

Narratives of the Constitutional Covenant

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Abstract: The constitutional narrative plays perhaps a surprisingly important role in American society. It claims to unfold present judgment from past precedent, according to the doctrine of *stare decisis*, given an eloquent exposition by the Supreme Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, where the Constitution is referred to as a “covenant” among generations. Analysis of this and other covenantal narratives spun by the Court suggests that despite the emphasis on precedent they may work according to the retrospective logic of narrative itself, in which elements become functional in terms of what follows them. Plots work from end to beginning, reinterpreting the past in terms of the present. The Supreme Court opinion, when subjected to an analysis sensitive to its narrative rhetoric, suggests something akin to the structure of prophecy and fulfillment in its composition of the covenantal narrative.

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Any society needs myths of origins to confer meaning – possibly sacrality – on itself. Such myths can be dangerous – they probably have been more noxious than beneficial over history – and need to be seen for what they are: constructed fictions, not revealed truths. They are narratives with etiological significance, “explaining” how we got to be the way we are. Among the many such narratives that Americans regularly call on, one of the most curious is the constitutional narrative – curious because it is not obvious why a society should need such explicitly, often technically legal narratives to make sense of itself. Yet since the U.S. Constitution in many ways takes the place of the texts held to be sacred in other societies, the need to find continuing meaning in the narratives spun from it may not be so surprising. Still, our reverence for and obedience to these narratives, even when they seem counterintuitive and socially unproductive, claims attention.

A notable recent phenomenon in constitutional jurisprudence has been the apparent upsurge of “originalism,” even among its opponents. A couple of decades ago, for instance, Justice William Brennan, dissenting in *Michael H. v. Gerald D.*, declared

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of Justice Antonin Scalia's majority opinion: "The document that the plurality construes today is unfamiliar to me. It is not the living charter that I have taken to be our Constitution; it is instead a stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past."¹ That "living charter" seems to be evoked less frequently at present, and the "prejudices and superstitions of a time long past" appear to command greater allegiance on the Supreme Court. In *District of Columbia v. Heller*, for instance – the 2008 case that held that the Second Amendment guarantees an individual right to bear arms – both Scalia's majority opinion and the lead dissent, by Justice John Paul Stevens, stake their claims on how that amendment should be understood in its original historical context.² That is, both Stevens and Scalia appear to sign on to what Scalia has long argued should be the underlying principle of constitutional interpretation: fidelity to the "original understanding" of the document, as evinced by the ratification debates, discussions in *The Federalist*, and similar writings, though Stevens argues that Scalia misuses those historical contexts. *Heller* led a number of commentators to declare that we all have become originalists.³ Whether or not this is true – the originalist argument can often be more polemical than truly historical, and its truth claims stand in tension with the normal respect accorded to the compiled wisdom of precedent – it does point to the extent to which debates about where our laws, our ideologies, and our social commitments come from matter in contemporary America. Strange that this should be so in a country that has always seen itself as resolutely turned to the future. But perhaps that future orientation paradoxically provides the very foundation for attention to the past, and to the narrative of how we got from past to present.

The common law tradition that the United States shares with Britain derives current legal decisions from precedent, fitting the present case to analogous cases that have come before. In constitutional adjudication, the precedents derive from and lead back to the written document that is considered the supreme law of the land. But that does not usually entail "originalist" readings: the chain of precedents deserves respect in itself, and ought not to be disregarded in a putative claim to original understandings. The respect for precedent is enshrined in the doctrine of *stare decisis*: the rule that one does not change the decisions made in the past, but builds upon them. One of the best expositions of what this means and how it works comes from Justices Sandra Day O'Connor, David Souter, and Anthony Kennedy, authors of the "joint opinion" in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the 1992 case that reaffirmed (with some modifications) the right to abortion first secured in *Roe v. Wade* (1973).⁴ The opinion is an effort to explain why it is that even if the Court would not rule as it did in *Roe* if the case were coming to it afresh, it is important to reaffirm its ruling close to a generation later. Beyond that, it is an effort to explain the source of the Court's authority to write the constitutional narrative.

