From Pyramids to Stories: Cognitive Reconstruction of Local Government Authority

John Martinez
FROM PYRAMIDS TO STORIES: COGNITIVE RECONSTRUCTION OF LOCAL GOVERNMENT AUTHORITY

By Professor John Martinez

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Introduction

This article describes a cognitive science approach to law, uses it to critically evaluate conventional "pyramid" legal analysis of local government authority, and suggests stories as alternative models for defining such authority. The article suggests that stories better reveal what is at stake in regard to local government authority and thus helps us to arrive at better solutions. The article illustrates the storytelling analytical approach in three situations: a local government's condemnation of private property for resale to a private developer, the delegation of land use control authority to neighborhood groups, and local government attempts to zone out nontraditional families.

Cognitive science is the study of how we acquire, process and use information. A cognitive model may be thought of as a lens through which we see the world, or as a template we use to make sense of what we perceive. The insight of cognitive science is that meaning is in large

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2. This description of cognitive science is drawn in part from my previous article in the area: John Martinez, A Cognitive Science Approach to Teaching Property Rights in Body Parts, 42 J. LEGAL EDUC. 290 (1992). I have also suggested a cognitive science approach to takings jurisprudence in my Government Takings treatise. See John Martinez, GOVERNMENT TAKINGS (Thomson-Reuters/West, "GOTA" database on WestLaw) Ch. 16 (Cognitive Science Approach to Takings--Thinking Outside the Box).


part a function of our use of cognitive models to organize the world around us.\(^5\) These cognitive tools embody our experiences, and are acquired, stored and modified through use.\(^6\) A significant body of scholarship has developed around the application of cognitive science to law.\(^7\)

\(^5\). There is indeed structure in the environment, but except at fairly simple perceptual levels, it must be learned through experience. When it is learned it becomes a mental structure that guides the course of future information extraction. The knowledge that is so gained does not consist of lists of unrelated factors or a heap of haphazard associations. As Piaget so often emphasized, the mind has a tendency to organize itself.


. . . Any number of vocabularies and conceptual frameworks have been constructed in an effort to characterize the representational level -- scripts, schemas, symbols, frames, images, mental models, to name just a few.


A cognitive science approach reveals that conventional modes of thinking about local government law use a form of cognitive model: a pyramid. Alternative cognitive models—such as story, script and scene rhetorics—better advance the purposes of local government analysis than entrenched modes of thought. This article makes vivid what is at stake in the choices among patterns of cognitive ordering by describing a vocabulary to talk about these patterns. Using that vocabulary, the article suggests that storytelling is a superior cognitive model than a pyramid for analyzing local government authority.

Part I describes a cognitive science approach to law. Part II traces the historical evolution of local government powers and focuses on the particularly intractable problem of adequately defining their proper scope. Part III unpacks conventional local government law analysis by exploring the writings of Frank Michelman, a preeminent local government law theorist. Part IV reveals the unstated assumptions of conventional legal analysis and the serious and unsettling consequences of those assumptions for defining local government authority. Part V reconstructs conventional local government law analysis in cognitive terms and Part VI concludes by suggesting stories as alternative cognitive strategies for defining local government authority.

I. A Cognitive Science Approach to Law

Cognitive science posits that the process of formation, storage, use and transformation of cognitive models is systematic and imaginative. The first step involves the "basic experiences"
common to all human beings by virtue of the general structure and functioning of the human organism in its environment. For example, one of these basic experiences is our primal discovery that we can obtain desired objects by moving toward them through space. As a second step, we conceptualize—or imagine—cognitive models that embody these basic experiences. Thus, we may imagine a source-path-goal cognitive model to represent the basic experience of obtaining a desired object by moving toward it through space. Third, we may use the source-path-goal cognitive model and its source basic experience to "experience" more abstract purposive behaviors, such as our conceiving of a half-completed task as "being halfway there." Finally, we may use the source-path-goal cognitive model as the basis for metaphors to structure other aspects of our existence. Thus, the metaphor "Life is a Journey," may be elaborated from the source-path-goal cognitive model, to conceptualize life.

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9. Winter, Transcendental Nonsense, supra note 8, at 1133.

10. Winter, Transcendental Nonsense, supra note 8, at 1132.

11. Winter, Transcendental Nonsense, supra note 8, at 1132. Winter sets out some of the most important schemas as source-path-goal, container (in-or-out orientation), part-whole, front-back, center-periphery and balancing. Winter, Transcendental Nonsense, supra note 8, at 1147. These will be discussed later in the text as the experientialist epistemological approach is applied to legal doctrine.

12. Winter, Transcendental Nonsense, supra note 8, at 1132.

13. Winter, Transcendental Nonsense, supra note 8, at 1115.
We use cognitive models and their derivative metaphors to understand, retain and apply more complex concepts. Legal concepts can thus be profitably explored in terms of a cognitive science approach. Conceived in terms of cognitive models, legal doctrine thus may be said to arrange legal analysis into core areas of certainty -- in which "most legally trained observers committed to applying [a] rule will experience the rule as having sufficient structure to constrain decision" and peripheries, where the degree of "fit" between the cognitive model and the particular circumstances leads to indeterminacy, and where metaphoric extensions of the cognitive model inform the manner in which we resolve cases.

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14. Winter, Transcendental Nonsense, supra note 8, at 1134.

15. In fact, "[e]xperientialist epistemology suggests that the courts will not function in a substantially different manner [if they self-consciously acknowledge the figurative discourse that clothes their decisionmaking]: They will not be able to purge metaphors from their analyses, but will be driven to other metaphors." Winter, Transcendental Nonsense, supra note 8, at 1164. "Metaphor is inevitable in legal analysis because it is central to human rationality; it is the primary mode of comprehension and reasoning." Winter, Transcendental Nonsense, supra note 8, at 1166.

16. This same notion is expressed by Kent Greenawalt as a "determinate" character of legal rules:

The main criterion for judging the existence of a determinate answer is whether virtually any intelligent person familiar with the legal system would conclude, after careful study, that the law provides that answer.


17. Winter, Transcendental Nonsense, supra note 8, at 1182-83. See also W. Quine, Two Dogmas of Empiricism, in William R. Bishin & Christopher D. Stone, LAW, LANGUAGE, AND ETHICS, AN INTRODUCTION TO LAW AND LEGAL METHOD 326 (1972) (referring to rules as force fields with cores and peripheries); Duncan Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. LEGAL EDUC. 518 (1986) (also referring to "force fields" of legal doctrines).

