

## LAW AND CULTURAL CONFLICT

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The subject of this symposium, “law and cultural conflict,” is wide-ranging and various. Even if we sharply narrow our focus to the judicial institutions by which the state declares and enforces its official vision of social order, “law” is multifarious in its purposes and functions. “Cultural conflicts” also come in radically diverse forms. Taken together, the permutations are staggering in their array and complexity. It is not surprising that debates about “law and cultural conflict” sometimes lose traction, because participants can so easily talk past each other by emphasizing different aspects of the larger subject.

The most useful contribution I can make as an introductory speaker, therefore, is to chart the overall contours of the topic which this conference seeks to address. My effort shall be to sketch an analytic framework that is sufficiently general to mediate usefully among the widely disparate views that participants in this conference will no doubt bring to bear on its three major topics: family, expression, and religion.

### I

We can begin with a relatively simple picture of the relationship between law and culture. Patrick Devlin famously argued that the law should be used to enforce the norms of a society’s culture:

[S]ociety means a community of ideas; without shared ideas on politics, morals, and ethics no society can exist. . . . If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically;

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it is held by the invisible bonds of common thought. . . . A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.<sup>1</sup>

Devlin imagines that law enforces "the invisible bonds of common thought" that hold us "together" as a society, and that this "fundamental agreement" in turn legitimates law. Law is thus figured as the arm of a coherent antecedent culture that is the ultimate source of society's identity and authority. This image has deep jurisprudential roots, stretching at least as far back as the work of Friedrich Karl von Savigny.<sup>2</sup> The image is also influential in the study of the anthropology of law. We can see it at work, for example, when the contemporary legal anthropologist Lawrence Rosen writes that the authority and content of the decisions of a Moroccan judge (or *qadi*) must be understood as flowing from "the cultural concepts and social relations" of his society.<sup>3</sup>

The Devlin model of the relationship between law and culture is pervasive within our modern legal system. The law commonly understands itself as enforcing "the common sense of the community, as well as the sense of decency, propriety and morality which most people entertain."<sup>4</sup> The common law in particular self-consciously embodies the "experience" and "custom" of the surrounding community.<sup>5</sup> Every time the common law requires a jury to reach a verdict based upon the judgment of the "reasonable person," it seeks to enforce "the general level of moral judgment of the community, what it feels ought ordinarily to be done."<sup>6</sup> Every time American common law imposes liability because an intrusion on privacy is "highly offensive to a reasonable person,"<sup>7</sup> or because conduct is "outrageous and intolerable in that it offends against the generally accepted

1. PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 10 (1965).

2. FRIEDRICH KARL VON SAVIGNY, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* (Abraham Hayward, trans., Arno Press 1975) (1831). Savigny stressed the "organic connection of law with the being and character" of a people, so that law "is subject to the same movement and development as every other popular tendency." *Id.* at 27.

3. LAWRENCE ROSEN, *THE ANTHROPOLOGY OF JUSTICE: LAW AS CULTURE IN ISLAMIC SOCIETY* 18 (1989); see *id.* at 28, 36.

4. *Pennsylvania v. Randall*, 133 A.2d 276, 280 (Pa. Super. Ct. 1957).

5. CHARLES B. GOODRICH, *THE SCIENCE OF GOVERNMENT AS EXHIBITED IN THE INSTITUTIONS OF THE UNITED STATES OF AMERICA* 239 (1853); WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* 19-50, 235-48 (1996); 1 ZEPHANIAH SWIFT, *A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT* 40 (Arno Press 1972) (1795); 1 JAMES WILSON, *THE WORKS OF JAMES WILSON* 184, 348 (Robert Green McCloskey ed., 1967).

6. 2 FOWLER V. HARPER & FLEMING JAMES, JR., *THE LAW OF TORTS* § 16.2 (1956).

7. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

standards of decency and morality,”<sup>8</sup> it is functioning according to the model advanced by Devlin. It is self-consciously seeking to enforce ambient cultural norms.

The Devlin model is also prominent within our constitutional law. Eighth Amendment jurisprudence, for example, seeks to implement “the evolving standards of decency that mark the progress of a maturing society.”<sup>9</sup> First Amendment jurisprudence locates the boundaries of obscenity by reference to “community standards.”<sup>10</sup> Due Process jurisprudence prohibits the state from enacting positive law that contradicts “fundamental liberties . . . deeply rooted in this Nation’s history and tradition.”<sup>11</sup> These liberties are conceived as representing “the basic values that underlie our society.”<sup>12</sup> In all these areas, constitutional law is understood to express and enforce basic cultural values.

These examples suggest that the Devlin model of law and culture usefully describes many phenomena within our legal system. But as a model it is nevertheless fundamentally incomplete, because it under-theorizes both law and culture. The Devlin model oversimplifies law, because law does not merely enforce antecedent cultural norms. It oversimplifies culture, because it inaccurately imagines that a society’s culture is stable, coherent and singular.

8. *Womack v. Eldridge*, 210 S.E.2d 145, 148 (Va. 1974).

9. *Atkins v. Virginia*, 536 U.S. 304, 311–12 (2002) (citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

10. *Miller v. California*, 413 U.S. 15, 24 (1973).

11. *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986).

12. *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion of Powell, J.); *see Washington v. Glucksberg*, 521 U.S. 702, 756–71 (1997) (Souter, J., concurring). The classic articulation is by the second Justice Harlan:

Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court’s decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.

*Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

## A

With respect to law, we must theorize legal institutions as performing at least two functions in addition to that of enforcing ambient cultural norms. First, law is frequently used by government as a tool of social engineering to accomplish politically desirable purposes. This is a routine use of law in the modern administrative state. Laws designed to prevent urban fires, avoid traffic accidents, or promote market efficiency follow the logic of instrumental rationality, which is distinct from, and sometimes hostile to, the logic of cultural values.

There is considerable tension between using law to enforce culture and using law to achieve instrumental ends. In the area of criminal law, for example, there has been fierce and ongoing debate about whether rules of liability should be fashioned to achieve the instrumental goal of deterrence or instead to reflect the moral judgment of the community.<sup>13</sup> The question is whether criminal law should be designed to alter conduct or to assess blame. The modern administrative state so pervasively deploys law as a method of channeling behavior that it has become very common to protest that contemporary law actually undermines culture. This is the thrust of Habermas's famous early complaint that law represents a "juridification" that operates as a "colonization of the lifeworld."<sup>14</sup> On this account, law does not enforce the norms of an ambient culture, but instead deracinates and suppresses culture.

