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Introduction: Law and Political Culture

Scholars in several disciplines—including history, political science, literature, and anthropology—have in recent years developed the interpretation of political culture as an effective tool for the study of legal rules and legal meaning. This interdisciplinary work in the humanities comes at a time when the legal academy has once again begun to look outside itself in a fresh effort to enrich its own understanding of legal rules and the role of law in society. The interest in classical republicanism is one example of the legal academy's desire to be informed from without. The law and literature movement is another similar endeavor, however much its emphasis is on technique rather than content.

The interpretation of political culture, however, is somewhat broader, suggesting that the republican vision may be only one of many and that the technical insights of law and literature represent but one facet of interpretation. More generally, the interpretive study of political culture attempts to understand how the interpretation of the legal system must be located within a legal culture (a culture which may legitimate the actions of the actors within it and even create icons for the society generally). The legal culture is in turn located within a political culture that gives meaning to and draws meaning from the legal culture. The articles and book reviews collected in this special issue of *The University of Chicago Law Review* illustrate how individual scholars from various disciplines have applied their interpretive techniques to the interplay of law and political culture.

The great variety displayed by the pieces published in this issue alone demonstrates that the interpretive study of political culture encompasses differing viewpoints and subjects. The bibliography that follows the articles and book reviews includes references to works that expand still further the scope of the field. Both the breadth of the subject matter discussed and the vitality of theoretical debate about interpretation and culture make it difficult to specify precisely the field's boundaries and constitutive principles.¹ Nonetheless, this essay attempts to supply at least a provisional definition of the interpretation of political culture and to isolate the two significant problems, those of political legitimacy and political identity, that make this interpretive discipline of direct interest to legal academics.

The interpretation of political culture is usefully identified by three features. First, the interpretive study of political culture involves an expansion, particularly in comparison to more traditional modes of study in law and political science, of the materials considered pertinent to understanding the meaning and content of political events. Thus the interpreter of American political culture will look to more than publicly articulated legal and policy reasons for a decision and to more than social, economic, and international circumstances. The interpreter will also bring within the scope of inquiry dominant images in popular literature and art;² oft-repeated or otherwise successful metaphors and figurative language;³ symbolically significant intermediary institutions such as churches, corporations, schools, universities, and families;⁴ the accepted prac-

¹ For one important disagreement among interpretive scholars about the proper understanding of the problems of ideology, causation, and language, see John Patrick Diggins, *The Lost Soul of American Politics* 347-65 (1984) (criticizing schools of thought identified with Bernard Bailyn, J.G.A. Pocock, and Clifford Geertz).

² For example, Robert Ferguson's discussion of Oliver Wendell Holmes in this issue includes an examination of a painting of Holmes prominently displayed at the Harvard Law School. Robert Ferguson, *Holmes and the Judicial Figure*, 55 *U.Chi.L.Rev.* 506 (1988).

Michael Rogin, in several studies of contemporary politics, has analyzed and displayed the broader political significance of popular films. Michael Paul Rogin, *Ronald Reagan, the Movie and Other Episodes in Political Demonology* 1-43, 190-271 (1987). Rogin's book is reviewed in this issue. See Jeffrey K. Tulis, *The Demon at the Center*, 55 *U.Chi.L.Rev.* 548 (1988).

³ Anne Norton explains that metaphors "reveal the informal, nonquantifiable content of nationality. They provide traits in which nationals can recognize their commonality, symbols and gestures in which they can express it." Anne Norton, *Alternative Americas* 11 (1986).

⁴ See, e.g., Sacvan Bercovitch, *The American Jeremiad* (1978) (examining the rhetoric of Puritan sermons in order to interpret the American mind more generally). See also Sacvan Bercovitch, *The Puritan Origins of the American Self* ix (1975) (proposing to study the Puritan tradition in order to explicate "our obsessive concern with the meaning of

tices and doctrines accompanying government institutions; stories of political conflict that come to have significance beyond the particular conflict in question;⁵ liminal—that is, “marginal” or “peripheral”—groups in society;⁶ and heroes and political leaders.⁷

Second, the interpretive study of political culture involves a self-conscious reformulation of the scholar's own categories for description of political events and matters. Interpretive scholars attend to the problems of political language—including, by implication, the political aspects of their own language—with great sensitivity. They regard political language as at least partly symbolic, a belief that entails comprehending the content of political symbols while simultaneously understanding how that content is changed by its use as a symbol.⁸ More fundamentally, the interpre-

America”).

