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Upside/Down View of the Countermajoritarian Difficulty

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"What is worthwhile and what is not are to such a large extent determined by the existing institutions and forms of life that we hardly ever arrive at a proper evaluation of these institutions themselves."[1]

I. Figure/Ground

Sometimes, the best way to solve a difficult puzzle is through a gestalt switch.[2] So too, some of the more interesting and intractable problems in legal theory inhere in the difficulty of distinguishing foreground from background. A classic and familiar form of critique exploits the ambiguity of figure/ground relations in an attempt to undermine the conventional assumptions upon which some area of the law depends.[3] But, as effective as this tactic may be for critique, it is

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1. Feyerabend, *Consolations for the Specialist*, in CRITICISM AND THE GROWTH OF KNOWLEDGE 197, 209 (I. Lakatos & A. Musgrave eds. 1970).

2. *Cf.* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 122-23 (2d ed. 1970) (concluding that anomalies and scientific crises "are terminated, not by deliberation and interpretation, but by a relatively sudden and unstructured event like the ges[t]alt switch").

3. The classic article is Robert Hale's *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 472-77 (1923), which argues that the background distribution of entitlements within a legal system will affect what is understood as "coercion." For a more familiar, recent

problematic as a strategy for reform. The catch, of course, is that a gestalt switch is not the kind of cognitive operation that is usually amenable to conscious decision and control.[4] Sure, if someone tells you what you are supposed to see, you may then be able to reconfigure the stimuli until they take the suggested form. But it will often prove difficult to maintain that reconfiguration in the face of earlier, settled habits of mind.[5] And what does one do in the absence of guidance? A gestalt switch just is not the kind of thing one prescribes with confidence.

To complicate matters, virtually all law takes place in the foreground. What I mean is that legal reasoning typically transpires without the least awareness of the background assumptions that render it intelligible.[6] This is not the product of ignorance, inattentiveness, or false consciousness. It is, rather, an ordinary matter of psychological and intellectual efficiency.

Consider the vast amount of everyday knowledge (*e.g.*, where a door leads, what a red light means, how people behave in a supermarket) that the average human needs in order to function successfully in the physical and social world. The sheer mass of it would overwhelm one's cognitive resources if it were necessary consciously to recall this information before it could be used. This is readily apparent in the case of a beginning driver whose hesitancy and conspicuous difficulty are the direct conse-

example, see Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874-75 (1987) (noting that common-law assumptions act as the unexamined "baseline" against which departures are measured and determined to be constitutional violations).

One problem with Sunstein's "baseline" metaphor is that it expresses only one of the possible figure/ground relations between legal conceptions and the background assumptions that render them intelligible. The "baseline" metaphor will work when there is a linear or scalar relation between two conceptions or states of affairs. But the relation between background and foreground may be one of framing or contextualization. Or there may be a complex, systemic relationship between two or more concerns. If so, the effort to conceptualize every constitutional issue as a matter of alternative "baselines" is apt to lead to some very strange conclusions. One example is Sunstein's characterization of West Coast Hotel v. Parrish, 300 U.S. 379 (1937). For him, the opinion assumed as a "baseline for analysis . . . a system in which all workers had a living wage." Sunstein, *supra*, at 881. It is as if Chief Justice Hughes had suddenly recognized that the required constitutional baseline was socialism. For a somewhat more plausible account of the background assumptions about community and state authority that characterize Hughes's opinion, see Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CALIF. L. REV. 1441, 1523-27 (1990).

4. "It is quite consistent to say both that we are sometimes able to carry out such [gestalt] processes, and that we are usually unable to say how we do it." Schön, *Generative Metaphor: A Perspective on Problem-Setting in Social Policy*, in METAPHOR AND THOUGHT 254, 275 (A. Ortony ed. 1979).

5. *Cf.* Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEXAS L. REV. 1195, 1197-1203 (1989) (showing how one recursively reinscribes one's own assumptions in attempting to understand other modes of thought).

6. *Cf.* S. FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 320-21 (1989) ("This simply means . . . that the context is so established, so deeply assumed, that it is invisible to the observer . . . .").

quence of the need consciously to mediate all of her actions and decisions. Learning to drive is a process of internalizing and making tacit both the physical skills needed to operate a vehicle and the basic rules of the road. Only as this process is mastered will the novice driver be able to focus her attention on the road and learn to coordinate with the traffic around her.

So too, the process of legal decision making is dependent on the embeddedness or *sedimentation* of innumerable background conceptions.[7] This build-up of meanings and assumptions permits the decision maker to employ these previously internalized conceptions, both cultural and specifically legal, without the need to synthesize them anew. Obvious examples in constitutional discourse are the concept of the "countermajoritarian difficulty" and the rebuke that a particular decision "is just another *Lochner*." For an initiate, these phrases need no citation because they immediately activate a wide array of cultural assumptions about democracy and the work of the courts, as well as a set of highly charged, professional criticisms that encompass the most severe forms of theoretical and ethical censure.[8] In just this way, sedimentation enables the legal decision maker to operate at relatively higher levels of abstraction and complexity, "opening the way for innovations that demand a higher level of attention."[9]

But this cognitive sophistication comes only at a price. To the very extent that the legal decision maker gains the ability to focus her attention and imagination on the task at hand, she will be correspondingly unconscious of the implications of the conceptual tools that she employs in its resolution. This would not matter if those tools were neutral and without normative dimension. If the conceptual tools are normatively loaded, however, they will shape and affect the legal decision maker's conclusions in ways that will have discernable normative consequences. In that case, the decision maker's unreflective invocation of even familiar

7. The term "sedimentation" comes from Husserl by way of Merleau-Ponty. The metaphor connotes the alluvial build-up of categories and conceptions deposited by the flow of our interactions and experiences in the physical and social world.

> This sedimentation is essential insofar as it frees us from the necessity of having to pay strict attention to every single thing we do, no matter how simple it may be. We thereby attain the 'mental and practical space' that enables us to build a personal existence and a human world.

M. LANGER, MERLEAU-PONTY'S PHENOMENOLOGY OF PERCEPTION: A GUIDE AND COMMENTARY 34 (1989). For a more extended discussion of this process, see Winter, *supra* note 3, at 1485-94.

8. This, of course, is precisely the strategy used by Sunstein in his *Lochner's Legacy* article. *See* Sunstein, *supra* note 3, at 874.

9. P. BERGER & T. LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE 57 (1966) (discussing the related process they call "institutionalization").

conceptual tools (perhaps I should say *especially* of familiar conceptual tools) will have significant, predictable effects on the outcomes of legal decision making. These effects will be all the more powerful—and, therefore, all the more determinative—to the extent that the decision maker is unaware that the conceptual tools she employs have a distinctive normative skew.[10]

Of course, it is no longer news that legal conceptions like "freedom of contract" or "judicial restraint" come laden with normative assumptions. But these conceptions are themselves only figures in the very near foreground. Just as a skillfully painted picture has perspective and depth, the surface conceptions of legal reasoning rest upon more than a single layer of sediment. Thus, my use of the figure/ground metaphor to explain the operation of legal concepts should not be taken to imply a simple two-dimensional relation. Rather, legal concepts are mediated by background assumptions that range at different levels of depth. Some legal concepts, like freedom of contract, are themselves mediated by other specifically legal conceptions, like the common-law protections of property and contract.[11] Others, like the countermajoritarian difficulty, are framed by assumptions about democracy and the work of the courts that might be characterized as political or cultural. But *every* aspect of legal reasoning also occurs against the backdrop of a massive cultural tableau which provides the tacit background assumptions that render the legal conceptions intelligible.[12]

When we focus conscious attention on the various institutions and forms of life that comprise this multi-layered background, however, it becomes obvious that these institutions have particular histories: they

10. This normative skew is one example of what Pierre Schlag calls "the politics of form." Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 906-24 (1991); *see also* Schlag, *"Le Hors de Texte, C'est Moi": The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631, 1670 (1990) (the politics of form "is the political constitution of human beings as particular kinds of selves, with particular kinds of social relations to each other"). The power of these sedimentations to affect decision making in unexpected ways (sometimes even in ways that are antithetical to the intentions of the decision maker) is a common phenomenon that, following Merleau-Ponty, I refer to as "adversity." Winter, *supra* note 3, at 1480-81, 1488-92.

11. *See* Hale, *supra* note 3, at 475; Sunstein, *supra* note 3, at 885.

12. *See* Clarke & Simpson, *Introduction: The Primacy of Moral Practice*, in ANTI-THEORY IN ETHICS AND MORAL CONSERVATISM 15 (S. Clarke & E. Simpson eds. 1989).

> [E]ven simple . . . injunctions—"Don't Kill," ["]Don't steal," "Don't break promises"—have to be imbedded in a network of cultural assumptions if they are not to be purely abstract requirements that do not yet prohibit anything. Their determinate interpretation is provided by the rules of background institutions and ways of life that cannot be formally and precisely spelled out. This conventional background cannot be definitely fixed, but it is essential for the practical understanding of [these] imperatives.

Id. On the indeterminacy of even the simplest propositions, see Putnam's Theorem. H. PUTNAM, REASON, TRUTH AND HISTORY 32-38, 217-18 (1981); G. LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND 229-59 (1987).

are products of prior political encounters and arrangements. As offspring of political struggle, these institutions carry with them normative orientations in the sense that only some possibilities will follow from a given history; other developments will be impeded by the very fact that we cognize the world in terms of the particular set of concepts and categories that arise from these forms of life. The capacity of these concepts and categories simultaneously to confer intelligibility and shape outcomes is what I call "the mutual entailment of the epistemic and the political."[13]

Thus, to say that law takes place in the foreground is to recognize that, when the law grapples with the overt conflicts of social life, it does so only against a sedimented background that already bears normative orientations. If this insight has remained underdeveloped in mainstream legal scholarship, it has not escaped the notice of minority scholars.[14] And for good reason: In later sections, I explore the way in which constitutional decision making reflects and transposes these normative orientations into legal outcomes with distinctively majoritarian overtones. At this point, however, it may help to observe the process in a seemingly more rudimentary context.

Consider (for the umpteenth time) a simple rule prohibiting vehicles in the park. "Plainly this [rule] forbids an automobile, but what about bicycles, roller skates, toy automobiles? What about airplanes? Are these, as we say, to be called 'vehicles' for the purpose of the rule or

13. Winter, *supra* note 3, at 1451-53, 1473-75; *see* Winter, *The Cognitive Dimension of the* Agon *Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2230 (1989) (questioning "the perspective that narrative is only instrumental and, therefore, at base a purely political tool" and suggesting, alternatively, that "the power and meaning of narrative is simultaneously epistemic and political"); *id.* at 2255-71 (arguing that for law to be perceived as "legitimate" and "objective," it must be coherent with the pre-existing stock of cultural categories and concepts, but that these categories and concepts "are cultural artifacts encoding particular and contingent normative conceptions").

14. *See, e.g.*, Culp, *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 534, 558 (1991) ("Black law professors are not permitted by our students or our colleagues to take our backgrounds for granted."). One powerful strategy for revealing and transforming the sedimented background that has emerged from the minority scholarship is the practice of storytelling. *See* Ball, *The Legal Academy and Minority Scholars*, 103 HARV. L. REV. 1855, 1859 (1990) (noting that storytelling by minority scholars "teach[es] us how racism and sexism may be hidden but are nonetheless built into the law of the dominant world and dehumanize it"); Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2413 (1989) ("Stories . . . are powerful means for destroying mindset—the bundle of presuppositions, received wisdoms, and shared understandings, against a background of which legal and political discourse takes place."); *see also* D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE 4-6 (1987) (noting the pervasive, subconscious character of racism in our culture). But, as Delgado and Stefancic argue in this issue, this strategy may have significant limitations. *See* Delgado & Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error?*, 69 TEXAS L. REV. 1929 (1991).

not?"[15] It seems natural to focus attention on the foreground question of what are "vehicles" covered by the rule because this is the locus of the rule's indeterminacy.[16] Thus, even Professor Lon Fuller questioned Hart's analysis by positing a case of a "vehicle" that, if included in the rule, would yield a bizarre, counter-intuitive result. Suppose, Fuller suggested, that a veterans' group wanted to mount a working World War II truck on a pedestal in the park as a war memorial.[17] Would it run afoul of "the 'no vehicle' rule?"[18]

Of course, Fuller maintained that a rule cannot be reduced to a single word; to interpret a rule, he asserted, one must go beyond the formal text and read the rule in light of its purpose.[19] Yet, he had surprisingly little to say about how one derives the purpose of the rule against vehicles:

> If the rule excluding vehicles from parks seems easy to apply in some cases, I submit this is because we can see clearly enough what the rule "is aiming at in general" . . . . If in some cases we seem to be able to apply the rule without asking what its purpose is, this is not because we can treat a directive arrangement as if it had no purpose. It is rather because, for example, whether the rule be intended to preserve the quiet in the park, or to save carefree strollers from injury, we know, "without thinking," that a noisy automobile must be excluded.[20]

But, we might ask, how is it that we can "apply the rule without asking

15. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607-08 (1958); *see* H.L.A. HART, THE CONCEPT OF LAW 121-32 (1961).

16. *See, e.g.*, Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 708-13 (1985) (using the "vehicles in the park" prohibition to demonstrate that the separation of law from politics cannot be maintained once we recognize the post-Wittgensteinian view of language); D'Amato, *Can Legislatures Constrain Judicial Interpretations of Statutes?*, 75 VA. L. REV. 561, 595-602 (1989) (describing the "vehicles" prohibition as a "classic jurisprudential example" and lamenting the tendency of commentators to get carried away with "penumbras" rather than focusing on the "core" issue); Schauer, *Formalism*, 97 YALE L.J. 509, 524-26, 540-41 (1988) (discussing the hypothetical rule prohibiting vehicles in the park as it relates to cars and trucks—the "core" of the rule—and the distinction between enforcing the letter and purpose of the rule); Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1172-80 (1989) (arguing that, although there is indeterminacy at the periphery, concepts like "vehicle" do have a "core meaning" that is not fixed and determinate, but rather is an "idealized conception of an experienced, contextual gestalt"); *see also* M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 12 (1987) (using "vehicle" to illustrate the linguistic indeterminacy thesis).

17. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 662-63 (1958).

18. *Id.* at 663.

19. *Id.* at 662-63 ("The most obvious defect of [Hart's] theory lies in its assumption that problems of interpretation typically turn on the meaning of individual words. . . . Even in the case of statutes, we commonly have to assign meaning, not to a single word, but to a sentence, a paragraph, or a whole page or more of text.").

