. Naturally, every artist wants to be remembered as a good artist. In addition, however, the artist wants his rememberers also to remember that to be an artist is good. In achieving immortality, individuals have a strong interest in making sure that others feel that they were good at what they did, but also that what they did is good. In other words, the reality principle delays satisfaction of the pleasure principle longer than Bloom realizes. The facilitation, however, is more effective and more permanent: the artist opens up pathways not just for himself, but for his art. Hence Bloom and other "influenced" artists strive to clear imaginative space for their particular art, or *techne*.

The will to power seeks alliances in its struggle to overcome nature and history. Every artist has in common with other artists the will to assert the dominance of his or her art. Literary creators are thus bonded by the mutual interest in the elevation of the art of literature. The individual novelist, for example, has ambivalent feelings toward great prior novelists. The new novelist feels the anxiety of influence from the old one. Yet, at the same time, the new novelist shares with the old novelist the drive to elevate the art of literature.

Authors of legal discourse, as well, feel this ambivalence. Judges, for example, feel the anxiety of influence from the greatest predecessor judges. But they also feel a timeless bond with prior and subsequent judges: the mutual drive to elevate the art of law generally and the art of judging in particular.

This drive to elevate the art of law or the art of literature stems in part from the anxiety of influence from other *techne*. While influence is essential to the legal decision-making process, it is not so much the influence of a previous decision maker. Rather, each judge feels the anxiety of influence from other strong truth-seekers who precede him. The novelist is similarly influenced by alternative *techne*: the philosopher, the theologian, and the politician, each of whom attempts to assert ascendancy for his *techne*. The anxiety which these assertions produce in the best authors of literature and law is not avoided, but channeled into a type of literature and law which seeks congenial associations. The anxious novelist finds congeniality with other novelists preceding him who share his interest in a sharing of common values. The good novel, therefore, is not a diseased product of the anxiety of influence from other literary creators. Instead, the good novel is the channeling of the influence of other truth-seekers into literary associations with previous literary cre-

ators. In other words, the good novelist is a good *friend* to those novelists who have gone before him and to those novelists who have yet to arrive.

Similarly, the anxious judge finds congeniality with preceding judges who share an interest in the elevation of the art of judging. The good judicial opinion, like the good novel, channels the anxiety of influence from competing truth-seeking techne such as philosophy, religion, politics, and even literature into an elevation of the art of judging. In other words, the good judge is a good friend to prior and subsequent judges.

The anxiety of influence created by other truth-seeking techne (i.e., philosophy, politics, and theology) shifts as the ultimate concerns of man shift. The techne of theology, for example, produces deeper anxiety in an epoch when man's ultimate concern is God than it does in an epoch when man's ultimate concern is Reason. Contemporaneous artists derive their anxieties of influence from the same fount: the ultimate concern, the unique word, or the universal signified of their particular epoch. The "good" artists in law and literature facilitate their anxiety by elevating their techne above the strongest techne of their epoch. Good literature channels the anxiety of influence created by competing truth-seeking techne into the elevation of the art of literature. Good legal discourse channels the anxiety of influence created by competing truth-seeking techne into the elevation of the art of law.

III. THE RENEWAL STRATEGY APPLIED: THE SEARCH FOR FRIENDS IN GREAT LITERATURE AND LAW OF THE PAST

This part of the Article is both descriptive and normative. It describes the manner in which relatively contemporaneous authors of literature and of law have in fact elevated their particular art form. Yet, the authors which I analyze also have been perceived by all those familiar with their work to be great authors. Thus, I also develop the normative suggestion that great authors of literature and of law are precisely those whose writings, respectively, elevate literature and law.

The authors analyzed in this part have been chosen, however, not just because they have attained a status of greatness. Richardson and Fielding were selected in addition because they in fact addressed each other with apparent enmity both in and out of their novels. Their anxiety from the other's influence was visible; yet, they channeled that anxiety into a common elevation of the art of the novel. Benjamin similarly displayed tremendous anxiety from the strongly competing influences of two of his friends, Gershom Scholem and Bertolt Brecht. He mediated their competing influences by elevating the art of literary criticism. In a similar manner, I analyze the opinions of Justice Holmes and Justice Story not only because of their lofty status, but also because of the superficial hostility which they display for each other's view of the art of judging.

The descriptive and normative analysis of these literary and legal au-

thors proceeds in this part through a dual comparison. First, I discover in the work of Richardson and Fielding and Justice Story a common, successful strategy for the elevation of their techne above the strongly competing techne of their epochs. While Richardson and Fielding argue for the supremacy of literature through the novel, Justice Story argued for the supremacy of law through the case. Second, I find in the work of Benjamin and Holmes a common strategy for the elevation of their art forms. That common strategy is markedly different from the one developed by Justice Story and the novelists, but it is no less successful. While Benjamin argued for the supremacy of literature through literary criticism, Holmes, in that same philosophic epoch, argued for the supremacy of law through social criticism.

A. *Friendship in the Age of the Novel and the Case*

1. Richardson, Fielding, and the Elevation of the Novel

The relationship between Samuel Richardson and Henry Fielding has been described as a "combat to the utterance."¹¹⁸ Indeed, Fielding derides Richardson's *Pamela* in his *Shamela*, while Richardson frequently wrote of his distaste for Fielding's work.¹¹⁹ Samuel Richardson and Henry Fielding, however, although they appear to be rivals, are in fact examples of good literary friends. Richardson subtly channels the anxiety of influence created in him from the techne of philosophy, politics and theology into an elevation of the art of literature. In perhaps more explicit fashion, Fielding also elevates the art of literature by channeling the anxiety of influence created in him by the techne of philosophy, politics and theology.

Richardson and Fielding derive their anxiety of philosophic influence from the writings of John Locke. Locke's ultimate concern seems at once divine, natural, and human. The state of nature, from which Locke unearths the laws of nature and the laws of life, appears at first glance to be the golden age ruled by God. Far from Eden, however, the state of nature is pure anarchy wherein "nothing but confusion and disorder will follow."¹²⁰ The first law of nature is self-preservation; this law gives rise to the natural right of self-preservation.¹²¹ With Locke's shift in empha-

118. A.D. McKillop, *Samuel Richardson: Printer and Novelist* 169 (1960).

119. The apparent rivalry between these two seminal novelists, however, is counterbalanced by a reciprocity of respect. In the *Jacobite's Journal* for January 2, 1747, Fielding recommended Richardson's *Clarissa*, and on October 15, 1748 wrote Richardson expressing his admiration for the novel. See M.C. Battestin & R.R. Battestin, *Henry Fielding: A Life* 442-43 (1989).

120. J. Locke, *Second Treatise of Government* § 13, at 12 (C.B. Macpherson ed. 1980) (1st ed. 1690) [hereinafter *Locke, Government*]. See also L. Strauss, *Natural Right and History* 224 (1953) (concluding that the state of nature is a state without government).

121. See J. Locke, *An Essay Concerning Human Understanding* §§ 3, 12 (P.H. Niddich rev. ed. 1987) (4th ed. 1700) [hereinafter *Locke, An Essay Concerning Human Understanding*]; J. Locke, *The Reasonableness of Christianity* 142-44 (G.W. Ewing 1964) (1st ed. 1695); *Locke, Government*, *supra* note 120, § 7, at 9.

sis from natural duties or divine obligations to natural rights, the individual—the ego—becomes the center of the universe. Knowledge thus is the product of the individual, who labors to unearth truths from nature. "Knowledge," Locke writes, "depend[s] on the labour of our Thoughts."¹²² For the literary artist, Locke's notion of attaining truth through human labor is liberating. Artifice, which is human labor, is capable of unearthing the truths of nature.

As a literary artist acting under the philosophical influence of Locke, Richardson felt that his novel could indeed have a foundation in truth and nature. In the frontispiece of his novel *Pamela*, Richardson writes that his work is "[a] Narrative which has its Foundation in Truth and Nature."¹²³ But Locke, the philosopher, further suggests that the philosopher is the figure of keen sense and superior reason who is capable of unearthing truth. Richardson channels the anxiety of Locke's influence by suggesting through *Pamela* that the literary creator searches for and finds truth in the nature of the individual. For Richardson, truth lies in the character. Pamela is truth: "[f]rom her signal *veracity* . . . persons, even *sorely tempted*, may learn to preserve a sacred Regard to *truth*."¹²⁴ In the individual character of Pamela, the universal laws of human nature are revealed; she is a "Pattern to her Sex, and Age."¹²⁵

As a letter-writer, Pamela mirrors her own nature, which, as Alan McKillop comments, is "like a *Philosopher* on one page and like a *changeling* the next."¹²⁶ In *Pamela's* earliest letters, her language is mimetic; she writes what she sees.¹²⁷ But as the novel progresses and as Pamela becomes educated, her writing style becomes more detached from life and more attracted to art. In keeping with literary convention, she compares her chastity to a city assaulted on all sides.¹²⁸ In keeping with Shakespeare, she describes the carp-pond in which she nearly drowned as "these perilous banks."¹²⁹ In Pamela's early epistles, experience is recorded; in her later letters, experience is shaped into artifice. The education of the letter-writer involves the development of the capacity to unearth the raw material of nature and, through literary labor, communicate the truths of nature. Richardson's letter-writer, not Locke's philosopher, has the ability to attain and communicate truth.¹³⁰

122. Locke, *An Essay Concerning Human Understanding*, *supra* note 121, § 10, at 52.

123. S. Richardson, *Pamela* frontispiece (1914).

124. S. Richardson, *Pamela* 452 (J.M. Dent & Sons Ltd. 1955) [hereinafter Richardson, *Pamela*].

125. A.D. McKillop, *Samuel Richardson: Printer and Novelist* 44 (1960).

126. *Id.* at 67.

127. Mrs. Jewkes "has a huge hand, and an arm as thick as my waist, I believe." Richardson, *Pamela*, *supra* note 124, at 97. Colbrand runs "with his long legs, well nigh two yards at a stride." *Id.* at 158.

128. *See id.* at 293.

129. *Id.* at 153.

130. The literary communication of the truths of nature, Pamela implies, is even more pleasant than the philosophic communication of those truths. The epistolary novel entertains by curious and affecting incidents. Truth is communicated through the interrela-

Although Fielding parodied Richardson's *Pamela* in his *Shamela* and *Joseph Andrews*, these latter works complement *Pamela's* elevation of the art of literature above the art of philosophy. Whereas Richardson holds the mirror to Pamela's nature, Fielding holds "the Glass to thousands in their Closets."¹³¹ In *Joseph Andrews*, Fielding claims that the literary art aims at universal truths. "I describe not Men," he writes, "but Manners; not an Individual, but a Species."¹³² *Joseph Andrews* rebukes *Pamela* by asserting that the truths of human nature are to be found not in the psyche of an individual, but in the history of a species. Yet Fielding's work coincides with Richardson's in its argument for literature as the means toward, and communication of, truth. Fielding's characters are not confined to "one Profession, one Religion, or one Country."¹³³ Those characters, rather, are born when the first "Creature appeared on the human Stage."¹³⁴ The literary artist aims at the universal and timeless in man's nature. While Richardson communicates truth through "incidents," Fielding communicates truth through "examples." These examples, Fielding states, "work more forcibly on the Mind than Precepts."¹³⁵ Locke engages in precepts; the literary artist engages in examples. The writer, Fielding declares, spreads the history of the best men; he "communicat[es] such valuable Patterns to the World."¹³⁶ Whereas Richardson elevates the art of literature above the art of philosophy by delineating man's nature as the province of literature, Fielding elevates the art of literature by delineating the universal history of man as the province of literature. The adverse dialogue between Richardson and Fielding involves the location of truth, not the capacity of literature to find and communicate truth.

The dialogue between Richardson and Fielding is even more "friendly" in *Clarissa* and *Tom Jones*. Almost as if instructed by Fielding's *Shamela* and *Joseph Andrews*, Richardson calls *Clarissa* a "History."¹³⁷ Richardson's focus in *Clarissa* is more situational and historical than it was in *Pamela*. The conflict between *Clarissa's* strong will and social circumstance is the subject of *Clarissa*.¹³⁸ The heroine,

tionships of literary characters, as they are described by those characters. The written word is the vehicle through which incidents are recorded for pleasure and instruction. The screen of written language—the letter which is one step removed from the incident—guards against the inflammation of the mind of the Reader. Richardson, in *Pamela*, implies that the literary art is a means to attain the truths which lie in human nature.

131. H. Fielding, *Joseph Andrews* 189 (1967) [hereinafter Fielding, *Joseph Andrews*].

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 17.

136. *Id.*

137. S. Richardson, *Clarissa or the History of a Young Lady* 1 (1932) [hereinafter Richardson, *Clarissa*].

138. More than *Pamela*, *Clarissa* is a play of contrasts: parents—children, brother—sister, male—female, aristocrat—merchant, art—nature, pagan—Christian. Indeed, the epistolary viewpoints in *Clarissa* expand to include a number of conflicting perspectives.

like Pamela, views herself in the mirror. But the image which Richardson describes is that of a pale, debilitated, and distraught woman made such by social pressure. The mirror that is *Clarissa* attempts to capture both the human nature of the strong-willed "example" and the universal nature of historical circumstance. In *Clarissa's* character, Richardson communicates not just an example of human nature, but a warning about the conflict of human nature with social circumstance. The art of literature, Richardson implies, has the singular capacity to traverse the conflict between the individual character and society. The contrast of human nature and social convention is truth; the literary artist, whose subject is contrast, communicates that truth. Thus, Richardson "completes" Locke's philosophy and elevates the art of literature.

Richardson's elevation of the art of literature above the art of philosophy in *Clarissa* coincides with Fielding's elevation in *Tom Jones*. The two works have amazing narrative similarities. Both novels contain an account of an heiress whose father wants her to marry a hideous suitor; both women prefer a somewhat promiscuous young man who is not approved by family; both women flee to London where they take up residence in an old, lewd woman's house. This coincidence of the plot line in *Clarissa* and *Tom Jones* complements the more subtle coincidence of the elevation of the art of literature in these novels.

Whereas Richardson implies that the literary subject is "conflict," Fielding explicitly states that conflict is the law of life and of nature. In *Tom Jones*, Fielding is "of necessity . . . led to open a new vein of knowledge."¹³⁹ Fielding takes pleasure in the fact that this new vein has not been discovered by "any ancient or modern writer."¹⁴⁰ Locke, of course, discovered conflict in the state of nature. Fielding swerves Locke's theory, however, by suggesting that conflict is dynamic and social. The new vein of knowledge which Fielding unearths is "no other than that of contrast, which runs through all the works of creation."¹⁴¹ Knowledge, Fielding suggests, can be unearthed in works, not just actions. That aspect of experience and history, in fact, which is more important to truth is language. "A true knowledge of the world," Fielding claims, "is gained only by conversation."¹⁴² In *Tom Jones*, more than in earlier works by Fielding, truth is discovered in the contrast of nature and circumstance. The literary artist, in his sole capacity to depict this new vein of knowledge, is superior to the philosopher.

