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Three Nearly Sacred Books in Western Law

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ESSAY

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We American lawyers pride ourselves on the secular nature of our legal system. We celebrate the separation of Church and State. We think that the moving spirit of the law is to be found not in eternal truths about the universe but in the contingent needs of social and economic policy. "The life of the law has not been logic: it has been experience," said Oliver Wendell Holmes, Jr.,[1] in a sentence that since 1881 has broadcast to every new generation of lawyers the pragmatic foundations of their craft.

We assume that we have little in common with the great religious legal systems found in Judaism, Christianity, and Islam. After all, our law does not come from God. It comes from the pen of human legislators. It is fallible, imperfect, subject to change, and hardly worthy of the respect we associate with Church and Synagogue.

How then can I propose to speak today about nearly sacred books in the Western legal tradition? It is simple. I am going to challenge the conventional view that law and religion occupy totally separate spheres of social life. On the contrary, I will argue that our legal culture and other secular legal cultures function very much like religious communities.

The hallmark of Western religion—Judaism, Christianity, and Islam—is that the religious life is grounded in the reading of holy books, most notably the Bible and the Koran. The holy

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1. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Little, Brown, and Co. 1909) (1881).

books come, either directly or indirectly, from God. The idea of the prophet, the human being in touch with the divine word, is central to the Western religious tradition. And all of this, I dare repeat the basic point, appears to be foreign to the mind of lawyers.

But is it, in fact, so foreign? Western law is also founded on particular documents, indeed many written documents that provide the starting point for legal thinking, precisely as the Bible and other holy books are the beginning of religious thinking. We call these documents of the law statutes and case opinions. And some of these documents have acquired central significance defining the legal culture that has grown up around them.

I want to focus on three documents that have been so important in their respective legal cultures that they deserve to be called "nearly sacred." The three I shall consider are the United States Constitution of 1789, the French Civil Code of 1804, and the German Civil Code of 1900.

The nearly sacred quality of these documents is expressed in two ways. First, these are documents that have sustained the nations committed to them through great political upheavals and provide a thread of continuity deeper than transient political loyalties. Second, the political durability of these basic documents has vested in their language an almost liturgical quality. The language is recited as though the repetition of the words by itself could sustain a political regime.

Let us begin with the United States Constitution, for that is the oldest among the three and the one with which we are most familiar. The same essential document has generated a sense of historical continuity in the United States that, with some exaggeration, we date back to 1789 or even to the drafting of the document in 1787. We would like to believe that the same Constitution has governed us for over two-hundred and twenty years. If this is true for some in the North, it is certainly not true for eleven states of the South, who, we should recall, rather significantly interrupted the flow of history and adopted their own constitution in 1861.[2]

It is not even clear that the Union had adhered to the same

2. *See* CONFEDERATE STATES OF AMERICA CONST., *available at* http://www.yale.edu/lawweb/avalon/csa/csa.htm (as of Feb. 2, 2001).

Constitution since 1789. First, there are good grounds to think that the Constitution was in abeyance during the Civil War. Lincoln had little regard for the niceties of habeas corpus and, in his famous Address at Gettysburg, dates the origin of the American republic not to the Constitution but to the Declaration of Independence.[3]

The Reconstruction Amendments[4] so drastically altered the constitutional framework that it is only with some exaggeration that we can say the same Constitution bound the country in the postbellum as in the antebellum period. The major changes, of course, are the introduction of national citizenship for all people born on the soil of the United States,[5] the due process clause regulating the behavior of the states,[6] and, above all, the commitment—for the first time in the United States Constitution—to the equality of all persons under the law.[7]

I have argued elsewhere that, in fact, we have two constitutions, one based on the priority of freedom and the other based on the priority of equality.[8] The constitution of freedom begins in 1789 and comes to a gradual end, first in the *Dred Scott*[9] case enthroning the freedom to own other human beings as property and finally in the guns of Charleston harbor. The second constitution begins with the Gettysburg Address in November 1863 and then forges a new constitutional order on the basis of the Thirteenth, Fourteenth, and Fifteenth Amendments. But this is my personal view of history.