Second, law is sometimes used to revise and reshape culture. American antidiscrimination law, for example, is commonly thought to possess such a transformative thrust.<sup>15</sup> There can be no doubt that Title VII of the Civil Rights Act of 1964 was meant to reshape the repressive norms of race that characterized the American workplace. Reformers typically seek to deploy law in this way. When Catharine MacKinnon advocated legislation to suppress pornography, for example, her ambition was to use law to sever the link between

13. See HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 9-16 (1968).

14. 2 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 356 (Thomas McCarthy trans., Beacon Press 1981). For another such complaint, in an anthropological register, see Stanley Diamond, *The Rule of Law Versus the Order of Custom*, 38 SOC. RES. 42, 44-47 (1971).

15. ANDREW KOPPELMAN, *ANTIDISCRIMINATION LAW AND SOCIAL INEQUALITY* 4-10 (1996).

female subordination and sexuality that she regarded as pervasive in American culture.<sup>16</sup>

On this account, the law does not merely reflect the norms of a pre-existing culture, but is instead itself a medium that both instantiates and establishes culture. In recent years “sociolegal scholars have increasingly embraced” such a “constitutive vision of law,” which “sees legal discourse, categories, and procedures as a framework through which individuals in society come to apprehend reality.”<sup>17</sup> In Austin Sarat’s influential formulation, law is understood to shape “society from the inside out by providing the principal categories in terms of which social life is made to seem largely natural, normal, cohesive and coherent.”<sup>18</sup>

If we were to accept the premise that law is a singular phenomenon, we might debate about whether law actually enforces an antecedent culture, or constitutes culture, or displaces culture because it functions as an instrument of “undeviating organization.”<sup>19</sup> But the premise is false. Law can and does perform all of these different relationships to culture.<sup>20</sup> With regard to the family, for example, law enforces antecedent cultural norms when it establishes parental obligations that reflect traditional family roles.<sup>21</sup> Law modifies these

16. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 26–28 (1987).

17. Paul Schiff Berman, *The Cultural Life of Capital Punishment: Surveying the Benefits of a Cultural Analysis of Law*, 102 COLUM. L. REV. 1129, 1140–41 (2002) (essay review).

18. Austin D. Sarat, *Redirecting Legal Scholarship in Law Schools*, 12 YALE J.L. & HUMAN. 129, 134 (2000) (book review).

19. THEODOR W. ADORNO & MAX HORKHEIMER, *DIALECTIC OF ENLIGHTENMENT* 87 (John Cumming trans., 1972).

20. See, e.g., Naomi Mezey, *Law as Culture*, 13 YALE J.L. & HUMAN. 35, 46 (2001) (“the relationship between culture and law” is “always dynamic, interactive, and dialectical—law is both a producer of culture and an object of culture.”).

21. See JAMES SCHOULER, *A TREATISE ON THE LAW OF DOMESTIC RELATIONS; EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT* 366–67 (5th ed. 1895):

It is a plain precept of universal law that young and tender beings should be nurtured and brought up by their parents; and this precept have all nations enforced. So well secured is the obligation of maintenance that it seldom requires to be enforced by human laws. Are we brought into this world to perish at the threshold by suffering and starvation? No; but to live and to grow. Some one, then, must enable us to do so; and upon whom more justly rests that responsibility than upon those who brought us into being? Hence, as Puffendorf observes, the duty of maintenance is laid on the parents, not only by Nature herself, but by their own proper act in bringing children into the world. By begetting them, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved.

For modern cases, see IRA MARK ELLMAN ET AL., *FAMILY LAW: CASES, TEXT, PROBLEMS* 497–501 (3d ed. 1998).

norms when it intervenes to ameliorate and undercut the traditional stigma attached to illegitimacy.<sup>22</sup> And law displaces these norms when it imposes legal requirements on welfare families that are inconsistent with traditional values but that are instrumentally necessary to serve the ends of the welfare system.<sup>23</sup>

## B

If the Devlin model rests on an incomplete account of law, it also presupposes an incomplete account of culture. The premise of the Devlin model is that culture subsists in “shared ideas” that establish an enduring and discrete community identity. The model assumes that culture is stable, coherent, and singular. These assumptions are quite common. The first two assumptions, for example, are at the heart of a certain kind of multiculturalism that seeks to “foster the recognition and appreciation of . . . diverse cultures.”<sup>24</sup> This form of multiculturalism necessarily presumes the existence of “several stable cultural communities both wishing and able to perpetuate themselves.”<sup>25</sup> A similar perspective supports claims that minority groups should be accorded a specific “right to culture,”<sup>26</sup> or that nations, which are in part defined by the “consciousness of a form of cultural community which requires protection and expression in appropriate institutional forms,”<sup>27</sup> deserve the right to self-determination. An analogous model of culture also underlies some arguments currently made in favor of the rights of “indigenous peoples.”<sup>28</sup>

22. See, e.g., *Gomez v. Perez*, 409 U.S. 535 (1973); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Levy v. Louisiana*, 391 U.S. 68 (1968).

23. Compare *Wyman v. James*, 400 U.S. 309, 318–20 (1971), with *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965) (Goldberg, J. concurring). See also *Griswold*, 381 U.S. at 495–96. (Goldberg, J., concurring).

24. Canadian Multiculturalism Act, R.S.C. ch. 24, § 3(1)(h) (1985) (Can.).

25. Joseph Raz, *Multiculturalism: A Liberal Perspective*, in *ETHICS IN THE PUBLIC DOMAIN* 158 (1994). For an attempt to justify multiculturalism without appealing to an essentialist model of culture, see BHIKHU PAREKH, *RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY* (2000). Whether law in a self-consciously multicultural state can free itself of essentialist assumptions is a different and more complex question.

26. Avishai Margalit & Moshe Halbertal, *Liberalism and the Right to Culture*, 61 *SOC. RES.* 491 (1994); see *THE RIGHTS OF MINORITY CULTURES* (Will Kymlicka ed., 1995).

27. Neil MacCormick, *Nation and Nationalism*, in *LEGAL RIGHT AND SOCIAL DEMOCRACY: ESSAYS IN LEGAL AND SOCIAL PHILOSOPHY* 261 (1982).