The very concept of the rule of law, write O'Connor, Souter, and Kennedy, requires continuity over time, so that citizens may rely on the law. Thus, though one might rule differently were the issue at hand coming to adjudication for the first time, the fact that it was once ruled upon in a certain way, and that people have come to rely on that ruling, alters the second adjudication, giving a heavy burden of proof to those who would reverse course. As the joint opinion puts it, to both those who approve, and those who disapprove but struggle to respect a

constitutional ruling, “the Court implicitly undertakes to remain steadfast” (*Casey*, 868). “Steadfastness” is indeed not only pragmatic – assuring a uniform law that can be relied on – but also moral: “Like the character of an individual, the legitimacy of the Court must be earned over time.” Note the words “over time”: earned legitimacy depends on a history, a narrative of consistency, written by several hands but in the same spirit and purpose. The moral Court, like the moral individual, must be true to itself.

There are times when the Court can and must overrule itself: the joint opinion points to the overturning of the *laissez-faire* economics of *Lochner v. New York* (1905) by *West Coast Hotel Co. v. Parrish* (1937) and – the most famous reversal – *Plessy v. Ferguson* (1896) overruled by *Brown v. Board of Education* (1954). The Court describes these two striking rejections of *stare decisis* as “applications of constitutional principle to facts as they had not been seen by the Court before.” Such reversals must be rare if the Court is to maintain its moral authority to speak in ways that will be accepted and complied with. As the joint opinion explains:

The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court’s legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation. (*Casey*, 865 – 866)

Sequence and consecution in the constitutional narrative must not be random; the new must be logically entailed by precedent. The most apt words in the lines

quoted above may be “sufficiently plausible,” a phrase that alerts us to the *rhetoric* deployed by the Court. What is “sufficiently plausible” is that which persuades its readership, its audiences, which assures narrative conviction in its narratees. “Sufficiently plausible” is tautological – but in a way that any public argument must be: it judges the effectiveness of persuasion by its capacity to persuade in fact. The logic of the joint opinion is necessarily circular: it claims that rulings by the Court will be accepted if and when they appear to fit seamlessly with the master narrative, which in turn means that their acceptance creates the seamless narrative, the perception that the law is “steadfast.” What “suffices” for the “sufficiently plausible” is ... what suffices.

Raising the moral stakes, in conclusion to its discussion of *stare decisis* the joint opinion states:

Our Constitution is a covenant running from the first generation of Americans to us, and then to future generations. It is a coherent succession. Each generation must learn anew that the Constitution’s written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution’s own promise, the promise of liberty. (*Casey*, 900)

By casting the Constitution as a “covenant,” and arguing that it offers a “coherent succession” from generation to generation, the Court images itself as the author of covenantal narratives, stories that claim the sacrality of generational solidarity, and of the present (and future) as realization of that which lay latent within the past. The “promise of liberty” will unfold as foretold by the covenant, as realization of a prophecy, as completion of that promise.

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The Court's logic in defense of its covenantal narrative is to a large degree the logic of narrative itself. It offers an example of what the French narrative theorist Gérard Genette calls "the determination of means by ends . . . of causes by effects." Genette writes:

This is that paradoxical logic of fiction which requires us to define every element, every unit of the narrative by its functional character, that is to say among other things by its correlation with another unit, and to account for the first (in the order of narrative temporality) by the second, and so on – from which it follows that the last [unit] is the one that governs all the others, and that is itself governed by nothing.⁵

The way events are enchainé is determined by the reasoning of a discoverer standing at the end of the process, then laid out as a plot leading from beginning to discovery. Earlier events or actions make sense only as their meaning becomes clear through subsequent events, in what Genette calls a "paradoxical logic." Or, as Roland Barthes suggests, narrative is built on a generalization of the philosophical error of *post hoc, ergo propter hoc*: narrative plotting makes it seem that if B follows A it is because B is logically entailed by A, whereas in fact A becomes causal only in terms of B.⁶ This narrative logic may to some degree cover over a tension between what is called for in order to create the seamless plot and the other paths – other claims to justice – that were not taken.