The dominant view holds, despite the evidence to the contrary, that we have a single Constitution amended twenty-seven times. This is a tribute to the nearly sacred quality of the constitutional text. It has survived a civil war, a new order of

3. "Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal." President Abraham Lincoln, Address Delivered at the Dedication of the Cemetery at Gettysburg (Nov. 19, 1863), *in* GARY WILLS, LINCOLN AT GETTYSBURG 261-62 (1992).

4. *See* U.S. CONST. amend. XIII (ratified Dec. 6, 1865), U.S. CONST. amend. XIV (ratified July 9, 1868), U.S. CONST. amend. XV (ratified Feb. 3, 1870).

5. *See* U.S. CONST. amend. XIV, § 1.

6. *See* U.S. CONST. amend. XIV, § 1.

7. *See* U.S. CONST. amend. XIV, § 1.

8. *See, e.g.*, GEORGE P. FLETCHER, OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY (2001).

9. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

equality under law, and a gradual shift from elitist republicanism to popular democracy.

The nearly sacred quality of the text comes through in attitudes toward the amendments and the original text. When we amend the Constitution, we do not change the original text. We simply add language at the end that says that things should be different than what we find in the text itself. For example, Article I, section 3, clause 1 provides: "[t]he Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote."[10]

Note the phrase "chosen by the Legislature thereof," which you will find reprinted in every edited and republished text of the American Constitution. It is only when you get to the amendments that you realize that this is not the way we choose our senators. The Seventeenth Amendment, ratified in 1913, tells us: "[t]he Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years; and each Senator shall have one vote."[11]

The only amendment to the Constitution consists in the use of the phrase "elected by the people thereof" instead of "chosen by the Legislature thereof." Now, what you might expect and what often happens when statutes are amended, the official editors of the Constitution would rewrite the Article I, section 3 clause to make clear that the people should elect their senators directly. But no, that would be to transgress against the nearly sacred text of 1789. The original is left alone, the amendment is added, and it is up to the reader to put the two together and realize that the new language controls the old. The editor helps by placing the old language in brackets as a clue that something has been changed.[12]

Not only the original means by which we choose our senators remains in every published text of the Constitution. The embarrassing language regulating slavery is still republished in every edition of the nearly sacred document. Thus we can still

10. U.S. CONST. art. I, § 3, cl. 1.

11. U.S. CONST. amend. XVII.

12. *See, e.g.*, WILLIAM W. VAN ALSTYNE, FIRST AMENDMENT: CASES AND MATERIALS xxv (2d ed. 1995).

read in Article I, section 2, clause 3:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.[13]

Again, the editors place brackets at the beginning and end of this sentence. It would not be a great sin, it seems to me, to drop the language altogether. That it remains says something important about our attitudes toward the integrity of the document. We insist that it was enacted as a whole in 1789, and that the whole requires republishing, albeit amended twenty-seven times.

The analogy with the holy books of Western religion cannot escape us. The prophets Isaiah and Jeremiah call our attention to the spirit of the law. They did not repeal the revelation at Sinai. They added to it. The New Testament did not repeal the Old. It added to it. The Koran and the Book of Mormon did not reverse the flow of history and substitute a new revelation that canceled the older one. That is not the way revelation works. It is always cumulative, just like the constitutional text and its amendments.

One of the twenty-seven amendments repeals another one. The Eighteenth Amendment prescribes prohibition.[14] The Twenty-first says, "Forget it. We changed our mind."[15] The state of affairs after the Twenty-first Amendment was the same as before the Eighteenth. Liquor was all right. But why not leave both of these amendments out? Who needs to read this? But there you find them—in every text of the document. Once added to the Constitution, an amendment is canonized. It is never forgotten.