For one comment on the difficulties these intermediary institutions pose for liberal politics and liberal political theory, see Lawrence Rosen, *Individual, Community, and the Law: A Review Essay*, 55 *U.Chi.L.Rev.* 571, 577, 583 (1988).

⁵ For example, see generally Bernard Bailyn, *The Ideological Origins of the American Revolution* (1955) (discussing the significance of the English revolution in the United States).

⁶ Norton borrows the idea of liminality from anthropologist Victor Turner. According to Norton, the idea of liminality

corresponds roughly to the terms “marginal” and “peripheral,” designating an individual or (and more often) a group, whose inclusion in the community is ambiguous. Such groups are subordinated within, or excluded from, economic, social and political structures. Their antistructural character is revealed in the traits ascribed to them . . .

When a group identifies itself, through metaphor, with another group, or individual whose liminality is recognized, it expresses a subjective perception of an analogous subordination in structure.

Norton, *Alternative Americas* at 12 (cited in note 3). For Turner's account, see Victor W. Turner, *The Ritual Process: Structure and Anti-Structure* 94-96 (1969).

⁷ Robert Ferguson in this issue comments upon the character of American legalism by studying the judicial persona of Oliver Wendell Holmes. Ferguson, 55 *U.Chi.L.Rev.* 506 (cited in note 2). In his book, *Law and Letters in American Culture*, Ferguson argues that Thomas Jefferson “exemplifies the original form and direction of the legal mind in America,” and that Daniel Webster “illustrates the changing nature of that mind in the first half of the nineteenth century.” Robert A. Ferguson, *Law and Letters in American Culture* 205 (1984).

Anne Norton treats John Randolph as significant because he represented certain ideal types in Southern culture. Similarly, she treats Herman Melville, Abraham Lincoln, and Walt Whitman as agents of particular themes in post-Civil War thought. Norton, *Alternative Americas* at 176-199, 277-329 (cited in note 3). J. David Greenstone, in an analysis that examines the same period as does Norton but reaches different conclusions, takes Lincoln, Stephen Douglas, and Daniel Webster as exemplary of conflicting interpretive moments within American liberalism. J. David Greenstone, *Political Culture and American Political Development: Liberty, Union, and the Liberal Bipolarity*, 1 *Stud.in Am.Pol.Dev.* 1, 28-49 (1986).

⁸ For examples of the commitment to regard political language as inherently symbolic, see Norton, *Alternative Americas* at 8-10 (cited in note 3); Greenstone, 1 *Stud.in Am.Pol.Dev.* at 1 (cited in note 7).

tive scholar doubts the existence of any perfect or universal language for comprehending political experience. A culture's forms of understanding are, by consequence, not conceptual confusions to be corrected by the interpreter's own theory, but rather alternative conceptual orderings of the world that may reveal shortcomings or blind spots in the interpreter's own categories.

One consequence of this second feature of the interpretation of political culture is to create certain links between that study and the study of rhetoric. Interpreters of political culture attend to problems of rhetoric both within their own work and within the cultures they study. If there exist no perfect or fundamental categories, then a scholar's defense of any particular philosophically or politically significant set of categories necessarily rests at least in part on persuasion rather than on pure demonstration.⁹ Likewise, the justification of a set of cultural categories within the politics of a culture rests on rhetoric rather than demonstration.¹⁰

While this rhetorical aspect of interpretation is fundamental to its practice, neither that aspect nor the self-conscious reformulation of categories creates a difference in kind between interpretation and more conventional modes of academic inquiry, such as versions of science, theory, and doctrine. Indeed, these features exist at times even in, for example, theoretical physics, a field regarded by many as a paradigmatically mathematical (and so demonstrative rather than persuasive) science. Niels Bohr's formulation of quantum mechanics effectively and self-consciously reformulated the category of "particle," once intuitively understandable as something like a tiny, unstructured marble, to make it one possible, observer-dependent manifestation of a set of quantum states.¹¹ John A. Wheeler's aphoristic claim that after quantum mechanics "[n]o elementary phenomenon is a phenomenon until it is a registered (observed) phenomenon" illustrates neatly both the rhetorical aspect of physics and the self-conscious refor-

For a warning that the modern understanding of thought as symbolic itself threatens to distort our comprehension of thinkers who did *not* regard thought in such a fashion, see Diggins, *The Lost Soul of American Politics* at 364-65 (cited in note 1). Diggins calls attention to the Founders' own, non-relativist understanding of "the elasticity of political ideas and their contextual fluctuations." *Id.* at 362.