20. *Id.* at 663.

what its purpose is" and do so, as Fuller says, "without thinking?"[21] The answer is that it is the background conception of a "park" that does most of the work; it is the idea of a "park" that informs our apprehension of the rule and renders it intelligible. If we know "without thinking" that an automobile is to be excluded, it is because we "know" that a park is for contemplative, meditative, and recreational activities like strolling, picnicking, exercising, and playing. And, knowing that, we also know "without thinking" that the purpose of the rule is to preserve the quiet and safety of the park.[22] Indeed, these conceptions are so deeply sedimented that it is hard to conceive of any *other* reasons for prohibiting vehicles.

In a later treatment, Fuller recognized that the rule can only be understood in light of culturally contingent, normative assumptions about the uses of a park.

> [T]he proper interpretation of the ordinance will depend on the meaning attributed to the institution "park" by the practices and attitudes of the society in question. In some countries . . . a park tends to be a place of quiet and repose, where the citizen may escape the tumult of the city. In the warmer latitudes it may be a place of music and gaiety, to which the citizen will betake himself after his need for repose has been satisfied by a siesta. . . . This means that in applying the statute the judge or police sergeant must be guided not simply by its words but by some conception of what is fit and proper to come into a park; conceptions of this sort are implicit in the practices and attitudes of the society of which he is a member.[23]

It would be odd, for example, if an official in our culture applied the rule to a child riding her tricycle in the park. The peculiarity of such an action does not result from any doubts about the proper classification of the tricycle: it is plainly a "vehicle." Yet, because it is the kind of vehi-

21. The question is all the more striking because it would be odd indeed for a lawyer or decision maker to research the question of legislative intent behind the rule. Would she read the minutes of the meeting at which the park department or city council adopted the rule? Would she search for some study or commission report that examined the problem of vehicles in the park? Would she find anything?

22. In this particular case, the highly conventional information conveyed by the sedimented conceptions "park" and "vehicle" cohere in a way that provides the rule with a relatively unproblematic degree of determinacy. *See* Winter, *supra* note 16, at 1178-79.

> The "purpose" of the statute will therefore be evident from its language terms. . . . It will be evident because "vehicle" is not just a word, but part of a cognitive process that evokes an experiential, embodied model. As a structure of thought, that model will identify an experiential gestalt: an object, its purposes, the manner of its use, and its concomitant hazards. The same will be true of the word "park": not any area of grass and trees, but one put aside for certain kinds of uses by embodied humans.

Id.

23. L. FULLER, ANATOMY OF THE LAW 58-59 (1968).

cle that "emits no fumes, makes no noise, and endangers no lives,"[24] it does not seem to fall within the prohibition against vehicles in *parks*. Indeed, unless the rule specified "no bicycles" (as some park signs do), we would be more likely to assume that tricycle-riding was precisely the kind of activity that the "no vehicle" rule was designed to safeguard.[25]

By the same token, part of the force of Fuller's counterexample of the vehicle-cum-statue in the park derives from the fact that statuary are a common part of our contemporary experience of parks. But these cultural understandings about the propriety of bicycles and statuary in parks are historical developments that were themselves the products of explicitly political theories and subsequent social contention. Many popular activities, including bicycling, were initially excluded from America's urban parks because they were considered inconsistent with the fundamental character and purpose of the park. In fact, it was not until the late nineteenth century that bicycles were permitted in most urban parks; even then, they were accomodated with specially constructed paths.[26] Similarly, park advocates resisted statuary both as undemocratic (which is to say, European and aristocratic) and as detracting from the naturalistic effect that was, in their view, the sine qua non of a park.[27] Changes in social practices and park philosophy that took hold in the first half of this century are, as I discuss below, what shape our current, unreflective assumptions about the appropriate uses of a park.

Thus, as Fuller observed, the pattern of legal enforcement and extralegal changes in the cultural practices that give meaning to the park as an institution will alter the coverage of even a simple statute like the one prohibiting vehicles in the park. "All this adds up to the conclusion that an important part of the statute in question is not made by the legislator, but grows and develops as an implication of complex practices and atti-

24. Schauer, *supra* note 16, at 540.

25. Exactly the same issue would arise if the rule banned "motor vehicles" and the child were riding in the park in her electrically powered toy automobile.

26. *See* G. CRANZ, THE POLITICS OF PARK DESIGN: A HISTORY OF URBAN PARKS IN AMERICA 13, 19 (1982). The history of urban parks in the United States is further discussed *infra* Part II(B).

27. *See id.* at 55-56; D. SCHUYLER, THE NEW URBAN LANDSCAPE: THE REDEFINITION OF CITY FORM IN NINETEENTH-CENTURY AMERICA 4-5 (1986). Cranz quotes a turn of the century tirade by a park advocate that provides some of the flavor of this opposition:

> There should be no place in them . . . for granite pantalooned remembrances of dead musicians and soldiers and statesmen. If we cannot teach people to realize that they should keep their effigies of statesmen where they belong, then let us hide them in thickets. . . . We should put nothing in our parks which suggests unrest or anything disagreeable, or that will frighten children, but we should put in objects that will suggest woods, trees, water, and nature.

G. CRANZ, *supra* note 26, at 56 (quoting Hall, *Park Inconsistencies* (pt. 4), 7 AM. PARK & OUTDOOR ART ASS'N 19 (July 1903)).

tudes which may themselves be in a state of development."[28]

These preliminary observations have profound implications for our conventional understanding of the countermajoritarian difficulty. I explore these implications in the sections that follow, using selected first-amendment contexts as case studies. I begin in Part II with an analysis of the way sedimented social assumptions about parks and other public spaces have affected the development and application of free speech doctrine. Perhaps a better way to highlight the power of our conventional assumptions, however, is to consider the way in which law is applied in a cross-cultural context. Accordingly, in Part III, I examine a recent decision rejecting the free exercise claim of Native Americans to see how different that claim looks when placed against the backdrop of diverse cultural assumptions. In Part IV, I explore the standard conception of the countermajoritarian difficulty and its dependence on the unspoken and unexamined background assumptions that frame it. Finally, in Part V, I raise some of the larger ramifications of the observation that the law can act only against a sedimented background which already bears normative orientations.

As we illuminate the background, our foreground conceptions of judicial review will begin to change. The conventional view of the countermajoritarian difficulty assumes both that the First Amendment and the other provisions of the Bill of Rights operate as constitutional constraints on political majorities and that judicial review is the primary mechanism by which those constraints are enforced.[29] In this view, the countermajoritarian difficulty is a product of the separation of powers and the establishment of an independent judiciary. But each of these assumptions becomes problematic once we recognize that judicial independence is a matter only of formal institutional design. In a crucialy important sense, however, judges are entirely *dependent* on the cultural understandings that make meaning possible. They cannot apply constitutional provisions such as the First Amendment without making unreflective use of a host of deeply sedimented concepts, categories, and assumptions. Repeatedly, the unarticulated normative orientations immanent in these background conceptions shape and produce deeply

28. L. FULLER, *supra* note 23, at 59.

29. I refer to this as "the conventional view" because, as an historical matter, it was not always the dominant understanding. For an alternative account of the original conception of the Bill of Rights that reads its provisions as populist and localist structural protections, see Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991). For an account of early nineteenth-century conceptions of judicial review as a majoritarian constraint on elected representatives, see Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. PA. L. REV. 1166, 1170-72 (1972).

majoritarian legal outcomes—"and that flips the point of the provisions exactly upside down."[30] In the end, we will confront a dramatically different conception of the countermajoritarian difficulty: the incongruity of a system that seriously expects the courts to act in countermajoritarian ways in order to to protect minority interests.[31]

II. Parks and Pleasure Grounds

A. Doctrinal Origins

The modern public forum doctrine treats public spaces like streets and parks as presumptively available for expression subject only to reasonable time, place, and manner restrictions.[32] The doctrine traces its origin to the Supreme Court's 1939 decision in *Hague v. Committee for Industrial Organization*,[33] where (writing for a plurality) Justice Roberts proclaimed:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been held for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. The privilege . . . to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.[34]

This passage, however, is widely recognized as dicta.[35] The actual holding in *Hague* is based on a straightforward application of *Lovell v. Grif-*

30. J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 62 (1980).

31. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 284 (1957) ("Under any reasonable assumptions about the nature of the political process, it would appear to be somewhat naive to assume that the Supreme Court either would or could play the role of Galahad."); *Cf.* R. COVER, O. FISS & J. RESNIK, PROCEDURE 730 (1988) ("I favor federal courts taking a lead in reforming institutions when the other officials fail. . . . At times the federal courts have been our allies in those commitments. There is every reason to believe that such a convergence of interests was temporary and accidental . . . ." (previously unpublished note of Professor Cover's found posthumously)).

32. *See, e.g.*, United States v. Grace, 461 U.S. 171, 183-84 (1983) (applying the public forum doctrine to the public sidewalks surrounding the United States Supreme Court building).

33. 307 U.S. 496 (1939) (plurality opinion).

34. *Id.* at 515-16.

35. *See, e.g.*, G. GUNTHER, CONSTITUTIONAL LAW 1197 & n.2 (11th ed. 1985) (noting that the ultimate holding in *Hague* rested on narrower grounds); Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 238 (noting that, in writing the passage, Justice Roberts answered the *Davis* dictum "with dictum of his own").

fin,[36] which the Court had decided the previous term. In each case, the Court struck down an ordinance that gave local authorities complete discretionary power to grant or deny permits for first-amendment activities.[37]

Justice Roberts's expansive rendition of the "immemorial" tradition of public expression in the streets and parks is problematic in another sense. As David Kairys has pointed out, the *Hague* Court's history was substantially revisionist; local control over expression was widely practiced and legally tolerated throughout the nineteenth and early twentieth centuries.[38] In *Davis v. Massachusetts*,[39] decided in 1897, the Court unconditionally affirmed a state conviction for preaching on Boston Common in violation of a city ordinance.[40] The *Davis* Court quoted from Justice Holmes's opinion for the Massachusetts Supreme Judicial Court sustaining the ordinance as within the government's power to regulate its property.[41] Justice Roberts offered his revisionist history in direct and explicit response to the reliance placed on *Davis* by Jersey City's Mayor Hague.[42] In one sense, then, we can see the Court's exaggeration as proportionate to the adverse history it had to overcome. Read this way, Kairys's claim that "[t]he Court made an essentially political and social judgment to change the law"[43] has power and resonance. Roberts did not distinguish *Davis* so much as obliterate it.

Under any reading, the decisions in *Davis* and *Hague* remain inconsistent.[44] It would nevertheless be a mistake to see the doctrinal shift

36. 303 U.S. 444 (1938).

37. In *Lovell*, the Court held invalid on its face a local ordinance prohibiting the distribution of literature on the street without the prior approval of a city official. *Id.* at 451-52. In *Hague*, the Court invalidated an ordinance regulating assemblies and parades "in or upon the public streets, highways, public parks or public buildings of Jersey City" without a permit. *Hague*, 307 U.S. at 502 n.1 (quoting the local ordinance).

38. *See* Kairys, *Freedom of Speech*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 237, 240-56 (D. Kairys 2d ed. 1990).

39. 167 U.S. 43 (1897).

40. *Id.* at 48.

41. *Id.* at 46-47 (quoting Commonwealth v. Davis, 162 Mass. 510, 511, 39 N.E. 113, 113 (1895)).

42. Hague v. Committee for Indus. Org., 307 U.S. 496, 514-15 (1939) (plurality opinion).

43. Kairys, *supra* note 38, at 241. Kairys, however, is sophisticated in his assessment of the role of social, cultural, and political forces in shaping that "judgment."

> The various factors discussed here would not necessarily operate intentionally or even consciously, nor would the justices necessarily see themselves as engaged in anything other than a legal analysis. Rather, they would be quite accustomed to expressing social and political concerns and values as legal arguments and to implementing changes of society's rules expressed in legal terms and not necessarily even self-understood as changes. Their socialization, education, and experience, their perception of their role, and their understanding of the needs of the society they serve could lead to this change in the law.

Id. at 258-59.

44. Kairys points out that *Davis* also involved a licensing ordinance. "[T]he *Davis* Court clearly based its decision on the property rights of the city, a basis the *Hague* Court rejected. . . . The

from *Davis* to *Hague* as a matter of self-conscious revisionism or simple manipulation. Rather, Roberts's opinion in *Hague* carefully interrogated the conceptual underpinnings of each of the *Davis* opinions. To understand how and why Roberts rejected the earlier Court's reasoning in *Davis*, we need both to examine carefully the opinions in *Davis* and to understand the intervening transformation of the cultural conception of a park.

On appeal to the United States Supreme Court, Reverend Davis argued:

> Boston Common is the property of the inhabitants of the city of Boston, and dedicated to the use of the people of that city and the public in many ways, and the preaching of the gospel there has been, from time immemorial to a recent period, one of these ways. For in the making of this ordinance in 1862 and its enforcement against preaching since 1885, no reason whatever has been or can be shown.[45]

The Court responded by quoting at length from the portion of Holmes's opinion that focused on the absolute nature of the property rights of the state.

> For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house. When no proprietary right interferes the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the less [sic] step of limiting the public use to certain purposes.[46]

Ownership is control. Q.E.D.

It is precisely at this point—where most contemporary casebooks and commentators stop[47]—that Roberts began his analysis in *Hague*. First, Roberts questioned the Court's rationale in affirming *Davis*: "The decision *seems* to be grounded on the holding of the state court that the

decisions are inconsistent." *Id.* at 266-67 n.9; *see also Hague*, 307 U.S. at 533 (Butler, J., dissenting) (noting that "in principle [the Jersey City ordinance] does not differ from the Boston ordinance, as applied and upheld by the Court . . . in *Davis*").

45. *Davis*, 167 U.S. at 46.

46. *Id.* at 47 (quoting Commonwealth v. Davis, 162 Mass. 510, 511, 39 N.E. 113, 113 (1895)).

47. *See, e.g.*, G. GUNTHER, *supra* note 35, at 1197 (quoting Holmes's language relied on by the Court in the *Davis* opinion); G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 1177-78 (1986) (stating that, under the Holmesian approach adopted by the Court in *Davis*, the problem of the public forum had been solved by resort to common-law concepts of private property). Kairys does report that "Holmes, like almost all state and lower federal court judges, viewed such an ordinance as simply a city regulation of the use of its park." Kairys, *supra* note 38, at 239 (footnote omitted). He does not, however, explain why all these judges might have understood the ordinance in that way.

Common 'was absolutely under the control of the legislature.' "[48] For Roberts, however, the question of ultimate title was very much beside the point. Instead, he echoed Reverend Davis's assertion of a "time immemorial" use to recognize "a kind of First-Amendment easement."[49] "Wherever the title of streets and parks may rest," Roberts observed, "they have immemorially been held in trust for the use of the public."[50] Taken as a legal rather than historical claim, this statement is far from revisionist. To the contrary, Roberts's understanding of state law was historically more accurate than that of the *Davis* Court. Under nineteenth-century doctrine, parks were explicitly characterized as property held in trust for the public.[51]

To be sure, Roberts went further and made the historically inaccurate claim that parks had always been held in trust "for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[52] Even so, his rejection of *Davis* did not hinge on that assertion. Rather, Roberts turned to a ground invoked by Holmes but ignored by the *Davis* Court on review.