No less coincidental in Richardson and Fielding is their elevation of the art of literature above the competing art of politics. Pamela's virtue is artifice.¹⁴³ Artifice exposes itself in the novel as Pamela's business acu-

139. H. Fielding, *History of Tom Jones, A Foundling* 133 (1964) [hereinafter *Fielding, Tom Jones*].

140. *Id.*

141. *Id.*

142. *Id.* at 531.

143. The virtue that is "rewarded" in *Pamela* seems confined to the retention of chas-

men. Pamela's artifice brings her monetary reward; the virtue of artifice, Richardson implies, has a role in the political and economic world.

In his parody of *Pamela*, Fielding also gives artifice a political role. Perhaps no one figure dominated the political world of Fielding's day more than Sir Robert Walpole. Walpole was the Prime Minister of England during the writing of *Shamela*.¹⁴⁴ Just four years prior to Fielding's development of *Shamela*, Walpole had passed the Licensing Act, with the specific intention of censoring Fielding's political satires.¹⁴⁵ Although his political leanings changed throughout his lifetime, Fielding held a personal and a theoretical distrust of Walpole. That distrust is channeled in *Shamela* toward the end of buttressing the art of literature about the art of politics.

The hypocritical figure of Parson Williams is interchangeable with the figure of Walpole. In "Letters to the Editor," a conceit borrowed from *Pamela*, Fielding derides Walpole in the pen of John Puff. Puff, whose name means "to advertise," remarks that the author of *Shamela* "must be doubtless most agreeable to the Age, and to *his Honour* himself."¹⁴⁶ Walpole, it is suggested, would somehow enjoy Fielding's work. In addition, however, Walpole could find himself within Fielding's work. Puff recommends to Fielding that:

in his next Performance, [he] undertake the Life of *his Honour*. For he who drew the Character of Parson *Williams*, is equal to the Task; nay he seems to have little more to do than to pull off the Parson's Gown, and *that* which makes him so agreeable to *Shamela*, and the Cap will fit.¹⁴⁷

This remarkable recommendation suggests that the figure of religion (Parson Williams) and the figure of politics (Sir Robert Walpole) are the same. In this one suggestion, Fielding inter-linearly argues that Walpole is just as hypocritical as Williams. The Prime Minister, like the Parson,

tity against violation before marriage. Despite the apparent virtue of Pamela, Richardson does not allow his character to be too good to be true. Pamela's attitude toward Mr. B's advances is really quite ambiguous, even artificial. This ambiguity is depicted in Pamela's articulation of Mr. B's attempted rape:

I found his hand in my bosom, and when my fright let me know it, I was ready to die; I sighed, and screamed and fainted away. And still he had his arms about my neck.

Richardson, *Pamela*, *supra* note 124, at 50. Pamela delights in her own letter-writing, in her artificial recounting of the events. Richardson wonderfully accentuates the artificial nature of this particular epistle. Pamela has fainted in Mr. B's arms, and yet is able to know that he "still had his arms" about her neck. The gap between reality and Pamela's recounting of that reality is artifice.

144. See A.D. McKillop, *Samuel Richardson: Printer and Novelist* 302-03 (1960).

145. See W.B. Coley, *Henry Fielding: The Jacobite's Journal and Related Writings* 264 n.3 (1974).

146. H. Fielding, *An Apology for the Life of Mrs. Shamela Andrews* 8 (1953) [hereinafter *Fielding, Shamela*].

147. *Id.*

is a confused seeker of artifice, who deserves punishment before the spiritual court.

Yet Walpole lacks *that* quality in Williams which "makes him so agreeable to Shamela."¹⁴⁸ The exact nature of that quality is not clear. Allusions throughout *Shamela* to sexual inadequacy point to a physical quality. The supposed author, Conny Keyber, for example, carries strong sexual connotations. Moreover, Shamela, grasping at Mr. B[ooby's] private anatomy, exclaims: "*O Parson Williams, how little are all the Men in the World compared to thee.*"¹⁴⁹ That which Walpole lacks, it seems, is William's potency. The "prime minister" is reduced to a hypocritical and impotent figure. There is no more trenchant attack that an artist could make on a politician than to call him impotent. The ability of the political figure to act in the real world and to accomplish practical goals is a threat to the status of artifice. Generally, art is considered ineffective in the political world.

While *Pamela* and *Shamela* demonstrate the potency of art in the political world, *Clarissa* and *Tom Jones* proceed to define the role of art in attaining political justice. In the political world devoid of art, *Clarissa's* death is seen as a consequence of her inability to conform to the dictates of family and society. *Clarissa*, the novel, however, teaches that the sanctions which the individual imposes upon himself are often more harsh than societal sanctions. The family is punished both individually and as a group.¹⁵⁰ The mother and father are consumed by their own guilt, while the children fall victim to unfortunate marriages.¹⁵¹ The individual *Clarissa* emerges triumphant in death over family and society. This ending would be no more than poetic justice if not for the fact that its message is connected intimately with political justice. The individual, Richardson suggests, is an autonomous being, who requires for its existence the free expression of his or her will. The bonds of society, likewise, require for their existence the tolerance of individual autonomy. If the will of the individual is stifled, Richardson implies, society will be consumed from within its own borders. In this manner, *Clarissa* truly is a "warning" to the political world of the dangers of enslaving the creativity of the individual.

Whereas Richardson calls for the freedom of the individual character, Fielding yearns for the kingship of the author. Life, Fielding writes, most exactly resembles the stage.¹⁵² On the stage of life, the author is a world-historical figure. Fielding is an artist who discloses the "revolutions of countries."¹⁵³ Once the author usurps existing authority, he founds a new regime. Fielding states that, "I am, in reality, the founder

148. *Id.* at 52.

149. *Id.* at 8.

150. See Richardson, *Clarissa*, *supra* note 137, at 406.

151. See *id.*

152. See Fielding, *Tom Jones*, *supra* note 139, at 217-18.

153. *Id.* at 33.

of a new province of writing, so I am at liberty to make what laws I please therein."¹⁵⁴ These laws aim not at the good of the author, but at the good of all Fielding's reading subjects. The author has consensual authority for Fielding, and the character has charismatic authority for Richardson. Both literary artists give to the art of literature a role in the historical world. Richardson stresses individual freedom and play. Fielding stresses social equality and role. Each focus coincides, however, in liberalism's tenuous relationship between the individual and society.

The coincidence of the love of the art of literature in Richardson and Fielding also manifests itself in the elevation of the art of literature above the competing art of theology. In *Shamela*, Fielding depicts the religious figure as *both* a poor victim and a confused aggressor of artifice. Parson Williams becomes Shamela's lover and father of her illegitimate child. The jealousy of Mr. B in *Pamela* is distorted in Fielding's story; Mr. B[ooby] is a cuckold to the good Parson. The original Parson Williams, who is "infatuated" with Pamela, withdraws from the tale after her wedding. Fielding's Parson, in ironic contradistinction, dominates both the story and Pamela's affections after she is married to Mr. B[ooby]. The Parson poaches Mr. B[ooby's] hares, rides with Shamela, kisses the bride, belittles Booby, and then discourses on the difference between flesh and spirit. The hypocritical church figure also accepts Booby's payment as consideration for his prayers.¹⁵⁵

Fielding replaces the art of theology with the art of literature. In *Tom Jones*, Fielding denigrates religious writers who teach that virtue is the certain road to happiness and vice the road to misery in this world.¹⁵⁶ This religious view, he claims, is not true.¹⁵⁷ Fielding unmasks his own design, which is to wipe off "a doctrine which can be of no use to a Christian writer."¹⁵⁸ In that doctrine's place, Fielding establishes virtue or goodness as a relative quality.¹⁵⁹ The truth of the moral doctrines of

154. *Id.* at 35.

155. See Fielding, *Shamela*, *supra* note 146, at 74. Williams becomes a vulnerable incarnation of the popular religious preference of faith over good works. The parson delivers a sermon on this theme: "*Be not Righteous over-much.*" *Id.* at 40. Shamela writes glowingly to mama about the Parson's doctrine of grace. "The Bible," Parson Williams suggests, "doth not require too much Goodness of us . . . 'tis not doing good to one another, for that is one of the greatest Sins we can commit . . . 'tis not what we do, but what we believe, that must save us." *Id.* Personally, Williams looks forward to Pleasures with Shamela, "not strictly Innocent." These pleasures quite simply can be "purged away by frequent and sincere Repentance." *Id.* at 39. Parson Williams and the doctrine of grace are true subjects of Fielding's derision. It is no wonder that Charles B. Woods opines that the reprimanding of the Clergy is one of the major themes in *Shamela*. See Woods, *Fielding and the Authorship of Shamela*, 25 *Philological Q.* 248, 271 (July 1946). This is a reprimanding for which Pamela provides the impetus.

156. See Fielding, *Tom Jones*, *supra* note 139, at 275.

157. See *id.*

158. *Id.* at 272.

159. See *id.* at 276-77. "For though every good author will confine himself within the bounds of probability, it is by no means necessary that his characters, or his incidents, should be trite, common, or vulgar." *Id.* at 277.

religion, then, is relative to a historical epoch and to a social situation. Because truths can only be known through conversation, these truths become relative to the time and place of the conversation. The conversation of individuals are a storehouse of truth and are thus sacred. The literary artist, whose subject is conversation, has access to a sacred realm which is closed to the theologian. Fielding, in effect, deifies language by suggesting that truth resides in, and morality is bound up with, conversation. Ultimately, Fielding as author and creator of conversation demands the "faith" of his readers. The author, who does not fall victim to the Marvellous, is "entitled to some faith from his reader."¹⁶⁰

While Fielding deifies the creator of conversation, Richardson deifies the character of the creator of letters. Both novelists elevate the art of literature above the art of theology. Spoken language, Fielding suggests, should be valued for its revealed truths. Individual character, Richardson suggests, should be valued for its concealed truths. The written word (the epistle) unconceals the quiet truths of individual character. The written word (*Tom Jones*) also quiets the spoken words of mankind into the soft truths of experience. Richardson and Fielding are thus good literary friends because they channel the anxiety of influence created in them by the techne of philosophy, politics, and religion into the elevation of the art of literature. The discourse from and between these two novelists results in the elevation of the art of literature.

2. Justice Story and the Elevation of the Case

The novels of Fielding and Richardson, therefore, are worthy of the deepest critical affection because they display the deepest literary friendship. Although he was not their exact contemporary, Justice Story wrote in an epoch flooded with the same philosophic, political and theological influences. He channeled these influences into an elevation of the art of law by exalting the "case."

In *Swift v. Tyson*,¹⁶¹ Maine land speculators fraudulently induced George Tyson to purchase worthless land. Tyson paid for the investment by note. Joseph Swift, a Maine banker, accepted Tyson's note from one of the Maine land speculators in satisfaction for a pre-existing debt.¹⁶² When Swift sought payment on the note in a federal diversity action, Tyson resisted, claiming that his obligation to pay was unenforceable because he had been fraudulently induced to accept the note in the first place.¹⁶³ Tyson found strong support for his claim in New York law.¹⁶⁴ But Swift argued that the case should be resolved not under New York law, but under developing principles of commercial law, which principles would allow Swift to recover so long as he did not accept the note with

160. *Id.*

161. 41 U.S. (16 Pet.) 1 (1842).

162. *See id.* at 14.

163. *See id.* at 15.

164. *See id.* at 16.

notice of the fraud.¹⁶⁵

Writing in 1842 for a unanimous court, Justice Story concluded that federal judges may disregard the decisions of state court judges on issues of a "more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation."¹⁶⁶ Finding the law governing negotiable instruments to be not only general, but international in scope, Justice Story concluded that a federal court is not prohibited from disregarding New York law.

In reaching that result, Justice Story channels the anxiety of influence created by the competing techne of politics, philosophy, and religion into an elevation of the techne of law. The elevation is subtle. It actually begins with an apparent denigration of the decisions of judges: "it will hardly be contended that the decisions of Courts constitute laws."¹⁶⁷ Instead, laws are "more usually understood"¹⁶⁸ to be only the product of legislation or custom. Judges appear to be less powerful than legislators. Legislators make laws, judges do not. Yet, the role of the judge turns out to be far more significant than that of the legislature. The decisions of judges are "evidence of what the laws are."¹⁶⁹ The "laws" of which judicial opinions are evidence, however, are not of the same order as the laws promulgated by the legislature. The legislature merely enacts rules—rules which may or may not be just. But judicial opinions are evidence not of rules, but of "truth." Unlike the legislature, the judge uses "general reasoning or legal analogies" to ascertain a "true exposition" or a "just rule."¹⁷⁰ Indeed, in this pivotal paragraph of *Swift*, Justice Story uses the word "true" no less than four times to describe the result reached by federal judges.¹⁷¹ He ultimately finds it "necessary" for federal judges to express the "true result" in their opinions.¹⁷² While legislatures merely enact rules, judges are both capable and obligated to discover truth.

Justice Story's opinion not only elevates the judge above the legislator, but also elevates the judge above the then-competing arts of theology and philosophy. When Justice Story declares that judicial decisions are not the law, but are only evidence of the law, he displays his anxiety over

165. *See id.* at 14-18.

166. *Id.* at 18-19. Justice Story's reasoning is based in part on his interpretation of Section 34 of the Judiciary Act of 1789, which is currently codified at 28 U.S.C. § 1652. *See* 28 U.S.C. § 1652 (1988). That Section, also known as the Rules of Decision Act, provides: "[T]he laws of the several states, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States, in cases where they apply." *Id.* at 19. Justice Story concluded that the "laws" referred to in this statute did not include common-law decisions of state court judges.

167. *Id.* at 18.

168. *Id.*

169. *Id.*

170. *Id.* at 18-19.

171. *Id.* at 19.