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13. U.S. CONST. art. I, § 2, cl. 3.

14. "After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." U.S. CONST. amend. XVIII, § 1.

15. "The eighteenth article of amendment to the Constitution of the United States is hereby repealed." U.S. CONST. amend. XXI, § 1.

Some of the amendments have sunk so deeply in our national consciousness that they are no longer subject to any textual change at all. The most notable is the First Amendment with language that has become as sacred as any words in the corpus of American law: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[16]

About a decade ago the Supreme Court held that it was unconstitutional, a violation of free speech, for the states to punish flag burning.[17] The crime was called "flag desecration," which is revealing in itself. The term "desecration" has obvious religious overtones. The American attitude toward the flag verges on the reverence attached to religious artifacts and, not surprisingly, Congress reacted with horror to the Court's ruling.[18] One reaction was to propose an amendment to the First Amendment which would have exempted flag burning from the range of protected free speech.[19] But the idea of amending the First Amendment proved to be unpalatable. To those of constitutional faith, it would have been a desecration of the text to tamper with the First Amendment. It was a case of one nearly sacred item—the flag—in conflict with another nearly sacred item—the basic text of American freedom. In the end, the First Amendment, in all its liturgical absoluteness, won out.

The United States Constitution is the paradigmatic case of faith, something like religious faith, invested in a legal document. For many scholars of the last generation, particularly the immigrants and children of immigrants from Eastern Europe, Jews, and Christians, the Constitution became an object of faith. The framers' words established the path to follow. If we would only live by the law revealed in Philadelphia in 1787 we would find the way to a democratic paradise on Earth. The explicit connection between Jewish theological thinking and the Constitution came into the open in Robert Cover's monumental arti-

16. U.S. CONST. amend. I.
17. *See* Tex. v. Johnson, 491 U.S. 397 (1989).
18. *See* VAN ALSTYNE, *supra* note 12, at 327-28.
19. *See id.*

cle in the Harvard Law Review, *Nomos and Narrative*.[20] His overinvesting the Constitution with religious meaning prompted Suzanne Stone to deliver her scholarly critique, carefully sorting out the ways in which the Jewish scholarly tradition was less than an inapt model for constitutional thinking.[21]

But my claim is not that constitutional thinking need be religious in nature, but merely that the legal culture surrounding our Constitution and other nearly sacred documents resembles a community of religious belief. I wish to pursue the analogy further by considering the tension in many religious cultures between literalism and fundamentalism, on the one hand, and liberal, expansive, dynamic interpretation on the other. We are familiar with this tension in approaches to reading the Bible. The question, for example, is whether the "day" in the seven days of creation[22] refers to a twenty-four-hour period or whether it can be understood symbolically as referring to a time period stretching for millions of years in our current understanding of time. A good deal of American religious life has centered on this struggle between a literal reading of the text and an imaginative or figurative interpretation designed to make sense of the underlying spirit of the text. This, of course, was the center of the great debate between William Jennings Bryan and Clarence Darrow in the famous Scopes trial testing the permissibility of teaching evolution in the school. The debate about evolution as compatible or incompatible with biblical teachings is still with us.

It is not surprising, then, that we encounter the same controversy in diverse approaches toward reading the Constitution. Justice Scalia has emerged as the great champion of the plain meaning rule of constitutional interpretation, which puts him in the same posture toward the charter of 1789 as William Jennings Bryan was toward the biblical charter delivered at Mount Sinai. The defense of literal reading is often expressed as an argument that the words represent God's will and fallible human beings could hardly substitute their judgment for God's. To get the

20. *See* Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

21. *See* Suzanne Last Stone, *In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory*, 106 HARV. L. REV. 813 (1993).