Holmes had made two arguments in his opinion for the Massachusetts court in *Davis*. The property argument relied on by the Supreme Court and quoted by so many of the commentators was, in fact, the second argument. The first was categorical: Holmes rejected Reverend Davis's claim that the ordinance implicated constitutional concerns. "It assumes that the ordinance is directed against free speech generally, . . . whereas in fact it is directed toward the modes in which Boston Common may be used."[53] For Holmes, the city ordinance was merely a permissible instance of the government's ordinary power to regulate parks. "There is no evidence before us to show that the power of the Legislature over the Common is less than its power over any other park dedicated to the use of the public."[54] Only then did Holmes invoke the property rights of the state and argue that the greater power includes the lesser. Because the government could "put[] an end to the dedication to public

48. *Hague*, 307 U.S. at 515 (plurality opinion) (emphasis added) (quoting *Davis*, 167 U.S. at 46).

49. Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 13. This characterization reflects particularly well Davis's claim that the Boston ordinance was not enforced against preaching for the first 23 years after its adoption. *See supra* text accompanying note 45.

50. *Hague*, 307 U.S. at 515 (plurality opinion).

51. *See* Brooklyn Park Comm'rs v. Armstrong, 45 N.Y. 234, 243 (1871) ("[T]he city took the title to the lands . . . for the public use as a park, and held it in trust for that purpose."), *cited in* Commonwealth v. Davis, 162 Mass. 510, 511, 39 N.E. 113, 113 (1895).

52. *Hague*, 307 U.S. at 515 (plurality opinion).

53. *Davis*, 162 Mass. at 511, 39 N.E. at 113.

54. *Id.*

uses," it could "take the lesser step of limiting the public use to certain purposes."[55]

Roberts resurrected Holmes's characterization and made it the basis of his distinction in *Hague*. Roberts summarized the Court's reasoning in *Davis* and observed:

> The ordinance there in question apparently had a different purpose from that of the one here challenged, for it was not directed solely at the exercise of the right of speech and assembly, but was addressed as well to other activities, not in the nature of civil rights, which doubtless may be regulated or prohibited as respects their enjoyment in parks.[56]

Thus, Roberts distinguished the Jersey City ordinance because it dealt "only with the exercise of the right of assembly" and was not premised on a general authority "to promote the public convenience in the use of the streets or parks."[57] To the contrary, the Jersey City ordinance did "not make comfort or convenience in the use of the streets or parks the standard of official action."[58] By focusing on the Jersey City ordinance's "uncontrolled official suppression" of speech,[59] Roberts related his distinction of the decision in *Davis* to his reliance on the Court's then-recent decision in *Lovell v. Griffin*.

From our contemporary perspective, the categorical analysis adopted by Holmes and Roberts seems bizarre if not disingenuous. After all, the Boston ordinance did include a clause that specifically prohibited speaking in the park.[60] That it also regulated other activities seems entirely irrelevant. To us, then, it seems appropriate that the *Davis* Court should have given the first part of Holmes's reasoning a cold shoulder and relied instead on a straightforward property analysis. By the same token, Roberts's embrace of Holmes's peculiar characterization of the Boston ordinance seems like an unprincipled attempt to avoid an adverse precedent.[61]

55. *Id.*
56. *Hague*, 307 U.S. at 515 (plurality opinion).
57. *Id.*
58. *Id.* at 516.
59. *Id.*
60. *See* Commonwealth v. Davis, 162 Mass. 510, 511, 39 N.E. 113, 113 (1895) (quoted in full at text accompanying note 64 *infra*). In contemporary discussions, *Davis* is consistently characterized as a case in which "the court upheld Davis's conviction based on a city ordinance that prohibited 'any public address' on public grounds without a permit." Kairys, *supra* note 38, at 239; *see also* G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *supra* note 47, at 1177 ("Davis . . . was convicted under a city ordinance which forbade, among other things, 'any public address' on any publicly owned property . . . .").
61. This impression is reinforced by Roberts's admission that: "We have no occasion to determine whether, on the facts disclosed, the *Davis* case was rightly decided." *Hague*, 307 U.S. at 515 (plurality opinion).

To evaluate the Holmes-Roberts explanation of the Boston ordinance from our contemporary perspective, however, is to understand nineteenth-century institutions through the lens of twentieth-century conceptions. To appreciate how Holmes and Roberts (both of whom were born and raised in the nineteenth century[62]) could have portrayed the Boston ordinance the way they did, it is first necessary to understand the nineteenth-century conception of a "park."

B. Political and Cultural Underpinnings

The best place to begin the effort to understand the nineteenth-century conception of a "park" is with the text of the Boston ordinance itself. In contrast to the Jersey City ordinance, which was directed solely at public speech and assembly,[63] the Boston ordinance was directed at a highly unusual assortment of activities in that city's parks. The Boston ordinance provided:

> No person shall, in or upon any of the public grounds, make any public address, discharge any cannon or firearm, expose for sale any goods, wares, or merchandise, erect or maintain any booth, stand, tent, or apparatus for purposes of public amusement or show, except in accordance with a permit from the mayor.[64]

To contemporary ears, this mélange sounds less like a lucid regulation of the park than like one of those children's games in which one lists "twenty-seven things not to do in the park on a Sunday afternoon" or, perhaps, a fictive list by Jorge Luis Borges.[65] To those who drafted the Boston ordinance in 1862, however, it was quite natural to include these disparate activities together in a single provision governing the park. For it is precisely these activities that were incompatible with the goals of the then-nascent urban park movement in America.

In the middle decades of the nineteenth century, notables like William Cullen Bryan, Andrew Jackson Downing, Frederick Law Olmsted, and Horace Greeley championed the construction of large urban parks that would provide healthful, restorative recreation in the midst of spreading urban congestion and squalor.[66] For these advocates, the park

62. Holmes was born in 1841, Roberts in 1875. *See* G. GUNTHER, *supra* note 35, at app. B-5, B-6. At the time of Holmes's 1895 decision in *Davis*, Roberts was 20.

63. "[N]o public parades or public assembly in or upon the public streets, highways, public parks or public buildings of Jersey City shall take place or be conducted until a permit shall be obtained . . . ." *Hague*, 307 U.S. at 502 n.1 (quoting the local ordinance).

64. *Davis*, 162 Mass. at 510, 39 N.E. at 113. Although the ordinance does not use the term "park," the term "public pleasure ground" was the conventional nineteenth-century equivalent. *See, e.g.*, G. CRANZ, *supra* note 26, at 15 (quoting Charles S. Sargent's description of the purpose of "public pleasure grounds").

65. *See, e.g.*, J. BORGES, OTHER INQUISITIONS 108 (1965).

66. *See* M. KALFUS, FREDERICK LAW OLMSTED 278-81 (1990); *see also* D. SCHUYLER, *supra*

was to be "an oasis from the noisome conditions of the city streets" that "offered a quiet and tranquillity contrasting sharply with the noise and activity of the streets."[67]

But to its proponents, the new urban park was more than a recreational facility or modest improvement in urban conditions. Nineteenth-century park advocates "considered the park not only a naturalistic landscape but an experiment in republican institutions."[68] The park was envisioned as a democratizing and civilizing reform.[69] It was to serve the goal of political reform in two related ways. First, the park was to provide the opportunity for all classes to associate with one another. In the words of one proponent, the park was "a kind of democracy, where the poor, the rich, the mechanic, the merchant and the man of letters, mingle on a footing of perfect equality."[70] Second, the pastoral scenery of the park was expeeted to have a restorative and refining effect that would "soften and humanize the rude, educate and enlighten the ignorant, and give continual enjoyment to the educated."[71]

In contrast to the cutthroat commercial activity of city life, "the restorative purposes of the park were [to be] accomplished through a noncompetitive, nonthreatening 'coming together' and through the restful contemplation of natural scenery."[72] Thus, Olmsted insisted

> that rural scenery could impose a calming sense of its own sacredness on the "rough element of the city." . . . Moreover, the natural

note 27, at 62-66 (noting that as access to the country became more difficult, parks were promoted as enclaves of rural beauty within the city).

67. I. FISHER, FREDERICK LAW OLMSTED AND THE CITY PLANNING MOVEMENT IN THE UNITED STATES 102 (1986).

68. D. SCHUYLER, *supra* note 27, at 181.

69. I. FISHER, *supra* note 67, at 5 ("[T]he creation of parks and city planning emerged as part of the reform movement of the latter nineteenth century."); M. KALFUS, *supra* note 66, at 279-80 ("Parks had been expected to be the living symbols of gentry culture, democratizing and civilizing."); *see also* Blodgett, *Frederick Law Olmsted: Landscape Architecture as Conservative Reform*, 62 J. AM. HIST. 869, 877 (1976).

> [Olmsted's] parks may be understood to reflect as accurately as civil service reform or tariff reform or Mugwump journalism a common group desire to counter the headlong popular impulses of the Gilded Age. The urban park, like the well-designed campus or suburb, was in his mind an urgent antidote for the restless habits of the American majority. . . . Olmsted's parks seemed to offer an attractive remedy for the dangerous problem of discontent among the urban masses. In contrast with other reforms put forward by the gentry, they visibly affected the everyday habits of large numbers of people. By providing pleasant and uplifting outlets in the narrow lives of city-dwellers, they promised a measure of social tranquility.

Blodgett, *supra*, at 877.

70. D. SCHUYLER, *supra* note 27, at 65 (quoting Stephen Duncan Walker).

71. *Id.* at 65-66 (quoting Andrew Jackson Downing).

72. M. KALFUS, *supra* note 66, at 281; *see also* I. FISHER, *supra* note 67, at 103 ("Olmsted's most important objective was to use the park to restore to the alienated city inhabitants a sense of community and to the fragmented psyche a sense of wholeness. In Olmsted's view, the park was an aesthetic instrument to achieve a social and psychological change in a business oriented, urban society.").

> simplicity of pastoral landscape would, he hoped, inspire communal feelings among all urban classes, muting resentments over disparities of wealth and fashion. For an untrusting, watchful crowd of urban strangers, the park would restore that "communicativeness" which Olmsted prized as a central American need.[73]

In short, both aspects of this reform were tied to the park's character as a pastoral pleasure ground. Only interactions in this idyllic setting would foster the sentiments of equality and community sought by these nineteenth-century republican reformers.

As a consequence, park advocates took strong stands about what should be permitted in these parks. As we have seen, ornaments like statuary were routinely opposed—though often unsuccessfully.[74] Architecture was secondary to the pastoral landscape;[75] buildings were kept rustic and unobtrusive.[76] Although social and political pressure from the working class eventually won out, park advocates and administrators staunchly resisted vigorous athletics as incompatible with the contemplative and restorative aims of the park.[77] Commercial activities were anathema; they "smacked of the city to which the pleasure ground was an antidote."[78] Similarly, most cities prohibited political and religious meetings in the parks because they were too divisive: "the pleasure ground was meant to transcend, not reflect, the evils of urban life, of which division was a prominent symptom."[79]

73. Blodgett, *supra* note 69, at 878. Olmsted's influence, both in his own time and in ours, should not be underestimated. "Olmsted himself designed sixteen or seventeen major park systems in different parts of the United States; and the other designers of the era were aligned with him or under his influence." G. CRANZ, *supra* note 26, at 168. Blodgett reports a telling complaint by a modern specialist: "We have not shown the ability to design anything much larger than a tot lot which refleets the differences between our way of life and that of Olmsted." Blodgett, *supra* note 69, at 888 (comments made at a 1965 White House conference on beautification).

74. *See* G. CRANZ, *supra* note 26, at 55-56 (discussing the emergence of statuary in parks despite designers' preferences for naturalistic shrubbery and landscaping); D. SCHUYLER, *supra* note 27, at 186-87 (reporting that park advocates opposed the Soldiers and Sailors Monument in the Grand Army Plaza at the entrance to Prospect Park in Brooklyn).

75. *See* G. CRANZ, *supra* note 26, at 42.

76. *See id.* at 49-55.

77. *See id.* at 15 ("In the concept of the park as pleasure ground no sport, no matter how wholesome, could appropriately be treated as the purpose of a park, but people misunderstood the function of parks."). Olmsted himself was a chief opponent:

> Olmsted never satisfactorily reconciled his tranquil, unitary vision of Central Park with the desires of its users. He had special trouble coping with the demands of the active young working-class male. . . . Like most thoughtful contemporaries of his class, he underestimated the bent for vigorous, organized leisure-time activities among boys and working men, and responded grudgingly to their desire for "manly and blood-tingling recreations," "boisterous fun and rough sports."

Blodgett, *supra* note 69, at 881; *see also* discussion *infra* note 79.

78. G. CRANZ, *supra* note 26, at 13.

79. *Id.* at 23. When Olmsted worked on Boston's Franklin Park in the 1880s, he assimilated into his plan some of the lessons he had learned from the popular conflict over the uses of Central Park. To avoid conflict over activities that he considered inappropriate to the pastoral pleasures of

Thus, many of the activities that we now associate with parks were, in the nineteenth century, deemed inherently inconsistent with the fundamental purposes of a park. Consider, then, how this nineteenth-century conception of a park changes our understanding of the Boston ordinance and the outcome in *Davis*. If the Boston ordinance is understood in its historical context, Holmes and Roberts are correct in their characterization: the ordinance *is* an appropriate regulation of the park. It is no different, in principle, than a constitutionally permissible regulation that prohibits noisy demonstrations in front of a school when classes are in session.[80] So too, *Davis* would be correctly decided even under the most protective version of the modern public forum doctrine. Under that doctrine, the relevant question is "whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."[81] Because *any* political or religious speech was fundamentally inconsistent with the "normal" activity of the park (if viewed in its time and context), Reverend Davis's conviction under the Boston ordinance would be upheld: "The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic

the naturalistic park, he placed alongside the main park a smaller ante-park designed separately to accommodate more active recreation. *See* M. KALFUS, *supra* note 66, at 299-300; D. SCHUYLER, *supra* note 27, at 141. Despite these accommodations, Olmsted remained adamantly opposed to inconsistent uses of his parks:

> Franklin Park was not expected, however, to bear the whole burden of modern activism. Olmsted wanted no men's athletic teams playing there; he wanted labor agitators and other speechmakers barred from its grounds; he wanted schoolchildren trained in dutiful respect to its peaceful influences; and he repeatedly urged that flat land outside the park be set aside for military musters, fireworks, and balloon ascensions. He specified that other facilities for physical activity be located at scattered sites elsewhere in the city.