172. *Id.*

Blackstone's influence. In his *Commentaries on the Laws of England* (1765-69), Blackstone concludes "as a rule, the decisions of courts of justice are the evidence of what is common law."¹⁷³ Blackstone himself elevated judges above philosophers and politicians, calling them "the depositories of the laws, the living oracles, who must decide all cases of doubt."¹⁷⁴ Blackstone still felt the need in his epoch to ground the laws which judges discover in the divine or in nature: "This law [of nature], being coeval with mankind and dictated by God Himself, is obligatory upon all."¹⁷⁵ As Professor Stanley Katz significantly concludes, however, Blackstone's lip-service to divine and natural law is merely "an obligatory eighteenth-century exercise, in which Blackstone accords to natural and revealed law about the same importance that Newton accorded to God in the operation of the physical universe."¹⁷⁶ Blackstone's obligatory exercise, though, is actually a slap in the face to theologians who claimed sole access to truth in divine law through interpretation of revelation and holy scripture,¹⁷⁷ and to natural law philosophers who claimed sole access to truth in a pre-societal state of nature.¹⁷⁸ It is the judge, not the theologian or the philosopher, who through right reason discovers what the true law is.¹⁷⁹ Blackstone was truly a great friend to law.

But if Justice Story had merely relied upon Blackstone in *Swift* for his own elevation of the art of the law, he would not have been so successful. Blackstone's views are neither cited nor referenced. Not only is *Swift* devoid of references to Blackstone, it is also devoid of references to divine or natural law. In place of natural or divine law, Justice Story subtly uses labels such as "just rule" or "general principles."¹⁸⁰ Whereas Blackstone might have felt obligated by his 1765 audience to pay some lip-service to the divine or to the natural, Justice Story writing for an 1842

173. 1 W. Blackstone, *Commentaries on the Laws of England* 20 (W. Hardcastle Browne ed. 1897) [hereinafter Blackstone, *Commentaries*]. I am again indebted for this link to Professor William Braithwaite, who concludes: "There can be very little doubt that it was upon Blackstone that Mr. Justice Story was drawing when he referred in *Swift* to court decisions as not themselves 'laws' (within the meaning of Section 34) but only 'evidence' of the law." W. Braithwaite, *A Swift-Erie Primer* (unpublished manuscript) 62 (1990) [hereinafter Braithwaite, *A Swift-Erie Primer*].

174. Blackstone, *Commentaries*, *supra* note 173, at 19.

175. *Id.* at 8. Blackstone also opined that all human laws depend on "the law of nature and the law of revelation." *Id.*

176. S.N. Katz, *Introduction* to W. Blackstone, *Commentaries on the Laws of England*, at vi (1979).

177. After reading the source of the "revealed" or "divine law" to "only" the "holy scriptures," Blackstone then renders the divine law irrelevant to the great number of issues to which it is "indifferent." Blackstone, *Commentaries*, *supra* note 173, at 8.

178. Blackstone's attack on natural law philosophers is direct. The "ethical writers" such as Hobbes, Locke and Rousseau, who envision a pre-societal state of nature are too wild to be seriously admitted. *Id.* at 14.

179. While the reason of mankind is corrupt, the reason of judges is clear. *See id.* at 19-20.

180. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 19 (1842).

audience feels no such compulsion. To the contrary, in his epoch traditional religion had "lost its capacity to supply an underlying order to moral and political life."¹⁸¹ And natural law romanticism had been assaulted by natural science.¹⁸²

Accordingly, Justice Story elevates judges not by equating them with philosophers and theologians, but by removing philosophy (nature) and theology (God) from the law. By stating that the law is "principles" of which the decisions of judges are "evidence," Justice Story creates space for law as a science.¹⁸³ Judicial opinions are individual experiments—particles of data. The successor judge and the legal scholar analyze the particles of data, and through, careful reasoning and logic discover the patterns of truth revealed by them. The lawyer thereby escapes the popular criticisms of theology and philosophy. The lawyer becomes a supreme scientist, at a time when science began to replace "the church in the minds of the social and intellectual vanguard as the locus of higher, spiritual value."¹⁸⁴ Indeed, the law shortly became a secular religion, capable of ordering individual lives around a few immutable principles and of producing an elite group of professional legal scientists.¹⁸⁵

Furthermore, Justice Story's elevation of law to science translated naturally into a new method of teaching law by analyzing cases rather than doctrine. The now-classic Langdell case method, of course, proceeded from Story's premise that judicial decisions are "evidence" of the law. Langdell expressed what Justice Story had earlier implied: "If [law] be a science, it will scarcely be disputed that it is one of the greatest and most difficult of sciences, and that it needs all the light that the most enlightened seat of learning can throw upon it."¹⁸⁶

Story's elevation of law was thus complete. The science of law becomes the supreme science in an age when science had become supreme. Even if a judge's decision is not law, it is the source of truth. Like the novel, the case is the particular mirror through which the universal law is reflected. Through the case, the judge reveals truth, while through their various interpretations and uses of cases, legal scholars and practitioners discover truth.

B. *Friendship in the Age of Literary and Social Criticism*

1. Walter Benjamin's Elevation of the Literary Critic

Walter Benjamin, the famous twentieth century German literary critic,

181. Grey, *Langdell's Orthodoxy*, 45 U. Pitt. L. Rev. 1, 36 (1983) [hereinafter Grey, *Langdell's Orthodoxy*].

182. *See id.* at 36.

183. *See also* The Miscellaneous Writings of Joseph Story 475-502 (1851)(Story's explicit statement that law is science).

184. Grey, *Langdell's Orthodoxy*, *supra* note 181, at 37.

185. *See id.* at 38.

186. Langdell, *Untitled Speech*, 3 L.Q. Rev. 123, 124 (1887)(cited in Grey, *Langdell's Orthodoxy*, *supra* note 181, at 38).

is a good friend to all literary artists because he channels the anxiety of influence from other truth-seeking techne into an elevation of the role of the art of literature. Benjamin felt deeply the anxiety of influence from two of his friends: Gershom Scholem and Bertolt Brecht. Scholem, in his communications with Benjamin and in his work, argued that the source of value in a disenchanted world must be found in the renewal of religion.¹⁸⁷ Brecht, in his communications with Benjamin and in his work, argued instead that faith in the modern world should be placed in the progress of history.¹⁸⁸ The anxiety of influence created by Scholem's claim for religion as the dominant art is channeled by Benjamin into the deification of language. At the same time, Benjamin channels the anxiety of influence derived from Brecht's exaltation of historical materialism into the historicization of literature.

The channeling of the anxiety of influence from Scholem and Brecht is accomplished, in part, by Benjamin, through the deification of language. Benjamin channels the anxiety of influence from Scholem's religious mysticism into the enchantment of literature. Against the currents of disenchantment in modern thought, Benjamin asserts language as a value in itself. "The goal I set for myself," he writes, "is to be regarded as the foremost critic of German literature. The trouble is that for more than fifty years literary criticism in Germany has not been considered a serious genre. To create a place in criticism for oneself means to re-create it as a genre."¹⁸⁹ The re-creation of criticism as a genre is a re-creation of value in language and in the art of criticism.¹⁹⁰

The restoration of value in language, however, requires, however, the enchantment of language. In *Unpacking My Library*, Benjamin suggests that books themselves are sources of enchantment.¹⁹¹ The true collector of books has a "passion" that borders on the "chaos of memories."¹⁹² The collector has an irrational impulse to recapture the past, which is in disarray. Yet this type of irrationality and chaos, like the irrationality and chaos of Scholem's mysticism, is salutary. The life of the book collector contains a "dialectical tension" between order and disorder.¹⁹³

187. See H. Arendt, *Introduction to Illuminations*, *supra* note 9, at 14-15.

188. See *id.* at 15.

189. *Id.* at 23-24.

190. The search for truth—philosophy—is, by its nature, concerned with the question of representation. See Benjamin, *On Language as Such and on the Language of Man*, in *Reflections*, *supra* note 9, at 314. The manner in which a philosophic project is communicated is central to its methodology; the form of representation is the area of truth toward which language is directed. See *id.* at 317. The dynamic nature of reality dictates a language appropriate to understanding that reality. The philosophic project is concerned with representing truth itself; it focuses language on language. See *id.* Language is not only a means of philosophic discourse, it is the end of that discourse as well. In language, truth resides. Benjamin, then, attempts to restore value in language, much as Scholem attempts to restore value in mysticism.

191. See Benjamin, *Unpacking My Library*, in *Illuminations*, *supra* note 9, at 59-67.

192. *Id.* at 60.

193. *Id.*

That life is everywhere characterized by magic. Benjamin writes that the collector has a "very mysterious relationship"¹⁹⁴ to the ownership of books. Ownership for the collector is not of utilitarian or functional value. Rather, the collector loves books as the "scene, the stage, of [his own] fate."¹⁹⁵ In books, Benjamin finds fate. "The most profound enchantment for the collector," he concludes, "is the locking of individual items within a magical circle in which they are fixed as the final thrill, the thrill of acquisition, passes over them."¹⁹⁶ The mystical side of the collector allows him to see in the past the mystery of his life. The book as an item of collection, for Benjamin, has a mystical value. The books of literature have a mystical quality coequal to religion.

Yet, not only do the books of literature have a mystical quality, the "telling" of literature does as well. In *The Storyteller*, Benjamin attempts to recapture the enchanting qualities of a trader in tales.¹⁹⁷ The "art of storytelling," Benjamin observes, "is coming to an end."¹⁹⁸ The decline in the art of storytelling is a "concomitant symptom of the secular productive forces of history."¹⁹⁹ The disenchantment of the world thus has a parallel in the disenchantment of storytelling. Benjamin claims that the authority of storytelling is in part derived from its mysterious quality; it has the authority of distance and time. "The intelligence that came from afar," Benjamin recalls, "possessed an authority which gave it validity, even when it was not subject to verification."²⁰⁰ The news story of modern life, by contrast, is dependent for its authority upon verification. Benjamin claims that the "dissemination of information has had a decisive"²⁰¹ role in the usurpation of storytelling authority. The modern listener subjects the news story to the scrutiny of reason. As mere information, the news story speaks to the standard of reason.

Yet Benjamin yearns for the renewal of storytelling which is rooted in less-than-rational authority. The storyteller "can attain an almost mystical depth;"²⁰² he brings words, soul, eye, and hand together in his art. That art, for Benjamin, is a dominant one. "[T]he Storyteller," he states, "joins the ranks of the teachers and sages."²⁰³ The art of storytelling is the art of counsel. The life of the storyteller is consumed by the story: "This is the basis of the incomparable aura about the storyteller."²⁰⁴ The story of the storyteller is the vehicle through which the "righteous man encounters himself."²⁰⁵ The mystical element of storytelling, Benjamin

194. *Id.*

195. *Id.*

196. *Id.*

197. See Benjamin, *The Storyteller*, in *Illuminations*, *supra* note 9, at 83-109.

198. *Id.* at 83.

199. *Id.* at 87.

200. *Id.* at 89.

201. *Id.*

202. *Id.* at 108.

203. *Id.*

204. *Id.* at 109.

205. *Id.*

suggests, is an enchanting force in a disenchanted world. Whereas Scholem exalts the religious doctrines of mysticism, Benjamin claims that language, books, and storytelling have mystical qualities which should be recaptured. Influenced by Scholem's work on mysticism, Benjamin channeled that work into essays which elevate the role of literature. Literature, not religion, is the proper source of enchantment in the modern world.

Coincidentally, however, Benjamin channels Brecht's historical materialism by arguing that literature, not history, is the driving force of political change. The form and method of literary expression should capture the essence of that expression. The essence of literary expression is reality. The nature of reality is fragmented and ever-changing. The literary devices used to capture that nature, therefore, must be fragmented and ever-changing. These devices must also cause the reader to reflect critically and constantly on the nature of reality.

The quotation is just such a device; it allows the reader objectivity in the examination of language. Benjamin once dreamed of a text produced entirely of quotations.²⁰⁶ The device of the quotation strips language of its context and allows the reader to reflect upon its origins and its development. The quotation marks themselves signal the reader to pause; they disrupt the system of normal discourse. The critical reflection which the quotation engenders is comparable to Brecht's alienation effect. In his essay, *What is Epic Theatre?*, Benjamin answers that the "art of the epic theater consists in producing astonishment rather than empathy."²⁰⁷ The devices of interruption and gesture create this astonishment. Brecht's concept of interruption informs much of Benjamin's theory of quotation. Yet Benjamin suggests that the device of interruption through quotation has a purpose that goes beyond a progressive audience response. "To quote a text involves the interruption of its context," Benjamin writes; "[i]t is therefore understandable that the epic theater, being based on interruption, is, in a specific sense, a quotable one."²⁰⁸ The highlight of Brecht's work—*Epic Theater*—is, for Benjamin, the subject of literary quotation. Essentially Benjamin subsumes Brecht's work in a larger literary context. "One can go even further [than Brecht]," he suggests, "and remember that interruption is one of the fundamental devices of all structuring."²⁰⁹ Hence, Benjamin channels the influence of Brecht's alienation effect into the elevation of textual technique as a means toward truth and as an end in itself. The historical progress toward which Brecht's theatre tends is for Benjamin a structure no different from all literary structures.²¹⁰

In language, the mystical and the material *coincide*. The coincidence

206. See H. Arendt, *Introduction to Benjamin, Illuminations*, *supra* note 9, at 4.

207. Benjamin, *What is Epic Theater?*, in *Illuminations*, *supra* note 9, at 150.

208. *Id.* at 151.

209. *Id.*

210. In the quotation, the modern journalist recaptures the authority of the ancient

of mysticism and alienation effect in Benjamin's theory of language elevates language itself. "In the quotation," Benjamin concludes, "language proves the matrix of justice."²¹¹ The authority of language is capable of effecting social change and capable of enchanting a culture. "From its two poles—classical and materialist humanism—the whole world of this man's culture is embraced by quotation."²¹² Ultimately mysticism is not religious and the alienation effect is not historically material. The influence of mysticism and the alienation effect coincide in Benjamin's elevation of the art of literature.

The elevation of the art of literature is also accomplished by Benjamin through the channeling in his work of the influence of Scholem's Kabbalah and Brecht's collective production. From Scholem's rejuvenation of Kabbalah, Benjamin adopted the view that the word is sacred.²¹³ Ben-

storyteller. The quotation combines elements of Mysticism and elements of the alienation-effect. The quotation, Benjamin states,

summons the word by its name, wrenches it destructively from its context, but precisely thereby calls it back to its origin. . . . In quotation the two realms—of origin and destruction—justify themselves before language. And conversely, only where they interpenetrate—in quotation—is language consummated. In it is mirrored the angelic tongue in which all words, startled from the idyllic context of meaning, have become mottoes in the book of Creation.

Benjamin, *Karl Kraus*, in *Reflections*, *supra* note 9, at 269. The scientific objectivity which Brecht seeks through his plays is achieved through the quotation, which eradicates the subjectivity of the text. In addition, however, the quotation calls attention to origin and temporal distance. As such, the quote gives the text an aura. This aura is mystical, even enchanting.