⁹ This problem and its relation to the modern interest in interpretation are the subject of Stanley Rosen's recent book, *Hermeneutics as Politics* (1987).

¹⁰ Obviously, the distinction (drawn in the text accompanying this note) between rhetoric in scholarship and rhetoric in culture is highly artificial, for it begs entirely the question of the relationship between scholarship and the scholar's culture.

¹¹ See Erik Rüdinger, gen. ed., 6 Neils Bohr: *Collected Works* 75-78, 91-92, 236-253 (1985).

mulation of categories within physics.¹² More generally, the self-conscious reformulation of categories and the prominence of rhetoric will occur in any field during those periods Thomas Kuhn describes as "extraordinary science," times where paradigm shifts take place.¹³ These features thus distinguish the practice of interpretation from other modes of inquiry only by their relative constancy within the practice of interpretation.

Third, the interpretive study of political culture treats thought as an irreducible component of political activity and political institutions. It is, in other words, not possible simply to reduce thought to a manifestation of social, economic, or biological factors, or to describe the political activity of a nation without reference to the conceptual forms used by its inhabitants. Whether or not this impossibility is the consequence of a real irreducibility of thought, or whether it is a practical manifestation of the current absence of any theory adequate to reduce thought to other factors, is not of essential importance to the project of the interpretive scholar. This third feature of the interpretive study of political culture undergirds the first two features, for it allows, justifies, and indeed, requires the interpreter's recourse to non-traditional manifestations of thought and helps to explain the interpreter's commitment to preserve a culture's ideational categories.

Insofar as the interpretation of political culture is already familiar to legal academics, it is for the most part so through the work of Clifford Geertz, who wrote the book that gave the practice its name.¹⁴ Geertz himself has articulated some general and influential definitions of the field. He has called the interpretation of culture "an elaborate venture in . . . 'thick description,'" the kind of description which sorts out structures of signification and so is capable of, for example, identifying a forward arm movement as an attempt to regain balance or the prelude to a punch or a greeting or an expression of political solidarity or the closing of a contract or a parody of the closing of a contract.¹⁵

¹² John Archibald Wheeler, *The Computer and the Universe*, 21 *Int.J.Theor.Physics* 557, 560 (1982). See also John Archibald Wheeler, *Beyond the Black Hole*, in Harry Woolf, ed., *Some Strangeness in the Proportion: A Centennial Symposium to Celebrate the Achievements of Albert Einstein* 341, 356-359 (1980). Wheeler coauthored with Bohr the seminal paper on nuclear fission, and went on to become one of America's greatest teachers of physics.

¹³ Thomas S. Kuhn, *The Structure of Scientific Revolutions* 82-85 (2d ed. 1970).

¹⁴ Clifford Geertz, *The Interpretation of Cultures* (1973).

¹⁵ Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, in *id.* at 6. The last four examples all interpret the arm movement as the beginning of, or an invitation into, a handshake. The example is modeled upon Geertz's own in *id.* at 5-8.

This thick description takes as its study "thought," conceived not as psychological or mystical processes but rather as the shared social phenomena of understanding: "thought consists of the construction and manipulation of symbol systems which are employed as models of other systems, physical, organic, social, psychological, and so forth, in such a way that the structure of these other systems—and, in the favorable case, how they may therefore be expected to behave—is, as we say, 'understood.'"¹⁶ Thick description of these symbol systems depends upon rendering comprehensible the modes of understanding of those who use and inhabit those systems, rather than reducing those systems into our own.