Blodgett, *supra* note 69, at 886. Although we can only speculate about the relationship, Reverend Davis's complaint that the 1862 ordinance had not been applied to prohibit speech on Boston Common until 1885 may have something to do with the fact that Olmsted began to work with the city at just that time. *See id.* at 883. It may also have had something to do with the change of municipal administrations; 1885 marked the election of the first Irish-American, a Democrat, as Mayor of Boston. *Id.* at 884.

80. *See* Grayned v. City of Rockford, 408 U.S. 104, 121 (1972) (stating that an anti-noise statute "represents a considered and specific legislative judgment that some kinds of expressive activity should be restricted at a particular time and place, here in order to protect the schools").

81. *Id.* at 116. In recent years, the public forum doctrine has been applied in a manner that has led some commentators to suggest that the nature of the forum is no longer the primary—or even a significant—concern. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-24, at 989-93 (2d ed. 1988). Rather, the Court has increasingly collapsed the doctrine permitting reasonable "time, place, or manner" restrictions into the more lenient standard established in United States v. O'Brien, 391 U.S. 367 (1968), which allows content-neutral regulation that furthers an important or substantial governmental interest unrelated to speech even though it results in incidental restriction of speech. *See* Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 650-54 (1991) ("The Court's growing focus on content discrimination and its gradually narrowing definition of discrimination in terms of government purpose may have caused the Court to conflate the various types of 'content-neutral' regulations and to devalue the threat that such regulations pose to freedom of speech.").

forum and hinder its effectiveness for its intended purpose."[82]

On this basis, Roberts's distinction between *Davis* and *Hague* begins to look more and more plausible. The *Davis* Court was faced with an across-the-board regulation of the park that, inter alia, included a prohibition of public speaking. In contrast, the *Hague* Court was faced with an ordinance that not only applied everywhere in Jersey City,[83] but also was "directed solely at the exercise of the right of speech and assembly."[84] Moreover, as was well known, the Jersey City ordinance was being invoked by Mayor Hague in a viewpoint-specific effort to thwart organized labor.[85]

Of course, these differences are not all that support Roberts's distinction in *Hague*. Equally important are the intervening changes in the uses of the park and the accompanying changes in its social conception that increasingly undermined the constitutional logic of Holmes's opinion in *Davis*. As we have seen, the "pleasure ground" concept of the park was already under pressure by the last quarter of the nineteenth century.[86] "In response to a changing constituency, park administrators made provision for various forms of modern recreation. . . . [T]he rise of active recreation marked a major shift away from the mid-century park ideal."[87] Playgrounds began to appear in parks with some frequency during the late nineteenth century.[88] At the turn of the century, progressives reshaped park planning to reflect their view of the needs of the

82. Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 811 (1985). To put the matter somewhat anachronistically, the dominant nineteenth-century conception of the park was as a special use forum. *Cf.* Kalven, *supra* note 49, at 12 ("Certainly it is easy to think of public places, swimming pools, for example, so clearly dedicated to reereational use that talk of their use as a public forum would in general be totally unpersuasive."). As such, speech could be regulated as long as the regulation was "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

83. The ordinanee applied to speech or assembly "in or upon the public streets, highways, public parks or public buildings of Jersey City." Hague v. Committee for Indus. Org., 307 U.S. 496, 502 n.1 (1939) (plurality opinion) (quoting the local ordinance).

84. *Id.* at 515 (plurality opinion).

85. *See id.* at 505 (plurality opinion) ("The findings are that petitioners, as officials, have adopted and enforced a deliberate policy of forbidding the respondents and their associates from communicating their views respecting the National Labor Relations Act . . . ."); Kairys, *supra* note 38, at 240 (noting that Hague "made it clear that labor organizers were not welcome in Jersey City . . . . Local businesses were promised that they would have no labor troubles while he was mayor; his response to the CIO was: 'I am the law' ").

86. *See supra* notes 26-27, 74-79 and accompanying text.

87. D. SCHULYER, *supra* note 27, at 186 (discussing Brooklyn's Prospect Park in the late 1880s).

88. *See* G. CRANZ, *supra* note 26, at 63 ("Before 1900, New York, Chicago, Philadelphia, Pittsburgh, Baltimore, New Haven, Providence, and San Francisco had such playground facilities, although these municipalities had not yet passed legislation enabling them to purchase land specifically for this purpose.").

urban working class.[89] Organized programming became a staple of the park;[90] consequently, "[s]ocial workers were the first professionals regularly employed by parks departments."[91] By the 1920s, America's urban parks were likely to include physical facilities and organized programs for baseball, tennis, ice hockey, and swimming, as well as official programming as diverse as gardening, folk dancing, social dancing, medical and dental clinics, branch libraries, and public lectures on political and social topics.[92]

During the Depression, park officials justified these programs as a solution to the problem of "the new leisure"[93]—a crude euphemism for rampant unemployment and enforced idleness. This rationale provided park officials with a good bargaining position in times of limited municipal budgets while maintaining the park's traditional political function as an "urban safety valve."[94] Even so, this reformulation of the park's purpose helped consolidate the social transformation of the park from a special use facility to a more open public resource. "In replacing an ideology of reform with one of leisure, park departments . . . made themselves subject to demand rather than to a norm of public service . . . ."[95] At the time of Roberts's opinion in *Hague*, the narrow conception of the park that underlay the Boston ordinance would have seemed increasingly unpersuasive. Conversely, the idea that the urban park was an appropriate literal analogue to the metaphoric "marketplace of ideas"[96] would have seemed increasingly plausible.

This is not to suggest that, by the 1930s, the park had spontaneously developed into a first-amendment forum. To the contrary, sedimented attitudes and assumptions were continually manifested throughout these changes in park theory and practice. Park officials continued to resist

89. *See id.* at 61-62. Cranz refers to this as the Reform Era, which he dates from 1900 to 1930. *See id.* at 61-80. For a discussion of the changing attitudes toward recreation and leisure that occurred as a response to the industrialization of the late nineteenth century, see D. RODGERS, THE WORK ETHIC IN INDUSTRIAL AMERICA, 1850-1920, at 94-124 (1978).

In Cranz's account of urban parks in America, the Reform Era was succeeded by the Recreation Era, which he dates from 1930 to 1965, and the Open Space System, which he dates from 1965 and thereafter. *See* G. CRANZ, *supra* note 26, at 101-17, 135-42. Cranz's somewhat formalistic periodization has been criticized. *See, e.g.*, M. KALFUS, *supra* note 66, at 299, 394 n.6; D. SCHUYLER, *supra* note 27, at 229. I have therefore used Cranz with some caution, drawing on his extensive reports of data and trends without necessarily relying on his specific periodization.

90. *See* G. CRANZ, *supra* note 26, at 61-62.

91. *Id.* at 169.

92. *See id.* at 68-77.

93. *Id.* at 105.

94. *Id.*

95. *Id.* at 106-07.

96. For a discussion of the conventional metaphors and social experiences that motivate this Holmesian metaphor, see Winter, *supra* note 16, at 1188-90.

unsponsored political, religious, and commercial activities.[97] At the same time, both the programs they championed and the justifications they offered tended to support the wide-ranging use of park facilities for purposes of expression.

> [P]ark departments . . . encouraged activities which lent themselves to festivals and pageantry—music, dramatics, dancing, art exhibits—because of their power to stimulate community interaction and integration. But it was characteristic of the era that these activities were also advocated by parks spokespeople who viewed them primarily as means of self-expression. The absence of a clarion call to reform during the era allowed a carefree variety of claims and appeals to surface.[98]

Notwithstanding the historical revisionism, by 1939 it was no longer farfetched for Roberts to suggest that parks were used "for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[99]

Thus, Roberts's rewrite of history and his revision of legal doctrine were not made out of whole cloth. Rather, they reflected major, widespread social changes in the practices and background assumptions that shaped the contemporary conception of the park and its proper uses. As aptly put in a Chicago park commission report just a year after *Hague*: "The shift was not in things or properties; it was in the social meanings of those things and properties."[100] Roberts's interrogation of *Davis* could not help but be affected by these intervening changes in social meaning; the question whether first-amendment activities constituted an appropriate public use of the park could only be answered in light of the prevailing social conception of the park. As Kairys suggests, it is in just this way that judges are "quite accustomed to . . . implementing changes of society's rules expressed in legal terms and not necessarily even self-understood as changes."[101]

97.

> Reform parks usually retained no more than fragments inherited from pleasure ground policy, namely, their prejudices. San Francisco park reports throughout the reform era show denials of permission for political assemblies, gospel meetings, peddling, advertising, and gambling, and commercial amusements such as theatres, motion picture houses, saloons, and bowling alleys were systematically excluded.

G. CRANZ, *supra* note 26, at 78; *cf. id.* at 142 (describing the resistance of park administrators to protests during the Vietnam War era).

98. *Id.* at 115 (footnote omitted).

99. Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939) (plurality opinion).

100. G. CRANZ, *supra* note 26, at 122 (quoting CHICAGO SOUTH PARK COMM'N, REPORT 1940, at 228).

101. Kairys, *supra* note 38, at 259; *cf.* K. LLEWELLYN, THE CASE LAW SYSTEM IN AMERICA 74-75, 83 (P. Gewirtz ed., M. Ansaldi trans. 1989) ("All words (that is, linguistic symbols) and all rules composed of words continuously change meaning as new conditions emerge."), *discussed in* Winter, *supra* note 3, at 1515-16.

C. *The Persistence of the Pleasure Ground*

Social conceptions that are deeply sedimented, however, will continue to be invoked by courts without self-conscious awareness either of their political origins or of their normative dimensions. Two recent examples of this phenomenon of adversity are *Clark v. Community for Creative Non-Violence*[102] and *Naturist Society, Inc. v. Fillyaw*.[103]

In *Clark*, the Court upheld the application of the Interior Department's anti-camping regulation to prohibit demonstrators, who were protesting the plight of the homeless, from sleeping overnight in a tent city set up across from the White House in Lafayette Park. The Court assumed that the proposed sleeping was "expressive conduct protected to some extent by the First Amendment."[104] At the same time, the Court was categorical about the applicability of the regulation: "It cannot seriously be doubted that sleeping in tents for the purpose of expressing the plight of the homeless falls within the regulation's definition of camping."[105] Accordingly, it upheld the regulation as a reasonable time, place, or manner restriction designed to keep "the parks at the heart of our Capital in an attractive and intact condition."[106] "[U]sing these areas as living accommodations," the Court observed, "would be *totally inimical* to these purposes."[107]

In dissent, Justice Marshall pointed out that "neither the Government nor the majority adequately explains how prohibiting respondents' planned activity will substantially further that interest."[108] True, the Court was evidently concerned with the wear and tear on the park, hence its reference to keeping the park "intact." But that hardly explains the Court's conclusion; the same line of reasoning would justify prohibiting any large scale demonstration, just as the governmental interest in preventing litter would justify a ban on distributing leaflets.[109] Moreover, concern with wear and tear is not quite the same as the Court's

102. 468 U.S. 288 (1984).

103. 736 F. Supp. 1103 (S.D. Fla. 1990), *aff'd*, 934 F.2d 1177 (11th Cir. 1991).

104. *Clark*, 468 U.S. at 293.

105. *Id.* at 292-93 n.4; *see also id.* at 300 (Burger, C.J., concurring) ("I find it difficult to conceive of what 'camping' means, if it does not include pitching a tent and building a fire. . . . With all its frailties, the English language, as used in this country for several centuries, and as used in the Park Service regulations, could hardly be plainer . . . .").

106. *Id.* at 296.

107. *Id.* (emphasis added); *see also id.* at 300 (Burger, C.J., concurring) ("[C]amping in the park . . . is conduct that interferes with the rights of others to use Lafayette Park for the purpose for which it was created.").

108. *Id.* at 308 (Marshall, J., dissenting).

109. *See* Schneider v. State, 308 U.S. 147 (1939) (holding that a ban on handbilling was unconstitutional).

assertion that the projected activity—sleeping—was "totally inimical" to the purposes of the park.

What underlay the Court's claim, of course, was a residual sedimentation: the nineteenth-century conception of the park as pleasure ground. This conception is implicit in the Court's insistence that the anti-camping regulation would keep the park "attractive,"[110] and it is apparent in the Court's initial description of the affected parks:

> [T]he National Memorial-core parks, Lafayette Park and the Mall, . . . are unique resources that the Federal Government holds in trust for the American people. Lafayette Park is a roughly 7-acre square located across Pennsylvania Avenue from the White House. Although originally part of the White House grounds, President Jefferson set it aside as a park for the use of residents and visitors. It is a "garden park with a . . . formal landscaping of flowers and trees, with fountains, walks, and benches." . . . The Mall . . . includes the Washington Monument, a series of reflecting pools, trees, lawns, and other greenery. . . . Both the Park and the Mall were included in Major Pierre L'Enfant's original plan for the Capital. Both are visited by vast numbers of visitors from around the country . . . .[111]

Chief Justice Burger expressed the point with characteristic simplicity: "Respondents' attempt at camping . . . is conduct that interferes with the rights of others to use Lafayette Park *for the purposes for which it was created*."[112] Although *Hague* and its progeny opened the urban park to expressive activity, the Court nevertheless managed unconsciously to reassert the original narrow conception of the park as pleasure ground in its determination of what forms that expression could permissibly take.

In *Naturist Society*, the federal district court considered a challenge to Florida park regulations that, inter alia, prohibited the "[s]ale or distribution of printed matter without a permit" and absolutely forbade any person to "use . . . or enter any park for the purpose of announcing, displaying advertising, or calling attention to any person, political party, religious institution or sect, or meeting or assembly thereof, or for the

110. *Clark*, 468 U.S. at 296.

111. *Id.* at 290 (quoting the NATIONAL PARK SERVICE, U.S. DEP'T OF THE INTERIOR, WHITE HOUSE AND PRESIDENT'S PARK, RESOURCE MANAGEMENT PLAN 4.3 (1981)). The Court's observation that the park is a resource "that the Federal Government holds in trust for the American people" is an echo of Roberts's recitation in *Hague* of the traditional view that "streets and parks . . . have immemorially been held in trust for the use of the public." Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939); *see also supra* notes 50-51 and accompanying text.

In contrast, Justice Marshall characterized the majority's description of these parks as "peculiar." *Clark*, 468 U.S. at 302 (Marshall, J., dissenting). While he acknowledged that it was "interesting" to learn about the historical origin of these parks, he pointed out that: "Missing from the majority's description is any inkling that Lafayette Park and the Mall have served as the sites for some of the most rousing political demonstrations in the Nation's history." *Id.* at 303.