22. *See Genesis* 1:1 – 2:3.

same proposition in the context of constitutional interpretation, merely substitute the word "framers" for God. Who are ordinary mortals of the twenty-first century to substitute their judgment for the nearly sacred words of the eighteenth century framers? The basic idea is that the legislator, the law-giver, has laid down the law at a certain moment in time. The law should be considered as something like a military order. We are required to obey, precisely as the order was intended.

An alternative way of thinking about legal texts is suggested by an illuminating tale in the Jewish legal tradition. As recorded in the Talmud, a group of rabbis were engaged in a debate about whether a particular earthenware oven was kosher or not.[23] One of them, Rabbi Eliezer, said no; the other rabbis said yes. Rabbi Eliezer proceeded to invoke a variety of fantastic signs to support his view: at his command a carob tree was uprooted and flew across the field, a stream flowed upstream, and the walls started to collapse before they were frozen in mid-fall. The rabbis were not impressed by these signs.[24] Then Rabbi Eliezer, desperate and alone, invoked the argument of original intent: "If I am right, let heaven be the proof."[25] A heavenly voice then proclaimed: "How dare you oppose Rabbi Eliezer, whose views are everywhere the law."[26] Rabbi Joshua arose and quoted Deuteronomy: "It is not in Heaven." Rabbi Jeremiah explained the reference, stating that ever since the Torah was given at Mount Sinai, "we pay no attention to heavenly voices, for God already wrote in the Torah at Mount Sinai."[27] The point is that once the language is released and given to jurists to fashion to the needs of their time, the task of the lawgivers is finished. Their intentions and desires cannot rule—either from the grave or from Heaven.

The development of Jewish law was left, therefore, to the

23. *See* BABA MEZIA 59b, *reprinted in* THE BABYLONIAN TALMUD, at 352-56 (Isidore Epstein trans., The Soncino Press 1935).

24. *See id.* at 352-53.

25. "If the *halachah* agrees with me, let it be proved from Heaven!" *Id.* at 353.

26. "Whereupon a Heavenly Voice cried out: 'Why do ye dispute with R. Eliezer, seeing that in all matters the *halachah* agrees with him!'" *Id.*

27. "That the Torah had already been given at Mount Sinai; we pay no attention to a Heavenly Voice, because Thou hast long since written the Torah at Mount Sinai, *After the majority must one incline.*" *Id.*

rabbis. A good example of imaginative rabbinic development is the entire body of law on the separation of meat and milk in the dietary laws. There is nothing in the Bible that requires this separation. The rabbis inferred the necessity of this separation from the provision in Exodus which reads, "You shall not boil a kid in its mother's milk."[28] Now it is a big stretch from this language to the impossibility, under Jewish law, of a kosher cheeseburger. But as the Talmud instructs, the law is in the hands of the jurists, namely the rabbis.

This model of rabbinic legal development, based on interpretation by learned students of the law, provides an important model for understanding the evolution of the law first in the Catholic Church, under the tutelage of the Church fathers, and then on the Continent of Europe, under the guidance of the academic commentators. As we shall see, modern scholars of the law on the Continent implicitly follow the example of the rabbis and the Church fathers. We can refer to them generally as the "learned interpreters" of the law.

The important lesson implicit in this story from the Talmud is not only that the learned interpreters can seize control of the legal system but that an important division separates commentary by the drafters of the law and commentary after the law is enacted. God should be understood, after all, as the drafter of biblical law. The rabbis declare, in effect, that God's views about original intent cease to be important as soon as the law is laid down in a finite and fixed set of words.

The secular analogue to this tale from the Talmud would be an effort by James Madison, the primary author of the Constitution, to opine after the enactment of the Constitution about the intentions that prevailed in Philadelphia during the summer of 1787. As secretary of state under Jefferson, and later as president, Madison obviously remained a critical figure in American law. Should his post-ratification opinions about original intent have carried weight? The lesson from the Talmudic case is no. After the Constitution was given to the people, the voices from the past lost their relevance. If God cannot decide the meaning of the law given at Sinai, James Madison was in no position to

28. *See Exodus* 23:19.

opine authoritatively on the intentions of the framers in Philadelphia.