The interpretive study of political culture thus may be defined concisely as an exercise in the "thick description" of political activity that is recognizable by (1) recourse to ideational materials often ignored by other forms of study, (2) a self-conscious attention to the reformulation of the scholar's own categories of understanding, and (3) a commitment to treat thought as an irreducible element of politics. As this description makes clear, the interpretation of political culture is a form of the study of public opinion and the relation between public opinion and politics, albeit a form that locates public opinion in shared conceptual structures and paradigms, rather than in discrete articulations of policy preferences.

Despite the distinctive features of the interpretation of political culture, it remains important to avoid exaggerating the difference between interpretation on the one hand and more conventional forms of empirical and theoretical research on the other. There is no good reason for interpreters of political culture to exclude familiar empirical data, for example, public opinion polls, from the corpus of materials they interpret.¹⁷ And even the most mathematical fields, such as theoretical physics, will at times manifest the self-conscious reformulation of categories characteristic of interpretive practice. The difference between these modes of inquiry and interpretation is a difference in attitude and in emphasis, not a sharp difference in kind. That difference arises in part

Geertz in turn borrows from Gilbert Ryle, *Thinking and Reflecting*, and Gilbert Ryle, *The Thinking of Thoughts*, both in Gilbert Ryle, *2 Collected Papers* 474-83 (1971).

¹⁶ Geertz, *Ideology as a Cultural System*, in Geertz, *The Interpretation of Cultures* at 214.

¹⁷ For example, Jeffrey K. Tulis explains the passage of the Hepburn Act, authorizing the Interstate Commerce Commission to regulate railroads and railroad rates, both by reference to such familiar sources as the Congressional debates and by an exegesis of the importance of national railroads as a political symbol. Jeffrey K. Tulis, *The Rhetorical Presidency* 97-116 (1987).

because interpretation of political culture aims not only to describe where the public stands on some issue but also to specify the dynamic ideational processes that generate particular stands.

Both the name and the principles of the interpretation of political culture may remind some legal thinkers of the recent scholarship on "Law and Literature" and "Law and Literary Criticism."¹⁸ These apparent similarities mask deep and important differences. First, and most importantly, the "Law and Literature" and "Law and Literary Criticism" movements have regarded literary interpretation as important to law for the way it illustrates the process of legal reasoning,¹⁹ while, as the pieces in this issue exemplify, the interpretation of political culture is important to legal scholarship for the substantive description of American politics and the American law it produces.²⁰ Second, while the "Law and Literature" and the "Law and Literary Criticism" movements frequently make the dependence of law upon written documents the basis of their arguments, the interpretation of political culture directs the attention of legal scholars beyond legal documents to culture more generally.

Yet to stress the differences between the interpretation of political culture and the scholarship on "Law and Literature" and "Law and Literary Criticism" is not to say the fields are entirely distinct: indeed, the interpretation of political culture may at times draw on aspects of both movements. A comparison of, on the one hand, Anne Norton's use of *Hamlet* to explicate the principles and paradigms of Southern politics and, on the other, Ronald Dwor-

¹⁸ See, e.g., the University of Texas symposium on law and literature, 60 *Tex.L.Rev.* 373 (1982), and the University of Southern California symposium on law and interpretation, 58 *S.Cal.L.Rev.* 1 (1985).

¹⁹ See Ronald Dworkin, *Law as Interpretation*, 60 *Tex.L.Rev.* 527 (1982); Owen M. Fiss, *Objectivity and Interpretation*, 34 *Stan.L.Rev.* 739 (1982); Paul Brest, *Interpretation and Interest*, 34 *Stan.L.Rev.* 765 (1982); Sanford Levinson, *Law as Literature*, 60 *Tex.L.Rev.* 373 (1982); and Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 *Tex.L.Rev.* 551 (1982), all agreeing that interpretation is important to law for what it has to say about the nature of legal reasoning, although disagreeing radically about the implications of interpretive theory for legal theory.