112. *Id.* at 300 (Burger, C.J., concurring) (emphasis added).

purpose of advertising any item or service for sale."[113] The plaintiffs, members of a society that promotes "social nudism," sought access to the John D. MacArthur State Park in order to display signs, distribute literature, and circulate petitions advocating that the north end of the park's beach be designated "clothing-optional."[114] The district court upheld the state's decision to limit the plaintiffs' "demonstration" to a card table in the parking lot, without banners or signs, at a fixed location that was out of the flow of pedestrian traffic.[115]

In considering the constitutionality of the state regulation, the district court focused on the state's property rights in a manner more reminiscent of *Davis* than *Hague*.[116] It reasoned that a beach is a nonpublic forum and not "a traditional public forum such as the townsquare."[117] Accordingly, the state "can act to preserve the property for its intended use."[118]

Given, however, that the beach is a state park, it is instructive to see how hard the court struggled to distinguish *Hague*.

> To state the obvious, John D. MacArthur park is a beach. Persons visit such a place for its recreational features. Visitors can swim and play games or merely rest under the sunshine, enjoying the natural beauty of the scenary [sic]. . . . The primary purpose of a public beach is to provide a place for public relaxation and recreation, whether active or restful. Unlike a public street or city park, beach visitors do not reasonably expect to be subjected to the full exercise of others' rights of free speech while at a public beach. . . . Further, unlike a park or street, the beach visitor cannot easily walk away. Some persons may feel more vulnerable when they lie on a beach without their normal amount of clothing. They often lie on the beach on a blanket or sit in a chair, arranging their possessions around themselves and setting out various objects such as drinks, a radio, and lotion. To require the beach visitor to leave every time a speaker approached or persisted in his solicitation

113. Naturist Society, Inc. v. Fillyaw, 736 F. Supp. 1103, 1108-09 (S.D. Fla. 1990) (quoting FLA. ADMIN. CODE ANN. 16D-2.07(1)(h) & 16D-2.08(2)(a) (1982 & Supp. 1985)), *aff'd*, 934 F.2d 1177 (11th Cir. 1991). The plaintiffs also challenged Rule 16D-2.04(1)(e), which requires bathers to wear swimsuits that "conform to commonly accepted standards." *Id.* at 1108 (emphasis omitted).

114. *Id.* at 1106. The court found that, before the beach was acquired by the state, the north end had been used by naturists for nude bathing. *Id.*

115. *Id.* at 1116-18.

116. The district court characterized the state's interests as "substantial and important."

> The state owns the John D. MacArthur beach with the right to manage it and use it to assure the site's availability for its primary purposes; in this case, as a beach. . . . The state . . . has an important interest in protecting its own property. Indeed, a very significant portion of Florida's economy is sustained by tourist visits attracted in large part by the state's natural resources including its beaches.

Id. at 1114 (citing *Clark*, 468 U.S. at 296, and Cox v. New Hampshire, 312 U.S. 569 (1941)).

117. *Id.* at 1115.

118. *Id.*

would impose a significant burden on the use of the park.[119]

Certainly, everything the court noted about the beach is true of a park: people go to parks for recreation, for the beauty of the scenery, for relaxation (or, as the court tellingly put it, "for *public* relaxation"), and even to sunbathe (at least that was true the last time I visited Central Park in summer).

Of course, it is not rigorous logic that sustains the court's conclusion. What sustains it (if anything does) is a culturally specific picture of an afternoon spent relaxing at the beach, one's "space" carefully demarcated with blankets and personal accouterment.[120] As the park administrator candidly stated in a letter to the Naturist Society: "We cannot . . . tolerate the actions of a few persons or groups to upset or destroy the harmony that our visitors have come to enjoy in Florida State Parks."[121] *That* sentiment would have resonated with the drafters of the 1862 ordinance at issue in *Davis* or, for that matter, with Frederick Law Olmsted.

III. Conflict on Cultural Grounds

A. Two Worlds, Worlds Apart

The Six Rivers National Forest in northwest California contains sites sacred to the Yurok, Karok, and Tolowa communities—Native Americans of the Klamath River region. It is also part of a national system of wilderness lands administered by the United States Forest Service.[122] In the 1970s, the Forest Service decided to open the virgin timber of the Blue Creek Unit of this national forest to logging. The resulting land management plan provided for the completion of the last segment of the road from Gasquet to Orleans, California ("the G-O Road"). Lying in the Chimney Rock section of the Blue Creek Unit, this segment of approximately six miles runs through the "high country" sacred to the Native American communities of the Klamath River area.

The Forest Service plan was criticized by the Advisory Council on Historic Preservation. In response to the Council's inquiry whether the area could instead be added to the National Register of Historic Places, the Forest Service commissioned Dr. Dorothea Theodoratus to conduct a cultural and anthropological study of the sites and their importance to

119. *Id.* at 1116-17.

120. *Cf.* Kalven, *supra* note 49, at 12 ("Certainly it is easy to think of public places, swimming pools, for example, so clearly dedicated to recreational use that talk of their use as a public forum would in general be totally unpersuasive.").

121. *Naturist Society*, 736 F. Supp. at 1112. The plaintiffs had relied on this letter in support of their claim that the defendant's actions were motivated by opposition to their message. The court rejected that claim. *Id.* at 1113.

122. *See* 16 U.S.C. § 1609 (1988).

the local Native American communities. In her report, Dr. Theodoratus recommended that the area be placed on the National Register.[123] The report also concluded:

> It is the general assessment . . . that the completion of the G-O Road via any of the proposed Chimney Rock alternatives (Routes 1-9) will produce an irreparable impact on the spiritual and physical well-being of the adjacent Yurok, Karok and Tolowa communities. Such impact will be created through the degradation of salient environmental qualities pertinent to the power quests of medicinal and spiritual practitioners who serve these communities.[124]

While the Forest Service took steps to initiate the first recommendation, it nevertheless went ahead with its plans to develop the area and complete the G-O Road.

The Native Americans sued to prevent the adoption of the land management plan and to enjoin completion of the road. Although the suit presented several statutory claims, the primary ground for relief was the claim that the Forest Service plan violated their rights under the free exercise clause of the First Amendment.[125] The district court enjoined the Forest Service both from opening the area to logging and from completing the G-O Road. The court found that the proposed road would impose a significant burden on the free exercise of the Native Americans' religion that was not justified by a countervailing governmental interest.[126]

While an appeal was pending, Congress designated most of the Blue Creek section as a Wilderness Area,[127] mooting the development plans. But Congress did not include in this designation the 1200-foot-wide corridor encompassing the G-O Road.[128] After rehearing, the Ninth Circuit

123. *See* Theodoratus, Cultural Resources of the Chimney Rock Section, Gasquet-Orleans Road, Six Rivers National Forest (1979), *reprinted in* Joint Appendix at 110, 197, Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988) (No. 86-1013) [hereinafter Theodoratus Report].

124. *Id.* The Report explained: "Specific sites within the project area are necessary to the training and ongoing religious experience of individuals using the area for personal medicine and growth, curing medicine, deviltry, and medicine affecting the well being of local communities as well as (today) the broader world community." *Id.* at 181.

125. The additional claims were premised on environmental statutes. The Native American plaintiffs were joined by several environmental groups and the state of California. Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 590-91 (N.D. Cal. 1983), *aff'd in part and vacated in part*, 795 F.2d 688 (9th Cir. 1986), *rev'd and remanded sub nom.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

126. The district court found that the road "would not materially serve several of the claimed governmental interests." *Peterson*, 565 F. Supp. at 595. It found the other asserted interests "speculative and diffuse" or otherwise falling "far short" of a compelling state interest. *Id.*

127. California Wilderness Act of 1984, Pub. L. No. 98-425, § 101, 98 Stat. 1619 (codified as amended at 16 U.S.C. § 1132 (1988)).

128. *See* Northwest Indian Cemetery Protective Ass'n v. Peterson, 795 F.2d 688, 691 (9th Cir.

affirmed the district court's injunction barring completion of the road.[129] The government sought certiorari. The Supreme Court granted certiorari and reversed in *Lyng v. Northwest Indian Cemetery Protective Association*.[130]

The Court concluded that the proposed completion of the G-O Road did not implicate free exercise concerns despite its "severe adverse effects on the practice of their religion."[131] It reasoned that the government's action would neither "coerce" anyone into violating their religious beliefs nor penalize religious activity by denying a generally available benefit.[132] Rather, the Court read the free exercise clause narrowly as a strict command of government neutrality. "The crucial word in the constitutional text is 'prohibit': 'For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.' "[133] The Court reasoned that the effect of the injunction was to grant the Native Americans a "religious servitude"[134] over national lands:

> No disrespect for these [religious] practices is implied when one notes that such beliefs could easily require *de facto beneficial ownership* of some rather spacious tracts of public property. Even without anticipating future eases, the diminution of the Government's property rights, and *the concomitant subsidy of the Indian religion*, would in this case be far from trivial . . . .[135]

The characterization of governmental actions in terms of "coercion," "neutrality," and "subsidy" raises the question of the background assumptions against which those actions are measured. This case is, therefore, a logical occasion for the critique that challenges the conventional assumptions upon which a legal characterization depends. The background regime of legal entitlements will determine what benefits are perceived as out-of-the-ordinary and, therefore, a subsidy and what impositions are understood as unwarranted and, thus, a coercive penalty or burden.[136] Accordingly, some commentators have suggested that the Court found no "coercion" in *Lyng* because it measured the govern-

1986), *rev'd and remanded sub nom.* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988).

129. *Id.* at 691-93, 698.

130. 485 U.S. 439 (1988).

131. *Id.* at 447.

132. *Id.* at 450-51 (rejecting a free exercise challenge to "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs").

133. *Id.* at 451 (quoting Sherbert v. Verner, 374 U.S. 398, 412 (1963)).

134. *Id.* at 452.

135. *Id.* at 453 (emphasis added).

136. *See* Hale, *supra* note 3, at 476-77 (noting that the concept of "coercion" is entirely dependent upon prior definition of legal and moral duties); Sunstein, *supra* note 3, at 882-83 ("The deci-

ment's actions against a common-law "baseline."[137] If one starts with the routine common-law assumptions about property ownership, then the government's actions in this case cannot be viewed as coercive because the government was only asserting "its right to use what is, after all, *its* land."[138] Conversely, to confer on the Native American communities special rights that effectively preclude other uses would constitute a subsidy.[139]

The problem with this analysis, however, is that the common law could equally provide the baseline for exactly the opposite set of characterizations and conclusions. Ira Lupu has argued that the common-law baseline "would support a finding of burden" in *Lyng* because the Native Americans' historic use of the high country could logically be said to establish an easement by prescription.[140] In fact, the Native Americans made the closely analogous claim under *Hague* and the modern public forum doctrine.

> The sacred area in this case has been used continuously "from time immemorial" by the region's Yurok, Karok, and Tolowa Indians for religious use; indeed, the practices which are seriously threatened by the government's actions have existed at this site long before the Six Rivers National Forest was established or the government even obtained title to the land.[141]

Measured against this baseline, the district court's injunction was hardly a subsidy.[142] To the contrary, the decision to complete the G-O Road looks more like an unwarranted burden analogous to a nuisance or constructive eviction.[143]

The manifest indeterminacy of the common law makes it unsuitable

sion about what is partisanship and what is neutrality depends on the baseline used for measurement.").

137. *See* G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *supra* note 47, at 277 (Supp. 1989) (concluding that the Court in *Lyng* was "relying largely on common-law or pre-governmental conceptions of what 'coercion' is").

138. *Lyng*, 485 U.S. at 453.

139. Thus, in its brief in the Supreme Court in *Lyng*, the government argued that:

> The public lands are a finite resource . . . . Moreover, the potential uses for a particular piece of property are frequently incompatible. The determination that one use is appropriate for a site may rule out several other competing uses for both that site and the surrounding area. And these potential uses are not simply abstractions. . . . Land management decisions thus resemble a zero sum game in which the government must choose among various individuals' competing claims to use particular public land.

Brief for Petitioners at 37, *Lyng* (No. 86-1013) [hereinafter Petitioners' Brief].

140. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933, 972-76 (1989).

141. Brief for Indian Respondents at 40, *Lyng* (No. 86-1013).

142. *Cf.* Brief for Respondent State of California at 15, *Lyng* (No. 86-1013) ("Forebearing to destroy the salient qualities of the high country does not provide the Indians with something they did not have before.").

143. *See* Lupu, *supra* note 140, at 975-76 (suggesting the latter analogy).

as a baseline because it cannot accomplish what a baseline must: afford a set of assumptions sufficiently firm and automatic to provide a stable, intelligible ground for subsequent cognitive operations. Rather, the common-law rules of property are themselves only midrange conceptions that depend on more deeply sedimented, cultural assumptions. To understand the Court's decision in *Lyng*, we need to understand the background conceptions that led the Court to see only one of these two common-law characterizations as appropriate.

One way to approach the problem would be to consider the set of assumptions that frame only one of two competing claims *as* a property claim. For the Court, the case was a conflict between "the diminution of the Government's property rights," on one hand, and "the concomitant subsidy of the Indian religion" on the other.[144] It is easy enough to identify the *legal* conceptions that framed the case this way. The Forest Service operates under the Multiple-Use Sustained-Yield Act of 1960[145] and the Forest and Rangeland Renewable Resources Planning Act of 1974,[146] passed pursuant to the property clause.[147] The former statute requires the development and maintenance of "the national forests for multiple use and sustained yield of the several products and services obtained therefrom."[148] The Native Americans, on the other hand, invoked the First Amendment's protection of religious freedom.[149] This was obviously necessary. Had they proceeded on a property theory, they would have had to confront the implications of their conquest and colonization.[150] They would have run headlong into the property clause.

So far, the analysis is rather unremarkable. Except for one thing. To understand the case as one concerning a conflict between "land use" and "religion" is already to load the normative dice. These characteristically Western categories organize the world in a way that is radically different from Native American understandings; indeed, these Western categories simultaneously distort and disadvantage the Native Ameri-

144. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988).

145. 16 U.S.C. §§ 528-531 (1988).

146. 16 U.S.C. §§ 1600-1614 (1988).

147. U.S. CONST. art. IV, § 3, cl. 2.

148. 16 U.S.C. § 529 (1988). "Multiple use" is defined as "the most judicious use of the land for some or all of these resources or related services." *Id.* § 531(a). "Sustained yield of the several products and services" is defined as the "achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without impairment of the productivity of the land." *Id.* § 531(b).

149. U.S. CONST. amend. I.

150. *See generally* R. WILLIAMS, THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST 8 (1990) ("The immunizing function of law and legal discourse also served as an effective tool for dismissing or deflating demands for further justifications or examinations of the colonizing enterprise.").

cans' claims.[151] Where Western culture separates the physical from the spiritual, Native American culture views Nature as that which mediates between the human and the divine.[152] Thus, Western culture distinguishes objects and their utility as resources from subjective mental states (like religious beliefs) and their significance to personal fulfillment. Native American culture, on the other hand, perceives an "intimate connection between environment, ecology, and religion."[153]

> When the native American looks at nature, it isn't with the idea of training a glass upon it, or pushing it away so that he can focus upon it from a distance. In his mind, nature is not something apart from him. He conceives of it, rather, as an element in which he exists.[154]

As described by contemporary Native Americans: "I use sacred land every day to exist on."[155] "In seeking the religious reality behind the American Indian tribal existence, Americans are in fact attempting to come to grips with the land that produced the Indian tribal cultures and

151.