The rhetorical technique of conceptualizing legal analysis dealing with "force fields" with cores and a peripheries, of course, is itself a cognitive model. It allows us to ask whether there are any rules for determining which particular legal rule-qua-cognitive model is applicable in any situation. This "characterization" step can have a powerful effect on the outcome in any particular case. Our central project of this article, however, is not to deal with the substance of outcomes, but to demonstrate that the cognitive approach can help illuminate the way in which we do legal analysis.
II. Local Government Authority

The nature and extent of powers held by local governments in America have been evolving over time. Moreover, the sources of governmental power and the manner in which we seek to control that power have developed in dynamic interaction with each other. Early conceptions of governmental authority rested almost exclusively on property. Thus, kings formerly owned all


19. The most significant account of the importance of the role of forms of judicial review of local governmental action is by Professor Michelman, who suggests that two contradictory and ultimately irresolute, "judicial mentalities" exist in judicial elaboration of the public purpose and delegation doctrinal areas: an economic "public choice" model and a non-economic "public interest" or "community self-determination" model. Frank I. Michelman, Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy, 53 Ind. L.J. 145, 147-48 (1977-78) [hereinafter Michelman, Political Markets].

Hendrik Hartog explores this dimension to some degree as well, explaining judicial refusal to recognize inherent right to local self-government as follows:

. . . Like their evangelical counterparts, judges distrusted the ability of public authorities (both legislators and city officials) to choose wisely. Their insistence on the autonomy of the law can be viewed as one way of distinguishing themselves from the political apparatus of the state, as, conversely, a way of identifying with the goals of moral reform. The doctrines they developed, although formally committed to legislative sovereignty, were shaped to ensure that courts would determine the legal consequences of public action.

From this vantage point, Dillon's Rule becomes an appropriate moral gesture, a way of compelling the legislature to take responsibility for the actions of an errant child. The city was not to be set loose on the streets of public action and expenditure freed from the constraints of its parent,. The law would compel the legislature to superintend its charge. H. Hartog, supra note 18, at 262-63.

20. This was usually in the form of real estate, the quintessential form of productive wealth, but other forms of productive wealth, such as monopolistic rights, were used as well. See Carol M. Rose, Public Property, Old and New (Book Review), 79 Nw. U. L. Rev. 216, 219 (1984) ("[F]irst, create an exclusive and lucrative proprietary right to perform some activity, then attempt to hedge the right with directions for its use, and finally grant it to someone and hope for the
property and merely shifted property entitlements around in order to effectuate royal policy. There was no "regulatory" sovereign power in the sense in which we usually understand governmental action today. This was also true of medieval towns, in which there was no separation between a town's property rights and its sovereignty rights.21

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This property-based governance persisted in Eighteenth Century America, when local governments relied almost exclusively upon their property interests for social control. In his account of the evolution of the powers of New York City, Hendrik Hartog describes how that city's property and governmental rights were initially "blurred and mixed."\textsuperscript{22} The original charter by Governor John Montgomerie in 1730 conferred governance and property powers on the city. The governance powers were the now-familiar police powers,\textsuperscript{23} including the authority to pass regulations for the public good, run jails and operate courthouses. The property powers, however, included ownership of most of Manhattan Island north of Canal Street, the underwater land that surrounded Manhattan, and the Brooklyn waterfront. The city used its property power to raise revenue, for example, through conveying waterlots to wealthy citizens on condition that the purchasers build adjacent streets and docks.\textsuperscript{24} Apparently, New York did not similarly use its property power to "regulate" in the modern sense, perhaps in part because regulation of conduct--directly through the exercise of sovereign power or indirectly through the use of property power--does not seem to have developed in political theory by that time.\textsuperscript{25} Instead, cities concentrated on property management, which only indirectly or derivatively regulated conduct.\textsuperscript{26}

\begin{itemize}
\item \textsuperscript{22} H. Hartog, \textit{supra} note 18, at 21.
\item \textsuperscript{23} Police power represents the authority to regulate for the benefit of the general health, safety, welfare and morals. \textit{See} Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (zoning).
\item \textsuperscript{24} H. Hartog, \textit{supra} note 18, at 68.
\item \textsuperscript{25} H. Hartog, \textit{supra} note 18, at 43.
\item \textsuperscript{26} H. Hartog, \textit{supra} note 18, at 40 ("The proper business of the [city] corporation was the management, care, and disposal of the real estate it owned."). Significantly, the city of Philadelphia passed only one new ordinance between 1740 and 1776. Jon C. Teaford, \textsc{The Municipal Revolution in America: Origins of Modern Urban Government} 56-59 (1975).
\end{itemize}
This primitive government power based on governmental property ownership atrophied with the reduction of government property.\textsuperscript{27} Instead, governments came to rely more and more on their "sovereign" powers to tax, license and regulate private conduct directly as the means for effectuating social policy.\textsuperscript{28}

The emergence of generalized governmental power separate from governmental property power forced examination of the ways in which such power should be contained. John Dillon argued that control of city power through judicial supervision of that control was essential, but his proposed solution was a miserly interpretation of grants of state power over cities:

The courts, too, have duties, the most important of which is to require these corporations, in all cases, to show a plain and clear grant for the authority they assume to exercise; to \textit{lean against constructive powers}, and, with firm hands, to hold them and their officers within chartered limits.\textsuperscript{29}

\textsuperscript{27} Professor Hartog suggests it might have been the other way around with respect to New York City. He argues that there was a generalized change in social consensus that local governments should simply be creatures of the state, that judicial doctrines for reviewing local governmental power adopted this consensus through strictly restricting local government power to that delegated from the state, and that thereafter New York City officials transferred away much of the city's remaining property, with no further thought about revenue or social coercion. H. Hartog, \textit{supra} note 18, at 7-8. We need not resolve which was the cause and which the effect, but merely recognize that property ownership as a source of local governmental power independent of state control became unavailable.