28. The World Bank, for example, has defined indigenous peoples as “groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged.” WORLD BANK, *OPERATIONAL DIRECTIVE 4.20*, reprinted in IWGIA Newsletter No. 3, Nov./Dec. 1991, at 19. For discussion, see Benedict Kingsbury, “Indigenous

There are many occasions, therefore, when we invoke the concept of culture in ways analogous to those presupposed by the Devlin model. This does not imply, however, that the assumptions underlying the model are immune from critique. In fact each of its three assumptions is highly vulnerable. If we examine the assumption of stability, for example, we can observe that culture, like all things human, is continuously evolving. Culture is “a *dynamic* process of self-understanding.”<sup>29</sup> It “is not a passive inheritance but an active process of creating meaning, not given but constantly redefined and reconstituted.”<sup>30</sup> The property of stability is therefore a relative phenomenon. The analogy of language is helpful. Just as language is constantly changing despite the fact that a functioning language requires relatively stable and shared meanings, so cultural understandings are always shifting despite the fact that a functioning culture requires relatively stable and shared perspectives.

The evolving nature of culture has important consequences for the Devlin model. Because cultural norms unfold in time, law can enforce cultural norms only by intervening into an ongoing process of historical development. The law is therefore always faced with the choice of whether to encourage or retard these evolutionary changes. Societies in fact typically use law to control processes of cultural development.<sup>31</sup> This use of law is never innocent; it cannot adequately be conceptualized merely as the enforcement of a static and unproblematic set of social values.

The assumption of cultural coherence is subject to a similar critique. The assumption conveys the idea of a transparent and internally consistent system that produces “fundamental agreement” on the “shared ideas” that constitute culture. Yet our experience of disagreement and cultural conflict is certainly as pervasive and as fundamental as our experience of cultural cohesion. It has even been observed that “a living tradition . . . is an historically extended, socially embodied argument, and an argument precisely in part about

*Peoples” in International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT’L L. 414, 419–26 (1998).

29. Kirsten Hastrup & Karen Fog Olwig, *Introduction*, in *SITING CULTURE: THE SHIFTING ANTHROPOLOGICAL OBJECT 3* (Karen Fog Olwig & Kirsten Hastrup eds., 1997) (emphasis added).

30. PAREKH, *supra* note 25, at 152–53.

31. Robert C. Post, *Between Democracy and Community: The Legal Constitution of Social Form*, in *DEMOCRATIC COMMUNITY* 163, 168–70 (John W. Chapman & Ian Shapiro eds., 1993).

the goods which constitute that tradition.”<sup>32</sup> Culture must thus be understood as establishing difference as well as unity. Although early anthropological work emphasized the cohesive or “integrated” dimensions of culture, more recently anthropologists have begun to regard such a one-eyed view as “clearly inadequate.”<sup>33</sup> This is because “[c]ulture is never a closed, entirely coherent system but contains within it polyvalent, contestable messages, images, and actions.”<sup>34</sup> Culture is now seen as “a site of social differences and struggles.”<sup>35</sup> It is impossible “to conceive of cultural identity apart from the arenas of contest in which questions of identity arise and are perforce answered.”<sup>36</sup>

This suggests that cultural cohesion, like cultural stability, is a relative phenomenon. If culture did not establish some framework of shared meanings, it could not perform the functions that we attribute to culture.<sup>37</sup> Yet culture does not perform these functions simply by instilling “fundamental agreement.” Instead culture creates meanings that allow for the possibility of dispute and contest. When law is invoked to enforce “cultural values,” therefore, it is often being used to advance one or another side of an ongoing cultural disagreement.<sup>38</sup>

An analogous point can be made about the third assumption of Devlin’s model, which is that culture is singular. Devlin presupposes that legal jurisdiction corresponds to a single society that in turn corresponds to a single culture. But this presupposition is arbitrary. Legal jurisdictions frequently extend over territory that encompasses two or more cultures. The number of states that now explicitly

32. ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 207 (1981).

33. Sally Engle Merry, *Law, Culture, and Cultural Appropriation*, 10 *YALE J.L. & HUMAN.* 575, 576, 579 (1998).

34. *Id.* at 582.

35. Richard Johnson, *What Is Cultural Studies Anyway?*, 16 *SOC. TEXT* 38, 39 (1987).

36. Carol J. Greenhouse, *Constructive Approaches to Law, Culture, and Identity*, 28 *LAW & SOC’Y REV.* 1231, 1240 (1994); see Madhavi Sunder, *Cultural Dissent*, 54 *STAN. L. REV.* 495, 514–16 (2001).

37. Of course there are those who suggest that we should discard the concept of culture altogether. See, e.g., Stephen Greenblatt, *Culture*, in *CRITICAL TERMS FOR LITERARY STUDY* 225 (Frank Lentricchia & Thomas McLaughlin eds., 1990) (“Like ‘ideology’ . . . ‘culture’ is a term that is repeatedly used without meaning much of anything at all, a vague gesture toward a dimly perceived ethos.”). For a discussion of the debate in anthropology, see Robert Brightman, *Forget Culture: Replacement, Transcendence, Relexification*, 10 *CULTURAL ANTHROPOLOGY* 509 (1995). Exemplary is James Clifford’s observation that “[c]ulture is a deeply compromised idea I cannot yet do without.” JAMES CLIFFORD, *THE PREDICAMENT OF CULTURE* 10 (1988).

38. For a discussion, see Robert C. Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 *CAL. L. REV.* 957, 976–78 (1989).

understand themselves to be “multicultural” is growing. It is vacuous to imagine that law in such states merely enforces culture.

The fundamental challenge faced by multicultural states is how to balance respect for cultural heterogeneity against the need to enforce a distinctive and hegemonic set of cultural values.<sup>39</sup> Multicultural states typically seek to design legal strategies to coordinate the relationship among multiple cultures. Such strategies range from individual rights, to group rights, to federalism. I have elsewhere considered the nature and implications of these strategies and will not now repeat that discussion.<sup>40</sup>

The variability of culture indicates that we might most usefully imagine the relationship of law to culture as arrayed along a spectrum. At one end law enforces cultural understandings that seem stable and uncontroversial, but that in reality are subject to the more or less incremental evolution that characterizes all culture. As we move to the middle of the spectrum, this evolution becomes more self-conscious and contentious. The law accordingly becomes an instrument for the explicit control of outright cultural disagreements. At some point these cultural disagreements become so intense that they lose their intramural character. They cease to occur between those who imagine themselves as struggling to define the destiny of a shared culture, and they become instead arguments between members of a dominant culture and those who wish to pursue a distinct cultural identity. At the other end of the spectrum, therefore, cultural conflict poses the question of whether and how the law ought to permit avowedly distinct cultures to coexist.