> Because of the particular nature of the Indian perceptual experience, as opposed to the particular nature of the predominant non-Indian, Western perceptual experience, any division into "religious" or "sacred" is in reality an exercise which forces Indian concepts into non-Indian categories, and distorts the original conceptualization in the process.

Theodoratus Report, *supra* note 123, at 110.

152. *See* A. HULTKRANTZ, BELIEF AND WORSHIP IN NATIVE NORTH AMERICA 126-27 (1981); *see also* Defendants' Exhibit F, *Lyng*, 485 U.S. 439, *reprinted in* Joint Appendix at 198, *Lyng* (No. 86-1013) [hereinafter Defendants' Exhibit F].

> The conflict over the "High Country" . . . goes beyond the question of whether or not the religious rights of a minority group are being denied. It involves a cultural conflict over the meaning of the area, with one culture's perception that it is a holy land challenged by another culture's belief that it is merely a valuable source of timber, copper, and other economically necessary resources. By denying that it is a fragile, significant area with religious values, the non-Indian culture is actually stating that the Indian's religion is of no value.

Defendants' Exhibit F, *supra*, at 200.

153. A. HULTKRANTZ, *supra* note 152, at 121. Hultkrantz cites to Ann Gayton's work with a central California tribe of the San Joaquin Valley. *See* Gayton, *Culture-Environment Integration: External References in Yokuts Life*, 2 SW. J. OF ANTHROPOLOGY 252, 253 (1946) ("[T]here is an intimate relation between important immaterial phases of the culture and the environmental setting.").

154. Momaday, *Native American Attitudes to the Environment*, in SEEING WITH A NATIVE EYE: ESSAYS ON NATIVE AMERICAN RELIGION 79, 84 (W. Capps ed. 1976). In Western thought, the closest analogue to this way of understanding the relationship between self and world is the phenomenological tradition in continental philosophy. *See, e.g.*, M. MERLEAU-PONTY, PHENOMENOLOGY OF PERCEPTION xi (C. Smith trans. 1962) ("The world is not an object such that I have in my possession the law of its making; it is the natural setting of, and field for, all my thoughts and all my explicit perceptions. . . . [T]here is no inner man, man is the world, and only in the world does he know himself."). For an elaboration of how this way of thinking might inform our understanding of constitutional law, see Winter, *supra* note 3, at 1447-53, 1485-94, 1507-13.

155. A. HULTKRANTZ, *supra* note 152, at 128. Or as one member of the communities affected in this case put it: "People who make . . . decisions must walk the land, know the people, and learn what is important to them." Theodoratus Report, *supra* note 123, at 149 (quoting a Native consultant).

their vision of community."[156]

Consider how these conceptual differences affect the reasoning in *Lyng*. For the Native American communities, the questions of "land use" and "religion" are but one question; for them, the questions of how one lives on the land and how one practices "religion" are one and the same. For the Court, however, the Native Americans' claim with respect to the land was something separate and outside. The Court did not see a holistic form of life rooted in an intimate association with the local geography; it saw, instead, a claim of access for religious purposes no different than that of a church group wanting to hold services on government property. For the Court, the land-based religious practices of the Native American communities became just another "use" value that must compete with other, more compelling use values.[157]

Once the claim is conceived in this way, however, the Native Americans' attempt to preserve the pristine conditions of a resource that is the government's to manage seems an obvious case of overreaching. That is exactly how the government argued the case:

> The free exercise claim advanced by respondents does not merely seek *access* to government property, it intrudes far more deeply into the management of public lands. Permanently barring the government from maintaining and developing its own property to achieve what it has determined to be its best uses of that property is far more onerous—and far more preclusive of other individuals' competing claims to use of the particular land—than requiring the government to allow an individual access to its property while leaving undisturbed the government's physical management of permissible uses.[158]

By introducing a conceptual separation between the Native American communities and the land, the centuries-old practices of these communities becomes a deep "intrusion" into the "permissible" uses of the government's property. In just this way, the Court is blinded from seeing the Native Americans' claim as a competing claim to the *land*.

Unthinking reliance on a Western conception of religion also distorts and reduces the Native American claimants' interest to a mere matter of subjective preference. In Native American culture, religion may be said to encompass the entire form of life.[159] In Western culture, on the

156. V. DELORIA, GOD IS RED 88 (1973).

157. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988) ("[A] law forbidding the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions. Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land.").

158. Petitioners' Brief, *supra* note 139, at 40.

159. *See* Theodoratus Report, *supra* note 123, at 180-81 ("This belief system has been shown to incorporate elements of daily life, ritual practice, geographic locale, and ideas of origin and World

other hand, religion is primarily a matter of belief or creed. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires."[160] Thus, the government argued that "the complainant's objection relates to his perception of how the government action may adversely affect his spiritual life."[161] It emphasized that, if the Constitution did mandate deference to such "perceptions," the inherently subjective forces of religious need and desire would prove ungovernable. "Further, the decision to attach religious significance to a particular parcel of land owned by the government is wholly unrelated to the land use selected by the government; it flows *solely* from the individual religious belief."[162] Accordingly, it warned the Court of the parade of horrors that would inevitably ensue. Others could claim that their religion required the government to make or refrain from making social welfare expenditures, or that the eagle is too sacred to be profaned by use as the national symbol, or that foreign aid to a particular government was either necessary for or an affront to their religious practices and beliefs.[163] "[I]t is this very subjectivity in the definition of religion that calls out for an objective limit on the scope of the Free Exercise Clause."[164]

In short, the Western categories that form the background conceptions in this case depend upon an understanding of objectivity and subjectivity as antagonistic, mutually exclusive alternatives. Moreover, this dichotomy and its associated dichotomous categories impose a particular, normative conception of subject-object relations that is savagely instrumentalist. Religion is a matter of *belief*; it is *subjective*, a matter of private *preferences*. Land, on the other hand, is something to be *used*; it is a *resource* to be maximized. The two belong to essentially separate spheres that entail different kinds of endeavor. One lies in the realm of conscience and belief, the other in the domain of action.[165] The govern-

Renewal into a conceptualization of sacredness. This concept is foreign in many ways to western European categories of thought."). For a comparison and contrast of these different conceptions of "religion" and the implications for free exercise doctrine, see Williams & Williams, *Volitionalism and Religious Liberty*, 76 CORNELL L. REV. 769 (1991).

160. Employment Div. v. Smith, 110 S. Ct. 1595, 1599 (1990). In *Smith*, two Native Americans were fired from their jobs as drug counselors because of their sacramental use of peyote. The use of peyote was a crime under state law. The Court held that the denial of unemployment benefits in these circumstances did not constitute a burden on the free exercise of the Native religion. *Id.* at 1599-1602.

161. Petitioners' Brief, *supra* note 139, at 27-28 n.24.

162. *Id.* at 41 (emphasis added).

163. *See id.* at 29. The Court directly incorporated this argument in its opinion. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 452 (1988).

164. Petitioners' Brief, *supra* note 139, at 30.

165. *See, e.g.*, Employment Div. v. Smith, 110 S. Ct. 1595, 1602 (1990) ("Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convic-

ment cannot interfere in the private sphere of religious belief and opinion. Thus, the Court acknowledged that "[t]he Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred."[166] By the same token, however, religion cannot interfere with the public sphere of land use and resource maximization. "[G]overnment simply could not operate if it were required to satisfy every citizen's religious needs and desires."[167]

Because the Court viewed the case in this sectorized way, it was able to conclude both that the Forest Service plan could have "devastating effects on the traditional Indian religious practices"[168] and that it would, nevertheless, "have no tendency to coerce individuals into acting contrary to their religious beliefs."[169] Of course, the inadequacy of this rigid sectorization occurred even to the Court; it realized that governmental programs will produce "incidental effects" which "make it more difficult to practice certain religions."[170] And it acknowledged that the imperfection of these categories is cause for regret.[171] But it nevertheless insisted that the "neutrality" and integrity of this line drawing must, in principle, be maintained.[172] Otherwise, the potentially ungovernable forces of subjective belief and desire would be overwhelming.[173]

B. Language and Landscape

Not surprisingly, the issues look quite different when they are understood against the alternative background of Native American culture. For Native Americans, it is the land that makes meaning possible:

tions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now."); Reynolds v. United States, 98 U.S. 145, 166 (1878) ("Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.").

166. *Lyng*, 485 U.S. at 453.

167. *Id.* at 452. At this point in its opinion, the Court recalled the parade of horrors that the government had conjured up in its brief. *See supra* text accompanying notes 163-64.

168. *Lyng*, 485 U.S. at 451.

169. *Id.* at 450.

170. *Id.*

171. *See id.* at 452 ("However much we might wish that it were otherwise . . . ."); *id.* at 453 ("Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen.").

172. *See id.* at 451 ("Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.").

173. *See* Employment Div. v. Smith, 110 S. Ct. 1595, 1605 (1990) (rejecting the argument that government must show a compelling state interest supporting a regulation that prohibits religiously commanded conduct because "[a]ny society adopting such a system would be courting anarchy"); *id.* at 1606 (acknowledging the potential oppression of minority religions, but concluding that the "unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself").

"American Indians hold their lands—places—as having the highest possible meaning, and all their statements are made with this reference point in mind."[174] Indeed, for many Native Americans, the land is a vital, constitutive element of their moral life: "The land is always stalking people. The land makes people live right. The land looks after us."[175] Once this way of seeing the land is understood, the "incidental" effects of a development plan can look more like the government's affirmative suppression of a remarkably complex normative system. The goal of this section is to show how the government's action in a land case such as this can be a paradigmatic first-amendment violation: when the government "develops" the resources of "what is, after all, *its* land,"[176] those actions may constitute nothing less than *censorship*.

For the Native American, land, religion, culture, and community are part of a single, integrated network of symbolic meaning: "features of the environment which are not essential to basic subsistence are caught up into the ceremonial, social, and religious superstructure."[177] As enlightened moderns, we may tend to think of these systems as primitive, mystical, arcane. Indeed, this impression seems confirmed by evidence of occult practices such as medicine making, power quests, and visions. But once we understand it, the integration of geography, culture, and self that characterizes the Native world view appears enviable in its subtlety, elegance, and sophistication.

Although both the environmental features that are selected and the meanings that are attached vary, what is common to many Native communities is the way in which the physical environment provides the symbolic system of their cultural life.

> [T]he native American ethic with respect to the physical world is a matter of reciprocal appropriation: appropriations in which man invests himself in the landscape, and at the same time incorporates the landscape into his own most fundamental experience. . . .
>
> . . . [T]his appropriation is primarily a matter of the imagination. The appropriation is realized through an act of the imagination which is moral [in] kind. I mean to say that we are all, I suppose, at the most fundamental level what we imagine ourselves to be. And this is certainly true of the American Indian. . . . [H]e is someone who thinks of himself in a particular way and his idea comprehends his relationship to the physical world, among other things. He imagines himself in terms of that relationship and

174. V. DELORIA, *supra* note 156, at 75.

175. K. BASSO, WESTERN APACHE LANGUAGE AND CULTURE 100 (1989) (quoting Mrs. Annie Peaches).

176. *Lyng*, 485 U.S. at 453.

177. Gayton, *supra* note 153, at 264.

> others. And it is that act of the imagination, that moral act of the imagination, that I think constitutes his understanding of the physical world.[178]

For example, the landscape and its fauna can be the source for "standardized mental symbols and imagery" that are then incorporated in visions or ceremonies; interpretation of these symbols may constitute "as normal a mental activity as, say, reading in our own culture."[179] Moreover, the symbolic use of imagery taken from the local landscape has a distinct advantage over the abstract symbolic forms typical of Western culture: "External reminders of cultural forms [are] met at any turn in the trail, on every hand, day in and day out."[180]

Using these social and symbolic processes, Native American communities draw upon the land as "the source of spiritual origins and sustaining myth which in turn provides a landscape of cultural and emotional meaning."[181] Here, the operative mechanism is narrative. Many of the legends and myths of Native communities are localized in the nearby landscape.[182] In *Lyng*, for example, Dr. Theodoratus reported that the high country "is the setting for many myths and narratives which are an integral part of traditional Northwest Indian beliefs and world view."[183] Although she did not fully develop their significance,[184] we can get some sense of the vital importance of these geo-

178. Momaday, *supra* note 154, at 80.

179. *See* Gayton, *supra* note 153, at 266 (discussing the Yokuts use of animal imagery in dreams for the purpose of obtaining supernatural powers).

180. *Id.* at 265; *see also* Smothers, *Future In Mind, Choctaws Reject Plan for Landfill*, N.Y. Times, Apr. 21, 1991, § 1, at 22, col. 2 ("For Odie Jim, 63 years old, the concern was . . . what could happen to the land that his ancestors had doggedly held on to while most Choctaws were being driven to reservations in Oklahoma in the last century. Mr. Jim credited the tribe's ability to hold on to its language and much of its culture through the years to the members' succeeding in maintaining their connection to the land.").

181. Pommersheim, *The Reservation as Place: A South Dakota Essay*, 34 S.D.L. REV. 246, 250 (1989). As we have seen, there are analogous Western cultural processes. Olmsted, it will be recalled, viewed the naturalistic urban park as having uplifting psychic effects on its users. *See supra* notes 71-73 and accompanying text. Similarly, the statuary so opposed by nineteenth-century park advocates can be understood as visual encodings of civic lessons. *See supra* notes 27, 74 and accompanying text.

182. *See, e.g.*, F. BOAS, GEOGRAPHIC NAMES OF THE KWAKIUTL INDIANS 9, 22-35 (1934) (describing how myths of the Kwakiutl Indians are attached to specific places).

183. Theodoratus Report, *supra* note 123, at 146; *see also* Recommendations of the Advisory Council on Historic Preservation on the Gasquet-Orleans Road Six Rivers National Forest, *reprinted in* Joint Appendix at 203, 213, *Lyng* (No. 86-1013) ("In cataloging the aspects of the High Country which, cummulatively [sic], accounted for its particular siguificance to indigenous populations, the mythical importance of the area most certainly be [sic] included. Many myths or other narratives either took place in this setting or used esoteric practice there as a central motif." (citations omitted)).