\textsuperscript{29} John F. Dillon, \textit{TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS} ch. 1, '9, at 25-26 (Chicago, James Cockcroft & Co. 1872)(emphasis in original).
This perspective resulted in the development of the Dillon Rule, whereby local
governments were not deemed to have the power to engage in any activity unless such power was
granted expressly or by necessary implication from grants of power from the state legislature.\footnote{30}
Early cases turned on interpreting fairly general grants of power to local governments from state
legislatures, such as the general police power to engage in activities for the health, safety, welfare
and morals of the community\footnote{31}. Courts infused meaning into these general grants of power through
equally vague notions of what a "public purpose" is or what is "ultra vires" of a general grant of
power.\footnote{32} However, courts have questioned the Dillon Rule and have instead been willing to
construe general grants of power from the legislature more generously or, in the alternative, have
completely abandoned the Rule in favor of a presumption that local governments have power to
engage in their activities unless they are prohibited from doing so by state legislation.\footnote{33}

III. Conventional Legal Analysis of Local Government Authority

\footnote{30} See, e.g., Taxpayers and Citizens of the City of Foley v. City of Foley, 527 So.2d 1261
(Ala. 1988) (adhering to the Dillon Rule); Borgelt v. City of Minneapolis, 271 Minn. 249, 250, 135
N.W.2d 438, 440 (1965) (applying Dillon Rule). For the argument that the Dillon rule is actually
a rule of contextuality and flexibility, see 3 Martinez, LOCAL GOVERNMENT LAW ' 13:5.

\footnote{31} See, e.g., Union Ice & Coal Co. v. Town of Ruston, 135 La. 898, 66 So. 262 (1914) (police
power held to be power to regulate, not to go into business operating an ice plant in competition
with private ice company).

\footnote{32} See generally Michelman, Political Markets, supra note 19 (discussing local government
power under "public purpose" doctrine). For a discussion of other common law concepts used to
define local government powers in the context of municipal contracts, see Janice C. Griffith, Local
Government Contracts: Escaping from the Governmental/Proprietary Maze, 75 IOWA L. REV. 277

\footnote{33} See, e.g., State v. Dirnberger, 152 Minn. 44, 187 N.W. 972 (1922). For a careful analysis
of the reasons to abandon the Dillon Rule, see State v. Hutchinson, 624 P.2d 1116 (1981).
Professor Frug, in his pathbreaking work on cities, contrasts city powerlessness with the power of
private corporations and suggests that cities should be given more of the powers possessed by
private corporations. Gerald E. Frug, The City as a Legal Concept, 93 HARV. L. REV. 1057,
1062-67 (1980).
Frank Michelman has written extensively regarding the evolution of local governmental authority\textsuperscript{34} and has made two important contributions to the field: First, he has described the conventional legal analytical framework for considering these questions. Second, his framework describes the critical role that standards of judicial review play in such analysis.

According to Michelman,\textsuperscript{35} analysis of legal issues implicates an organizational structure which at its most specific considers the factual circumstances giving rise to the issues and at its most general considers philosophical conceptions of value. The entire organizational framework asks the following questions:

1. **Factual Circumstances:** What factual circumstances give rise to the specific problems involved?
2. **Doctrine(s):** What established legal doctrines would ordinarily be expected to resolve the questions thereby posed?
3. **Standards of Judicial Review:** What standards of judicial review would a court be expected to apply?
4. **Normative Model(s):** What normative models underlie the standards of judicial review in the context of the relevant legal doctrines?
5. **Philosophical Conceptions of Value:** What philosophical conceptions of value underlie the normative models?


\textsuperscript{35} The substance of this framework was derived from Michelman, *Political Markets*, supra note 19.
In his article on models for local government legitimacy,Michelman illustrated the form and operation of this organizational structure. He examined three different factual situations: a local government's condemnation of private property for resale to a private developer in exchange for the developer's dedication of parking slots to the local government, the delegation of land use control authority to neighborhood groups and attempts by local governments to zone out people living together in nontraditional living arrangements. These factual circumstances were considered under three different doctrinal areas: public purpose, delegation of power to non-governmental groups and local government zoning with respect to nontraditional groups.


37. Michelman, Political Markets, supra note 19, at 147.

At the third level of analysis, Michelman suggested four different standards of judicial review for applying the legal doctrines involved: strictly procedural review, rational basis substantive review, per se categorical substantive review and primary purpose or weighing-of-benefits substantive review. These forms of judicial review were themselves considered under two different normative models: a public choice model and a public interest model. He contends:

In the economic or public choice model, all substantive values or ends are regarded as strictly private and subjective. The legislature is conceived as a market-like arena in which votes instead of money are the medium of exchange. The rule of

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39. Under this form of review, a "court looks only to see that the [governmental agency] in reaching its decision has complied with the legislative procedures established by or under the constitution, statutes, and home rule charter if any, and that no specific rules against bribery, conflict of interest, or the like have been violated. The court [must] refuse[] to reexamine the merits or even the bare substantive rationality of the [governmental agency's] judgment." Michelman, Political Markets, supra note 19, at 160.

40. Under this form of review, a "court ascertains whether a [governmental agency], acting in good faith, could rationally conclude that the total (net) benefits to municipal citizens from this particular [governmental action] will exceed their total (net) tax and other costs." Michelman, Political Markets, supra note 19, at 160-61.

41. Under this form of review, a court ascertains whether the governmental action violates a specific, applicable prohibition, such as the prohibition against the use of the city's taxing power in direct aid of a particular private enterprise, in the hypothetical situation posed. Michelman, Political Markets, supra note 19, at 161.

42. Under this form of review, a court ascertains whether the private benefits to the entrepreneur clearly predominate over the public benefits. Michelman, Political Markets, supra note 19, at 161.

43. He defines a normative model of government as "a general conception of how governmental institutions ideally must be supposed to work in order to satisfy the conditions of a theory of moral justification for such institutions." Michelman, Political Markets, supra note 19, at 147.