The eloquent defense of *stare decisis* in *Planned Parenthood v. Casey* suggests that the narrative of constitutional interpretation depends on the retrospective interpretation of the prior narrative in light of the new episode the Court is adding to it. This must be the case because dissenters can and do argue that the new decision precisely misinterprets prior history,

which would be better served – given a more plausible plot line – by the opposite ruling. The form taken by all constitutional interpretation indeed follows this model: that the proposed interpretation realizes the true meaning of the constitutional narrative better than the alternatives. It provides the better ending, defined in terms of the ending that makes better sense of the plot leading up to it. If the present is constrained by the past, as in legal theorist Ronald Dworkin's famous analogy of the "chain novel," with different authors furthering its plot, more strikingly the past is hostage to the present, which redefines its meaning.⁷

It falls within this same logic that constitutional narratives often claim they are based on a return to the beginning – to the text and context of the Constitution itself – in order to track forward the development of text and idea. This is especially true when the Court is aware that it is propounding what will appear to be a radically new interpretation, one that will not be accepted without resistance. Thus, for instance, Chief Justice Earl Warren in the landmark case *Miranda v. Arizona* (1966) – which extended the Fifth Amendment protection against self-incrimination to police interrogation of criminal suspects – claims:

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence. . . . We start here . . . with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized . . . an explication of basic rights that are enshrined in our Constitution. . . . These precious rights were fixed in our Constitution only after centuries of persecution and struggle.⁸

The ruling in *Miranda*, Warren claims, is simply the emergence into the light of day of what was all along entailed by the Fifth

Amendment privilege against self-incrimination. *Miranda* makes good on a long history; it realizes that narrative's latent meaning. It is as if constitutional law had always contained within itself the seed that now matures into *Miranda* doctrine.

Inevitably, the dissenters in *Miranda* claim that Warren has the story wrong. To Warren's assertion that the majority's ruling is "not an innovation," Justice Byron White ripostes that "the Court has not discovered or found the law. . . . [W]hat it has done is to make new law" (*Miranda*, 531). Another dissent by Justice John Marshall Harlan refers to "the Court's new constitutional code of rules for confessions" (*Miranda*, 504). Harlan sets out to mark the point at which the Court "jumped the rails" (*Miranda*, 508) – the point at which it deviated, with dire results, from the correct narrative line. He, too, reaches back to origins, to claim that the majority's reliance on the Fifth Amendment is "a *trompe l'oeil*," a deceptive reality effect that it has taken for reality itself. Harlan brands the majority's ruling as a wholly implausible narrative: "One is entitled to feel astonished that the Constitution can be read to produce this result" (*Miranda*, 518). And in his peroration, Harlan declares, citing the words of a bygone Justice, Robert Jackson: "This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added" (*Miranda*, 526). There seems to be an interesting, if unintended, pun here, on storeys as features of houses and stories as narrative. In both senses of the word, Harlan implies that the new narrative episode written in *Miranda* brings the collapse of the entire narrative. It makes it the wrong story.

For all their discourse on origins, then, both majority and dissent in *Miranda* implicitly rely on the notion that the outcome of the story, the ending written

(however provisionally) by the current ruling, determines the meaning of the story's earlier episodes: the present rewrites the past.⁹ They discover here – though without explicit awareness – the logic of narrative itself. As a number of commentators on narrative, myself included, have argued, narrative is retrospective. It begins from the end, which confers meaning on beginning and middle, which indeed allows us to understand what can be identified as beginning and middle. When we read a narrative, we read toward the end, not in knowledge of what it will bring, but in anticipation that it will bring retrospective illumination to the plot leading to it. Thus Sartre's fictional spokesman Roquentin, in *La Nausée*, argues that when you tell a story – as opposed to living it – you only appear to begin at the beginning, because in reality "the end is there, transforming everything."¹⁰ That is, the knowledge that an end lies ahead confers intention and meaning on the actions recounted. This is what he means by "adventure," which in its Latin root, *ad-venire*, refers us to what is to come. Roquentin says further, "[W]e feel that the hero has lived all the details of this night as annunciations, as promises, or even that he lived only those that were promises, blind and deaf to all that did not herald adventure. We forget that the future wasn't yet there." It is in the peculiar nature of narrative as a sense-making system that clues are revealing, that prior events are prior, and that causes are causal only retrospectively, in a reading back from the end.