²⁰ Of course, the law and literature movement is sufficiently diverse to encompass certain projects that have substantive aims comparable to works in law and political culture. Indeed, some works easily fit aspects of both law and literature as well as law and political culture, treating legal texts as elements of the larger culture. Notable examples include James Boyd White's study of the way judicial opinions create a shared language, Richard Posner's analysis of the rhetoric of judicial opinions, and Robert Ferguson's discussion of the place of legal oratory in American culture. See James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (1984); Richard A. Posner, *Law and Literature: A Relation Reargued*, 72 *Va.L.Rev.* 1351 (1986); and Ferguson, *Law and Letters in American Culture* (cited in note 7).

kin's use of the same play to elucidate the structure of legal reasoning, illustrates at once both the way in which the interpretation of political culture may draw upon "Law and Literature" and also the way in which the interpretation of political culture stresses substantive description.²¹

The defining features of the interpretation of political culture manifest themselves in an attention to two fundamental constituents of politics, legitimacy and identity. In the act of discovering buried or neglected facets of legal and political culture, thereby reinterpreting contemporary culture, those who engage in the inquiry invigorate our visions of the proper polity. Thus, the interpretation of the interplay of law and political culture is the study, as well as the practice, of a form of legitimation.

The political culture sets both the boundaries and the direction of legal argument,²² creating a forum for such discourse but insisting that the content of the discourse take certain forms. To the extent that a controversial argument may be embodied in a legitimate form, the argument itself has begun to achieve a certain legitimacy. The capacity to manipulate the forms of legal argument, to render palatable otherwise distasteful notions, is at the heart of legitimation. How far the legal system will go in liberating or in repressing individual and collective goals depends on its perceived legitimate role within the general political culture. The law may recognize as legitimate an individual's property in her own labor; the law may regard any collective activity not sanctioned by the state as illegitimate, hence punishable as a conspiracy. Thus, the law's power to sanction, quash, or deter individual or collective action is the power to help determine an act's legitimacy, at least for that moment.

More particularly, the relationship between law and political culture in America is curiously symbiotic. While our political culture defines the scope of interpretations considered legally legiti-

²¹ Norton, *Alternative Americas* at 196-97, 271 (cited in note 3); Ronald Dworkin, *Law as Interpretation*, 60 *Tex.L.Rev.* at 530-531 (cited in note 19).

Works often considered representative of law and literature may also use literature to illuminate substantive themes in the law or in legal thought. See the exchange between Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 *Harv.L.Rev.* 384 (1985), and Posner, 72 *Va.L.Rev.* 1351 (cited in note 20).

²² Anne Norton, *Transubstantiation: The Dialectic of Constitutional Authority*, 55 *U.Chi.L.Rev.* 458 (1988); Morton Horwitz, *The Warren Court: Rediscovering the Link Between Law and Culture*, 55 *U.Chi.L.Rev.* 450 (1988); J. David Greenstone, *Against Simplicity: The Cultural Dimensions of the Constitution*, 55 *U.Chi.L.Rev.* 428 (1988).

mate,²³ the argumentative and interpretive forms the legal system provides are so elastic that their creative use can powerfully alter the political landscape.²⁴ The examples are numerous and pervade American history. Marshall's artful evocation in *Marbury v. Madison*²⁵ of the role of a judiciary has helped to give us a political system in which the courts have developed an institutional autonomy within government. That autonomy has been transformed, since Marshall, into a putative neutrality within politics. In our own times, the law's definition of rights and injuries, from property rights to actions cognizable as torts, helps determine the contours of debate on any given issue. Indeed, the very existence of a culture of rights indicates how pervasive has been law's influence on political culture.

Longstanding interpretations of some legal forms, especially the Constitution and the legal and political traditions it embodies, have even so pervaded the everyday claims of Americans that they can contain a political force far beyond their actual legal force. When an individual asserts the right to free speech, for example, the assertion is usually not a legal claim against the government. It is usually nothing more than a claim to be able to speak one's mind free from the interference of others. This claim, however, is legitimated not so much by the content of the speech as by the prohibition on governmental censorship embodied in the first amendment, which has been transformed into a claim that no one may authoritatively hush another. The claim is, nonetheless, phrased in the terms of a right, that is, a claim with legal force. In that sense a cultural tradition, one with decidedly indistinct historical roots and a controversial philosophical pedigree, has developed, at least in part, because it is constitutionally ensconced.

Law has constituted itself with the claim that it is a relatively autonomous element of the culture; law claims an independent and creative power within political culture. It can both constrain and

²³ The classic work on the subject remains Louis Hartz, *The Liberal Tradition in America* (1955). For an extended discussion of that book relating Hartz to many of the themes discussed in this issue, see Greenstone, 1 *Stud. in Am. Pol. Dev.* 1 (cited in note 7).