In the literary structures of modern communication, the quotation is a device of authority. In his essay *Karl Kraus*, Benjamin celebrates Kraus as a journalist worthy of respect. The reporting of Kraus, Benjamin writes, "embodies the secret of authority: never to disappoint." *Id.* at 248. In this essay, Benjamin suggests that authority is possible in a world which stresses the dissemination of information and the verifiable news story. For the political figure, authority is power and appointment is the delegation of power. The secret of political authority is at once not to disappoint the people over whom power is yielded and not to disappoint the people in whom power is entrusted.

This authority is so much literary as it is political. For the journalist, "disappointing" means coloring the news story with subjectivity. The secret of literary authority is the appointment of, and delegation of authority to, other literary works. True authority "is binding . . . toward itself in the same degree as toward others." *Id.* The modern communicator, then, can harbor authority if he acknowledges that authority is equally applicable to himself as it is to others. The journalist can recapture the spatial and the temporal authority of the storyteller through the proper use of literary authority.

211. *Id.* at 269.

212. *Id.*

213. In *On Language as Such and the Language of Man*, Benjamin traces the creation and fall of the word. See Benjamin, *On Language as Such and the Language of Man*, in *Reflections*, *supra* note 9, at 314. The Edenic life of mankind was one in which there was only one language. In the act of Creation, "God breathes his breath into man: this is at once life and mind and language." *Id.* at 321. Reading the Book of Genesis with rabbinical skill, Benjamin delineates a linguistic rhythm to the process of Creation. The individual acts of Divine Creation are framed at the beginning and end by language: "Let there be—He made (created)—He named." *Id.* at 322. The Creation of Life is accomplished with the "creative omnipotence of language." *Id.* at 323. Benjamin comments that "[l]anguage is therefore both creative and the finished creation." *Id.* After the crea-

jamin, in language that could have been written by Scholem, declares that "[t]he highest mental region of religion is (in the concept of revelation) at the same time the only one that does not know the inexpressible."²¹⁴ For Scholem, this highest religious region is revealed to man from above and through time.

But, for Benjamin, man can share in the creative language of God. "The point where human language participates most intimately in the divine infinity of the pure word," Benjamin writes, "[is] the human name."²¹⁵ Man is superior to other beasts in his ability to name his own kind. "The proper name is the communion of man with the *creative* word of God."²¹⁶ The name, therefore, mediates the word of God with the product of His creation. Benjamin contends that the mystical linguistic theory "rests on a misunderstanding."²¹⁷ That misunderstanding, which Scholem shares, is the notion that the "word is simply the essence of the thing."²¹⁸ Benjamin rejects the Kabbalistic view of the word of God in favor of a view which allows for mediation. "[T]he thing in itself has no word," Benjamin claims, "being created from God's word and known in its name by a human word."²¹⁹ The knowledge that man has of the thing is not, as Scholem suggests, spontaneously revealed to him. Rather, Benjamin asserts that "the name that man gives to language depends on how language is communicated to him."²²⁰ The word of man gives language to things from which "the word of God shines forth."²²¹ In the human name, the word of God becomes "receptive." The language of man which receives the word of God is fertile; "it aims to give birth to the language of things themselves."²²²

Benjamin rejects the belief that the word of God is revealed solely through the will of God. The reception of the word of God by man through language is an event which advances the return of pure language. Thus Benjamin gives to the language of man a real role in Scholem's otherwise divine Kabbalistic process. Furthermore, Benjamin's concept of Creation and the Fall is a linguistic one. Whereas Scholem desires the return of the divine word of a Judaic God, Benjamin

tive act, God cognized the world through "name." The relationship of name to knowledge is absolute in God; "only there is name . . . the pure medium of knowledge." *Id.*

The Creation of man, unlike the Creation of things, does not emanate from language. "God made things knowable in their names," Benjamin writes; "man, however, names them according to knowledge." *Id.* Thus, even the paradisiac state of man knows a human language one step removed from the Word of God. "All human language is only reflection of the word in name." *Id.*

214. *Id.* at 321.

215. *Id.* at 323-24.

216. *Id.* at 324.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 324-25.

221. *Id.* at 325.

222. *Id.*

seems more concerned with the return of pure language—a language where word and object do have more than an accidental relationship to each other. Benjamin thus channels the influence of Scholem's Kabbalah into a theory which elevates the language of man.

In a coincidental manner, Benjamin channels the influence of Brecht's theory of collective production into an elevation of the human word. The dilemma of Marxist writing since Marx involves the proper tasks to be assigned to the artist. According to Benjamin, Brecht feels that he solves this dilemma by viewing the artist as a producer, in whose very product the forces of economic production are apparent.²²³ The influence of this resolution on Benjamin's work is strong. In *The Author as Producer*, Benjamin reiterates the dilemma of Marxist aesthetics and develops the theory that "a decisive criterion for judging the revolutionary function of literary works lies in the degree of technical progress in literature that leads to a revised function of art forms and thus also of the intellectual means of production."²²⁴ This theory suggests that Marx's superstructure is alive with a dialectic of its own.²²⁵ That dialectic gives to the work of art a real place in the progress of history. Brecht, who apparently desired no less for the work of art, believed that the play could stir a mass audience into progressive action. Although he realized the productive aspects of each drama, Brecht valued the specific and real reaction to his plays.²²⁶

In unique contradistinction, Benjamin suggests that the entire history of art is infused with historical meaning. In *The Work of Art in the Age of Mechanical Production*, Benjamin traces the history of artistic technique, much as other Marxists have traced the history of economic production.²²⁷ The decline of the "authority" and "ritual" of the work of art throughout history parallels the decline of the state and religion in preparation for the advent of Communism. Benjamin welcomes the film as the utopian art form. In the technique of cinema, the production is collective, the audience is mass, the equipment is scientifically advanced, the perspective is interrupting, and the creator and critic are leveled. The technique of artistic production reveals for Benjamin a stage in the relations of economic production which is favorable to Communism. Like Brecht, Benjamin creates a theory that is useful for the revolutionary demands of politics. But, unlike Brecht, Benjamin does so by energizing the theory of art with tremendous historical significance. The dialectic of art is "no less noticeable in the superstructure than in the economy."²²⁸ The realm of art encompasses thought and action, superstructure, and

223. See Benjamin, *Conversations with Brecht*, in Reflections, *supra* note 9, at 203.

224. Benjamin, *The Author as Producer*, in Reflections, *supra* note 9, at 221.

225. See Benjamin, *Conversations with Brecht*, in Reflections, *supra* note 9, at 217-18.

226. See Benjamin, *Brecht's Threepenny Novel*, in Reflections, *supra* note 9, at 201; Benjamin, *What is Epic Theater?*, in Illuminations, *supra* note 9, at 147.

227. See Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in Illuminations, *supra* note 9, at 217.

228. *Id.* at 218.

substructure. Benjamin energizes art by giving its history ideational and material significance. He is not so much interested, as is Brecht, in energizing history through art.

The concept of "technique," for Benjamin, means more than the method of artistic production. In part, Benjamin relies on a classical definition of technique as *techne*.²²⁹ The work of art allows truth to emerge; the origin of art is art. The goal of artistic discovery, Benjamin claims, is the "origin."²³⁰ The end of Benjamin's technique is *techne*. In recovering the full sense of technique as *techne*, Benjamin adapts Brecht's notions of collective production to his own literary ends. The work of art is both material and ideal, the product of the highest arts. Benjamin elevates the role of literary criticism by suggesting that the master-art is art itself: literary criticism is the *techne* of all *techne*.²³¹

229. In *The Origin of the Work of Art*, Heidegger recalls the full impact of *techne*:

Techne, as knowledge experienced in the Greek manner, is a bringing forth of beings in that it *brings forth* what is present as such *out of* concealedness and specifically *into* the unconcealedness of their appearance.

M. Heidegger, *The Origin of the Work of Art*, in *Basic Writings* 149, 180 (1977).

230. *See id.* at 179.

231. The concept of time in Benjamin's writing is informed by linguistic progress. The history of mankind, Benjamin suggests, is the history of the language of man. That Benjamin's aesthetic theory is Kabbalistic in its reliance on the Sacred Word and Mystical in its reliance on the enchantment of literary moments is apparent. What is not yet apparent, however, is the influence upon Benjamin of Scholem's conception of revelation and Messianism. Benjamin shares Scholem's hope in the possibility of a utopian community. For Scholem, the Messiah arrives without preparation; the utopia can be restorative or wholly new. The arrival of the Messiah is apocalyptic and redemptive; history comes to an end. Benjamin's faith in the possibility of utopia is grounded in his faith in the return of pure language. Throughout history, man develops a plurality of names for the same thing. From the paradise of one language, man falls to the prattle of multiple tongues. After the fall, the "things" which man names become "over-named." *See Benjamin, On Language as Such and on the Language of Man*, in *Reflections*, *supra* note 9, at 330. The many languages of man take him further and further from the bliss of pure language. But the multiplication of languages throughout time unconceals the questions of the nature of language and allow for the eventual return of pure language. Benjamin's utopia is one in which the "ultimate clarity [of] the word of God unfolds." *Id.* at 332. The end of history, Benjamin implies, is a restoration of pure language mind. Whereas Scholem hoped for the sudden appearance of the Messiah, Benjamin studies the gradual "unfolding" of the word.

The languages of man, though they be prattle, are not without Messianic significance. The object, Scholem suggests, will be rejoined with the word in a sudden redemptive moment. That word for Benjamin, however, is present in every human word; by naming "things" man communes with the divine. *See id.* at 318. The mediation between God and man is the name. But the name is carried through history in the form of Tradition. The words of men are traded, the languages of man are traded, and finally the translations of mankind are traded. Language becomes "higher" throughout time; history is a unified "movement made up of language." *Id.* at 332. The trading of literature reveals slowly the Word of God. Thus tradition (the trading of literature), for Benjamin, takes the places of Hermes as the messenger of the Word of God. Benjamin's hermeneutic runs from the narrow intention of every piece of literature to the larger intent of divine language. This hermeneutic cycle ends in the restoration of pure language-mind. Literature has a role in the Messianic Ideal, which is itself a Linguistic Ideal. Benjamin replaces Scholem's religious Messianism with a linguistic one.

The process by which the utopia of linguistic wholeness returns is, for Benjamin, a literary one. "History" for Benjamin is not a God; rather, it "is the subject of a structure."²³² That "structure" involves a hermeneutic cycle between intention and intent, prattle and word, and language-in-use and pure language. Thus the historical materialist is a literary critic: the study of tradition. The historical materialist blasts a specific era out of the course of history—a specific work out of the lifework. "As a result," Benjamin suggests, "the lifework is preserved . . . and canceled [*aufheber*]."²³³ The structure of history is a lifework out of which the historical materialist blasts a "Messianic cessation of happening:" the single work.²³⁴ In the single work, Benjamin finds the message of history which is ultimately the message of Hermes: the word. Benjamin contends that the material world is found in the single word, that the historical world is a literary structure, and that the progress of time moves toward a literary paradise. The art of literature usurps the role of history in Brecht's theory. Benjamin elevates the role of the literary artist by giving literature a value loftier than historical materialism.

Not only does Benjamin give literature an historical role, he gives literature an epistemological role as well. Scholem upholds the art of the detached rabbinical scholar, who, through interlinear readings of sacred texts, gleans religious meaning. The posture of the detached scholar is given by Benjamin to the translator. "The interlinear version of the Scriptures," Benjamin suggests, "is the prototype or ideal of all translation."²³⁵ The translator reads the pure language between the lines of many languages. Unlike the detached rabbinical scholar, however, the translator acts on the languages of men, the languages of tradition, and the language of stories. The possibility of translation is created by overnaming. With each new translation, the translator can attain a portion of the pure language. Thus, translation aims at the objectivity and detachment of pure language. But, in contrast to Scholem's scholar, the translator has weak Messianic power; he can unconceal pure language from prattle. The translator of literature, who is the epitome of the literary critic and creator, is capable of discovering truth in the lines of literature. Benjamin demonstrates that the messenger of truth is literature and the reception of truth is literary.

The literary discovery of truth, however, has a certain material quality. The historical materialist, Brecht contends, is the figure in whom truth may be known. Although he applauds the objectivity and detachment of the literary critic and literary translator, Benjamin does not abandon the material world. The truths that are revealed through the history of art

232. Benjamin, *Theses on the Philosophy of History*, in *Illuminations*, *supra* note 9, at 261.

233. *Id.* at 263. The word "aufheber," a Hegelian term, means to preserve, to elevate, to cancel.

234. *Id.*

235. Benjamin, *The Task of the Translator*, in *Illuminations*, *supra* note 9, at 82.

have a tactile quality: "the tasks which face the human apparatus of perception . . . cannot be solved . . . by contemplation, alone. They are mastered gradually by habit, under the guidance of tactile appropriation."²³⁶ Even the translator must perform his art in the marketplace of traded stories. The literary creator, Benjamin claims, should be a "*flâneur*, whose mode of life still surrounds the approaching desolation of city life with a propitiatory luster."²³⁷ The city, the crowd, the store all provide material for art. The material of art is not to be derived from complete scholarly detachment. "In the Flâneur," Benjamin observes, "the intelligentsia pays a visit to the marketplace"²³⁸ and returns with an artistic product that is both material and ideal, spontaneous and contemplative, active and thoughtful. Benjamin employs Brecht's materialism as a means to get the detached scholar into life. The product of the translator, who is not so detached as the rabbinical scholar, and the flâneur, who is not so active as the historical materialist, is a literature that is of supreme value to the modern world. The art of literature, if practiced correctly, is the art of truth. But the art of literature, if contemplated correctly, is also the art of historical progress.

By giving the art of literature a role in attaining truth and historical progress, Benjamin elevates the art of literature to the *techne* of all *techne*. In so doing, Benjamin channels the anxiety of influence created by the truth-seeking potential of Scholem's theology and Brecht's history into an elevation of the art of literature. Benjamin clears imaginative space for himself in the history of literature, and clears imaginative space for the art of literature in the history of thought. The art of literature, for Benjamin, is useful in that it is a means to attain truth and to recapture pure language. In addition, the art of literature is pleasant in that it is enchanting. But the use and the pleasure which literature provides is inherent in the "good" *techne*. Benjamin, unlike both Scholem and Brecht, employs literature as a means to elevate the art of literature. That art is both a means and an end. The art of literature, Benjamin suggests, is the highest "good." Because Benjamin elevates the art of literature to the status of the highest "good," he is a good friend to the literary artist.