Historian Carlo Ginzburg has speculated that narrative originated in a society of hunters, in the tracing of signs pointing to the passage of quarry. Learning to put those clues together in a narrative chain that would lead to the quarry offers a form of reasoning that is not properly speaking

either deductive or inductive, but precisely narrative: the creation of meaningful sequences. Ginzburg compares this “hunter’s paradigm” to ancient Mesopotamian law, which worked through discussions of concrete examples rather than the collection of statutes – similar in this respect to Anglo-American “case law” – and to Mesopotamian divination, based on the minute investigation of seemingly trivial details: “animals’ innards, drops of oil on the water, stars, involuntary movements of the body.”¹¹ The same paradigm is found in the divinatory and jurisprudential texts, with this difference: that the former are directed to the future, the latter to the past. Generalizing further, Ginzburg suggests that all narrative modes of knowing (such as archaeology, paleontology, geology) make what he calls “retrospective prophecies”¹²: prophecies that work backward from outcome to that which announces and calls for the outcome.

The notion of *retrospective prophecy* perfectly characterizes the constitutional narratives written by the Supreme Court, and perhaps indeed most legal narrative. It is a prophetic narrative cast in the backward mode, implicitly arguing that the ruling in the case at hand is the fulfillment of what was called for at the beginning – somewhat in the manner that medieval Christian theologians argued that the Gospels offered a fulfillment of the prophetic narratives of the Hebrew Bible, as figure and fulfillment. For Augustine, for instance, Moses is a *figura Christi*, Noah’s Ark a *praefiguratio ecclesiae*.¹³ Past history is seen as realized, as fulfilled, in the present. It is as if the past were pregnant with the present, waiting to be delivered of the wisdom that the Court reveals in its ruling. Recall *Casey*’s use of the word *covenant* to describe the Constitution, precisely in its historical relation to the citizenry. Each new ruling by

the Supreme Court is an episode in the unfolding narrative of that covenant.

The argument from origins that you get in a Court case such as *Miranda* is doubtless sincere, and necessary, in its desire to make origins entail a certain outcome, to argue: this is not an innovation in our jurisprudence, but the present application of long-standing principle and precedent, part of that “coherent succession.” Nonetheless, we can recognize in it the structure of the retrospective prophecy, in its arguing that the stipulated outcome is the only way to realize the history of constitutional interpretation, to deliver on its immanent meaning. Narrative always has Genette’s “double logic,” telling its story from the beginning but structuring it in terms of the end that makes sense of that beginning. It is like the structure of trauma in many of Freud’s case histories, where a later event will retrospectively sexualize and thus confer traumatic force on an earlier event.

Judicial opinions are full of a rhetoric of constraint: the judge cannot rule otherwise than he is doing because he is constrained by precedent. Whatever his personal preferences in the case, the outcome is imposed on him by the history leading up to it. Furthermore, it often seems that the more the Court’s ruling might be interpreted as an innovation – a break with the past – the more the rhetoric of the opinion asserts the seamless continuity of its ruling with the past, its simple and necessary entailment.¹⁴ The rhetoric of *stare decisis* may in this manner be something of a “cover-up,” a claim that the weight of the past narrative dictates this outcome – whereas the dissent, as in *Miranda*, will claim that the Court has “jumped the rails,” lost the proper design and intention of the narrative, given the wrong plot, betrayed the “covenant.” To say this is not to argue that the narrative

traced from origin to endpoint is useless or false. The conclusion to the narrative will be acceptable to its audiences only if the construction of the narrative has been “sufficiently plausible,” to use *Casey’s* words again. As Dr. Watson says to Sherlock Holmes at the end of one of their cases, “You reasoned it out beautifully. . . . It is so long a chain, and yet every link rings true.”¹⁵ The chain composed of true links is perspicuous as a chain only at the end. The detective story is in this an exemplary form of narrative because it shows so well how this chain is constructed.