²⁴ For example, Robert Ferguson discusses how American legal orators, and Daniel Webster in particular, reconstituted the legal idea of union in a way that shaped nineteenth century politics. Ferguson's own study of Webster's practice effects a second remaking of the concept, conjoining poetic and political meanings of union. Ferguson, *Law and Letters in American Culture* at 59-84 (cited in note 7). See also Jack Rakove's treatment of Madison's understanding of Ellsworth's image of union, Jack Rakove, *The Madisonian Moment*, 55 *U. Chi. L. Rev.* 473, 499 (1988).

²⁵ 5 U.S. 137 (1803).

conserve the political culture;²⁶ it may also legitimate controversial and minority ideas by clothing them in legal garb. It can do so because law has its own pattern of development and it uses our language in its own way. Its autonomy, and its legitimacy, stem from its ability to capture the essential—and not so essential—elements of the political culture in that pattern and language. The legal system, in short, domesticates political norms. The legal system, however, can also bind the culture. A particular interpretation of constitutional norms embodied in a court decision may, for example, help foreclose the culture in general from considering alternative interpretations. The current debate within the academy generally, and the law schools in particular, over the meaning of republicanism within American culture, for example, has reopened a political vision that had been given up for nearly two centuries, in part because non-republican legal interpretations became entrenched.²⁷

Only the extremely naive can argue that a contemporary republicanism must be a political and legal vision of our own creation. If it were only such a vision it would hardly have to bother with the name republican or the visions of what constitutes a republic embodied in the thought of individuals from Plato to Madison.²⁸ The content of the thought, and the contexts in which it was developed, are more than a pedigree legitimating, through historical authority, political ideals for our consideration. Rather, the embodiment of republican ideals in our Constitution and lesser laws requires us to interpret the language used in the documents containing those legal rules. The interplay between the documents and the interpreter helps constitute the identity of the interpreter and the community to which the interpreter belongs. Historians are undoubtedly correct in stressing the contextual limits imposed on the interpretation of the language in a document at any given moment. But language's very plasticity—its inability to capture completely a clear thought, much less an inchoate or aspirational concept—leaves us free, indeed encourages us and further, ought to encourage us self-consciously to engage in an interpretation that captures the aspirations embodied in the language.

²⁶ Eugene O. Genovese, *Roll, Jordan, Roll* 25-49 (1972).

²⁷ See Horwitz, 55 *U.Chi.L.Rev.* 450, 454 (cited in note 22).

²⁸ For disparate views on the possibilities for a modern republicanism in American law, see Horwitz, 55 *U.Chi.L.Rev.* 450; John Patrick Diggins, *Class, Classical, and Consensus Views of the Constitution*, 55 *U.Chi.L.Rev.* 555 (1988); Greenstone, 55 *U.Chi.L.Rev.* 428 (cited in note 22).

Such an interplay is inevitable because we think in language systems.²⁹ For that reason, while law uses our language, it also remakes the language, because it embodies at once aspirations and the limits of the moment. At a later moment, the aspirations may be differently, more fully, realizable, and the language takes on a new meaning. The identity of the community captured by the language will have changed, though the words remain the same. In that sense the interpretation of the culture of republicanism, for example, can inform our contemporary political culture, can help us realize our deeper aspirations captured in the legal forms that constitute our political system.

While the interpretation of law is an everyday process, certain points in history can crystallize the identity of a community that is embodied in language. The adoption of the Constitution itself signaled the beginning of the end of the republican vision and gave America the legal language on which to more fully realize a commercial republic.³⁰ But, the Constitution was less clear on other matters, remaining susceptible to contradictory interpretations that necessarily awaited resolution at later moments. For nearly seventy-five years, for example, American constitutional politics held in tension the competing languages that divided North from South and structured conflict over decisive political issues. The Civil War was, in part, fought over which language best held the identity of the American community.³¹ Of course, such tensions have only once required resolution in war. At other crucial moments, artful interpretation has given us a contingent resolution of the tensions.