The jurisprudential assumption underlying this view is that any legal text—be it the Bible or the Constitution—comes to dwell in the hands of those who interpret and apply it to concrete cases. Admittedly, as part of the process of the argument, one can have recourse to the original language. In a debate about the scope of free speech, for example, it is of some value to underscore the very first words of the First Amendment: "Congress shall make no law . . . abridging the freedom of speech . . . ."[29] "No law," as Justice Black thought, meant no law. The case law has gone another route, but the appeal to the original text remains a persuasive consideration.

The original text is persuasive but not decisive. The Constitution did not become fixed forever when the words were written down and became authoritative. It began to live, to negotiate its interpretation and reinterpretation in the course of history. To put the matter in a slightly different way, this is the difference between the Constitution—the document, and constitutional law—the body of principles that have evolved over time.

One of the principles of constitutional law is that most provisions of the Bill of Rights apply to the states. The text of the First Amendment may refer only to Congress but we know as a matter of constitutional law that the prevailing interpretation is that neither Congress nor the states shall make a law encroaching upon the protected freedoms of the First Amendment.

Is important to keep this distinction in mind as we turn now to the other two nearly sacred documents of Western law—the French Civil Code of 1804 and the German Civil Code of 1900. Common lawyers suffer from a great misconception about the nature of codification. The view is widespread that the great codes of the Continent purport to solve all legal problems. They supposedly regulated everything in such great detail that there is no place for judicial imagination and creativity. Nothing could be further from the truth.

The French *Code civil* tries to regulate the entire field of

29. U.S. CONST. amend. I.

torts in five brief provisions. The basic rule is found in Article 1382, which provides: "Every action causing harm obligates the person by whose fault it occurs to repair the harm."[30] The entire law of strict liability for dangerous activity springs from another provision, Article 1384, which adds the not-so-useful information: "One is responsible not only for the damage one causes by one's own acts but also for that caused by the persons for whom one must answer or by things in one's charge."[31] The key is the latter phrase "or by things in one's charge."

The paradox of French law is that however much the *Code civil* is celebrated, the words of the code provide almost no guidance to the solution of concrete cases. The situation is similar to the problem of referring abstractly to freedom of speech, due process, and equal protection of the law and leaving it to the courts to figure out what these terms mean in practice. Indeed, Holmes could have been thinking about the *Code civil* when he wrote, "General propositions do not decide concrete cases."[32] The language and style of the code are important—not as algorithms for solving problems but a liturgy that expresses the tradition and continuity of French law.

The code has survived five republics, three wars with Germany, Napoleon III and Fascism in Vichy. And yet its language remains essentially the same. The code has a reputation for clarity and simplicity of style. It is reported that Henri Stendal, author of "The Red and the Black," read ten paragraphs every night before retiring. Some of the sentences of the code are indeed disarming. One of my favorites is Article 1134, which prescribes the effect of contracts: "Contracts legally formed take the place of the statutory law for the parties to the contract."[33] In other words, the parties can, by contract, define their own law.

It is not surprising that Francophiles in Quebec stress three sources of their distinctive identity in Canada. Their special status derives not only from their history and their language but

30. *See* THE FRENCH CIVIL CODE (J.H. Crabb trans., F.B. Rothman 1977) (as amended through July 1, 1976).

31. *See id.*

32. *See* HOLMES, *supra* note 1.

33. *See* FRENCH CIVIL CODE, *supra* note 30.

from their having adopted the *Code civil* as the foundation of the legal culture.