“It is so ordered,” the Supreme Court opinion typically ends. The Court has managed to make its orders, its outcomes, stick with remarkable consistency. Presidents, legislators, police, citizens accept the order however much they may disagree with it, however fervent their protests may be. Even such a paltry and embarrassing decision as *Bush v. Gore* in 2000 – devoid of legal reasoning, patently jury-rigged for the occasion – managed to make itself obeyed. There are a very few moments in American history when the Court’s narrative has seemed so implausible and so unacceptable to parts of the country that the issue has created civil unrest. The most notable was probably *Dred Scott v. Sandford* (1856), which provided a decision so contentious and unsatisfactory – and a narrative of American citizenship so starkly exclusionary – that its issues could be decided only by the Civil War. Closer to our own time, the Court’s decisions in *Brown v. Board of Education* I and II (1954 and 1955) provoked various degrees of resistance, most notably and violently the refusal of the executive branch of the state of Arkansas, in the person of Governor Orval Faubus, to execute the Court’s orders. In fact, Faubus used the power that ought to have been brought to the execution of the law to its infraction,

refusing entry by African American students to Little Rock Central High School, and mobilizing the Arkansas National Guard to bar the doors. This was followed by President Eisenhower’s sending units of the 101st Airborne Division to Little Rock to force the students’ entry.

This crisis in resistance to the Court’s order – unprecedented in U.S. history, before or since – spurred the Court to assemble in special session, in September 1958, and to issue its ruling in *Cooper v. Aaron*, affirming the Eighth Circuit Court of Appeals’ reversal of the Arkansas District Court’s grant of a stay of integration in Little Rock.¹⁶ *Cooper v. Aaron* has the distinction of offering not simply the unanimous opinion of the Court, but also the names of all nine justices spelled out at the outset of the opinion. Here, the Court reaches back to the very genesis of its power of judicial review in *Marbury v. Madison*:

In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as “the fundamental and paramount law of the nation,” declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, that “It is emphatically the province and duty of the judicial department to say what the law is.” This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land. (*Cooper*, 18)

Like Antaeus touching ground to regain strength, the Court here touches its very beginnings as a branch of American governmental power. Note the words “it follows that”: not only the Constitution,

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but the interpretive narratives spun from it are the supreme law.

Appended to the unanimous opinion in *Cooper v. Aaron* is a concurring opinion by Justice Felix Frankfurter – a narcissistic move on his part that somewhat disfigures the impressive unity of the Court’s self-presentation in the case, but a document that is full of interest. It is a tense, eloquent, strained piece of judicial rhetoric in reaction to the “profoundly subversive” use of state executive power to thwart rather than carry out the law, and a reaffirmation of “this Court’s adamant decisions in the *Brown* case” – decisions, the adjective implies, set in stone. Frankfurter reaches back even further than *Marbury v. Madison*, to quote John Adams on the need for a “government of Laws, not of Men.” Frankfurter then goes on to cite from his own concurring opinion in *United States v. United Mine Workers*¹⁷:

The conception of a government by laws dominated the thoughts of those who founded this Nation and designed its Constitution, although they knew as well as the belittlers of the conception that laws have to be made, interpreted and enforced by men. To that end, they set apart a body of men, who were to be the depositories of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be “as free, impartial, and independent as the lot of humanity will admit.” So strongly were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with extraordinary safeguards and prestige. (*Cooper*, 23 – 24)

So here it is that the priestly caste of the Supreme Court justices emerges from the shadows to stand in full view, its certification to interpret the law of the land reaffirmed. These interpreters are not like any others. They are “depositories of

law.” They are set aside in the temple to contemplate and to expound the law – which here sounds very much like the Law. Frankfurter has sensed that a subversive threat of disobedience to the constitutional narrative declared by the Court needs to be met with a rhetoric that at the last foregrounds the very status of the Court itself, the solemn context of its speech acts.

“It is so ordered”: the outcome so proposed writes the past history of interpretation in a rhetoric that touches back to origins and foregrounds its own constraints in reaching this end. The Court offers an arche-teleological discourse that stresses origin and constraint in order to achieve ends. Such a narrative of the covenant is no doubt simply necessary – covenantal discourse, one might say, is like that. The structure of prophecy and fulfillment is doubtless a requisite of any claim to a master narrative that governs societies. If the discourse of American constitutional interpretation turns out to be remarkably biblical, that should not come as a surprise, since it is difficult to imagine a society without some sort of providential discourse underlying it. If the Constitution is our myth of origins, we must expect it to generate mythic narrative consequences. It should perhaps be subjected to a more acute awareness of its narrative logic. Here is where *reading* – of the attentive sort practiced by literary scholars at their best – might sharpen the legal caste’s interpretive enterprise.