2. Justice Holmes: *Erie*, *Lochner*, and the Elevation of the Judge as Social Critic

Labeling Justice Story and Justice Holmes friends seems odd for at least two reasons. First, they were not contemporaries; they never actually met or spoke to each other. Second, if they had met and spoke, they no doubt would have argued at length about their opposing views of the

236. Benjamin, *The Work of Art in the Age of Mechanical Reproduction*, in *Illuminations*, *supra* note 9, at 240.

237. Benjamin, *Paris, Capital of the Nineteenth Century*, in *Reflections*, *supra* note 9, at 156.

238. *Id.*

nature of law, particularly as those views apply to the issue whether a federal court sitting in diversity cases must apply the law of the state or is instead free to fashion federal common law.²³⁹ In their different resolutions of that issue, however, Justices Story and Holmes actually reveal themselves to be friends. Despite their different results, both Justices in their opinions elevate the techne of law above the competing techne of religion, philosophy, and politics.

Justice Holmes launched vigorous attacks on Justice Story's opinion in *Swift v. Tyson*.²⁴⁰ In *Kuhn v. Fairmont Coal Co.*,²⁴¹ Justice Holmes called Justice Story's view of law a "fiction" that "had to be abandoned."²⁴² Similarly, in the *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*²⁴³ case, he argued that Justice Story authored *Swift* under the "tacit domination of the fallacy"²⁴⁴ that a "transcendental body of law"²⁴⁵ exists. Finally, in *Erie Railroad Co. v. Tompkins*,²⁴⁶ Justice Holmes's critique of Justice Story's understanding of law commanded majority support. Justice Brandeis, writing for the Court, recited Justice Holmes's exposure of the fundamental "fallacy" underlying *Swift*: "the assumption that there is 'a transcendental body of law outside of any particular State but obligatory within it . . .,' that federal courts have the power to use their judgment as to what the rules of the common law are."²⁴⁷ Law is not truth; law is what a sovereign says it is. And federal judges are bound to apply the law of the state sovereign in diversity cases.²⁴⁸ Hence, Justice Holmes's dissenting opinions—incorporated into the *Erie* majority opinion—seem not only to degrade Justice Story, but also to degrade the art of law. If law is not truth, but only an expression of sovereign will, then the science of the law is not a search for truth, but only an instrument of political power.²⁴⁹

239. Compare *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1842)(diversity action opinion of Justice Story holding that state laws do not bind the federal court in matters determinable by the general principles of law) with *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 370-72 (1910)(Holmes, J., dissenting)("the title to real estate in general depends upon the Statutes and decisions of the State within which it lies"); *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938)(holding that there is no general common federal law and that the law to be applied in any diversity case is the law of the State, basing its reasoning in part on Justice Holmes' *Swift* dissent).

240. 41 U.S. (16 Pet.) 1 (1842).

241. 215 U.S. 349 (1910).

242. *Id.* at 371 (Holmes, J., dissenting).

243. 276 U.S. 518 (1928).

244. *Id.* at 535 (Holmes, J., dissenting).

245. *Id.* at 533.

246. 304 U.S. 64 (1938).

247. *Id.* at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

248. See *id.* at 78.

249. Professor Braithwaite is profound in his criticism of *Erie*'s denigration of American judges as mere followers of the will of the sovereign. See Braithwaite, *A Swift-Erie Primer*, *supra* note 173, at 69.

Yet, Holmes's rejoinders to Justice Story display a more profound friendship; they actually elevate the techne of law by channeling the anxiety of influence created by the political and social philosophies of his particular epoch. Justice Story's view of law as a transcendental body of reason engendered the science of law. That science, however, then revealed the irrationality of Justice Story's belief in a transcendent body of reason. If Justice Holmes had merely upheld the "fiction" of law as brooding omnipresence of reason, then law would have become only a part of that fiction. The art of law too would have lost its legitimacy. The task for Holmes was to find a new, plausible justification for the lofty place which Story had assigned to law. If in Holmes's epoch law is merely what the sovereign creates, then the elevation of judges requires an argument that judges are the supreme sovereign.

In his pre-*Erie* dissents and in his *Lochner v. New York*²⁵⁰ dissent, Holmes makes just such an argument. First, he displays how the precedential value given to *Swift* must yield in *Erie* to "[c]riticism."²⁵¹ The criticism is textual; a competent scholar has discovered that Justice Story's construction of the Rules of Decision Act was incorrect.²⁵² But the criticism is also political and social; "[e]xperience in applying the doctrine of *Swift v. Tyson*, had revealed its defects, political and social."²⁵³ Nonetheless, Justice Brandeis, in incorporating Holmes' views into the *Erie* majority, writes that textual and social criticism alone would be inadequate justification for the overturning of precedent. The "unconstitutionality of the course pursued" in *Swift* apparently supplies the needed justification. Yet, it is not the Rules of Decision Act which is found in *Erie* to be unconstitutional. Instead, as Justice Holmes reasons, it is the "'assumption of powers by courts of the United States'" in applying the Act which renders the "course pursued" unconstitutional.²⁵⁴

In *Erie*, the Supreme Court does not assess the constitutionality of legislative or executive power; instead, it assesses the constitutionality of its own power. In doing so the Court does not reason from any express constitutional prohibitions. Rather, the fundamental "fallacy" underlying the assumption of judicial power in *Swift* is philosophical. It is a discarded view of law. But in discarding that view of law, the court forever makes itself the arbiter of what the correct view of law is. Judges do not merely discover what is the law, they discover what law is. While Holmes suggests that law is the creation of the sovereign, it is clear that judges retain the power to define the philosophic meaning of law. Judges are sovereigns too. Therefore, they have the power to create (not merely discover) law. Moreover, because judges are sovereigns over the issue of

250. 198 U.S. 45 (1905).

251. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 73 (1938).

252. See *id.* at 72.

253. *Id.* at 74.

254. *Id.* at 79 (quoting *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

what law is, they have the power to create the very definition of law as well. Judges are sovereign over philosophers; they are the supreme sovereigns.

Justice Holmes further elevates the role of the judge by suggesting that the law which the judges create is not only supreme, it is just. In his famous *Lochner* dissent, Justice Holmes brilliantly befriends judges by arguing that they—more than philosophers or politicians—have access to truth. He channels the anxiety of influence created by the competing techné of philosophy and politics into an elevation of the techné of law.

The majority and dissenting opinions in *Lochner* are, almost by definition, “combats to the utterance.”²⁵⁵ Justice Peckham delivered the opinion of the Court, which concluded that New York’s law prohibiting the employment of bakery workers for more than ten hours a day or sixty hours a week was an unconstitutional deprivation of liberty without due process.²⁵⁶ He reasoned that the individual liberty protected by the Fourteenth Amendment includes the “right of contract,”²⁵⁷ that the purely “labor law” ends of the statute were outside the state’s legitimate police power,²⁵⁸ and that while the objective of health regulation may be within the state’s legitimate police power, the New York law had no “direct relation, as a means to [that legitimate] end.”²⁵⁹ In his dissent, Justice Harlan agreed that the Fourteenth Amendment protects “liberty of contract,” but not from state laws which have a “real or substantial relation to the protection of health.”²⁶⁰ He found it “impossible, in view of common experience, to say that there is here no real or substantial relation” between the regulation of bakery working hours and the health of bakery workers.²⁶¹ While Justice Harlan’s dissent was narrow in its critique of the majority’s analysis of the connection between the statute’s ends and its means, Justice Holmes’s dissent was far more sweeping. He attacked the entire “theory” upon which the majority opinion is based.²⁶²

Despite their differences in method and result, these *Lochner* opinions coincide in their authors’ attempts to elevate the art of law over competing arts. Justice Peckham’s strategy for judicial elevation is perhaps the most obvious—hence the most crude and ultimately ineffective. His opinion is a plain manifestation of judicial power; it strikes down a law

255. A.D. McKillop, Samuel Richardson: Printer and Novelist 169 (1960).

256. See *Lochner v. New York*, 198 U.S. 45, 53, 64 (1905).

257. *Id.* at 57.

258. See *id.*

259. *Id.* at 57. The *Lochner* majority opinion has been criticized on each of these elements of its reasoning. See, e.g., Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 42-43 (1972) (discussing the judicial shift in the critique of *Lochner* as to legislative ends, not means); Warren, *The New “Liberty” Under the Fourteenth Amendment*, 39 Harv. L. Rev. 431, 449 (1926) (criticizing the expansion of the concept of liberty from the narrow common law definition as freedom from restraint to the freedom to contract).

260. *Lochner v. New York*, 198 U.S. 45, 69 (1905).

261. *Id.*

262. *Id.* at 75.

passed by the legislature. As such, the opinion asserts the superiority of the judiciary over the legislature as a source of authority. Indeed, Justice Peckham asks his readers to join in the fight against legislative hegemony. By asking the rhetorical question whether "we [are] all . . . at the mercy of legislative majorities?,"²⁶³ Justice Peckham not only has in mind a negative response, he has in mind a defiant response. The question suggests that the judiciary and the people ("we") together are threatened by the power of "legislative majorities." The judiciary must be given sufficient power so that "we" are not at the mercy of legislative majorities.

Despite its facial attempt to garner judicial strength, Justice Peckham's opinion ultimately fails to elevate the art of the law. It turns out that the judicial role is severely limited. If a statute is "within the power" of the state, Justice Peckham opines, it is valid—even if the "judgment" of the court be "totally opposed" to the law.²⁶⁴ The question which it is the Court's role to answer is correspondingly limited: "Is [the legislation] within the police power of the State?"²⁶⁵ The Court is thus relegated to defining the power of a state. Because defining the police power of a state may include identifying the state's proper objectives in protecting the "safety, health, morals and general welfare of the public,"²⁶⁶ Justice Peckham views his defining role as one of "great importance."²⁶⁷ Yet, the decision itself suggests that the state's police power is limited to protecting the "health" (as opposed to the equality) of its citizens.²⁶⁸ In subsequent cases, the Court will be confined to the mechanistic determination whether a state statute promotes health.

Peckham further diminishes the role of the judiciary by elevating the competing *techne* of philosophy. As Holmes suggests in his dissent, the majority opinion embraces a philosophic position fashionable in its day. In his *Social Statics*, Herbert Spencer popularized the philosophic view that, with rare exceptions, every man should have the right to do what he wishes so long as he does not interfere with another's right to do the same. In *Lochner*, the "rights of individuals" to enter into contracts "upon such terms as they may think best"²⁶⁹ are expressly made a part of the "liberty of the individual protected by the Fourteenth Amendment."²⁷⁰ Justice Peckham asserts that absent the result in *Lochner*, protection from "undue interference with liberty of person and freedom of contract [would be only] visionary."²⁷¹ Peckham's role is to make Spen-

263. *Id.* at 59.

264. *Id.* at 57.

265. *Id.*

266. *Id.* at 53.

267. *Id.* at 54.

268. *Id.* at 57 (Peckham dismisses as illegitimate any "labor law" end of redressing inequalities).

269. *Id.* at 61.

270. *Id.* at 53.

271. *Id.* at 60.

cer's philosophic vision into a legal reality. He nowhere questions the philosophy of laissez-faire. Nor does he question its transcendence. Instead, law is made entirely subservient to philosophy, indeed subservient to a fashionable philosophy.

Holmes's dissent, by contrast, is "the greatest judicial opinion in the last hundred years"²⁷² precisely because it elevates the art of law above the competing art of philosophy. Judge Posner has gone a great distance toward discovering why Holmes's dissent in *Lochner* has commanded such tremendous fame and respect. He observes that the dissent—like many of Holmes's opinions—is not a paradigm of formal logic.²⁷³ Many of its assertions are offered without citations to precedent and many of the citations are "inapposite."²⁷⁴ Nor does Holmes even attempt to find authority for his position in the opinions of the many or in the laws of nature. Judge Posner justifiably concludes that the opinion "is not logically organized, does not join issue sharply with the majority, is not scrupulous in its treatment of the majority opinion or of precedent, is not thoroughly researched, does not exploit the factual record, and is highly unfair to poor old Herbert Spencer."²⁷⁵

But the dissent is hardly the "rhetorical masterpiece" which Judge Posner finds it to be.²⁷⁶ To the contrary, it is cacophonous, choppy and awkward. The "opening sally" which Judge Posner finds so effective because of the self-assurance with which it appears to have been made, is typical.²⁷⁷ We are told first that the case "is decided,"²⁷⁸ an arrestingly awkward use of tense. We are more fully told that the case is decided "upon" an economic theory,²⁷⁹ a phrase which either omits a key word such as "based" (i.e., decided based upon an economic theory) or mixes its metaphors. A case may "rest" upon an economic theory; but it cannot in precise linguistic usage be "decided upon" something. The sentence gets worse. We are introduced to "a large part of the country,"²⁸⁰ but we have no clue what the words "large" or "part" mean in this context. "Large" in number, stature, or significance? "Part" in geography, political sphere, or populace? Next, we are told that a "part" of the "country" does not "entertain" the theory which the "case is decided upon."²⁸¹ Because parts do not in the real world entertain decided-upon

272. R. Posner, *Law and Literature: A Misunderstood Relation* 285 (1988) [hereinafter Posner, *Law and Literature*]. Judge Posner actually concluded ironically that Holmes' dissent in *Lochner* "is not, in short, a good judicial opinion. It is merely the greatest judicial opinion of the last hundred years." *Id.*

273. *Id.* at 281 (citing Currie, *The Constitution in the Supreme Court: Full Faith and the Bill of Rights, 1889-1910*, 52 U. Chi. L. Rev. 867, 900 (1985)).

274. *Id.*

275. *Id.* at 285 (citation omitted).

276. *Id.*

277. *See id.*

278. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

279. *Id.*

280. *Id.*

281. *Id.*

theories, the objective correlative for the metaphor is completely lost. And the impression of the sentence is not saved by its harmony. The *c*'s of "case," "economic" and "country" are cacophonous. The conjunction of "large" with "part" is equally annoying.

So too is Holmes's consistently inadequate referential language. Judge Posner finds in the language "If it were a question . . ." a subtle ethical appeal, which portrays Holmes as "slow to jump to conclusions."²⁸² The portrayal no doubt was lost on Holmes's contemporary readership, most of whom knew that Holmes had in fact already embraced Herbert Spencer's economic philosophy.²⁸³ What is not lost on Holmes's readership (contemporary or otherwise), however, is the typical lack of clarity in the reference "it." The imprecision in language is made worse by the later inclusion in the same sentence of another "it" ("I should desire to study *it* further"²⁸⁴)—which apparently refers to something other than the first "it." A similar lack of reference is used in the dissent's ultimate justification for its author's lack of classic research: "It does not need research to show that no such sweeping condemnation can be passed upon the statute before us."²⁸⁵ What is the "it" that does not need research?