44. Michelman, Political Markets, supra note 19, at 148.
majority rule arises strictly in the guise of a technical device for prudently controlling the transaction costs of individualistic exchanges.\textsuperscript{45}

Thus, the public choice model, according to Michelman, is "an economic ideal conception of politics as a vehicle for private self-maximization."\textsuperscript{46} The public-interest model, on the other hand, according to Michelman,


\textsuperscript{46} Michelman, \textit{Political Markets}, \textit{supra} note 19, at 187. For a critique of this view of public choice theory, see Miller, \textit{The Operation of Democratic Institutions}, 49 \textit{Pub. Admin. Rev.} 511 (1990) (arguing that public choice theory rejects a pluralist, "sum of the preferences" approach and is instead consistent with a liberal democratic ideal in the New Deal tradition).
depends at bottom on a belief in the reality -- or at least the possibility -- of public or objective values and ends of human action. In this public-interest model the legislature is regarded as a forum for identifying or defining, and acting towards those ends. The process is one of mutual search through joint deliberation, relying on the use of reason supposed to have persuasive force. Majority rule is experienced as the natural way of taking action as and for a group.47

Thus, he considers the public interest model as "a noneconomic ideal conception of politics as a vehicle for community self-determination."48

At the fifth level of analysis, Michelman views these models as reflective of two different philosophical traditions: the public choice model is linked to a Hobbesian or Lockean notion of freedom:

The general idea is that values, so-called, are taken to be nothing but individually held, arbitrary and inexplicable preferences (the subjectivist element) having no objective significance apart from what individuals are actually found to be choosing to do under the conditions that confront them (the behaviorist element); from which it seems to follow that there can be no objective good apart from allowing for the maximum feasible satisfaction of private preference as revealed through actual choice -- or, in other words, through "willingness to pay." The resulting allocation of resources to their highest-paying employments is the state known to economics as efficiency.49

47. Michelman, Political Markets, supra note 19, at 149.
49. Michelman, Political Markets, supra note 19, at 152-53.
In contrast, the public interest model, he contends, traces its roots to a tradition in Western thought associated with Kant, Rousseau and Aristotle, that "conceives individual freedom in such a way that its attainment depends on the possibility of values that are communal and objective -- jointly recognized by members of a group and determinable through reasoned interchange among them[;] . . . freedom is the state of giving the law to oneself."^50

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^50. Michelman, Political Markets, supra note 19, at 150.
Applying the two normative models to the reasoning and outcome of cases in the public purpose and delegation doctrinal areas of law, he concludes that public choice theory really consists of two variants: the "market failure" and "big bribe" variants. Under the big bribe variant, "we buy civil peace for the price of abiding by whatever the duly constituted legislative process presents us with."51 Under the market failure variant, we accept governmental intrusion into the market when there is "unusual difficulty (high transaction costs) in striking a bargain or in organizing all who would have to agree to participate in a transaction in order that its potential, mutual benefits may be reaped. Such difficulty can result when the number of persons who stand to benefit from a costly undertaking is large, and none of these potential beneficiaries can produce the benefit for themselves without also making it available to others (whom it will not be possible to exclude, at any cost or at feasible cost)."52 Michelman demonstrates that a crucial element in the market failure variant is the theory of coalitions, (of log-rolling), whereby vote-trading occurs between legislators, because "[w]ithout that theory there can be no credible assurance that each individual will, over the long run, derive net advantage to his or her own, private interests from the majoritarian state."53 But, alas, "in recognizing the crucial significance of log-rolling, one sees that the market failure account depends not only on a conception of self-interested legislative traders -- or of legislative traders self-interestedly responsible to self-interested constituents -- but also on a conception of legislative output as not a series of discrete, separately intelligible and appraisable enactments, but rather a continuous unitary network of compromise -- of implicit multilateral trade so complex as to be almost certainly opaque and indecipherable to any outside

51. Michelman, Political Markets, supra note 19, at 162.

52. Michelman, Political Markets, supra note 19, at 155.

53. Michelman, Political Markets, supra note 19, at 173.
Michelman thereby concludes that there is no room for substantive review under the market failure theory, whereas the "big bribe" theory supports only procedural review. Accordingly, court cases in these areas can be consistently explained by the public choice model only by restricting judicial review to a strictly procedural analysis: The governmental action must be upheld "as long as the [action] can be seen to have originated in a duly constituted legislative process in which there was the clearest of opportunities for log-rolling by or on behalf of a well-defined, "vested" interest . . . which stood to be directly harmed by the . . . enactment. . . ." The public choice model would thus render illegitimate any form of substantive review of governmental action, whether deferential or activist, and regardless whether such review is undertaken pursuant to the public purpose or delegation doctrines, general welfare provisions (police power), or the due process or equal protection clauses.

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54. Michelman, Political Markets, supra note 19, at 175-76.
55. Michelman, Political Markets, supra note 19, at 177.
56. Michelman, Political Markets, supra note 19, at 177.
Applying the public interest model to the decisions of cases in these areas, Michelman suggests that courts would "not have available any tightly structured logic or formula for deducing when a legislature has switched out of the ideal role . . . [of searching] for the right or best answer."\(^{57}\) "They would have to consult their own educated understanding of the values broadly shared in their society -- including the rate and direction of evolution of values -- in order to make judgments about whether given legislative products fairly reflect an effort to realize those values or trajectories . . . [s]ometimes . . . remitted to . . . hunches."\(^{58}\)

Methodologically, he contends, courts applying the public interest model must be particularly attuned to the motivational importance of context: "[T]he definition of aims through politics is an ethical process, and one which treats the individual as the ultimate object of ethical concern[, and s]uch insistence means that when individuals act politically, when they act as citizens, they . . . act on behalf of and with regard to one another, as well as themselves, as persons worthy of a full and equal measure of respect."\(^{59}\) Thus, for example, citizens are more likely to perceive themselves as acting in a true civic forum, rather than a battlefield or market, if the decisionmaking group is not a narrow segment or a limited group.\(^{60}\)

IV. The Consequences of Conventional Legal Analysis of Local Government Authority

Michelman's criticisms of the public choice model as an underlying normative framework for judicial decisionmaking in the public purpose, delegation and single-family zoning areas is persuasive. The crux of the matter is that substantive judicial review of local government action in

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\(^{57}\) Michelman, Political Markets, supra note 19, at 178.

\(^{58}\) Michelman, Political Markets, supra note 19, at 178.

\(^{59}\) Michelman, Political Markets, supra note 19, at 185.

\(^{60}\) Michelman, Political Markets, supra note 19, at 186.
these areas persists, and that the public choice model simply does not treat such review as legitimate.