The risk of defining the interplay of political culture and law in this symbiotic manner, however, is that it sounds tautologous; that which exists defines that which is legitimate. If the political, and legal, worlds were self-defining, then such an accusation would have very powerful force. But identity is not self-defining. It partakes of a reflection, a chase after certain defining ideals combined with moments when the ideals themselves are scrutinized, reinvigorated, redefined, or discarded.³² The definition of political identity is thus a product of the contingencies of the moment and more

²⁹ J.G.A. Pocock, *Politics, Language and Time* 15 (1973).

³⁰ See generally Gordon S. Wood, *The Creation of the American Republic* (1969).

³¹ See generally Anne Norton, *Alternative Americas* (cited in note 3).

³² This continuing reflection is of immediate relevance to constitutional interpretation because of the Constitution's assertion that it is the result of "the People's" authorship. See generally, Norton, 55 *U.Ch.L.Rev.* 458 (cited in note 22).

persistent elements of the culture.

Moments of political crisis not only test and reform standards of legitimacy but also may lay bare the character and content of national identity. A crisis may reveal not only a deep consensus within political culture but also the existence of fundamental tensions among the aspirations of a culture. The Civil War provides a paradigmatic example. J. David Greenstone, for example, examines the thought of Abraham Lincoln, Stephen Douglas, and Daniel Webster to show how the politics in the American North in the 1850s revealed that American culture contained "fundamental differences of meaning and description, of knowledge, of ethics, and the human personality" resulting from "fundamentally different interpretations of unavoidably ambiguous rules."³³

Yet while periodic occasions of political crisis may both serve to crystallize the national identity at the moment of crisis and also help to reveal that identity to later interpreters, they do not simply resolve the questions asked by the interpretive scholar. Indeed, in one sense they may deepen them: the political resolution to a period of crisis may result in a reformation of identity that hides what were once crucial aspects of or tensions within an earlier identity.³⁴ Moreover, recognizing a true crisis is itself a difficult problem for the interpreter of political culture. Legal scholarship today, for example, sometimes constitutes itself within the mode of crisis;³⁵ does that rhetoric signify a true crisis in either legal thought or American politics?³⁶ Finally, even a true crisis will at best illustrate the character of national identity only with respect

³³ Greenstone, 1 *Stud. in Am. Pol. Dev.* at 21 and following pages (cited in note 7). For further development of Greenstone's ideas on the relation between constitutional development and constitutive rules, see Greenstone, 55 *U. Chi. L. Rev.* 428 (cited in note 22).

³⁴ See, e.g., Norton, *Alternative Americas* at 16 (arguing that Melville, Lincoln, and Whitman effected a "reformation of national identity in the wake of the war" and that this new identity "elaborated itself not only in historical accounts of the nation and the war, but also in the subsequent policies and institutional development of the United States").

³⁵ See, e.g., Richard Davies Parker, *The Past of Constitutional Theory—And Its Future*, 42 *Ohio St. L. J.* 223 (1981) (constitutional scholars have reached a "crossroads" where they must decide whether to continue along established lines or "turn in a new direction"); G. Edward White, *The Text, Interpretation, and Critical Standards*, 60 *Tex. L. Rev.* 569 (1982) ("[o]ne is hard pressed to summon up subjects that are more important for American academic culture at this juncture in its history" than "the nature of scholarly interpretation and the formation of critical standards for evaluating scholarship"); Sanford Levinson, "The Constitution" in *American Civil Religion*, 1979 *S. Ct. Rev.* 123, 151 (1979) ("The 'death of constitutionalism' may be the central event of our time just as the 'death of God' was that of the past century (and for much the same reason)").

³⁶ On this point, consider Paul de Man's self-referential exegesis of Mallarmé's speech on a crisis in poetry, in Paul de Man, *Criticism and Crisis*, in de Man, *Blindness and Insight: Essays in the Rhetoric of Contemporary Criticism* 3-8 (2d ed. 1983).

to some limited number of problems at the focus of the crisis.

Even in the context of a possible crisis, and certainly in the absence of crisis, any representation of national identity—whether constructed as a matter of practical politics by the inhabitants of a culture or as a more self-conscious matter of scholarly inquiry by the student of a culture—will necessarily have to answer two questions about political thought: whose opinions count, and how do they count? Both questions are of central concern to the interpreter of political culture.