We can illustrate the segments of this spectrum by examples drawn from the area of family law. Although the institution of the family appears stable and enduring, it is actually constantly evolving. When the law endows children with rights, it participates in this slow process of change, incrementally changing the family from an institution defined by status-dependence to one characterized by the

39. See, e.g., THE LAW REFORM COMMISSION OF AUSTRALIA, REPORT NO. 57: MULTICULTURALISM AND THE LAW 9–11 (1992) (“Multicultural policies are based on the premise that all Australians should have an overriding and unifying commitment to Australia. . . . The problem is to differentiate between those values which are necessary for cohesion and those which may be adjusted to allow for diversity.”).

40. See Robert C. Post, *Democratic Constitutionalism and Cultural Heterogeneity*, 25 AUSTRALIAN J. LEG. PHIL. 185 (2000); see also Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297 (1988).

coexistence of autonomous agents.<sup>41</sup> At times this evolution becomes overtly political; the nature of the family becomes subject to conscious debate and contention. When in response to the political pressure of mobilized feminism the law moved to criminalize marital rape, therefore, it should be understood as having intervened to sustain one side of a vigorous cultural dispute about the proper role of women within the family.<sup>42</sup> The question to be decided was how law ought to define the common social institution of the family. This question is quite different from that faced by law when it is asked not to impose norms of family life upon society generally, but instead to permit a discrete cultural minority to pursue its own vision of the family despite its inconsistency with dominant social norms. The latter question is that of cultural pluralism. It is exemplified by *Wisconsin v. Yoder*,<sup>43</sup> in which the Amish community argued that its own vision of family life justified exemption from a Wisconsin state law requiring children to be sent to school until the age of sixteen.

## II

Discussion of the topic of law and cultural conflict frequently begins from the premise of the Devlin model. Law is understood as enforcing antecedent and stable cultural values, and the presence of cultural conflict is accordingly understood to pose sharp and unusual difficulties for law. But if the analysis in Part I is correct, law is perennially implicated in cultural conflict, so that cultural change and disagreement is the ordinary state of affairs rather than the exception. Law is not thereby undermined, however, because law can itself constitute cultural norms. Law can create the preconditions of its own legitimation, because it can establish values that “seem natural

41. *Newmark v. Williams*, 588 A.2d 1108, 1115–18 (Del. 1991); *In re Sumey*, 621 P.2d 108, 110 (Wash. 1980); MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 11 (1981) (discussing “the trend toward attenuation of family ties [that] has gathered force, reaching into the core of the nuclear family, simultaneously loosening its legal bonding and emphasizing the autonomy and independence of its individual members – husband and wife, parent and child”); Ira Mark Ellman, *Family Law*, in *COMMON LAW, COMMON VALUES, COMMON RIGHTS: ESSAYS ON OUR COMMON HERITAGE BY DISTINGUISHED BRITISH AND AMERICAN AUTHORS* 171–77 (2000).

42. See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1375–76, 1484–99 (2000).

43. 406 U.S. 205 (1972).

and necessary.”<sup>44</sup> Law is in this sense performative, constituting the very culture in whose service it purports to act.

Society thus has great flexibility in deploying law to intervene into situations of cultural conflict. In determining the nature of these interventions, it must be decided, first, *what* values law should be used to sustain and, second, *how* law ought to be used to sustain those values. The latter question will frequently turn on an important variable that we have not yet made explicit: the distinct jurisprudential requirements of different forms of legal action.

Law can intervene into cultural matters in a wide variety of ways, ranging from criminal sanctions at one end of the spectrum, to subsidies and tax exemptions at the other. These different forms of legal action are not fungible. Each kind of legal action possesses its own logic and requirements, and each must be assessed on its own merits. The justification for one kind of legal intervention may be inadequate or inapplicable when applied to a different kind of intervention.

How law ought to respond to cultural conflict thus requires close attention to the distinct properties of different forms of legal action. In this section I shall illustrate the point by examining a form of legal intervention that is of some importance to the major topics of this conference: constitutional adjudication. I shall take as my text the case of *Romer v. Evans*,<sup>45</sup> which involved a bitter but exemplary debate about how courts ought to situate themselves with respect to cultural conflict when engaged in the practice of judicial review.

In *Romer*, the United States Supreme Court considered the constitutionality of an amendment to the Colorado Constitution prohibiting municipalities from enacting ordinances that banned discrimination based upon “homosexual” orientation. Controversies over the status of homosexuality are today the site of intense cultural dispute.<sup>46</sup> The Court concluded that the Colorado amendment was “born of animosity toward the class of persons affected” and hence unconstitutional.<sup>47</sup> In dissent, Justice Scalia argued that “[t]he Court

44. Austin Sarat & Thomas R. Kearns, *The Cultural Lives of Law*, in *LAW IN THE DOMAINS OF CULTURE* 8 (Austin Sarat & Thomas R. Kearns eds., 1998). Of course law may fail in this task of cultural creation, in which case a social crisis may ensue.

45. 517 U.S. 620 (1996).

46. For an acute analysis of some of these controversies, see Kenneth L. Karst, *Law, Cultural Conflict, and the Socialization of Children*, 91 CAL. L. REV. (forthcoming 2003).

47. *Romer v. Evans*, 517 U.S. 620, 634 (1996).

has mistaken a Kulturkampf for a fit of spite.”<sup>48</sup> Scalia contended that it was “no business of courts (as opposed to the political branches) to take sides in this culture war.”<sup>49</sup> He accordingly branded the Court’s conclusion “an act, not of judicial judgment, but of political will.”<sup>50</sup>

At the heart of *Romer* lay the question of whether and how discrimination against homosexuality can be justified. Scalia’s dissent argues that because this question is a matter of explicit cultural disagreement, the Court ought to defer to the democratic judgment implicit in the popular ratification of the Colorado amendment. Note, however, that Scalia does not argue that *law* should never intervene in cultural disagreements. To the contrary, he explicitly accepts the possibility of a legislative response to contemporary debates about the status of homosexuality. Nor does Scalia even object to *judicial* intervention into ongoing cultural debates. There is nothing in Scalia’s dissent that would disable courts from enforcing antidiscrimination ordinances that protected sexual orientation, even if such enforcement were to require courts to decide whether treatment of particular employees was a matter of rational judgment or of spite.