A corollary of Michelman's analysis is that market failure in particular is not a potential underlying explanation for the outcomes in these areas, because, as he notes, "the market failure account depends not only on a conception of self-interested legislative traders -- or of legislative traders self-interestedly responsible to self-interested constituents -- but also on a conception of legislative output as not a series of discrete, separately intelligible and appraisable enactments, but rather [as] a continuous unitary network of compromise -- of implicit multilateral trade so complex as to be almost certainly opaque and indecipherable to any outside observer." 61

Accordingly, as Michelman shows, only strictly procedural review, whereby a "court looks only to see that the [governmental agency] in reaching its decision has complied with the legislative procedures established by or under the constitution, statutes, and home rule charter if any, and that no specific rules against bribery, conflict of interest, or the like have been violated . . . [and does not] reexamine the merits or even the bare substantive rationality of the [governmental agency's] judgment" can legitimately take place under public choice theory. 62

Michelman's contention that public interest theory grounds judicial review in these areas is not as persuasive as his arguments about public choice theory. He does not convincingly show that the public interest model is a more likely underlying normative framework; he only shows that the public choice model is not substantiated by courts' actions in this area.

61. Michelman, Political Markets, supra note 19, at 175-76.

Perhaps the most telling difficulty with the public interest model is the lack of any authoritative sources of substantive content against which judges can evaluate legislative decisionmaking. As he points out, "In the end, whether in the economic conception or [in the public interest conception,] the judge has to fall back on an educated sense of how people think, feel, or want."64

63. Michelman, Political Markets, supra note 19, at 199.

64. An alternative analytical model would not completely reject the Public Choice theory criticized by Michelman, but would instead incorporate economic efficiency as merely one potential objective. Under such an enriched approach, the sources of substantive content for judicial review of governmental action would be more precisely identified as deriving from various common law, statutory and constitutional provisions, both state and federal, and further shaped by the particular cognitive constructs which judges bring to the interpretive task: their basic experiences, idealized cognitive models and elaborating metaphors. Such an approach would provide a broader, more inclusory foundation for judicial review, taking into account not only "public interest" concerns, but "public choice" concerns as well.

Cass Sunstein has urged a similar focus on specific textual references as particular sources of substantive content for judicial review. Cass R. Sunstein, Interest Groups in American Public Law, 38 STAN. L. REV. 29 (1985) [hereinafter Sunstein, Interest Groups]; Cass R. Sunstein, Naked Preferences and the Constitution, 84 COLUM. L. REV. 1689 (1984) [hereinafter Sunstein, Naked Preferences]; See also Cass R. Sunstein, Beyond the Republican Revival, 97 YALE L.J. 1539 (1988) [hereinafter Sunstein, Beyond the Revival] (elaborating on his thesis by urging that courts adopt a more activist standard of judicial review as a general constitutional requirement, not just when discrete values or interests are threatened). His project is to develop a theory of legislative action to deal with the evil of "naked preferences," defined as those circumstances in which "the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want." Sunstein, Naked Preferences, at 1689.

Sunstein assimilates political ordering according to "naked preferences" to market ordering and contrasts that with "a conception of a political process in which differential treatment is justified not by reference to raw political power, but to some public value that the differential treatment can be said to serve." Sunstein, Naked Preferences, at 1694. The latter maps almost perfectly onto Michelman's conception of a public interest model of legislative decisionmaking. Accordingly, we can view Sunstein's intellectual project as including the elaboration of forms of judicial review, as well as other, structural changes, that are necessary in order to assure a public-regarding legislative process. Sunstein, Interest Groups, at 63-64. This might supply the necessary content to standards of judicial review which seek to operate pursuant to the public interest model, a shortcoming left open in Michelman's Political Markets piece.

In summary, Sunstein seems to reject the proposition that values for informing public interest analysis are exogenous to the political process. Instead, he "envisions the Constitution and the courts imposing a deliberative model on Congress, through judicial review of the discussions
and interactions between legislators, protection of legislators’ independence from constituents, and stimulation of greater access of different groups to legislative deliberations, all with the purpose of ensuring that representatives can and will express their view of legislation in a thoughtful manner."

Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. Pa. L. Rev. 1567, 1589 (1988). Sunstein finds justification for such review in a "modern republican" understanding that "politics has a deliberative or transformative dimension[; i]ts function is to select values, to implement "preferences about preferences," or to provide opportunities for preference formation rather than simply to implement existing desires." Sunstein, *Beyond the Revival*, at 1545.
The "Thayerite objection" remains, however: "[T]he tendency of a common and easy resort to [judicial review is] to dwarf the political capacity of the people, and to deaden its sense of moral responsibility" that comes from "fighting the question out in the ordinary way." That is, formulation of an acceptable theory of legislative action nevertheless requires that we formulate an acceptable role and theory for judicial review of such action.

In another article elaborating upon a modern republican theory of legislative action, Michelman acknowledges that judicial review of such action cannot be "strictly procedural review," a point he also made in his Political Markets article. In that article he concludes that:

"The Court helps protect the republican state -- that is, the citizens politically engaged -- from lapsing into a politics of self-denial. It challenges 'the people's self-enclosing tendency to assume their own moral completion as they now are and thus to deny to themselves the plurality on which

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66. The modern republican understanding includes four central principles, each informing and defining the others:

1. The first principle is deliberation in politics, made possible by what is sometimes described as "civic virtue." In the deliberative process, private interests are relevant inputs into politics; but they are not taken as pre-political and exogenous and are instead the object of critical study.

2. The second principle is the equality of political actors, embodied in a desire to eliminate sharp disparities in political participation or influence among individuals or social groups. Economic equality may, but need not, accompany political equality; in this sense, as in others, the political process has a degree of autonomy from the private sphere.

3. The third principle is universalism, exemplified by the notion of a common good, and made possible by "practical reason." The republican commitment to universalism, or agreement as a regulative ideal, takes the form of a belief in the possibility of settling at least some normative disputes with substantively right answers.

4. The fourth and final principle is citizenship, manifesting itself in broadly guaranteed rights of participation. Those rights are designed both to control representative behavior and to afford an opportunity to exercise and inculcate certain political virtues. Citizenship often occurs in nominally private spheres, but its primary importance is in governmental processes. Sunstein, Beyond the Revival, supra note 62, at 1541-42.