ENDNOTES

- ¹ *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), 141.
- ² *District of Columbia v. Heller*, 554 U.S. 570 (2008).
- ³ For example, *New York Times* legal correspondent Adam Liptak writes, “The two sides in the Heller case claimed to rely on the original meaning of the Second Amendment, based on analysis of its text in light of historical materials”; Adam Liptak, “Justices’ Ruling on Guns Elicits Rebuke, From the Right,” *The New York Times*, October 21, 2008. *Slate* legal correspondent Dahlia Lithwick comments that *Heller* “revealed the absolute dominance of conservative interpretive theories at the high court . . . leading more than one commentator to enthuse that regardless of the outcome, after *Heller*, ‘we are all originalists now’”; Dahlia Lithwick, “The Dark Matter of Our Cherished Document,” *Slate*, November 17, 2008.
- ⁴ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. (1992), 833. Subsequent citations are noted parenthetically within the text.
- ⁵ Gérard Genette, “Vraisemblance et motivation,” in *Figures II* (Paris: Éditions du Seuil, 1969), 94. Translated by David Gorman as “Vraisemblance and Motivation,” *Narrative* 9 (3) (2001).
- ⁶ Roland Barthes, “Introduction à l’analyse structurale des récits,” *Communications* 8 (1966): 10. Translated by Richard Howard in Susan Sontag, ed., *A Barthes Reader* (New York: Hill & Wang, 1982).
- ⁷ See the most recent exposition of this model of interpretation in Ronald Dworkin, *Law’s Empire* (Oxford and New York: Oxford University Press, 2006), 228 – 238.
- ⁸ *Miranda v. Arizona*, 384 U.S. 436, 439, 442 (1966). Subsequent citations are noted parenthetically within the text.
- ⁹ Literary theorist and legal scholar Stanley Fish makes a similar point in his critique of Ronald Dworkin; see Stanley Fish, “Working on the Chain Gang: Interpretation in Law and Literature,” in *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*, ed. Stanley Fish (Durham, N.C.: Duke University Press, 1989), 94.
- ¹⁰ Jean Paul Sartre, *La Nausée* (Paris: Gallimard, 1947), 59 – 60; my translations. For an analogous argument about how legal precedent is important in terms of its future viability, see Jan Deutsch, “Procedure and Adjudication,” *Yale Law Journal* 83 (1974): 1553 – 1584. Deutsch argues, for instance: “as we create precedent, by the choice among theoretically possible grounds of decision, we must attempt to anticipate future relevance.” I am grateful to my friend Michael Seidman, Professor at Georgetown Law Center, for bringing Deutsch’s essay to my attention.
- ¹¹ Carlo Ginzburg, “Spie. Radici di un paradigma indizario,” in *Miti Emblemi Spie* (Torino, Italy: Einaudi, 1986), 158 – 159. Translated by John Tedeschi and Anne C. Tedeschi as “Clues: Roots of an Evidential Paradigm,” in *Myths, Emblems, Clues* (London: Hutchinson Radius, 1990), 96 – 125. I have modified the Tedeschi translation in places in order to give a more literal rendition, and I have noted page references to both the Italian original and the translation.
- ¹² Ginzburg, “Spie,” 183; Tedeschi, “Clues,” 117.
- ¹³ See Erich Auerbach, “Figura,” in *Scenes From the Drama of European Literature* (New York: Meridian Books, 1959), 38.
- ¹⁴ Joseph Halpern takes a similar position with regard to *Miranda*: “In contrast to the dissents, the majority opinion employs a comfortable rhetoric that denies and masks change”; Joseph Halpern, “Judicious Discretion: *Miranda* and Legal Change,” *Yale Journal of Criticism* 2 (1) (1987): 58. Halpern’s perceptive essay confirms my views of the rhetoric of *Miranda*.
- ¹⁵ Conan Doyle, “The Red-Headed League,” in *The Adventure of the Speckled Band and Other Stories of Sherlock Holmes* (New York: Signet, 1965), 83.
- ¹⁶ *Cooper v. Aaron*, 358 U.S. 1 (1958). Subsequent citations are noted parenthetically within the text.
- ¹⁷ 330 U.S. 258 (1947), 307 – 309.