Scalia’s argument is thus quite narrow. Scalia contends that the Court should not exercise the power of judicial review to set aside otherwise valid enactments on the basis of the Court’s view of a contemporary cultural debate. This argument ultimately turns on a conception of the proper scope of constitutional adjudication. Although on the surface the debate between Scalia and the majority opinion looks like an argument about the relationship of law to cultural conflict, it is in fact a disagreement about how judicial enforcement of constitutional guarantees should relate to contemporary cultural values.

Like Justice Black before him,<sup>51</sup> Scalia believes that authorizing judges to hold statutes unconstitutional based upon a perception of

48. *Id.* at 636 (Scalia, J., dissenting).

49. *Id.* at 652 (Scalia, J., dissenting); *see id.* at 652–53 (Scalia, J., dissenting):

When the Court takes sides in the culture wars, it tends to be with the knights rather than the villeins—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court’s Members are drawn. . . . [The] law-school view of what “prejudices” must be stamped out may be contrasted with the more plebian attitudes that apparently still prevail in the United States Congress, which has been unresponsive to repeated attempts to extend to homosexuals the protections of federal civil rights laws.

50. *Id.* at 653 (Scalia, J., dissenting).

51. *Griswold v. Connecticut*, 381 U.S. 479, 507 (1965) (Black, J., dissenting).

ambient cultural values would risk the exercise of an abusive and arbitrary judicial power.<sup>52</sup> Although Scalia knows that courts ascertain and enforce cultural values all the time,<sup>53</sup> he does not believe that these values establish a sufficient constraint on judicial discretion to justify judicial review. The possibility of judicial appeal to such values in constitutional cases constitutes an open invitation “to replace judges of the law with a committee of philosopher-kings.”<sup>54</sup> Courts should seek to interpret and apply such values only when authorized to do so by legislation, or when they render common law rulings that can be overridden by legislation.

Legislation is the product of politics, and the relationship between politics and culture is curiously ambiguous in Scalia’s jurisprudence. At times Scalia seems to regard legislation as authoritative because it is a more accurate register of cultural attitudes than courts.<sup>55</sup> Thus the Court has sometimes held that the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country’s legislatures.”<sup>56</sup> At other times, however, Scalia seems to regard legislation as authoritative because it reflects a sovereignty that is authorized to exert a positive and arbi-

52. *Atkins v. Virginia*, 536 U.S. 304, 348 (2002) (Scalia, J., dissenting) (“The arrogance of this assumption of power takes one’s breath away.”).

53. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998):

In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player’s working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach’s secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.

54. *Stanford v. Kentucky*, 492 U.S. 361, 379 (1989) (Scalia, J.); *see id.*:

[The appeal to] evolving standards of decency . . . has never been thought [to be] a shorthand reference to the preferences of a majority of this Court.” For the Court to reach “a decision supported neither by constitutional text nor by the demonstrable current standards of our citizens [would fail] to appreciate that ‘those institutions which the Constitution is supposed to limit’ include the Court itself.

55. Thus Scalia seems to argue that Congress may have been a better register of the cultural attitudes of the nation when it repeatedly opted for the “plebeian” side of the culture wars surrounding homosexuality. *See supra* note 49.

56. *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989). Scalia has himself observed that “[a] revised national consensus so broad, so clear, and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved.” *Stanford*, 492 U.S. at 377.

trary "political will" unfettered by considerations of ambient culture.<sup>57</sup> Legislation is imagined as an exercise of pure power that transcends culture altogether.

In either case—whether legislatures are a more accurate gauge of culture than courts or are instead exempt from any obligation to be culturally responsive—courts overstep their proper role when they seek constitutionally to invalidate legislation based upon their own perception of cultural values. Scalia argues that constitutional interpretation should instead proceed only in the presence of indicia of constitutional meaning, like dispositive constitutional text or specific evidence of the intentions of the framers, that are objective enough strictly to confine judicial discretion.<sup>58</sup>

It is evident that generalities about "law and cultural conflict" cannot adequately engage Scalia's argument. Scalia's point turns on a theory of how cultural conflict should affect the specific institution of constitutional adjudication. If popular sovereignty is understood as a mechanism by which law is forced to respond to evolving cultural norms, judicial displacement of this mechanism poses the question of judicial authority in an especially stark and dramatic form. Scalia hopes to sidestep that question by imagining an immaculate form of constitutional review that proceeds without any involvement in cultural values at all. He imagines that courts can decide constitutional questions by reference to objective and mechanical tests that do not entail the responsibility of interpreting cultural values. The temptation to locate such an Archimedean point outside culture is pervasively evident in American theories of judicial review.

I do not mean to deny that judicial review can sometimes proceed in this way. There are moments when constitutional text speaks plainly and unambiguously. The efforts of a third California Senator to enroll in the Senate, for example, would most likely be interdicted by simple reference to the words of the Constitution.<sup>59</sup> But in the vast majority of cases judicial review functions in a very different manner. Constitutional text must be interpreted, and interpretation requires

57. On the tension between popular sovereignty and cultural values like "democracy," see Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 CAL. L. REV. 429 (1998). The potential gap between legislation and ambient cultural norms is the premise of the due process jurisprudence discussed in text at notes 11–12 *supra*. It is a standard chestnut of jurisprudence to analyze the problem of legislation that runs contrary to the mores of a population, as, for example, was arguably the case during prohibition in the 1920s.

58. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989).

59. For a discussion, see Robert C. Post, *Theories of Constitutional Interpretation*, in CONSTITUTIONAL DOMAINS 23, 24–26 (1995).

the exercise of a “reasoned judgment”<sup>60</sup> that applies cultural values specified neither in constitutional text nor in the history of constitutional enactments.<sup>61</sup> Certainly Scalia’s own federalism decisions appeal to such ambient values in the context of what might fairly be called a “cultural war” about the importance of state sovereignty.<sup>62</sup>

Because constitutional interpretation characteristically proceeds against an evolving background of cultural assumptions and expectations, judicial understandings of the Constitution have evolved as the nation’s culture has evolved.<sup>63</sup> That is why historians are perfectly justified to view the development of the Court’s constitutional jurisprudence as a form of intellectual history that reflects the country’s cultural development.<sup>64</sup>

Constitutional law is not exempt from history because it deals in “rights.” Rights are legal rules defined in order to bring about states of the world either that serve instrumental ends or that instantiate particular cultural values.<sup>65</sup> The constitutional right at issue in *Romer*, for example, required the Court to interpret and apply the cultural value of equality. Egalitarian norms are always defined by reference to ambient cultural values.<sup>66</sup> Constitutional rights of equality will thus be hegemonic precisely to the extent that they depend upon controversial cultural understandings of equality. The drafters of the Fourteenth Amendment fully grasped this point. They realized that the right to the Equal Protection of the Laws would require courts to impose the cultural values of the North upon the South. That is why Senator Charles Sumner could unabashedly praise the “imperialism of Equal Rights”:

The Nation will not enter the State, except for the safe-guard of rights national in character, and then only as the sunshine, with beneficent power, and, like the sunshine, for the equal good of all. As well assail the sun because it is central—because it is imperial. Here is a just centralism; here is a generous imperialism. Shunning with patriotic care that injurious centralism and that fatal imperialism,

60. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 849 (1992).