The modern republican conception includes a theory of rights that "understands most rights as either the preconditions for or the outcome of an undistorted deliberative process." Sunstein, Beyond the Revival, supra note 62, at 1551. Thus, liberty of expression and conscience, the right to vote (Sunstein, Beyond the Revival, supra note 62, at 1551) and freedom of religion (Sunstein, Beyond the Revival, supra note 62, at 1555) are basic preconditions for deliberation, the first principle of modern republican thought.

their capacity for transformative self-renewal depends."\textsuperscript{68} The path he uses to get there begins with a philosophical conception of American constitutionalism which rests "on two premises regarding political freedom: first, that the American people are politically free insomuch as they are governed by themselves collectively, and, second, that the American people are politically free insomuch as they are governed by laws and not [people]."\textsuperscript{69} Judicial review, Michelman thereby contends, is legitimate because it (merely) seeks to reinforce the (assumed) underlying basic tenets of American constitutionalism.

\textsuperscript{68} Michelman, \textit{Law's Republic}, \textit{supra} note 34, at 1532. He thereby arrives at approximately the same place as Sunstein regarding the role of judicial review. \textit{See supra} note 62.

\textsuperscript{69} Michelman, \textit{Law's Republic}, \textit{supra} note 34, at 1499-1500.
The unsettling fact remains, however, that it is a judicial determination of whether legislation is both "our" and "law." He responds to that concern, at least in part, by saying that "[j]udges perhaps enjoy a situational advantage over the people at large in listening for voices from the margins. Judges are perhaps better situated to conduct a sympathetic inquiry into how, if at all, the readings of history upon which those voices base their complaint can count as interpretations of that history -- interpretations which, however re-collective or even transformative [--] remain true to that history's informing commitment to the pursuit of political freedom through jurisgenerative politics."\(^70\)

Having thereby overcome the Thayerite objection, at least tentatively, we confront the deeper "Cartesian Anxiety": "the sense that we are caught between [dominating] objectivism, the belief that there are or must be some fixed, permanent constraints to which we can appeal and which are secure and stable[, and [nihilistic] relativism, the message that there are no constraints except those we accept."\(^71\) In other words, having formulated at least a tentative justification for judicial review, we must consider formulation of standards under which that review will be conducted.

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\(^{70}\) Michelman, Law's Republic, \textit{supra} note 34, at 1537.

\(^{71}\) Michelman, The Supreme Court 1985 Term, Foreword: Traces of Self-Government, 100 Harv. L. Rev. 1, 24 n. 110 (1986) (quoting Richard J. Bernstein, \textit{Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis} 16, 18-19 (1983). \textit{See also} Winter, Transcendental Nonsense, \textit{supra} note 8, at 1127 ("In its starkest form, it is the tension between foundationalism and nihilism[.] Either there is some support for our being, a fixed foundation for our knowledge, or we cannot escape the forces of darkness that envelop us with madness, with intellectual and moral chaos." quoting Richard J. Bernstein, \textit{Beyond Objectivism and Relativism: Science, Hermeneutics, and Praxis} 18 (1983)).
In confronting the Cartesian Anxiety, Michelman has made some powerful arguments that the activity of judicial review of governmental action is consistent with modern republican theory. He explains that judges themselves engage in dialogue, among multiple-judge panels and among courts. To that we might add the continuing dialogue among courts, executives, legislatures and voters expressing their preferences through elections, initiatives and referenda. But even Michelman's attempt at justifying "civic virtue"-reinforcing judicial review falls short of an explanation of what sources the court can use to test whether "civic virtue" has been achieved by legislative processes in light of any given substantive legislative outcome. As Feldman points out, the statement that "valid" kinds of legislative action are based on public value is tautological: in essence, it justifies any government action as long as it is premised on more than the exercise of raw political power. Feldman argues instead that preferences are socially constructed not only through the political process, but through the judicial process as well. He suggests:

"The Court's practice of constitutional adjudication is a conversation with the rest of society that requires the Court simultaneously to search for and to create meaning." 

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"In Kuhnian terminology, we all experience and perceive reality through various paradigms--world views--and those paradigms consist of structures that are

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74. See Sunstein, Naked Preferences, supra note 64, at 1694.

75. Feldman, Essay, supra note 73, at 1335.

76. Feldman, Essay, supra note 73, at 1357.
socially constructed or created."

The same can be said about judges. And, unlike Michelman's conceptions, standards of judicial review are themselves the judges' paradigms, or world views, through which they perceive reality. That reality may be articulated in terms of Michelman's conventional analytical framework, consisting of the philosophical foundations of law, normative models, legal doctrine and the facts, but it is nevertheless a product of that more elusive process we know as cognition.

V. A Cognitive Critique of Conventional Legal Analysis

A. Michelman Approach as Metaphor: "Pyramid" Thinking

The analytical model Michelman presupposes may be expressed in cognitive terms as a triangle or as its three-dimensional cousin, a pyramid. The pyramid metaphoric representation of the Michelman analytical framework entails successively more abstract expressions of principles as one moves from the bottom to the top of the pyramid. Thus, the base of the pyramid is the level of individual fact patterns, unruly and incoherent in their myriad variety, doctrine exists at the next "higher" "level of abstraction" up the pyramid, then standards of judicial review, followed by normative models and, toward the top of the pyramid, philosophical conceptions of value.

This cognitive reconstruction of the Michelman approach reveals two powerful features of the Michelman model. The first feature is an implicit hierarchy of control. Each higher level of abstraction has a determinative effect on all the levels below it: doctrine determines the facts, the standard of judicial review determines the applicable doctrine, normative models determine the standard of judicial review and philosophical conceptions of value determine the normative models. This feature of the Michelman analytical model may be a manifestation of the perhaps more familiar principle that our analytical models define our reality: we see what we expect to

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78 For a description of this process as "synchronic," in contrast to a "diachronic," or narrative, rhetorical style, see Carol M. Rose, Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory, 2 Yale J. of L. & the Humanities 37, 37-39 (1990).
see. Thus, the doctrines we use to resolve disputes determine what facts are relevant, the standards of judicial review determine what doctrines we perceive as controlling, and so on up the analytical pyramid.