184. At several points in her report, Dr. Theodoratus remarked on the guarded and confidential nature of her Native informants:

> [P]art of the belief system . . . requires that Indians avoid indiscriminate discussions about this sacred training. As has been pointed out by a Karok man, "Indian people are very

graphically grounded narratives from an historical note she does provide: "[W]hen the federal government attempted to remove Indian people from the Klamath River to reservations distant from their homeland, they almost invariably escaped and made their way back to the Klamath River where the geography provided daily associations with their traditional religious practices."[185]

The cultural role of geographically grounded narratives is not restricted to myths and religious practices. For some Native communities, the local geography is also the source and symbol of narratives that incorporate important cultural norms. The Western Apache, for example, have a tradition of historical narrative which consists of stories that encode moral lessons of appropriate communal behavior. When a member of the tribe violates a tribal norm, the pertinent story will be told to remind that person how to behave. Typically, the narrator is an elder who may tell the story to a larger group without specifying the intended "target." As described by one Apache:

> So someone stalks you and tells a story about what happened long ago. It doesn't matter if other people are around—you're going to know he's aiming that story at you. All of a sudden it *hits* you! It's like an arrow, they say. . . . [I]t goes in *deep* and starts working on your mind right away. No one says anything to you, only the story is all, but now you know that people have been watching you and talking about you. They don't like how you've been acting. So you have to think about your life.[186]

Each story is named after and situated in the local landscape. Every recitation of the story begins and ends with the invocation of the place name, such as "It happened at 'coarse-textured rocks lie above in a compact cluster' " or "It happened at 'men stand above here and there.' "[187] Once the intended target has internalized the point of the story, the local geography continues to act as a metonym for the moral lesson.

> It's hard to keep on living right. Many things jump up at you and block your way. But you won't forget that story. You're going to see the place where it happened, maybe every day . . . . If

confidential. There are lots of things that white society still doesn't know, and Indian people won't give out any information about it whatsoever."

Theodoratus Report, *supra* note 123, at 145. This secrecy was particularly evident with respect to culturally significant aspects of the local landscape. *Id.* at 160 ("Many consultants chose to be deliberately vague about specific locations of sacred places because it is culturally inappropriate to discuss such sacred sites."); *see also id.* at 147 ("Other ethnographers have noted secrecy in studies of Indian religions . . . .").

185. *Id.* at 185; *see also* Pommersheim, *supra* note 181, at 251 (noting the similar failure of a government relocation program in the 1950s that attempted to move Native Americans off the reservations and resettle them in major urban areas).

186. K. BASSO, *supra* note 175, at 124-25.

187. *Id.* at 119.

> you don't see it, you're going to hear its name and see it in your mind. It doesn't matter if you get old—that place will keep on stalking you like the one who shot you with the story.[188]

Part of the effectiveness of the practice is a matter of association. Many Native American place names are richly descriptive of the physical features of the landscape; others refer to some historical practice or event identified with the place.[189] Typically, the specificity of the place name provides a connection between the narrative and the unique features of the local landscape. In many instances, the description of the location bears a figurative relation to the substance of the story. For example, the story entitled "It happened at 'coarse-textured rocks lie above in a compact cluster' " concerns the death and disgrace of an Apache who sexually molested his stepdaughter in violation of Apache incest taboo.[190] The imagery of the place name is a rather graphic metaphor for sex ("coarse-textured rocks lie above") within the family ("in a compact cluster").

In other instances the relation is less colorful, although no less forceful. "It happened at 'men stand above here and there' " concerns the humiliation of an Apache who acted too much like a white. The story takes place during a period of famine on the reservation. An Apache killed a white man's cow someplace off the reservation. He was arrested by a policeman, another Apache, at "men stand above here and there." But, when the Native policeman went to report the arrest to the commander at Fort Apache, he forgot what he had come to report. He returned to make his report the next day, but again forgot why he had come. After an attempt to cover his embarrassment by making small talk with his supervisor, he took the man who had killed the cow and

188. *Id.* at 125. Basso reports that related cultural practices contribute to the success of this socialization device. "Apaches, who travel a great deal to and from their homes, habitually call on each other to describe their trips in detail." *Id.* at 107.

189. *See, e.g., id.* at 110-11. According to Basso, descriptive names are by far the most common amongst the Apache. *Id.* References to legendary and mythological events are also frequent among southwestern tribes, but they are rare amongst those of the Pacific Northwest. F. BOAS, *supra* note 182, at 21.

190. K. BASSO, *supra* note 175, at 119. A similar example is the story "It happened at 'big cottonwood trees stand spreading here and there.' " This story concerns a mother-in-law ("big cottonwood tree") who meddles in her son-in-law's household ("spreading here and there"). During the first year of marriage, Apache couples live in the camp of the bride's parents. (Thus, "big cottonwood trees" represent the shelter of the parents' camp.) While there, custom entitles the bride's mother to criticize and instruct her son-in-law. Once the new couple establishes their own residence, however, social custom prohibits the mother-in-law from interfering. In "It happened at 'big cottonwood trees stand spreading here and there,' " a rival tribe attacked the Apache camp before dawn and killed the residents in their sleep. An old woman heard some Apache men cry out and, thinking it was her son-in-law picking on her daughter, she called out to him to stop. The attacking tribe heard her and killed her. Only a single young girl survived the attack. *Id.* at 118.

relased him at "men stand above here and there." [191] The story is understood as "a harsh indictment of persons who join with outsiders against members of their own community."[192]

The association that gives this story so much power is one that cannot be replicated. The spot called "men stand above here and there" is a ridge overlooking the valley in which this Apache community lives. In the mid-nineteenth century, lookouts were posted at that spot to protect against surprise attacks from the U.S. Sixth Cavalry.[193]

It is by no means certain that all Native American communities observe precisely these cultural practices with respect to place names and moral narratives.[194] Nevertheless, the record in *Lyng* indicates that the Klamath River communities also maintain a close connection between particular locations and important cultural narratives. In describing the religious practices of these Native communities, Dr. Theodoratus noted that: "An indispensible participant in the World Renewal ceremonies is an individual (a formulist or medicine man . . .) who recites set narratives at specified places in a fixed order."[195] Even more evocative is the report of one of her correspondents concerning the quest through the high country for spiritual power. "Every step of the way is important: 'every step of the way you learn something.' "[196]

The symbolic importance of the landscape to Native Americans, and its role in maintaining their *nomos*, dramatically changes the nature of the issues in a case like *Lyng*. Any alteration of the landscape—the placement of a road, the mining of a ridge, the harvesting of a forest—could be the destruction of an irreplaceable landmark significant to the

191. *Id.* at 119-20.

192. *Id.* at 120.

193. *Id.* at 111. Basso describes an instance in which this story was used with great effect. A young woman appeared at a puberty ceremony wearing pink plastic curlers in her hair. According to Apache custom, those attending are supposed to wear their hair in a free-flowing manner as a sign of respect. When this young woman subsequently visited her grandmother, the older woman recounted "It happened at 'men stand above here and there.' " Shortly thereafter, the young woman left. When Basso inquired about her departure, the grandmother said: "I shot her with an arrow."

Two years later, Basso gave the young woman a ride home. He asked her about the incident. In English, she explained that as soon as she realized that her grandmother was referring to her: "I sure don't like how she is talking about me, so . . . I threw those curlers away." Basso pointed out that they were passing "men stand above here and there." "She said nothing for several moments. Then she smiled and spoke softly in her own language: 'I know that place. It stalks me every day.' " *Id.* at 121-23.

194. *See* A. HULTKRANTZ, *supra* note 152, at 118-19 ("There is, in fact, much to say against any generalization of Indian relations with nature in North America. The continent is large and complex, geographically as well as ethnographically."). Basso notes, however, that there has been comparatively little study of Native American place names. *See* K. BASSO, *supra* note 175, at 105-06.

195. Theodoratus Report, *supra* note 123, at 112-13; *see also supra* text accompanying notes 183-85.

196. Theodoratus Report, *supra* note 123, at 133-34.

moral life of the Native American community. Thus, "[t]he Government's rights to the use of its own land"[197] may, in a literal sense not even anticipated by Robert Cover, entail the authority to destroy the "common life in a dedicated space within the normative world."[198] In point of fact, the Court's indulgence of the "incidental" effects of the Forest Service's land development plan may be the realistic equivalent of allowing the government to expunge a chapter of the Bible.

IV. Root Difficulties

Alexander Bickel struck a deeply resonant chord when he branded judicial review "a deviant institution in the American democracy."[199] "For judges and lawyers, the 'countermajoritarian difficulty' recalled the Old Court's long, and ultimately futile, judicial struggle against the New Deal. For them, Bickel's warning reinforced the impropriety of using the Constitution as laissez-faire capitalism's ultimate weapon against popular control."[200] The modern preoccupation with the countermajoritarian difficulty is driven by the anxiety that the Warren Court's protection of minority rights and individual liberties, which many of us view as a genuine "good thing," may be indistinguishable in theory from the predations of the *Lochner* Court.

Indeed, once generalized and stated at the level of political theory, the conflict between democracy and judicial review seems difficult to avoid.[201]

> The root difficulty is that judicial review is a counter-majoritarian force in our system. . . . [W]hen the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control not in behalf of the prevailing majority, but against it.[202]

197. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 454 (1988).

198. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 49 (1983).

199. A. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 18 (2d ed. 1986).

200. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1014-15 (1984); *see also* Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 63-64 (1989) (noting the pivotal role of *Lochner* and the reaction it engendered during the New Deal period in shaping modern constitutional law); Winter, *supra* note 3, at 1460-65, 1469-71 (arguing that the post-New Deal paradigm in constitutional law was shaped by the reaction to *Lochner*, but that the modern preoccupation with the "countermajoritarian difficulty" is a reaction to the anomaly opened up by *Brown*).

201. "[N]o amount of tampering with democratic theory can conceal the fact that a system in which the policy preferences of minorities prevail over majorities is at odds with the traditional criteria for . . . democracy . . . ." Dahl, *supra* note 31, at 283.

202. A. BICKEL, *supra* note 199, at 16-17.

Nevertheless, the examples we have explored above suggest that the specter of judicial review as an anti-majoritarian force is primarily a problem of the legal foreground. To a large extent, much of what the Court does necessarily employs mainstream conceptions that already preclude or impair minority concerns—in effect, exercising control not against the prevailing majority, but on its behalf.

Much of the force of Bickel's formulation is a function of the authority of its background conceptions. The conventional statement of the countermajoritarian difficulty is firmly grounded in two closely related assumptions: first, that the electoral process is definitive of democracy and, second, that an unelected judiciary is politically unaccountable.[203] This grounding is implicit in Bickel's "root difficulty" metaphor, and it is explicit in his ensuing discussion.[204] Yet, "[e]ven superficial analysis reveals . . . that the contrast between a Court wholly insulated from the desires of the electorate and a legislature and executive devotedly registering the will of their constituents functions rather as a literary device than as a description of reality."[205] On one hand, President Reagan's success in reconstituting the federal bench seems to confirm the wisdom of Robert Dahl's observation that "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majority of the United States."[206] On the other

203. In contrast, Dahl's original analysis of this problem starts from the more subtle premise that democracy consists in policymaking which reflects majority preferences—of which electoral outcomes are only a rough gauge. *See* Dahl, *supra* note 31, at 283-84.

204. Bickel acknowledges that:

> there are other means than the electoral process, though subordinate and subsidiary ones, of making institutions of government responsive to the needs and wishes of the governed. Hence one may infer that judicial review, although not responsible, may have ways of being responsive. But nothing can finally depreciate the central function that is assigned in democratic theory and practice to the electoral process.

A. BICKEL, *supra* note 199, at 19.

205. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 185 (1968).

206. Dahl, *supra* note 31, at 285; *see* R. DAHL, DEMOCRACY AND ITS CRITICS 190 (1989) ("[T]he views of a majority of the justices of the Supreme Court are never out of line for very long with the views prevailing among the lawmaking majorities of the country."). In response, someone will no doubt point out that presidents often make "mistakes" in making judicial appointments—mistakes that these presidents later come to regret. *See, e.g.*, J. ELY, *supra* note 30, at 46-47 (noting that Presidents Truman and Eisenhower are reported to have considered the appointments of Justices Clark and Warren, respectively, as their "worst mistakes"). The problem with this observation is that a couple of exceptions do not necessarily disprove the rule. Aside from Clark and Warren, who are all these other "mistaken" appointments? (Blackmun, maybe.) In contrast, the dramatic impact of the Roosevelt and Reagan appointments on the Court's orientation more closely typifies the less conspicuous changes effected by other presidents. Within two years of Nixon's resignation, for example, the Court decided: Gregg v. Georgia, 428 U.S. 153 (1976) (upholding the death penalty); Washington v. Davis, 426 U.S. 229 (1976) (requiring proof of intent to discriminate to establish an equal protection violation); Rizzo v. Goode, 423 U.S. 362 (1976) (rendering impossible all systemic challenges to police violence); Stone v. Powell, 428 U.S. 465 (1976) (excluding fourth-amendment claims from habeas corpus review); Paul v. Davis, 424 U.S. 693 (1976) (holding that

hand, it is increasingly difficult in these days of entrenched congressional incumbency, falling rates of electoral participation, slick media campaigns, and "Read my lips" sloganeering to mistake the electoral process for the authentic workings of a democracy.[207]

Of course, the democratic objection to judicial review has never really depended on a candid assessment of the actual practices of democracy.[208] To the contrary, Thayer's early statement of the case against judicial review was premised on a set of explicitly idealized assumptions about the processes of representative democracy:

> [I]n a court's revision of legislative acts, . . . the question is not merely what persons may rationally do who are such as we often see, in point of fact, in our legislative bodies, persons untaught it may be, indocile, thoughtless, reckless, incompetent—but what those other persons, competent, well-instructed, sagacious, attentive, intent only on public ends, fit to represent a self-governing people, such as our theory of government assumes to be carrying on our public affairs,—what such persons may reasonably think or do, what is the permissible view for them.[209]

But this idealization only reinforces the sense in which the countermajoritarian difficulty is not the logical and theoretical trump that it sometimes appears, but is itself a controversial normative claim about appropriate institutional relations among different governmental

defamation by police officials implicates no liberty or property interest secured by the due process clause); Imbler v. Pachtman, 424 U.S. 409 (1976) (holding that prosecutors have absolute immunity from damage actions alleging unconstitutional conduct); Mathews v. Eldridge, 424 U.S. 319 (1976) (invoking cost-benefit analysis in approving post-deprivation hearings for disability benefits terminations); Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) (requiring a showing of "scienter" to establish securities fraud under Rule 10(b)(5)); Warth v. Seldin, 422 U.S. 490 (1975) (raising the constitutional minima for standing); Milliken v. Bradley, 418 U.S. 717 (1974) (disapproving interdistrict relief for school desegregation); and Edelman v. Jordan, 415 U.S. 651 (1974) (limiting plaintiffs to "prospective" injunctive relief under the Eleventh Amendment). Of these opinions, all but two were written by Nixon appointees. *See also* Fiss, *A Life Lived Twice*, 100 YALE L.J. 1117, 1122-24 (1991) (describing the significant inroads in the Warren Court's jurisprudence made by the Burger-Rehnquist Courts).