61. See Post, *supra* note 59.

62. Robert Post, *Justice for Scalia*, N.Y. REV. OF BOOKS, June 11, 1998, at 57.

63. This is ultimately because law is a cultural form that is only “relatively autonomous” from other cultural forms. Robert Post, *The Relatively Autonomous Discourse of Law*, in *LAW AND THE ORDER OF CULTURE* viii (Robert Post ed., 1991).

64. See, e.g., H. JEFFERSON POWELL, *A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS* (2002).

65. Post, *supra* note 59, at 1–15.

66. See ROBERT C. POST ET AL., *PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW* (2001).

which have been the Nemesis of France, I hail that other centralism which supplies an equal protection to every citizen, and that other imperialism which makes Equal Rights the supreme law, to be maintained by the national arm in all parts of the land. Centralism! Imperialism! Give me the centralism of Liberty. Give me the imperialism of Equal Rights.<sup>67</sup>

The history of Fourteenth Amendment jurisprudence demonstrates the truth of Sumner's insight. The canonical Equal Protection decision of the twentieth century, *Brown v. Board of Education*,<sup>68</sup> "burst asunder the shackles of original intent"<sup>69</sup> in order to enforce a highly contestable interpretation of the value of equality that was required neither by the text nor by the history of the Clause, but that represented instead the Court's own view of the "present" requirements of "American life throughout the Nation."<sup>70</sup> The Court did not justify this view on the basis of "objective" criteria that lay outside of processes of cultural interpretation. To the contrary, *Brown* is a particularly clear instance of the Court using the medium of constitutional rights to impose its cultural vision upon a hostile and recalcitrant section of the nation. Between the equality envisioned by *Brown* and the segregation embraced by the South, there was no neutral or Archimedean point of decision; it was a simple question of whose cultural understandings were to prevail.<sup>71</sup>

Of course it may always be asked why the Court's apprehension of cultural values should trump those of majoritarian lawmaking institutions. For this reason the dependence of judicial review upon the interpretation of cultural norms poses a sharp challenge to judicial authority. This challenge has generated a vast literature under the rubric of the "counter-majoritarian difficulty." I will not summarize that literature here, except to note that it arises precisely because the notion that constitutional rights can be defined by autonomous legal tests that are impervious to cultural norms is so obviously false. This suggests that although Scalia is right to worry about unrestrained

67. CONG. GLOBE, 42nd Cong., 1st Sess. 651 (1871).

68. 347 U.S. 483 (1954).

69. Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 253 (1991).

70. *Brown*, 347 U.S. at 492-93.

71. It is of course true that both sides to *Brown* properly believed that they were advocating the *correct* understanding of the Constitution, not merely the understanding with the greatest access to national power. The warrant for these beliefs lay largely in the distinct cultural values to which each side appealed to justify their constitutional interpretations. From the perspective of the legal historian or sociologist, therefore, the question posed by *Brown* was which set of cultural values would ultimately prevail.

judicial authority to impose cultural standards, his implicit quest for an autonomous legal rule of decision that is unaffected by ambient cultural norms is quite chimerical. The question posed by judicial review is when and how the Court should refrain from participating in ongoing cultural conflicts, not whether such participation can be avoided altogether.

I strongly doubt whether there are any general or theoretical answers to this question. Instead it depends upon intensely practical issues of judicial "statesmanship,"<sup>72</sup> issues that involve a multitude of highly contextual factors that include the nature and importance of the pertinent constitutional right as well as the scope and intensity of the pertinent cultural conflict. From an historical point of view, we can say that constitutional adjudication represents a kind of continuous judicial gamble whereby the Court summons the nation to embrace the cultural values that inform and sustain its own decisions. Sometimes this wager succeeds, as it did with *Brown v. Board of Education*. But sometimes it fails, as when, during the crisis of the New Deal, the country ultimately repudiated the cultural understandings that underlay the Court's resistance to the administrative state.

### III

Our analysis of *Romer* suggests that different forms of legal action will raise different jurisprudential considerations. It follows that how law intervenes into cultural conflict is an important variable that must be assessed independently of the substantive content of the law's intervention. The enforcement of cultural values in legislation or the common law is different from their enforcement in constitutional adjudication. Because judicial review requires unelected judges to displace democratic political mechanisms for resolving cultural conflict, its appeal to cultural values is especially problematic. That is why theories of judicial review display the recurrent fantasy, visible in Scalia's *Romer* dissent, that constitutional adjudication can proceed in a manner that is somehow independent of cultural norms.

In this third and final part of my Essay, I shall discuss yet another salient dimension of law's relationship to cultural conflict. This dimension does not concern the difference between distinct forms of legal action, but instead the structural characteristics of different

72. Melvin I. Urofsky, *The Brandeis-Frankfurter Conversations*, 1985 SUP. CT. REV. 299, 314 (quoting Justice Louis David Brandeis).

forms of legal rights. All rights instantiate cultural norms, and for this reason all rights hegemonically displace competing norms. But some rights, like the First Amendment speech rights that are a major topic of this conference, aim to promote norms that affirmatively embrace the value of cultural heterogeneity. Legal enforcement of such rights places law in a fundamentally different position vis-à-vis cultural conflict than does legal enforcement of the kinds of rights that simply suppress cultural conflict in the interests of social solidarity.

The right of equality can sometimes take the latter form. In its constitutional embodiment in the Equal Protection Clause, the right to equality is often given a limited interpretation, as a right simply to “immunity from”<sup>73</sup> specific kinds of state discrimination. But egalitarian rights can also reflect a positive vision of equality that can be realized only when persons are placed in certain defined relationships with each other. The widespread proliferation of antidiscrimination statutes at the end of the twentieth century testifies to the fundamental contemporary importance of this vision of equality. Many modern proponents of “liberal egalitarianism,” like Will Kymlicka, argue that the value of equality ought to be enforced throughout civil society, so that it “extends into the very hearts and minds of citizens.”<sup>74</sup> These liberal egalitarians believe that equality is not just a matter of “immunity from” government discrimination, but that it is instead an essential and positive value that should inform the ways in which inhabitants of our society treat each other. Like Patrick Devlin, they argue that the “fundamental agreement about good and evil” that defines our society should receive pervasive legal enforcement.