The second feature of the Michelman model viewed through a cognitive lens, however, is the perhaps more sinister normative claim that the higher up on the pyramid a concept appears, the "better" it is. Thus, for example, since the doctrinal level is "higher," the implicit normative claim is that it is a "better" way of dealing with reality than by confronting the naked chaos of its myriad factual variations. This implies that we should not experience chaotic reality directly, but that we should do so only indirectly, through multiple lenses. In other words, we are encouraged to assume that reality is orderly, if only we can see it the right way.79

B. The Order We See Is the Order We Impose

Michelman's way of seeing reality, however is just one way. Cognitive analysis allows us to critically examine that perspective. Cognitive analysis allows us to name Michelman's approach as a cognitive model and thereby establish an essence to which we can relate.80 Moreover, cognitive analysis allows us to describe one feature of Michelman's cognitive model as incorporating the proposition that reality is orderly as its starting point. We can then proceed to consider whether reality is indeed orderly, or whether the order we see is instead the order we impose.

79. There is an insidious prescriptive dimension to the pyramid: [T]he version of reality that has for the most part prevailed in the entire culture gives us internal scripts about how to argue and, indeed, how to know. The dominant culture has established certain criteria for theories, for legal arguments, for scientific proofs -- that is, for authoritative discourse. Thus, the very ground rules for disputing which version of reality should prevail belong to the world view that has been dominant in the past. Martha Minow, The Supreme Court, 1986 Term--Foreword: Justice Engendered, 100 HARV. L. REV. 10, 65 (1987).

"Chaos" theory is a field of learning that touches on that assumption. Sometimes known as nonequilibrium theory or transformation theory, chaos theory "presents a view of the processes of change in which instability, disorder, and unpredictability serve as central features in the development of new forms of organization and complexity." It attempts to explain how apparently random systems -- whether natural phenomena such as dripping faucets, roulette wheels, or weather patterns or social phenomena, such as methods of public administration or market economies -- may suddenly and unpredictably experience dramatic transformations.

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Chaos theory suggests that we should not assume that the world exists in patterns of order with intermittent moments of chaos, but that we should assume instead that the world is normally chaotic, with moments of order. Viewed in Chaos terms, legal decisionmaking—the resolution of social disputes through authoritative means, whether by courts, legislatures or popular votes—is not an orderly process, but a chaotic one. Chaos theory therefore suggests that legal decisions are not arrived at through the application of doctrine to facts, that doctrine is not determined by standards of judicial review, that such standards are not determined by normative models, and that such models are not determined by philosophical conceptions of value. Instead, Chaos theory suggests that decisionmaking activity is chaotic, that legal decisions are the manifestations of dynamic systems—courts, legislatures or popular voting—whose outcomes are not orderly, but chaotic. "Law," in Chaos terms, therefore, is both a product and a manifestation of society, a society that is chaotic, not determined.88

Chaos theory is therefore useful for us in two ways. First, it provides a counterpoint to Michelman's cognitive model: Michelman posits a reality that is orderly, with intermittent disorder; Chaos theory posits a reality that is disorderly, with intermittent periods of order. Second, at a "meta-cognitive model" level, Chaos theory serves not just as an alternative cognitive model to Michelman's approach, but also as a model for critical examination of any cognitive model. Cognitive models may thus be viewed as simply alternative ways to implement contested human ends. We need not settle on one model for all places and for all time; there are different ways to see

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88. Michelman acknowledged that his analytical framework did not explain all that courts do in the areas he studied. Courts do not, for example, follow one or another standard of judicial review, symbolizing one or another normative principle, and so on up the pyramid. Instead, courts seem at times to follow one, at times another principle, and at times some principle not included in the pyramid. In this fundamental way, Michelman's analytical framework simply demonstrates that it does not work as a completely satisfactory explanation of the very activity it purports to depict.
the world. In this conceptualization, Chaos theory serves as a cognitive construct that is not just an explanation of behavior, but a possible vocabulary for describing available strategies.

The vocabulary of Chaos theory as a meta-cognitive model seeks to identify the underlying purposes served by any cognitive model. These purposes may include a need for a sense of control, a need for predictability, a need for narrowing disputes and shaping the terrain for the exercise of power and a need for an understanding of meaning and location. Cognitive models which may not look much like Michelman's approach at all may thus serve many of the same purposes.

VI. Stories as Alternative Strategies for Defining Local Government Authority

A. The Telling Point of Stories

A story is structured chaos. It provides a narrative foundation from which the observer, (whether listener, reader or viewer), can imagine several possible outcomes. A crucial difference between conventional analytical discourse and the storytelling form of discourse is that the listener of a story is in large part responsible for what stories have to say. In contrast, conventional analysis directs the observer toward certain pre-determined, and largely undebatable, content. Stories invite the listener to create a content for the story that is unique to the observer. Conventional forms of discourse, by contrast, control in large part what the observer derives from the experience of reading, listening or participating in the communication involved.

The activities of local government in relation to its citizens, to the state or federal legislature, or to the courts may be viewed as stories. Such stories provide the framework for

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89. For an excellent sampling of Native American stories, presented in storytelling form, see Hyemeyohsts Storm, SONG OF HEYOEHKAH (1981); See also Hyemeyohsts Storm, SEVEN ARROWS (1972).

analysis; they do not contain their own explanations. Alternative interpretations are accommodated; it is possible to derive different, yet acceptable, meanings.

B. Examples of Issues of Local Government Power Considered as Stories

We can apply story rhetoric to the areas of local government authority examined by Michelman. The first situation involves a local government's condemnation of private property for resale to a private developer in exchange for the developer's dedication of parking slots to the government. The story rhetoric would go something like this:

Centerville has experienced a substantial increase in automobile traffic in its downtown areas in the past two years. The consensus among the city council members is that additional parking is needed to accommodate the increased number of vehicles. Additional parking space could be created through construction of a downtown parking structure, but no public or private entity seems inclined to undertake such a project. The city has therefore decided to condemn a private piece of property in Centerville and resell the parcel to a private developer willing to construct a parking structure.

Downtown Parking Associates, an existing private parking concern, is willing to buy land in the downtown area for parking structure construction, but has been unable to obtain a piece of land to do so because all the downtown property owners want to hold off on selling because they believe downtown land will dramatically escalate in value in the years to come.