This lack of clarity may not detract from the opinion's power, but it certainly does not enhance its quality as rhetorical masterpiece. The point of this dissection of some of the language of Holmes's dissent is not to judge that language. Instead, the dissection shows that whatever power the dissent retains cannot be found in its rhetoric or style.

Rather, Holmes's dissent is a good and powerful opinion because although it superficially reduces the political role of the courts, it brilliantly, subtly and successfully elevates the art of law above the competing art of philosophy. On the surface, the opinion seems to limit severely the courts' power to strike down laws which "embody" majority opinions. The opinion, however, actually limits severely the power of philosophy. First, Holmes generalizes away the most influential philosophers of his epoch. John Stuart Mill authored a strong defense of political and economic freedom as a means by which mankind may ultimately discover truth.²⁸⁶ Charles Darwin authored an equally strong argument for the natural evolution of mankind toward greater survivability. Rather than confront these great thinkers of his day, however, Holmes confronts only a watered-down version of them. Herbert Spencer popularized the dominant philosophies of Holmes' epoch by using Darwin's theory of natural selection as the justification for an economically free society in which only the fittest survived. Accordingly, Holmes begins his dissent by claiming that the majority opinion rests upon "an economic theory"

282. Posner, *Law and Literature*, *supra* note 272, at 283.

283. *Id.* (citing Gordon, *Holmes' Common Law as Legal and Social Science*, 10 Hofstra L. Rev. 719, 740 (1982)).

284. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

285. *Id.* at 76.

286. See generally J.S. Mill, *On Liberty* (1859).

rather than a philosophic theory. In so doing, he deflates (*Kenosis*), curtails (*Askesis*), and then generalizes away the strong philosophers of his day.

But he goes further. After reducing philosophy to economics, Holmes then uses the device of metonymy to transfer a school of economic thought not only to a single person, but to a single work of a single person: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*."²⁸⁷ Judge Posner argues that this line has become "one of the most famous in law"²⁸⁸ because the absurdity of the contrary proposition operates as "a substitute for proof." That may be so. But suppose Holmes had written instead: "The Fourteenth Amendment does not enact John Stuart Mill's *On Liberty*, or John Locke's *Second Treatise*." The notion that the authors of the Fourteenth Amendment may have enacted Mill's or even Locke's philosophy is not so absurd.²⁸⁹ What makes Holmes's proposition so absurd and ultimately so persuasive is that before he makes the proposition he has already reduced the strongest philosophies of his day to a single book with a "weird title, written by an Englishman."²⁹⁰ He first alludes to some "well-known writers,"²⁹¹ then reduces their views to a "shibboleth" of radical liberty and ultimately reduces the "shibboleth" to Spencer's book.²⁹² The attack on Herbert Spencer's *Social Statics* does operate as a substitute for proof—proof of the inferiority of philosophy to law.

But Holmes is not even fair to Herbert Spencer. In his seminal law review article entitled "The Path of the Law,"²⁹³ Holmes himself writes that "not even Mr. Herbert Spencer's Every man has a right to do what he wills, provided he interferes not with a like right on the part of his neighbors."²⁹⁴ In his later dissent, however, Holmes swerves Spencer's views by radicalizing them into the following formula: "[t]he liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others."²⁹⁵ Holmes thus makes use of each of Bloom's defense mechanisms to combat the anxiety of influence created by the competing art of philosophy.

The dissent, however, does more than merely reduce the art of philosophy. Holmes also affirmatively elevates the role of law. He opines that the state may regulate life in ways that "we as legislators might think as

287. *Lochner*, 198 U.S. at 75.

288. Posner, *Law and Literature*, *supra* note 272, at 281.

289. In his work, *Processes of Constitutional Decisionmaking*, Paul Brest asks: "If the Constitution does not exact Herbert Spencer's *Social Statics*, does it enact John Stuart Mill's *On Liberty* (1859)?" G. Gunther, *Constitutional Law* 532 (11th ed. 1985) (quoting P. Brest & S. Levinson, *Processes of Constitutional Decisionmaking* (1st ed. 1975)).

290. Posner, *Law and Literature*, *supra* note 272, at 284.

291. *Id.*

292. *Id.*

293. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 466 (1897).

294. *Id.*

295. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

injudicious."²⁹⁶ When the judiciary ("we") acts "as legislators," its power may be limited. But the judiciary also acts as philosophers. Holmes writes that a state law can embody a "dominant opinion" so long as the law does not "infringe fundamental principles as they have been understood by the traditions of our people and our law."²⁹⁷ It becomes the judge's job to determine whether a dominant opinion infringes fundamental principles. Accordingly, it is the judge who has the power to discover and enforce fundamental principles—it is not the legislatures job, the people's job, or the philosopher's job. How does the judge discover fundamental principles? In the most important sentence of the dissent, Holmes tells us: "The decision will depend on a judgment or intuition more subtle than any articulate major premise."²⁹⁸ The judge's decisions regarding fundamental principles are based on judgments more subtle than the major premises or general propositions of philosophy or politics. What is more, the judge's insights into fundamental principles are deeper than language itself—more subtle than an articulate view of those principles. The discovery of truth, of fundamental principles, is the result of an "inarticulate and unconscious judgment"²⁹⁹ made by a court of law. Holmes's dissent in *Lochner* is the greatest opinion in the last one hundred years because it elevates the art of law above all competing arts as a method of obtaining truth.

IV. THE RENEWAL STRATEGY APPLIED TO CONTEMPORARY DISCOURSE: THE SEARCH FOR FRIENDS IN THE AGE OF THE LAW-AND-LITERATURE DEBATE

Justice Story argued for law's supremacy by elevating the case as a datum of truth. Similarly, Fielding and Richardson argued for the supremacy of literature by elevating the novel as a datum of truth. As case-writer or novelist, the judge and the literary creator respectively overcame the anxiety of influence created by modern natural-law philosophers. If truth is found in natural law, then judges are able to display truth in their own cases and to discover truth in the cases of their friends, the predecessor judges. To the judges' claim to truth, however, Richardson and Fielding respond that the literary artist, through the novel, also portrays a case, from which truth can be gleaned.

As the anxieties of philosophic influences shifted with time, so too did the strategies of judicial and literary elevation. In Benjamin, we see a paradigm of philosophic influence. Scholem's religion and Brecht's historical materialism each flooded Benjamin's art.³⁰⁰ He responded by elevating the art of literary criticism to new heights, arguing that language had a religious and revolutionary quality which only the literary critic

296. *Id.*

297. *Id.* at 76.

298. *Id.*

299. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 466 (1897).

300. See H. Arendt, *Introduction to Illuminations*, *supra* note 9, at 13-15.

could tap. Justice Holmes felt the same anxieties of philosophic influence. Like Benjamin, he was still influenced by legal philosophers who assigned to law a quasi-religious quality. Yet, like Benjamin, Holmes also felt deeply the influence of historicists who argued that legal decision making is nothing but the causal outgrowth of the economic, social, and political factors of the day. In his pre-*Erie* and *Lochner* dissents, he brilliantly swerved these anxieties of influence by first elevating the case—"[g]eneral propositions do not decide concrete cases"³⁰¹—and then elevating the judge who balances economic, social, and political factors before creating the law which decides the case. It is the judge, though, and not the philosopher or artist, whose judgment goes beyond general propositions and articulable premises to attain the just result. The judge, thus, becomes a social critic.

Even those who disagree with the results of Justices Holmes's and Story's decisions must acknowledge their relative greatness. The opinions are deemed great precisely because they are arguments for the greatness of their authors. This evaluation of the works of Holmes and Story, of course, benefits from hindsight. Whether it is possible to evaluate contemporary judges and their decisions from the same criteria is a question which still needs to be addressed.

The answer to the question requires an examination not only of current judges and their decisions, but also of the sources of their anxieties of influence. The development of arguments for the supremacy of law and the supremacy of literature has led naturally to a "law as literature"³⁰² debate. Judges today suffer, and in at least the near future will continue to suffer, therefore, from the anxiety of influence created by literature and the philosophy of language. No contemporary philosopher is capable of generating more anxiety of influence than Jacques Derrida. Accordingly, the good judicial opinion in this epoch must necessarily channel the anxiety of influence created by Derrida's philosophy of language into an elevation of the art of law. In evaluating contemporary judges, therefore, this section must first describe Derrida's attempt to elevate the art of linguistic philosophy, and then describe the judiciary's responsive effort to elevate the art of law. Unfortunately, the judiciary thus far has been unable to channel Derrida's strong anxiety-creating influence into an elevation of law.

A. *The Influence of Derrida*

If Fielding and Richardson argued that the novelist displays truth and Benjamin argued that the literary critic is a vehicle of positive social change, then Derrida demonstrates that language is the playground of truth. Derrida's depiction of language as the playground of truth, how-

301. *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

302. The label for the "debate" comes from the lead article in a Texas Law Review Symposium entitled "Law and Literature." See Levinson, *Law as Literature*, 60 Tex. L. Rev. 373, 373 (1982).

ever, is itself a masterful channeling of the anxiety of influence from alternative truth-seeking techne into an elevation of the philosophy of language.

Derrida's strategy involves a creative misreading of many of the sources of his anxiety of influence, and of the sources of the anxiety of influence for all contemporary thinkers in the Western world. While these sources surely include Freud, Hegel, Marx, and Nietzsche, Derrida embodies the tradition of Western philosophy in the person of Ferdinand de Saussure. Derrida was overwhelmed by Saussure's influential semiology—a "*science that studies the life of signs within society*."³⁰³ A "sign" is the conjunction of a "signifier" and a "signified."³⁰⁴ The signifier is a phoneme, or the sound of the spoken word. The signified is the concept which the sound of the spoken word conjures in the minds of the speaker and the listener or the community of speakers and listeners. Both the signifier and the signified are arbitrary; they develop differently depending upon time, location, and culture. The plainest example of the arbitrary quality of the signifier and the signified is the undeniable fact that a sound heard among French-speaking people will not conjure the same concept in those people as will the same sound heard among English-speaking people. Languages are different and so too are the relationships between signifiers and signifieds.

More importantly, the existence of the sign depends upon differences *within* a linguistic system. A signifier conjures a signified only if the other signifiers within a language are different from that particular signifier. For example, the phoneme of signifier "chair" communicates the concept of signified "chair" only because the signifier "chair" sounds different from other signifiers in the English linguistic system such as "bench" or "couch." Syntax and context create greater differentiation and thus greater communication. Hence, "a comfortable chair" conjures a different signified from "an endowed chair." Saussure's conclusion from these points is that "[l]anguage is a system of interdependent terms in which the value of each term results solely from the simultaneous presence of others."³⁰⁵ In other words, a "linguistic system is a series of differences of sound combined with a series of differences of ideas."³⁰⁶ Language simply does not and cannot exist outside of a system: "language has neither ideas nor sounds that existed before the linguistic system."³⁰⁷ Because language can only be understood as part of a structure, Saussure's science of signs requires a structural analysis.

In Saussure's semiology, Derrida finds the apotheosis of the failure of

303. F. Saussure, *Course in General Linguistics* 16 (Bally & Sechehaye eds., Baskin trans. 1959) (emphasis in original).

304. *Id.* at 65-67.

305. *Id.* at 114.

306. *Id.* at 120.

307. *Id.*

all of Western philosophy. In *Of Grammatology*,³⁰⁸ Derrida begins by describing the entire "*history of (the only) metaphysics*" as the attempt to assign the "origin of truth in general to the logos."³⁰⁹ From Plato to Heidegger, Western philosophers, despite all of their insignificant differences, have shared one significant assumption: truth is found in the spoken word, the word of God, the voice of reason, or the universal signified. The center or structure which has informed all Western philosophy to date is the belief in the truth of the logos, the spoken word. Saussure's new science of the structure of signs merely imposes that same center on language itself. Saussure is the epitome of logocentrism. He gives the spoken word primacy over the written word in the linguistic structure.

If, as Derrida suggests, Saussure represents the epitome of the logocentrism of Western thought, then Derrida may battle his anxiety of influence from all that thought by transcending Saussure. Indeed, he attempts to do so. Derrida claims to step back from Saussure and see what "Saussure saw without seeing, knew without being *able* to take into account."³¹⁰ The system of languages which Saussure describes has produced "logocentric metaphysics," which itself depends on a definition of "being" as fixed or centered "presence."³¹¹ This logocentrism shackles Saussure and his successors from exploring writing rather than speech. Derrida deflates both Saussure and Western philosophy when he declares: "This logocentrism, this *epoch* of the full speech, has always placed in parenthesis, *suspended*, and suppressed for essential reasons, all . . . reflection on the origin and status of writing."³¹²

Derrida thus seeks to replace Saussure's already sophisticated science of signs with a new, transcendent science of the origin and status of writing. This new science of writing is called Grammatology. In fact, in one of the most overt responses imaginable to the anxiety of influence, Derrida expressly substitutes his new science for Saussure's semiology:

I shall call it [grammatology] . . . Since the science does not yet exist, no one can say what it would be; but it has a right to existence, a place staked out in advance.³¹³

Derrida thereby explicitly stakes out space for himself as a philosopher apart from his precursor, Saussure.

Derrida's new science of grammatology studies writing, but it is not writing in the traditional sense. In the logocentric tradition, writing is merely instrumental; it is an alphabetic script which conveys the concepts embodied in the spoken word. Derrida's post-structuralist writing or *écriture* is the *a priori* process by which language itself is produced. Writing is not just a system of notation used to describe conduct; it is the

308. See Derrida, *Of Grammatology*, *supra* note 5.

309. *Id.* at 3.

310. *Id.* at 43.

311. *Id.*

312. *Id.*

313. *Id.* at 51.

“essence” of conduct, of the “totality” which makes all conduct possible.³¹⁴ Because writing is the essence of all conduct, including all art forms, the grammatologist is elevated above all of those art forms.³¹⁵ Even before humanity discovered and described what it means to “be,” or to be human, the written mark (the gramme or grapheme) existed.³¹⁶ By studying the written mark, therefore, grammatologists study the “irreducible atom” or “element” of all human experience.³¹⁷ That study reveals the “origin of *meaning* in general.”³¹⁸ Hence, Derrida’s science is not merely a new science which stands next to other sciences such as semiology. Grammatology is the supreme science; a science which has as its subject the study of the origin of mankind’s effort to describe meaning. Ultimately, “what writing itself . . . betrays, is life.”³¹⁹ Derrida thereby channels the anxiety of influence from the entire logocentric tradition of Western philosophy by demonstrating that his *techné*—the new science/art of grammatology—puts the lie to all prior scientific, artistic, political, philosophical, and legal claims to truth.