This argument exemplifies what Nancy Rosenblum has usefully identified as the “logic of congruence.” The logic of congruence holds that morally essential values should be enforced throughout a society so as to permeate its culture.<sup>75</sup> “A standard social science thesis views congruence between public institutions and private associations as a key to political stability.”<sup>76</sup> Underlying the logic of congruence lies the notion that cultural conflict about essential moral values should effectively be suppressed. As the position of many

73. *Ex parte Virginia*, 100 U.S. 339, 345 (1879).

74. Will Kymlicka, *Civil Society and Government: A Liberal-Egalitarian Perspective*, in *CIVIL SOCIETY AND GOVERNMENT* 79, 88 (Nancy L. Rosenblum & Robert C. Post eds., 2002).

75. NANCY L. ROSENBLUM, *MEMBERSHIP AND MORALS: THE PERSONAL USES OF PLURALISM IN AMERICA* 36–41 (1998).

76. *Id.* at 36.

liberal egalitarians suggests, the logic of congruence is entirely compatible with many versions of the right to equality.

The logic of congruence, however, is in deep tension with First Amendment rights of expression. This can be seen in the Court's recent decision in *Boy Scouts of America v. Dale*,<sup>77</sup> where the Court explicitly repudiated the logic of congruence by holding that a "First Amendment right of expressive association"<sup>78</sup> prohibited New Jersey from imposing antidiscrimination norms upon a private association formed for expressive purposes. Although the Court acknowledged the importance of egalitarian norms, it held that the purpose of First Amendment rights was to establish a discrete social sphere in which persons were immunized from the legal enforcement of cultural values, even essential values like equality. This purpose underlies the notorious conflict between the First Amendment and the Equal Protection Clause,<sup>79</sup> which has frustrated those who would regulate public discourse in order to sustain egalitarian values.<sup>80</sup>

First Amendment rights of expression typically function to define domains of social life in which persons are exempt from legal regulation. These domains are "antihegemonic," meaning that they are immune from the official legal control of the state. They are not, however, protected from private forms of power. The First Amendment creates a communicative sphere—"public discourse"—that is antihegemonic in the sense that legal enforcement even of such fundamental cultural values as civility and respect is prohibited.<sup>81</sup> The United States is virtually the only country in the world where public discourse cannot be regulated because it is offensive or outrageous or indecent. Although the Court has accepted the logic of congruence to the extent of authorizing regulation of such speech within high

77. 530 U.S. 640 (2000).

78. *Id.* at 640.

79. See OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* (1996).

80. For a discussion, see Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517 (1997) [hereinafter Post, *Equality and Autonomy*]; Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991); cf. *R.A.V. v. St. Paul*, 505 U.S. 377 (1992); *Buckley v. Valeo*, 425 U.S. 946 (1976); *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986); *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

81. I am speaking at a high level of abstraction and generality. The details are actually quite intricate. For a discussion, see Robert C. Post, *Community and the First Amendment*, 29 ARIZ. ST. L.J. 473 (1997); Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601 (1990) [hereinafter Post, *Constitutional Concept*].

schools,<sup>82</sup> it has resolutely maintained that within public discourse conflict over such essential cultural values should be resolved without benefit of legal control.

I do not mean to imply that First Amendment rights do not themselves have hegemonic implications. Like all rights, First Amendment prohibitions are meant to embody positive normative commitments, and it is clear that these commitments are hegemonic with respect to those who disagree with them.<sup>83</sup> The First Amendment creates antihegemonic domains so as to realize cultural values often associated with democracy, autonomy or tolerance. The toleration required by the First Amendment is incompatible with the beliefs of those who would rule by autocratic decree or who would suppress offensive or blasphemous expression. In the fracas that embroiled Britain over the Salman Rushdie affair, for example, the First Amendment would unambiguously have overruled those who advocated that speech be suppressed.<sup>84</sup> First Amendment speech rights thus have a double aspect. They instantiate positive cultural values, and they simultaneously prevent law from resolving cultural conflict within public discourse by enforcing cultural norms.

The duality of First Amendment speech rights distinguishes them from the kind of equality rights advocated by liberal egalitarianism, which do not possess this curious twofold aspect. Whereas liberal egalitarian rights would impose cultural norms that require the establishment of specific social relationships, First Amendment speech rights restrict the government's ability to enforce such norms. First Amendment speech rights do not themselves establish the social relationships that make expression constitutionally valuable, but instead seek to establish the preconditions for constitutional values that can be realized only if communication is rendered "immune from" from certain forms of government regulation.<sup>85</sup> Thus whereas

82. See *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).

83. My personal view is that a major constitutional commitment of the First Amendment is to the creation of a neutral space of communicative participation designed to facilitate universal democratic legitimation. For a discussion, see Post, *Equality and Autonomy*, *supra* note 80. There are, however, many competing accounts of the fundamental purpose of the First Amendment. For a survey, see FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982).

84. See, e.g., M.M. Slaughter, *The Salman Rushdie Affair: Apostasy, Honor, and Freedom of Speech*, 79 VA. L. REV. 153 (1993).

85. The point is tricky because the First Amendment prohibits government regulation in order to realize positive social values, like democracy or autonomy. See *supra* note 83. But First Amendment speech rights do not themselves establish the social relationships that constitute the realization of these values; they instead rule out forms of government regulation

liberal egalitarian rights are fully compatible with the logic of congruence, the whole purpose of First Amendment rights is to circumscribe that logic.<sup>86</sup> Liberal egalitarian rights and First Amendment speech rights are accordingly quite differently situated with respect to the phenomenon of cultural conflict. Although both liberal egalitarian rights and First Amendment speech rights suppress cultural conflict with respect to the positive values they instantiate, the purpose of the latter is to establish antihegemonic domains in ways that liberal egalitarian values never can.