Downtown Parking has contacted the city and is willing to dedicate a couple of parking slots in a newly constructed structure for city use if the city will use its

91. See supra notes 36-38 and accompanying text.
eminent domain power to condemn a suitable parcel of private land in the area.

The city council has decided to take up Downtown Parking Associates' offer, but has been challenged on its authority to do so. At this juncture, alternative sub-plots to the story could be elaborated:

**Disgruntled Competitor** The challenger is another private developer who was willing to take the city's deal, but was unwilling to dedicate any parking slots for the city.

**Environmentally-Concerned Citizen** The challenger is a concerned citizen who wants no additional parking in the downtown area because it will generate additional pollution.

**Traditionalist Citizen** The challenger is a concerned citizen who thinks local governments should not be engaged in real estate development, but that such activities should be left in the private sector.

A major social value involved in defining the proper scope of local government authority in these circumstances is to assure public control over land use in the downtown area. Another purpose is to provide predictability in downtown land use so others in the downtown area will know how to structure their own uses. A third need is to assure that questions of land utilization will turn on a settled idea about whether there will be enough parking to accommodate the amount of traffic generated by a burgeoning downtown. Finally, a fourth need is to assure general confidence in the operations of the city council and the extent to which their decisions preserve the health, safety and welfare of the local residents.

Each of these purposes might be differently served by the implementation of the city's plan for a parking structure. Moreover, and significantly, the city might be considering different needs,
depending on what parties are challenging its action. Unlike conventional doctrinal analysis, however, a story presentation does not foreclose the possibility that the dispute might be resolved in different ways, depending on who is challenging the proposal. Such a possibility is not part and parcel of the conventional understanding of dispute resolution through litigation. In essence, a story cognitive model frees the imagination to conceive of different ways to address a social conflict.

The second situation dealt with by Michelman involves definition of a local government's power to delegate land use control authority to neighborhood groups. The story rhetoric would go something like this:

Several "anti-satellite disk" residents of a neighborhood are concerned about the proliferation of satellite disk antennas in their neighborhood. They would like to veto the installation of unsightly antennas in the area and have approached the city council with various proposals for achieving that objective.

Several sub-stories might arise:

**Absolute Veto** Under one proposal, the anti-satellite disk residents would have an absolute veto over any prospective disk antenna, without review by any governmental entity and without having to explain their reasons.

**Reasonableness Review** Under another proposal, the anti-satellite disk residents would only be empowered to exclude "unsightly" satellite disks from the neighborhood. Again, there would be no governmental review of their decisions and no standards by which to measure unsightliness.

**Governmental Review** Under a third proposal, the anti-satellite disk residents

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92. See *supra* notes 36-38 and accompanying text.
would have the power to preclude installation of "unsightly" satellite disks, but the city council would review all decisions of the residents as a matter of right to avoid circumstances in which "arbitrary" action was taken.

The purposes underlying the limitations on local government power to delegate authority to neighborhood groups include avoiding delegation of standardless discretion, assuring those affected by neighborhood group decisions have a proper opportunity to be heard and securing involvement of governmental officials whenever policies that transcend a neighborhood are involved.

Each of these purposes might be differently served depending on the criteria, procedures and opportunity for appeal to governmental authority that might be incorporated into the governmental delegation of power to neighborhood groups. Significantly, the concern for access to information of those who want to install satellite disks may invoke the need for more constrained delegation of authority to neighborhood groups. That interest is not tightly "localized." In contrast, delegation of authority to neighborhood groups to control noise or the planting of pollen-sprouting plants that may generate allergic reactions throughout the neighborhood might call for different outcomes. Again, the story rhetoric allows for consideration of such variations.

The third situation dealt with by Michelman involves definition of a local government's power to zone out people living together in nontraditional living arrangements.93 The story rhetoric would go something like this:

93. See supra notes 36-38 and accompanying text.
A city is concerned about preserving the character of its single-family residential (SFR) neighborhoods. Accordingly, it would like to define its SFR zones in such a way as to preserve the essence of the SFR zones. The essence of the SFR zone is viewed as the incorporation of only one "family unit" per structure. Thus, structures that would accommodate two families, such as duplexes, apartments or condominium structures, would not be consistent with the "single" family unit scheme.

There are at least two possible sub-stories available:

**Preservation of the Existing Intensity of Land Use** The "single" families could be defined in terms of numbers of individuals occupying the same structure. Thus, rote numbers could be used to limit the size of a "family" for purposes of the ordinance.

**Exclusion of Undesirable Living Arrangements** "Single" families might be defined to exclude any living arrangements other than the most conventional, formally married, husband-and-wife-and-children grouping.

The purposes underlying the limitations on local government power to define "families" for purposes of single-family residence zones include preserving local authority to define local land uses, preventing local authorities from making distinctions that are not reasonably likely to achieve their objectives (preventing local jurisdictions from making arbitrary laws) and protecting vital individual interests from oppression by local governments.

Each of these purposes might be differently served depending on the criteria incorporated into a local government's definition of a "family." Thus, if the definition of a family is so tightly circumscribed that only the storybook nuclear family would fit it, then only a very few groups of related individuals would qualify. The SFR zones would experience a constant turnover of
"families" moving into and out of the area as the people involved reconstitute their living arrangements from a nuclear to an extended "family." Although silly, this definition seems to have no other significant shortcomings.

Any definition meant to include inevitably excludes. Thus, the purpose behind the definition of a "family" is not necessarily objectionable. The real rub arises, of course, to the extent that the definition of the family utilizes characteristics that impinge on fundamental rights or use suspect criteria for classifying among acceptable and unacceptable residents. Thus, defining the "family" in stereotypical conventional terms would not seem objectionable, unless people are affected whose deeply held traditions involve extended, nontraditional living arrangements. In those circumstances, the sincerity of the beliefs in the alternative arrangements, the stability of the tradition in the culture, the extent to which the incorporation of such living arrangements would prejudice the limited use character of the SFR zones and the motivations behind the formulation of the definitions of "families" to exclude such living arrangements would certainly all come into play.

Conclusion

A cognitive science approach frees the mind to conceive of different ways of resolving social conflicts. Liberated from the seemingly entrenched character of conventional understanding of legal doctrine, we can more easily debate about which cognitive pathways better serve contested human ends. This article suggests that conventional legal analysis is but one cognitive model for that work and that stories may prove valuable alternative tools.