But Derrida’s elevation of grammatology is not limited to prior competing *techné*. Instead, his attack on logocentrism is *a fortiori* an attack on any imagined centers, systems, or orders of understanding. All such systems are necessarily built around an assumption about what is the *same* in human existence. But for Derrida there is only *difference*. When the French speak the word “*differance*,” at least three meanings are suggested: (1) to disperse; (2) to defer or to postpone; and (3) to be unlike.³²⁰ Derrida captures all of these meanings and, at the same time, points to the absence of any of these meanings. Lest the concept of *differance* become yet another false center, system, or order, Derrida declares that it is the *absence* of all such centers, systems, or orders: “It is not a being-present, however excellent, unique, principal, or transcendent one makes it. It commands nothing, rules over nothing, and nowhere does it exercise any authority.”³²¹ More dramatically, difference describes the inability of signifiers to produce or present the concepts or articles which they purport to signify. When the cluster of signifiers “endowed chair” are spoken together, they promise to produce a concept in the listener’s mind. But what they really convey is difference: (1) they disperse or scatter into many possible meanings; (2) they only defer or postpone the production of the thing referred to; and (3) they are unlike other clusters such as “comfortable chair.” Thus, far from conveying meaning within a system of language, Saussure’s “sign” is a playground

314. *Id.* at 9.

315. *See id.* Derrida refers to cinematography, choreography, pictorial, musical, sculptural, military, political, and athletic activities all as forms of “writing.”

316. *See id.*

317. *Id.*

318. *Id.*

319. *Id.* at 25.

320. *See* V. Leitch, *Deconstructive Criticism* 41 (1983).

321. Derrida, *Speech and Phenomena*, *supra* note 85, at 153.

of *difference*. If language is a playground of *difference*, then so too must be any code or any philosophic, political, scientific, or artistic "system of reference."³²²

Although *difference* purports to be apolitical ("it rules over nothing")³²³ and aphilosophical ("not a being-present"),³²⁴ the science of *difference* requires the deconstruction of all political and philosophical structures. Derrida's grammatologists tortuously follow in any language, code, or system of reference the trace of *difference*. In so doing, they necessarily expose the centers or structures which underlie every philosophic or political regime.

But neither the exposure nor the deconstruction of false centers, for Derrida, requires their elimination. To the contrary, *difference* suggests and requires for its own legitimacy its own opposites. *Difference*, therefore, requires at least three forms of non-*difference*: (1) a scattering or dispersal, but a scattering or dispersal of something called meaning; (2) a delay or postponed production of a thing signified, but the presence of that delay or postponement and the presence of the perception of its delay or postponement; and (3) an unlikeness which assumes an understanding of likeness or sameness or coincidence. Because *difference* requires the absence of difference, grammatologists who perform the art or science of deconstruction require structure. The only pernicious structure from Derrida's point of view, therefore, is one that does not permit an inquiry into the play of differences within itself. Structures are acceptable so long as they do not close the human mind to the possibilities of their absence. If Derrida's philosophy of writing, or *difference*, leads to any political view, it is the view that all structures should be fluid or plastic enough to be shaped by the constant inquiry into the play of *difference* which the structures permit.

Hence Derrida brilliantly elevates his science over politics and philosophy. Grammatology is the art/science which puts the lie to all other arts and sciences. But grammatology also recognizes that it needs some structure, albeit fluid and plastic, for its very existence. Conveniently, Derrida's *difference* necessarily requires just enough structure to keep his new *techne* going.

B. Judge Posner and Contemporary Anxiety

In its elevation of grammatology, Derrida's philosophy wages a frontal attack on all competing *techne*, including the art of law. If contemporary judges hope to keep the art of law on the lofty plane where Justices Story and Holmes have placed it, they must confront the anxiety of Derrida's influence. Although some judges no doubt have no awareness of Derrida's work, they all show traces of his influence. United States

322. *Id.* at 141.

323. *Id.* at 153.

324. *Id.*

Court of Appeals Judge Richard Posner, however, has expressly confronted Derrida's influence. Because Judge Posner's work both epitomizes acute Derridean influence and suggests possible strategies of channeling that anxiety, that work is analyzed in this section. As his opinion and those of the Supreme Court in the *Dynamics* case show, however, none of the typical styles of contemporary judicial decision making successfully channels Derrida's influence into an elevation of the *techne* of law.

1. Judge Posner

In his books *Law and Literature*³²⁵ and *The Problems of Jurisprudence*,³²⁶ Judge Posner directly confronts Derrida and deconstructive literary criticism.³²⁷ His first mechanism of defense against Derrida is to define deconstructive criticism narrowly. He describes all of Derrida's philosophy as an effort to expose "the non-communicative aspect of language" and the self-referential quality of all texts.³²⁸ Second, Judge Posner deflates Derrida by calling "too obvious" the notion that language can be "dense and refractory."³²⁹ Third, Judge Posner argues that Derrida's obvious and narrow points have "obscure" or "remote" relevance for law:

Literary texts may or may not be self-referential and (if the former) therefore incoherent, but it would not follow that a legal text was self-referential and therefore incoherent too; the purposes and techniques of authors of literary texts are different from those of the authors of legal texts.³³⁰

But Posner's strategy for immunizing law from Derrida's philosophy by arguing that the "purposes and techniques" of legal texts differ from those of literary ones is unsuccessful. First, Judge Posner nowhere defines a legal text or a literary text. Because he does not define a legal text or a literary text, Judge Posner cannot categorize the different purposes or techniques on which he bases his strategy of separation.

Second, even if he had defined a legal text, his suggestion that its drafters have purposes and techniques different from those of the drafters of literary texts is unpersuasive. Apparently, drafters of legal texts such as the framers of statutes or constitutions are different from drafters of literary texts because their intent is to communicate their will to judges, and their technique is to use transparent language to do so. No support is given for these assertions. As Stanley Fish has made abundantly clear,

325. Posner, *Law and Literature*, *supra* note 272.

326. R. Posner, *The Problems of Jurisprudence* (1990) [hereinafter Posner, *Problems*].

327. See Posner, *Law and Literature*, *supra* note 272, at 211-20; Posner, *Problems*, *supra* note 326, at 153-57.

328. Posner, *Law and Literature*, *supra* note 272, at 213.

329. *Id.* at 214.

330. *Id.* at 215.

no support exists.³³¹ Even the drafters of statutes and constitutions do not have as their sole or primary purpose the communication of their will to judges. Assuming their purpose could be known (or is even relevant), the drafters of such legislative or constitutional commands must also have in mind some communication to the people who are, and will in the future be, subject to those commands. At this point, at least, the purposes of the creator of the literary and legal text coincide; poets and legislators alike seek a popular and an influential audience for their language. Moreover, Judge Posner defines the field of legal drafters too narrowly. Ironically, he excludes himself and all other judges from that field. But Judge Posner would not argue that his purpose in writing opinions is to communicate his will to other judges. Even if that were his purpose, it would not distinguish his intention from that of the poet. Nor does the technique of transparent language separate the legal from the literary text. Whether by accident or by design, legal texts are more often ambiguous than they are clear. If a text is clear at all, it is because its author—like Hemingway—has adopted a style of plainness.

Third, Judge Posner's argument ultimately fails because it is merely consequentialist. He argues that if deconstruction of legal texts were permitted, then there would be no way for drafters of legal texts to communicate their wills to judges.³³² While he may recognize the legal difficulties which would arise if Derrida is correct, Posner does not dispute that he is correct. His consequential argument is tantamount to an argument for willful blindness; Derrida may be right, but he is too dangerous, so let's just ignore what he says. That is not an effective strategy.

Finally, by misreading Derrida, Judge Posner fails to appreciate what it is that Derrida thought law and literature had in common. Law is not like literature because they both are truly "non-communicative." Nor is law like literature because they both are self-referential in the sense that they have as their true subject their own non-communicative nature. Instead, Derrida's insight, among many, is that law and literature have in common with all language the *absence* of a single point of reference. Law, like literature, cannot be reduced to a center; it cannot be explained as part of a system or a structure. Rather, law, like literature, is only the play of differences. This does not mean that communication is impossible. But it does mean that all attempts to rationalize, interpret, explain, justify, or systematize law and literature are the product of human engineering. Those efforts cannot claim any true success.

Recognizing that all interpretations of law and literature are only the

331. See, e.g., Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 Tex. L. Rev. 551, 563-64 (1982) (arguing that a reader cannot read text independently of intention; operations are inseparable); Fish, *Interpretation and the Pluralist Vision*, 60 Tex. L. Rev. 495, 503 (1982) (arguing that any text is capable of pluralistic interpretation); S. Fish, *Is There A Text In This Class?* 327 (1980) (questioning textual meaning independent of readership).

332. See Posner, *Law and Literature*, *supra* note 272, at 240.

product of human engineering, however, does not require the abandonment of the effort. To the contrary, because for Derrida all human conduct is writing or *écriture*, and because interpretation is one form of writing, interpretation must be a truly human act. A regime that encourages interpretive acts must, therefore, encourage truly human acts. Only the regime which prevents or discourages acts of interpretation presents a danger of closing the human mind. The implications of Derrida's philosophy for law and society are not, as Posner simplistically assumes, the abandonment of all structure and communication. Derrida's philosophy instead suggests a legal structure which not only protects freedom of communication, but also is fluid enough to be altered by the communication which it protects.

Judge Posner does not deny these insights. But, rather than shape his elevation of the art of law around Derrida's undeniable insights, Judge Posner ultimately tries to protect law by hiding it from those insights. He and his foremost contemporaries on the bench have simply forged ahead in the face of Derrida's philosophy. They have built their new methods of interpretation around various old or borrowed systems and in doing so have failed to elevate the art of law.

2. The *Dynamics* Case

The various judicial opinions written in the case of *CTS Corp. v. Dynamics Corp. of America*,³³³ including that of Judge Posner, present outstanding examples of this failure. They not only denigrate their own role and that of their strongest predecessor judges, but they also completely fail to channel the anxiety of influence created by Derrida and deconstruction.

The issue framed was whether the State of Indiana's anti-takeover legislation³³⁴ was unconstitutional because it was either preempted by the Williams Act³³⁵ or violative of the "dormant" Commerce Clause.³³⁶ In its majority opinion, the Supreme Court argued that Indiana's Control Share Acquisitions statute was not preempted by the Williams Act because compliance with both the state and the federal law was not impossible, and the purposes of the state law were not inconsistent with those of the federal one.³³⁷ In finding that the statute also did not interfere with Congress's power to regulate interstate commerce, the majority reasoned that it (1) did not on its face discriminate against non-Indiana citizens, (2) did not create multiple or inconsistent burdens on interstate commerce, and (3) fostered local benefits which outweighed any burdens

333. 481 U.S. 69 (1987). See also *CTS Corp. v. Dynamics*, 794 F.2d 250, 250 (7th Cir. 1986) (declaring unconstitutional Indiana's Control Share Acquisition Act).

334. The statute challenged is titled The Control Share Acquisitions Chapter of the Indiana Business Corporations Law, Ind. Code § 23-1-42-1 (Supp. 1986).

335. See 15 U.S.C. §§ 78m(d)-(e) (1988).

336. U.S. Const. art. I, § 8, cl. 3.

337. See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 78-87 (1987).

on interstate commerce.³³⁸

The Supreme Court's majority opinion denigrates the art of law in a manner typical of contemporary decisions. Justice Powell's opinion for the Court is a quintessential act of judicial balancing.³³⁹ Even in its preemption analysis, the majority balances the benefits it finds in the statute against its impediments to the "accomplishment and execution of the full purposes and objectives of Congress."³⁴⁰ The majority acknowledges that Indiana's statute does in fact favor incumbent management to the detriment of out-of-state acquirors at least by delaying the consummation of tender offers and making them more expensive.³⁴¹ The Court makes its own judgment, however, that the delay is not significant enough to upset the purposes of Congress as expressed in the Williams Act. It even expressly offers its own policy views: "In our view, the expenses . . . fairly are charged to the offeror."³⁴² Leaving aside the Court's pretense of ascertaining the full purposes and objectives of Congress, its particular balancing of political and social interests denigrates its own authority. First, the interests which the Court balances are hardly fundamental. The issue is whether, on balance, the Indiana statute will serve more than hinder the congressional purposes underlying the Williams Act. Second, the actual weighing of interests is not serious. Rather than draw on a full evidentiary record or a body of empirical evidence, the Court simply asserts that the "strategic advantage" which the brand new statute gives to incumbent management will have "little significance."³⁴³

This type of narrow interest-balancing is more acute in the Court's treatment of the constitutionality of Indiana's anti-takeover statute under the Commerce Clause. After concluding that the statute does not on its face discriminate against interstate commerce because it applies equally to both residents and non-residents of Indiana and does not create a risk of inconsistent regulatory burdens, the majority engages in a classic balancing test. The statute is not unconstitutional, the Court concludes, because the burdens it imposes on the interstate market for corporate control are outweighed by its purported benefits to the shareholders of Indiana corporations.³⁴⁴ But this balancing effort, like the preemption

338. *See id.* at 87-94.

339. *See, e.g.,* McFadden, *The Balancing Test*, 29 B.C.L. Rev. 585, 603-14 (1988) (thoroughly and insightfully tracking the ascendancy of the balancing test); Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943, 988, 993 (1987) (describing the "widespread use of balancing" as "doctrinally destructive nihilism" because it neglects the text of the Constitution (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 369 (1985) (Brennan, J., dissenting))).

340. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 79 (1987) (citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

341. *See id.* at 82 n.7.

342. *Id.*

343. *Id.*

344. *See id.* at 89-94; *see also* *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (stating a general rule that an even-handed state statute which only incidentally effects

analysis which precedes it, implicitly denigrates the role of the judge as well. The battle between local shareholder benefits and the shifts in corporate control is not a fundamental, philosophical, or political one. If it is an economic battle, then the Court performs its balancing without any empirical care. Hence, the form of the Court's balancing analysis implicitly denigrates its own role in decision making.

But Justice Scalia concurs separately in the judgment explicitly to denigrate that role further. He describes the Court's balancing act as "standard practice" and then declares: "such an inquiry is ill suited to the judicial function and should be undertaken rarely if at all."³⁴⁵ The balancing inquiry is ill-suited to the judicial function in part because, as Justice Scalia writes:

I do not know what qualifies us to make that judgment—or the related judgment as to how effective the present statute is in achieving one or the other objective—or the ultimate (and most ineffable) judgment as to whether, given importance-level *X*, and effectiveness-level *Y*, the worth of the statute is "outweighed" by impact-on-commerce *Z*.³⁴⁶

Apparently the Court is incapable even of weighing parochial interests such as shareholder welfare and corporate control shifts. If the Court is unqualified to weigh local interests, it certainly is unqualified to weigh fundamental values.