In evaluating how law ought to respond to cultural conflict, therefore, one option is to enforce rights, like liberal egalitarian values, that resolve cultural conflict by imposing a particular set of cultural values. A second option is to enforce rights, like First Amendment speech rights, that create discrete and bounded domains within which cultural conflict is allowed to proceed without legal control. Although the absence of such control creates the possibility of the “tumult,” “discord” and “cacophony” which typically accompanies unmediated cultural dispute,<sup>87</sup> First Amendment jurisprudence justifies this turbulence by the “hope that use of such freedom will ultimately produce a more capable citizenry and a more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.”<sup>88</sup>

The Religion Clauses of the First Amendment, which constitute the third major topic of this conference, also create antihegemonic domains. These Clauses must be understood in the context of centuries of European religious controversy in which successive regimes had sought to impose the cultural practices of particular forms of Christianity. The Religion Clauses were enacted to prevent the federal government from enforcing religious values in this way. The Establishment Clause meant (at a minimum) that federal law could

that are inconsistent with these values. For this reason the enforcement of First Amendment speech rights is always a necessary but not sufficient condition for the realization of First Amendment values.

86. That is why the state action requirement functions differently in the context of the Equal Protection Clause than it does in the context of the First Amendment. See, e.g., Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 U.C.L.A. L. REV. 1537 (1998). On the potential expansion of the state action requirement with respect to the Equal Protection Clause, see, for example, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 249, 280 (1964) (Douglas, J., concurring).

87. *Cohen v. California*, 403 U.S. 15, 24–25 (1971).

88. *Id.* at 24.

not be used to enforce the religious practices of any particular religious sect; the Free Exercise Clause meant (at a minimum) that persons would have a space for enactment of their personal religious beliefs that would be insulated from federal legal regulation. Taken together, the Religion Clauses signified that the Framers intended conflict over religious practices to proceed without authoritative federal legal resolution.

Like First Amendment speech rights, the Religion Clauses also have a double aspect. They are hegemonic with respect to those who disagree with the value of religious toleration that they promote. The Establishment and Free Exercise Clauses flatly overrule those whose religious views demand the creation of a theocratic and intolerant state; they effectively excommunicate such persons from the American constitutional community. But the Religion Clauses also check the logic of congruence by creating specific social domains in which conflict over religious values is allowed to proceed without benefit of dispositive legal intervention. From a sociological point of view, the controversy presently enveloping the interpretation of the Clauses concerns the nature and boundaries of these antihegemonic domains. The constitutional values facilitated by the Religion Clauses do not inhere in the implementation of any particular set of religious practices, but instead in possibilities that can be realized only if such practices are rendered "immune from" state control. Like First Amendment speech rights, the Religion Clauses create rights that are antihegemonic in a way that liberal egalitarian rights can never be.

This analysis suggests that some forms of rights are fully compatible with the logic of congruence, and hence with the suppression of cultural conflict, whereas other forms of rights are designed to create antihegemonic domains that facilitate cultural conflict. In any particular instance, therefore, we must determine which kind of rights the law ought to enforce. This is a highly contextual inquiry, involving numerous difficult and competing considerations. Five factors spring immediately to mind. First, the case for pursuing the logic of congruence by legally enforcing a positive cultural value that suppresses cultural conflict crucially depends upon the nature and significance of that value. How important is it to society? How essential is it to a culture's identity or to its sense of justice or morality?

Second, the creation of antihegemonic domains that preserve cultural conflict can also serve to realize important cultural norms.

The nature and significance of these norms must be weighed against the case for pursuing the logic of congruence, which would legally impose positive cultural values upon these domains. The value of democracy, for example, requires that some forms of cultural conflict be allowed to persist within public discourse. This implies that the imposition of positive cultural values on public discourse in order to suppress conflict must always be balanced against the potential damage to democratic commitments.

Third, precluding legal control over domains of social life permits forms of private power to flourish. In some circumstances the growth of this private power may raise grave questions of policy. A common criticism of some First Amendment speech rights, for example, is that dismantling state regulation permits the rich and the powerful to dominate the channels of public discourse, and that this domination undermines the very reasons for creating the antihegemonic domain of public discourse.<sup>89</sup> In other circumstances, however, the growth of private power does not seem to be troubling. The First Amendment Religion Clauses, for example, are seldom if ever criticized because they allow powerful and dominant religious sects to thrive. The capacity of antihegemonic domains to alter the balance between state and private power thus creates normative implications that must be assessed with care on a case-by-case basis.

Fourth, legal enforcement of positive cultural values can produce negative, as well as positive effects. Behind the Establishment Clause, for example, lies a violent history suggesting that legal imposition of certain kinds of religious practices can provoke retaliation or war. If the costs of following the logic of congruence are sufficiently high, the enforcement of values that suppress cultural conflict may simply not be worth the benefits.

Finally, the persistence of cultural disagreement can sometimes also be costly. No society has unlimited tolerance for disorder and turbulence. Cultural conflicts can spin out of control and threaten to unravel the core values that Devlin (and Durkheim) postulate are necessary for every society to survive as a viable social entity. Unmediated cultural conflict can lead to civil war or secession; it can undermine the very values that justify creating antihegemonic do-

89. For a discussion, see Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109 (1993).

mains.<sup>90</sup> In such instances, it may be better legally to impose fundamental cultural values than to face the unacceptable consequences of costly and destructive cultural conflict.

Even a cursory examination of these factors is sufficient to justify the conclusion that there is very little of a general or theoretical nature to be said about whether the law ought to deploy rights that facilitate or that suppress cultural conflict. This question can only be settled by close study of the pros and cons of particular legal interventions.

#### IV

Some will no doubt be disappointed by the relentlessly contextual nature of these conclusions. Whether we are addressing the general relationship of law to cultural conflict, or the jurisprudence of particular forms of legal action, or the imposition of rights that facilitate instead of suppress cultural dispute, we repeatedly find that the question of how law ought to respond to cultural conflict is deeply dependent upon the specific nature, content and history of proposed legal interventions, as well as their likely consequences. The only abstract truth seems to be that we cannot escape the risks and responsibilities of practical judgment.

What, then, has been the point of this inquiry? Nothing I have said will settle any of the outstanding debates that engulf the three major topics of this conference. I noted at the outset, however, that a general perspective on the relationship between law and cultural conflict would not and could not resolve differences of opinion regarding legal regulation of expression, religion, or the family. At most this Essay can aspire to offer something far more modest—the establishment of a common analytical framework that will facilitate constructive dialogue among those who disagree about the proper regulation of these controversial matters. That, at any rate, has been the ambition of this brief Essay.

90. An example of this phenomenon is when the tumult associated with unmediated cultural conflict within public discourse undermines the very democratic values that justify the creation of the antihegemonic space of public discourse. I have elsewhere referred to this possibility as the “paradox of public discourse.” See Post, *Constitutional Concept*, *supra* note 81.