The 1804 *Code civil* brought about a cultural revolution similar to the ideological thrust of the American Constitution, at least as Lincoln understood the egalitarian thrust of the Constitution set against the background of the Declaration of Independence. As Americans abolished feudalism and royalty as institutions of government, the French incorporated the slogans of the 1789 Revolution—*liberté*, *egalité*, and *fraternité*—into their *Code civil*. This is most evident in the law of property, which abolishes the feudal institutions of estates in land. The commitment of the code is to liberal principles of free alienability of land and private autonomy in the field of contracts—the kind of autonomy that permits their framers to say that the parties to a contract can, of their own volition, define the law governing their relationship.

To be sure, the precise words of the *Code civil* are not as fixed and not nearly as sacred as the language of the 1789 Constitution. The code has been amended innumerable times, with changes carried out in the body of the text as well as in the addition of specialized statutes that take precedence over the general language of the code. Yet the code remains the framework and the starting off point for thinking about each aspect of private law. If a French lawyer wants to find out the current law, say, of French citizenship, he or she begins by opening an annotated edition of the code to the relevant topic and then consulting the specialized statutes, which are gathered under the relevant code provision. The code is supreme not in its language, not in the hierarchy of the legal system, but in the framework of thought that guides the mind of the French jurist.

But if the *Code civil* does not solve problems in and of itself, how do cases get decided under the code? The French have a well developed tort law, in particular, a vast body of law based on strict liability. The leap from language "or things in one's charge" to the current law of strict tort liability is about as imaginative as the rabbis' developing the law of separation of meat and milk on the basis of the prohibition against boiling a kid in its mother's milk.

The appropriate question is to ask: Well, if this develop-

ment has taken place, who under French law fulfills the role of the rabbis or the Church fathers? The understandable bias of lawyers in the common law tradition is to assume that the interpretative function is realized by judges, and indeed the judges do fulfill part of it. The French have no doctrine of *stare decisis*, but they do have a vast body of *jurisprudence*, as they refer to their case law. And a pattern of decision in the case—*jurisprudence constante*—has the same influence under French law as precedent has in the current state of the common law.

But it is not the courts alone that fulfill the interpretative function in the Continental civil law jurisdictions. The writings of scholars provide a source of legal understanding parallel to the decisions of the courts. The point may be more telling, as we shall see, in Germany than in France, but the tradition of scholarly *doctrine* is critical to the development of French law, particularly French private law. Common lawyers are wont to say that scholarly writing is merely secondary authority, commentary on the real authorities—the legislature and the courts. The Continental tradition toward scholarly authority is fundamentally different. The distinction is rooted in history. The civil law began in thirteenth century Bologna as commentary on the Roman legal sources. The universities and the professors, therefore, were central figures in the evolution of the civil law tradition.

The way all this is discussed in German reveals an important connection with the theological teaching of the Church. Doctrine, in German, is readily labeled "Dogma." Theoretical elaboration on the foundation of a particular body of law is called *Dogmatik*. The origins of this term are the Greek terms *dokein* and *dogmatikos*. In a Protestant legal culture, such as England and the United States, the use of this word in secular legal discourse is, to say the least, disturbing. Nothing could be more deprecatory than describing a particular theory of law as "dogmatic"—akin to the obligatory faith of the Church. From the standpoint of comparative law, however, we should realize the "parochial" nature of this reaction to the analogy between the secular legal culture and religious teachings. The same analogy is implicit in the word "doctrine," which comes from the Latin *docere*, meaning "to teach." Yet we are generally not

aware that doctrines represent the teachings of the best and most learned minds about the principles that should bind the courts.

There is in every legal culture, in my view, a de facto struggle over the power of interpretation. The conflict is between the influence of judicial decision-makers and of scholarly commentators. In the common law tradition, the judges are relatively dominant, but in many civil law countries the scholars have been historically more important than judges in elaborating the law. Whether the body of interpreted law comes from judges or from scholars, it is clear in every legal culture that a major gap exists between the code as a finite set of words and the law that the code generates. The difference between code and binding law is the space occupied by interpretation—development of the law by courts and scholars.