Although he reached the opposite result, Judge Posner's opinion for the Court of Appeals in *Dynamics*³⁴⁷ similarly denigrates the role of judges. Like the Supreme Court majority, Judge Posner frames both the preemption and the commerce clause issues as balancing tests. The Control Share Act is preempted if it upsets the balance which the Williams Act strikes between incumbent management and potential acquirors;³⁴⁸ it violates the Commerce Clause if its burdens on the "interstate market in securities and corporate control" outweigh its putative local benefits.³⁴⁹ Judge Posner simply struck those balances differently from the Supreme Court majority. Unlike that majority, Judge Posner predicted that the Indiana statute would be a "lethal dose"³⁵⁰ for tender offers, thereby unconstitutionally upsetting the Williams Act's balance between offerors and targets. He also predicted that the burden which the statute would impose upon interstate tender offers would be "direct, intended and substantial," while its benefits to Indiana residents would be "trivial or even negative."³⁵¹ Calling the question "all a matter of balancing,"³⁵² Judge

interstate commerce will be upheld unless the burden on commerce is clearly excessive in relation to the local benefits).

345. *Dynamics Corp.*, 481 U.S. at 95.

346. *Id.*

347. *Dynamics Corp. of Am. v. CTS Corp.*, 794 F.2d 250, 260-64 (7th Cir. 1986), *rev'd*, 481 U.S. 69 (1987).

348. *See id.* at 262.

349. *Id.* at 264.

350. *Id.* at 262-63.

351. *Id.* at 264.

Posner accordingly struck down the Indiana statute on Commerce Clause grounds as well.

Judge Posner's balancing is as parochial and flippant as is the Supreme Court's majority. He weighs the statute's immediate socio-economic burdens against its immediate socio-economic benefits. But he expressly admits the lack of any empirical basis for his balance. His opinion instead only "assume[s]" that CTS's shareholders generally are non-residents of Indiana, "doubt[s]" the statute's local benefits and predicts that no tender offer will run the statute's "gauntlet."³⁵³ It is not an elevation of the judicial art to portray judicial decision makers as parochial predictors.

That Judge Posner and the Supreme Court majority predicted the parochial effects of the statute so differently seems to support Justice Scalia's critique.³⁵⁴ If reasonable judges can reach such different conclusions about the costs and benefits of a statute, then the balancing test itself must allow for arbitrary decision making and lead to unpredictable results. Yet, Justice Scalia's attack is not based on the consequences of judicial balancing; rather, it is based on the competence of judges. He argues that judges are not even qualified to balance mundane interests.

Typical of contemporary judges who reject balancing, however, Justice Scalia offers no successful strategy of judicial elevation to take its place. In *Dynamics* and elsewhere,³⁵⁵ Justice Scalia argues that vague, ad hoc balancing tests should be replaced by objective, bright-line tests. Justice Scalia generally derives his so-called bright-line tests from two types of sources: plain language or tradition established through pre-balancing case law.

Both sources are tapped in *Dynamics*. First, Scalia would decide the preemption issue without reference to the tough issues of the congressional purpose underlying the Williams Act. Rather, he finds in the plain language of the Williams Act's anti-preemption provision sufficient grounds for validating the statute. Second, he would decide the Commerce Clause issue without balancing interests. Instead, he would apply the purported bright-line tests of discriminatory purpose and inconsistent regulatory burdens developed before the age of balancing.³⁵⁶

The comfort which Justice Scalia suggests judges may take in those clear rules of decision is cold. The myth of an objective interpretation of something called plain language in any significant statutory or constitutional provision has been dispelled not only by Derrida. Judge Posner

352. *Id.* at 263.

353. *Id.* at 263-64.

354. *See* CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 95 (1987) (Scalia, J., concurring).

355. *See, e.g.,* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 108-13 (1987) (Justice Scalia writes separately to reject a balancing test approach to issues of personal jurisdiction in favor of a bright-line test derived from the tradition established before the balancing cases).

356. *See Dynamics Corp.*, 481 U.S. at 95-96.

himself joins a long list of scholars in rejecting Justice Scalia's implicit assumption that language can be plain and that lines can be bright.³⁵⁷ Similarly, Justice Scalia's retreat to pre-balancing rules of decision provides only false safety for judges. For example, the bright-line rule which informed the Commerce Clause cases before balancing took over may be stated as the following: A state statute is unconstitutional if (1) its purpose is to treat non-residents differently from residents or if (2) it creates a risk of inconsistent state regulations.³⁵⁸ Because the second alternative basis for unconstitutionality clearly requires the judiciary to predict socio-economic risks, it is prone to the same attack that Justice Scalia levels upon balancing. And because the first alternative basis for unconstitutionality requires the judiciary to divine the true purposes of the legislature, it is prone to the same attack that Justice Scalia levels upon the majority's effort to find the congressional purposes underlying the Williams Act. The ability of these rules to constrain arbitrary decision making is undermined by Justice Scalia himself. The various opinions in the *Dynamics* case thus denigrate the art of judicial decision making by reducing the role of the judge to balancer of parochial interests, by suggesting that the judge is incompetent even to strike that balance, and ultimately by signaling a retreat to dated rules of decision which provide a patently false illusion of clarity.

But the contemporary denigration of the judicial role manifest in the *Dynamics* opinions is still more subtle. Each of those opinions displays tremendous enmity for a great precursor judge and friend, Justice Holmes. The majority's statement that the "Constitution does not require the States to subscribe to any particular economic theory,"³⁵⁹ and Justice Scalia's statement that a "law can be both economic folly and constitutional,"³⁶⁰ are both uncited allusions to Justice Holmes's statement in his *Lochner* dissent that a "constitution is not intended to embody a particular economic theory."³⁶¹ At first blush, the references to Holmes's *Lochner* dissent seem completely appropriate. In that dissent, Holmes suggested that the states have the constitutional power to regulate the bakery industry, even where the regulation might be inconsistent with an economic theory which embraces freedom of contract. Similarly, the majority and concurring opinions in *Dynamics* suggest that the State of Indiana has the power to regulate its own corporations, even where the regulation might be inconsistent with an economic theory which embraces the free interstate movement of assets to their highest valued uses.³⁶² By analogy, Mr. Richard Posner is the contemporary version of

357. See Posner, Problems, *supra* note 326, at 262-69, 299.

358. See *Dynamics Corp.*, 481 U.S. at 95 (citing Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 Mich. L. Rev. 1091, 1094-98 (1986)).

359. *Id.* at 92.

360. *Id.* at 96-97.

361. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

362. See *Dynamics Corp.*, 481 U.S. at 83, 95.

Mr. Herbert Spencer.

The affinity between the *Dynamics* opinion and the *Lochner* dissent is only superficial. In *Dynamics*, the assertion that the Constitution does not require the "states to subscribe to any particular economic theory"³⁶³ is used as an excuse for the abandonment of judicial decision making. To paraphrase Justice Scalia's opinion, a judge may think, based on experience, education, and even intuition, that the Indiana law is "folly," but that judge is nonetheless incapable of making a judgment because the Constitution allows the states to be wrong. Justice Holmes's assertion that "a constitution is not intended to embody a particular economic theory,"³⁶⁴ by contrast, is used as a justification for unbridled judicial decision making. To paraphrase Justice Holmes, a judge should not be enslaved by any particular economic theory; instead, the judge must be free to reach a judgment about whether a state statute would "infringe fundamental principles" based on "a judgment or intuition more subtle than any articulate major premise."³⁶⁵ What a judge does is "more subtle" than the application of economic philosophy.³⁶⁶ For the *Dynamics* majority and Justice Scalia, however, judicial decision making should be based on something *less* subtle than any articulate major premise; it should be based on slavish adherence to a state's judgment.

This fundamental difference between Justice Holmes' views and those of his contemporary counterparts regarding the power and competence of judges is further evidenced by subtle shifts in the language of the opinions. The *Lochner* dissent makes a timeless and universal claim: "a" constitution (not just the United States Constitution) generally is "not intended" to embody "a" particular economic theory. In *Dynamics*, there is no doubt that "the" United States Constitution is the only judicial concern; that particular constitution lacks particular language requiring the states to adhere to a particular economic theory. More significantly, the *Dynamics* majority interjects the "States" into Holmes's formulation. It is the states which are not required to adhere to an economic theory. While Justice Holmes may well have agreed with that assertion, his subject in the *Lochner* dissent was not states, but judges. In that dissent, it is the judges who are not required to adhere to a particular economic theory.

Finally, in perhaps the most revealing transformation of the *Lochner* dissent of all, Justice Scalia creatively misreads Justice Holmes's assertions regarding the legitimate process of judicial decision making. For Holmes, a judge's decisions are more "subtle" than "articulate" premises.³⁶⁷ They are deeper than language itself. In direct contradistinction, Justice Scalia declares that judges are not qualified to make the

363. *Id.* at 92.

364. *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

365. *Id.* at 76.

366. *Id.*

367. *Id.*

“[u]ltimate (and most *ineffable*) judgment”³⁶⁸ regarding the balance of parochial interests. A judge’s decisions cannot penetrate language. Judges cannot make “ineffable” decisions.

Not only do such decisions denigrate a great friend in Justice Holmes, they also do not begin to confront the legitimate philosophic critiques of judicial decision making implicit in Derrida’s work. They respond to Derrida’s influence by continuing to balance local interests without recognizing the fundamental contradictions in a regime which creates petty tensions, by embracing the structure of economic efficiency as an alternative method of decision making without recognizing the fundamental contradictions within that substitute structure, or by returning to the womb of language or tradition without recalling that all interpretations of language or tradition are creative.

Hence, the *Dynamics* opinions, in a manner typical of contemporary judicial decisions, fail to elevate the art of the judge. They are self-denigrating (not self-effacing), they denigrate a great friend in Justice Holmes, and they do not channel the anxiety of influence created by Derrida and other philosophers of language.

3. *Dynamics* Rewritten: A Possible Model of Friendship

But, how should a contemporary judge go about channeling the anxiety of influence from strong competing techne into an elevation of the art of the judge and the art of the law? There is room for creativity in developing successful strategies. One approach, among many, which might work involves judicial candor. Suppose the majority opinion in *Dynamics* were the following:

Indiana’s Control Share Acquisition Act regulates the hostile acquisition of controlling shares of Indiana corporations through the tender offer device. The statute was proposed, drafted, and passed by the Indiana legislature in the midst of a hostile tender offer for an Indiana corporation. It was proposed and drafted by one of the law firms which currently represents the management of the Indiana corporation subject to the hostile bid. Management “opted-into” the statute as soon as it was passed as one of its many defenses to the hostile bid. The bidder—*Dynamics*—has sued to enjoin the statute’s operation. At least in this case, therefore, the statute has had an adverse effect on an out-of-state, hostile bidder for an Indiana corporation.

In keeping with its role, *Dynamics* challenges the statute on two grounds which fit neatly into our established constitutional doctrine: (1) the state statute is preempted by the Williams Act, and (2) the state statute interferes with Congress’ power to regulate interstate commerce. *Dynamics* argues that the Indiana statute is preempted because it upsets the purpose of Congress to strike an even balance between incumbent management and hostile bidders; it violates the dormant Commerce Clause because it unconstitutionally interferes with the in-

368. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (emphasis added).

terstate market for corporate control. CTS argues to the contrary that the statute is consistent with congressional purposes because it protects shareholders of Indiana corporations against both incumbent management and the hostile bidder, and does not unconstitutionally discriminate against interstate commerce. Both arguments are plausible.

But we are unable to determine with certainty congressional purpose, or to predict what the full effect of the Indiana statute will be on interstate commerce. Based on our collective experiences and our knowledge of the facts of this case, we believe that the Indiana statute does favor management over hostile bidders. Whether we decide that this unevenness violates the Williams Act or interferes with interstate commerce depends on our own judgments about whether favoring management over hostile bidders is salutary. We have considered carefully the costs and benefits of the recent surge in takeover activity throughout the land. We understand that there is a strong economic philosophy which embraces hostile tender offers as a means of ensuring that corporate assets are freely transferred to their highest valued uses. We also understand that there is a strong social and community concern that the transfer of assets and industries out of state will upset local associations, economies, labor forces, and even charitable contributions.

A constitution does not embody any particular philosophy. Because each of the competing philosophies in this case is based upon an inflexible and ultimately false structure, our decision will not embody them either. The decision which we must make is more fundamental than the articulable premises of those philosophies. Accordingly, although we can trace the difference here between an economic philosophy which favors the free play of assets and a political philosophy which favors the free play of interpersonal relations in local communities, we must ultimately perform our judicial role and make a judgment more subtle, fluid, and ineffable than any philosophic structure can accommodate.

Our judgment is that the free play of interpersonal relations within local communities is more important than the free play of assets within the nation. We believe that the maintenance of local communities in which people coincide encourages friendship more than does the protection of the national play of assets. Even if our intuition is wrong, our decision will remain as a symbol of our belief that we value communities which encourage friendship more than we do economic arrangements which encourage wealth-maximizing asset-transfers.

Apart from the virtue of honesty, this effort to rewrite *Dynamics* befriends Justice Holmes by preserving the elevating spirit of his *Lochner* dissent and befriends all judges by channeling the anxiety of influence from Derrida's philosophy of language into an elevation of the art of judging. Derrida is used to deflate the false, articulable premises of competing philosophic arts. But Derrida is also deflated. It is the judge's role in a society of role-playing to make and effectuate judgments. While Derrida can only opine on texts from a distance, the judges' opinions are texts which have a direct impact of what people do. The judge ultimately

channels the anxiety of Derrida's influence by reaching honest, if ineffable, judgments which create the kind of fluid structures in which the friendships which spring from play are likely.

V. CONCLUSION

Although this Article reaches broadly into works of philosophy and literature, its goals are really quite modest. I have tried to construct a standard for evaluating all discourse and particularly the judicial opinion in an epoch which questions the legitimacy of standards of evaluation. The good judicial opinion is one that befriends prior and subsequent judges by elevating the art of writing judicial opinions. Surely it is not too much to ask of our judges that they write their opinions in a manner that elevates their art form. A judge who can step back from a written opinion and say that he or she has written something which is itself an act of friendship to all other judges has written a "good" opinion.

Perhaps this Article's most ambitious goal, however, is symbolic. I hope that this Article will encourage others—particularly legal scholars—to accept and to transcend the undeniable insights which Derrida, deconstructionists, and even critical legal scholars have made about our legal system. If it is possible to construct an argument for friendship by using, not rejecting, the insights, then it may be possible to construct in the future a similar argument for truth and beauty.