Today's egalitarian impulse to assert that everybody's opinion counts in American politics obscures the difficulty of the first question. Through most of American history, the exclusion from the public domain has in fact been remarkably broad, diminishing if not eliminating entirely the political authority that might otherwise have been accorded to the opinions of blacks, women, children, native Americans, the poor, and others.³⁷ Even if we dismiss such exclusions based upon gender, ethnicity, or wealth as clear—but certainly historically and still presently significant—mistakes, the question of whom to include remains very difficult. Is citizenship an appropriate requirement? And if the the opinions of resident aliens count, do only the opinions of *legally* resident aliens count? Does it matter whether they speak English? Do corporations, or other collectivities, have opinions of their own?

More perplexing questions arise when we begin to consider those with extreme or unusual views. The question of who counts is obviously tied up with the question of how people count: it is much less troublesome to include anomalous opinions within those that count if it is possible to "explain away" some of the peculiarities of those opinions. Thus, the white supremacist or the superstitious eccentric might be regarded as true members of the American community, but some might take their opinions to stand for something different than what they themselves take those opinions to stand for: extraordinary opinions might be said to be distorted by prejudice; or by a selfish quest for distinction, status, or celebrity; or by an impoverished education. On the other hand, it is possible that these apparently exceptional individuals may be exceptional

³⁷ A number of constitutional amendments were necessary to guarantee the franchise to the groups mentioned in the text. See U.S. Const., amend. XV (blacks and other racial minorities), XIX (women), XXIV (barring poll taxes), and XXVI (eighteen year-olds). On the political significance of American Indians for American politics, see Michael Paul Rogin, *Liberal Society and the Indian Question*, in Rogin, *Ronald Reagan, the Movie* at 134 (cited in note 2).

only for their candor: their opinions may be especially true indicators of a collective identity that more prudent members of the collectivity conceal. Still a third possibility is that exceptional groups and opinions have a sort of ambiguously negative significance: the larger community may define itself in opposition to these exceptional elements.

The problem of deciding how an opinion counts for the purpose of determining national identity is not limited, however, to the evaluation of the extraordinary members of the community. On the contrary, it is pervasive. How is one to count the little-thought-about opinions of the mainstream members of the community? One must have some way of distinguishing between what people now think, and what they would think after reflection and research, and a way of distinguishing the relative importance of these reflective and unreflective opinions.

Moreover, while overt manifestations of belief in certain ideals is the easiest aspect of political culture to discern, belief may be expressed in other ways. Collective political identity is a product of the continuing collective judgment of the population about the legitimacy of the political culture, both its elements and its entirety. That judgment may express itself in acquiescence—tolerating departures from ideals—for reasons deemed necessary to the preservation of other ideals. That acquiescence may embody a false necessity, but it also may embody the actual collective choice of the polity trying to achieve one ideal in preference to another.

Certain historical moments may also precipitate dramatic changes in the choice of ideals, and hence in what constitutes acquiescence as well as in articulated beliefs. Political directions, and legal forms and arguments, may be legitimate at one point in history but anathema at others. What are the forms? How do they interact? Why do they change? The interpretive study of our legal system and its political culture attempts to answer these questions.

In seeking to resolve these questions and thereby to produce a representation of national identity, interpreters of political culture explicate the shared texts, conceptual and symbolic structures, and principles that constitute politics within our nation. These forms effect a metaphoric unification of particular characteristics of individual and group identity with particular principles and particular allocations of power, and so structure the possibilities of political discourse. The forms thereby define the ideal boundaries (or a set of perhaps conflicting ideal boundaries) of the nation, separating what is essential to the nation from what exists within it as a matter of contingent circumstance.

So understood, the interpretation of political culture is itself a distinctly political, although not necessarily partisan, project. As an intellectual strategy for comprehending legal controversy, it is inseparable from the nation's striving to articulate its own standards of legitimacy and its own identity. The essays that follow thus reflect, in self-conscious fashion, the tensions and multivalence of the political culture they study, both in their conclusions and in their refinement of the interpretive method. By their recognition of cultural complexity and the consequent need for interpretive argument, these essays invite the legal reader to reinterpret their significance, and the significance of political culture, for law.

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