The difference between code and law—parallel to that between the Constitution and constitutional law—is expressed clearly in Continental Europe legal languages. In virtually all of these languages, the finite words of the code are understood as a species of enacted statutory law—called *loi*, *ley*, *legge*, *Gesetz*, or *zakon*. The law based on the code is thought to partake of a larger body of principles known by a different label, as *droit*, *derecho*, *diritto*, *Recht*, or *pravo*. Thus the French Code is known as the *Code civil*, but the law based on the code is called *le droit privé*. Analogous phrases are employed to refer to other bodies of law. Just about every European language makes this clear linguistic distinction between the code and the law based on the code.

We have therefore the following contradictory situation in the Continental European context. The language of the code is sacrosanct, but the body of law based on the code goes far beyond the canonized words of the code. The code provides the thread that runs through history and ties the country together through diverse political regimes, but the law derived from the code is what matters in the day-to-day life of the legal system. The same observation applies, of course, to the American Constitution. The Constitution always remains the same, subject to its formal amendments. But constitutional law changes from generation to generation.

The French *Code civil* had an impact across the European

landscape. Napoleon's armies carried the code with them and implanted it, precisely as English colonists took the common law with them and left it as their legacy to their former colonies. French law also took hold in some of the western German states, but nineteenth century Germans displayed a fierce resistance both to French influence and to the very idea of codification. In 1815, Savingy argued passionately that each nation must develop its own legal culture based on indigenous attitudes and cultural assumptions. Germany was not ready, he claimed, for codification, and this position prevailed in the still independent German states. In the course of the nineteenth century, German scholars engaged in lively debate about the foundations of private law, and though they claimed that they were exploring the German *Zeitgeist*, they devoted themselves primarily to the study of Roman texts.

This impressive body of German scholarship sought to find an underlying unity in private legal transactions. This quest for unity stood to the law as Einstein's later pursuit of the unified field theory stood to the world of physics. The intellectual breakthroughs of this nineteenth century scholarship were two ideas that enabled the scholars to conceptualize the entire body of private law as a unified whole. The first idea was the notion of a declaration of will, a *Willenserklärung*, a manifestation of the intent to be bound. The same declaration of will expresses itself in the making of a contract and in the act of transferring property. Thus the ritualistic aspect of transferring property—say by manumission or the handing over the object—took on merely evidentiary significance. The foundation for both contract and property transactions was the will of the parties participating in the transaction.

The second major breakthrough was the idea of a relationship of indebtedness—one party's owing something to another. This notion of the *Schuldverhältnis* provides a matrix for unifying contracts and torts in one framework called the law of obligations. Executory contracts generate obligations, and so do the actions that constitute torts. The torts themselves can have different foundations, but what they all have in common—and indeed with contracts as well—is that by virtue of the obligation the obligor must do something for the obligee.

With these two ideas as their foundation, the late-nineteenth century lawyers were ready, after the unification of the country in 1871, to think about the codification of private law. It took another generation for the code finally to take shape and to be passed by Parliament in 1896 to take effect at the beginning of the new century.

The *Bürgerliches Gesetzbuch*, or BGB as it is affectionately called, is in fact a remarkably different kind of code from the French *Code civil*. Its most striking achievement is the formulation of a General Part in the first of the BGB's five books. The General Part establishes general principles that govern the other four books, which are in order: The Law of Obligations, the Law of Things or Property, Family Law, and Inheritance. The General Part sets forth the unity of private law that the nineteenth century thinkers aspired to understand. The central idea of the General Part is the declaration of a will to be legally bound. This concept provides the unity underlying contracts, property transfers, marriage ceremonies and testamentary succession. Abstracting the declaration of will in this way enables the resolution of certain problems, such as mistake, fraud, and coercion, in a single legislative swoop. Paragraph 119 provides that any declaration of will is voidable if it is made under a mistake such that if the correct facts were known the declaration would not have been made. Paragraph 123 provides for voidability in cases of fraud or coercion. The assumption is that all transactions of the will are essentially the same—whatever the particular context. Where special problems do arise, the code can and does deviate from the general rule.