207. *Cf.* Dahl, *supra* note 31, at 283-84 ("[N]ational elections are little more than an indication of the first preferences of a number of citizens—in the United States the number ranges between about forty and sixty percent of the adult population—for certain candidates for public office. . . . [O]n the basis of an election it is almost never possible to adduce whether a majority does or does not support one of two or more policy alternatives.").

208. *See* Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 367 (1978) ("We may assume that the preferences of voters are ultimately emotional, inarticulate, and not subject to rational defense. . . . [T]he will of the majority controls, not because it is right, but—well, because it *is* the will of the majority. This is surely an impoverished conception of democracy, but it expresses at least one ingredient of any philosophy of democracy . . . .").

209. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 149 (1893). To be sure, Thayer's more important theoretical point concerns the perverse incentive structure of a system in which those chiefly responsible for policymaking are encouraged to defer questions about the normative appropriateness of their decisions to other decision makers. *Id.* at 155-56. It is precisely this point that Robert Dahl has emphasized in his most recent reconsideration of the value of judicial review. *See* R. DAHL, *supra* note 206, at 189, 192.

agencies.[210]

This tendentious quality is revealed in a curious feature of contemporary discussions of the countermajoritarian difficulty. What begins as a problem concerning the legitimacy of judicial review in a democracy invariably and inexplicably turns into a debate about judicial method.[211] Routinely, discussions of the countermajoritarian difficulty undergo a stunningly swift metamorphosis from a question of institutional legitimacy (what justifies judicial review?), to one of institutional relations (how should the Court coordinate with the "political" branches?),[212] to one of institutional competence (what is it that courts do better than legislatures?),[213] to one about institutional role performance (has the Court

210. *Cf.* Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEXAS L. REV. 1207, 1210 (1984) ("[I]n selecting a model for judicial review, . . . the choice must be based upon substantive values, upon a political theory that examines how our government should be structured and identifies which values are so important that they must be shielded from majority rule.").

211. In Gerald Gunther's casebook, for example, this shift appears rather abruptly at page 20. *See* G. GUNTHER, *supra* note 35, at 20 (noting that questions of constitutional interpretation and the proper degree of deference to legislative judgments are "[c]losely related to the debate over the legitimacy of judicial review"); *cf.* Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 STAN. L. REV. 929, 971-72 (1988) (tracing the infinite regress in constitutional theorizing).

212. Thus, the doctrinal point of Thayer's article is that a court should not hold a statute unconstitutional unless its invalidity is clear beyond a reasonable doubt. *See* Thayer, *supra* note 209, at 138-52. Similarly, one can readily understand the various positions of Ackerman, Bickel, and Ely as first and foremost a matter of institutional relations in a properly conceived democratic system. For Ackerman, the Court acts as an intertemporal mediator between the vicissitudes of normal, interest-driven politics and the more authoritative, democratic contributions of politically mobilized constitutional moments. *See* Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 463 (1989); Ackerman, *supra* note 200, at 1049-51. For Bickel, the "passive virtues" act as a mediating device or safety valve as the Court tries to introduce principle into the ongoing politics of legislative enactments. *See* A. BICKEL, *supra* note 199, at 111-98. And, for Ely, the role of judicial review is essentially facilitative of ordinary, democratic politics. *See* J. ELY, *supra* note 30, at 73-104.

213. This is immediately apparent in Bickel, who justifies judicial review in terms of the differential capacity of judges to engage with matters of principle:

> [C]ourts have certain capacities for dealing with matters of principle that legislatures and executives do not possess. Judges have, or should have, the leisure, the training, and the insulation to follow the ways of the scholar in pursuing the ends of government. This is crucial in sorting out the enduring values of a society, and it is not something that institutions can do well occasionally, while operating for the most part with a different set of gears. . . .
>
> Their insulation and the marvelous mystery of time give courts the capacity to appeal to men's better natures, to call forth their aspirations, which may have been forgotten in the moment's hue and cry.

A. BICKEL, *supra* note 199, at 25-26. On this point, Bickel's position is hardly different from that of Jesse Choper, Owen Fiss, or Herbert Wechsler. *See* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 138, 168 (1980) ("The Court's formidable and delicate task is to consult those complex sources of historic and contemporary values that are the ingredients of sound constitutional interpretation, as well as its wisdom and conscience—and then to decide."); Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 12-13 (1979) (noting that the judicial office "is structured by both ideological and institutional factors that enable and perhaps even force the judge to be objective . . . . Two aspects of the judicial office give it this special cast: one is the judge's obligation to participate in a dialogue, and the second is his indepen-

acted in a properly constrained manner?).[214] Yet, no matter how one answers these questions—and no matter which conventional justification of or limitation on judicial review one finds congenial—the central problematic remains: an unelected judiciary is empowered to overrule the policy decisions of the "representatives of the actual people of the here and now."[215] Imagine a parallel conversation among economists. Someone identifies that the regulation of some area of the economy is inconsistent with what we know about the functioning of markets. Everyone nods sagaciously and responds (in chorus): "Yes, yes. Definitely. What we should do is regulate it in [my favorite] way . . . ." In much the same way, Bickel identifies a problem at the root of the practice and everyone—himself included—immediately begins to talk about how the branches should yield their fruit.

If the transposition of the issue is in one sense startling, it is in another sense utterly predictable. Much too much rides on the practice of judicial review, and almost no one in the legal academy (and I do not exempt myself) is ready to give it up.[216] Liberals want more activist protection of minorities and civil liberties; conservatives want more protection of private property; and everyone wants a judicial audience to whom they can address their professional prescriptions.[217] "[I]t is no wonder that a great deal of effort has gone into the enterprise of proving that, even if the Court consistently defends minorities against majorities,

dence."); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15-16 (1959) ("[T]he main constituent of the judicial process is that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is acheived . . . ." "No legislator or executive is obligated by the nature of its function to support its choice of values by the type of reasoned explanation that . . . is intrinsic to judicial action . . . ."). And, in an important sense, each of these writers finds resonance in the earlier comments of John Stuart Mill. *See* J. MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 242-43 (C. Shields ed. 1958) (3d ed. 1865) ("[C]omplete reliance has been felt, not only on the intellectual pre-eminence of the judges composing that exalted tribunal, but on their entire superiority over either private or sectional partialities."). Even Ely echoes this theme in justifying his conception of a representation-reenforcing approach to judicial review. J. ELY, *supra* note 30, at 88 ("[S]uch an approach . . . involves tasks that courts, as experts on process and (more important) as political outsiders, can sensibly claim to be better qualified and situated to perform than political officials.").

214. Thus, the chief debate centers not on whether we should have judicial review, but rather over the appropriate methodologies for the Court to use: Should the Court be interpretivist or non-interpretivist? Originalist or organicist? Etc., etc. *See, e.g.*, Chemerinsky, *supra* note 210, at 1207-09 (describing the debate between interpretivists and non-interpretivists).

215. A. BICKEL, *supra* note 199, at 17.

216. "[J]udicial review greatly increases the power of certain lawyers, and indirectly of the legal profession, over the shaping of the American constitutional and political system and its public policies. Thus the power of judicial review nicely serves the corporate interests of the legal profession." R. DAHL, *supra* note 206, at 358 n.5.

217. *But see* Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990) (gently questioning the convention that authorizes the academy to make normative prescriptions without checking to see whether anyone is listening).

nonetheless it is a thoroughly 'democratic' institution."[218]

And, yet, it is not my point that the character of the debate is determined solely or even primarily by professional self-interest. Rather, something else lurks unexamined in the background of these discussions of the countermajoritarian difficulty that frames and shapes the terms of the debate. *That something else is the practice of judicial review itself.* Imagine the article that concluded: "*Marbury* is wrong as a matter of legal and political theory. Judicial review is undemocratic. It should stop." It is unthinkable. No one—not Thayer, nor Frankfurter, nor Bickel, nor Bork—even comes remotely close to such a conclusion.[219] It is unthinkable because, for us, judicial review is itself an institution so firmly established in our political, social, and professional consciousness that its continued existence is utterly unassailable: "Inertia is a guiding principle in politics as well as physics, and the very existence of our institutions—the persuasive testimony of history—itself serves to produce a significant degree of acceptance."[220] As a consequence, the only questions that are conceivable for us concern the forms judicial review might take and the limits it should observe.

In other words, discussions of the countermajoritarian difficulty and the debates over the proper parameters for judicial review are foreground disputes that are actively shaped by the range of background assumptions against which they necessarily take place. The modern debate over judicial review transpires against the immediate background of the *Lochner* era and its repudiation in favor of the New Deal. But the debate also takes place against a deeper, more entrenched historical background out of which the practice of judicial review emerged as a quintessentially American contribution to jurisprudential and political thought.[221] The

218. Dahl, *supra* note 31, at 283.

219. *See* Chemerinsky, *supra* note 210, at 1209 ("None of the critics of the Supreme Court's activism suggests that all judicial review should be eliminated. . . . [E]ven judicial review based on the intent of the Framers is, by the critics' criteria, undemocratic.").

220. Deutsch, *supra* note 205, at 216; *see also* A. BICKEL, *supra* note 199, at 14 ("So long have [*Marbury v. Madison* and *Martin v. Hunter's Lessee*] been among the realities of our national existence . . . . It is late for radical changes."); L. TRIBE, *supra* note 81, § 1-9, at 15 (stating that his treatise proceeds "on the premise of a relatively large judicial role more because it has become an historical given than because any ineluctable logic would have made an alternative course of history unthinkable or patently unwise."). At the same time, the historical contingency of the practice does not in any way impeach its propriety.

> In the absence of a universally best solution [to the problem of minority rights], specific solutions need to be adapted to the historical conditions and experiences, political culture, and concrete political institutions of a particular country. Quasi guardianship in the form of a supreme court with the power of judicial review is a solution that Americans have accepted as desirable.

R. DAHL, *supra* note 206, at 192.

221. S. STIMSON, THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL 6 (1990) ("[T]hree problematics of central concern in American

paradox which makes this issue so intractable is that the background assumption—*i.e.*, the cultural and cognitive entrenchment of the historical practice of judicial review—is also the subject of the foreground dispute.

V. Living with the Upside/Down

The countermajoritarian difficulty begins to pale once we recognize the courts' dependence on the cultural understandings that enable meaning. The conventional concern is that judges will impose their values in contravention of the policy choices of democratically elected legislatures. But the mutual entailment of the epistemic and the political means that judges cannot even think without implicating the dominant normative assumptions that shape their society and reproduce their political and cultural context. We have seen how the unreflective invocation of basic social conceptions—like the concept of a park, the nature of religion, and the idea of land as a resource—can already mold doctrinal outcomes in ways that disfavor and disadvantage minority claims. Under these circumstances, judicial review is not quite the champion of the oppressed—nor the threat to democratic values—that we sometimes suppose.

Have we solved the countermajoritarian difficulty? Hardly, and for two reasons. First, the normatively loaded conceptions that frame and configure legal thinking in terms of the dominant understandings of the culture are not the equivalent of mechanical formulae capable of determining a single "right answer." Because those conceptions must be of the sort that enable action and thought under dynamic social conditions, they necessarily entail only normative *orientations* and not determinate procedures capable of imposing specific outcomes.[222] Second, *dominant*

revolutionary considerations of law—legal certainty, judicial independence, and judicial space—prompted juries to take the final judgment of law away from justices in colonial America. And these same three problematics can be seen to feature in the post-revolutionary decision by framers of the Constitution to move this power of final judgment into the forum of a newly conceived court, in the form of judicial review."); *see also* 1 J. GOEBEL, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 73-142 (1971) (discussing historical antecedents of judicial review in colonial and state court practices); Thayer, *supra* note 209, at 130-34 (locating the origins of judicial review in the constitutive legal power of colonial charters and describing some of the state struggles over judicial power in the first quarter of the nineteenth century).

Early nineteenth-century courts justified judicial review as a majoritarian constraint on elected representatives. Nelson, *supra* note 29, at 1170-72. Concern over the anti-democratic quality of judicial review became acute during the Jacksonian age. *Id.* at 1180. But the practice of judicial review was already entrenched by that time; rather than abandon an established practice, the courts articulated a rationale that justified the practice as necessary to protect minorities against the tyranny of the majority. *Id.* at 1181-84.

222. For a more complete explanation, see Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 963, 992-97 (1991); *see also* Winter, *supra* note 3, at 1490-94 (explaining the role of sedimentation in enabling some and disabling other developments in constitutional law).

conceptions are not the same thing as *majority decisions*. Indeed, they can be antithetical to the particular results of majority deliberations—as *Lochner* itself attests. For both these reasons, there is no necessary agreement between legislative determinations and judicial decision making. To be sure, both legislative and judicial decisions spring from the same social and cultural sources. And, as a consequence, they are likely to converge—or, at least, run parallel—in most cases. But it remains perfectly possible to have the worst of both worlds: judicial review (or interpretation) that overturns (or undermines) democratic decision making, but that nevertheless fails to transcend the dominant normative assumptions implicit in our background conceptions.

These observations suggest, however, that the conventional focus on the countermajoritarian difficulty misses the more significant difficulties of both democracy *and* constitutionalism. Because most of our attention is on the institutional conflicts that occupy the foreground, we tend not to notice the more powerful normative processes at work in the background. While we worry about overt judicial fidelity to majoritarian decision making, we fail to examine the constitutive role of our sedimented cultural conceptions in both the judicial and legislative processes. Because legislators too can act only in terms of the cultural understandings that enable meaning, an important part of any statute "is not made by the legislator, but grows and develops as an implication of complex practices and attitudes which may themselves be in a state of development."[223] By the same token, when, as in *Hague*, judges engage in "innovative" interpretations of constitutional rights, they may only be realizing those same developments in social practices and attitudes as they affect our reflexive understanding of basic social conceptions.[224]

This means, however, that neither the legislative nor the judicial processes fit neatly into the foreground categories to which they are ordinarily assigned. The identification of democratic self-government with decision making by majority vote is problematic. On one hand, both the electoral and legislative processes will already be shaped by the dominant normative assumptions immanent in sedimented social conceptions—assumptions that, in any given case, can ensure self-defeat rather than enable self-direction. On the other hand, the outcomes of deliberative processes will not necessarily bear their intended meanings, but will evolve along with changes in the underlying social practices. Similarly,

223. L. FULLER, *supra* note 23, at 59.

224. *See* Winter, *supra* note 3, at 1505-22 (discussing and elaborating "trimorphic constitutionalism," which includes a cultural, socially-situated mode of constitutional lawmaking that originates outside the formal processes of legislation, adjudication, and constitutional emendation).

the assumption that the Court can be relied on to enforce constitutional constraints neglects the significance of the unarticulated normative assumptions that shape and produce legal outcomes with distinctively majoritarian overtones.

It is only something like a conceptual gestalt switch that can bring the importance of the background adequately into focus. An upside/down view of the countermajoritarian difficulty is necessary before we can even begin meaningfully to think about the field.