The French *Code civil* did not have a general part, and therefore the achievements of the BGB represent a major advance in legal thought. Not only did the German code achieve an abstraction and generalization of private law, but it synthesized the law of obligations in a separate book of the code. The law of obligations begins with its own general part, which sets up general principles that govern all twenty-five special cases of obligations, including sales, leases, unjust enrichment and torts. The central insight of this general part to the second book is found in Article 249, which defines the general duty to repair in kind: "Whoever has a duty to repair must create the situation

that would have existed if the circumstances producing the duty to repair had not come about."[34] This principle covers the diverse cases of performing a contract not performed, returning goods improperly held, and repairing damage caused in tort. If for some reason the duty to repair in kind is not feasible, then the obligor must provide compensation in money. In practice, of course, obligors end up owing a duty to pay compensation but the preliminary obligation, in principle, is to take an action to correct the source of the problem. The generalization of obligations explains why fault and contributory fault are just as important in thinking about contract liability as about tort liability.

The surprising feature of the code is that in its pursuit of abstraction it overlooks a fundamental problem. The code seeks to formulate principles of contract and contractual breakdown without using the notion of contractual violation or breach. One would think that it would be impossible to formulate a theory of contract without a notion of breach. But the BGB tries to do so. The central notions of contractual breakdown are the unwillingness to perform and the failure to perform within a deadline set by the obligee. Overlooked is the situation in which the obligor is willing and able to perform but performs negligently. Illustrative examples are medical malpractice and the delivery of defective goods that cause harm. For various reasons there is a tendency to think of these negligent acts as contractual faults rather than as torts, as they might be conceptualized in the common law. Despite the impulse to think of these breaches as grounded in contract, the code fails to mention the possibility of negligent breach causing harm.

Two years after the code came into force, in 1902, a scholar named Staub noticed this deficiency and wrote an influential book, entitled "Positive Breach of Contract," with the aim of supplementing the code provisions with principles of breach and liability. His method is illuminating, for it bears a significant resemblance to techniques used by the United States Supreme Court to supplement the text of the Constitution with important principles, such as the right to privacy under the due process clause. Professor Staub drew on the idea of *Rechtsanologie*—or

34. *See id.*

analogy based on principles of law. He noticed that there were several contexts in the code that implicitly recognized the idea of contractual breach. From these particular examples he inferred a general principle of breach as a principle embedded in the code. Soon thereafter the courts accepted the idea and now positive breach of contract is a standard feature of German law. This is a dramatic example of the way in which scholarly writing can function as a source of law.

The United States Supreme Court used the same basic technique of inferring a principle of constitutional privacy from particular instances in the Bill of Rights recognizing the importance of the home and personal papers.[35] The document was instinct, it was argued, with the idea of privacy. It remained to the interpreters to explicate the obvious—at least that which was obvious in our time and place.

This kind of generalization from particular provisions in a code has certain ideological preconditions. The inference does not work if the starting points are drawn from a haphazard collection of statutory provisions. It is possible only if the code is understood as a document embodying wisdom, a document whose whole is greater than the sum of its parts. The wisdom is invested in the code and remains there to be discovered by later generations. We are willing to make this assumption about the United States Constitution, and the French and Germans about their civil codes.

The assumption of wisdom encoded in the document is, of course, reminiscent of the efforts to search for clues and suggestions of hidden truths in the Bible. That lawyers approach the Constitution and the great civil codes in the same way established my central proposition—that these are nearly sacred documents of the law. They are the documents that sustain legal cultures from generation to generation, from regime to regime, and they carry wisdom from the past waiting for us, in the present, to interpret and understand.

35. *See, e.g.*, Griswold v. Conn., 381 U.S. 479 (1965).