

PRACTICING DIALOGUES ABOUT DIFFERENCE: USING MULTIPLE PERSPECTIVES IN TEACHING THE FOURTEENTH AMENDMENT

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In writing for the Supreme Court in *Grutter v. Bollinger*, Justice Sandra Day O'Connor reiterated the “overriding importance of preparing students for work and citizenship,” and the relationship between education and good citizenship.¹ She noted that “universities, and in particular, law schools, represent the training ground for a large number of our Nation’s leaders.”² The *Grutter* Court recognized the importance of legal education and access to the legal profession in preparing “talented and qualified individuals of every race and ethnicity” for civic engagement and leadership.³ “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”⁴ Teaching the various doctrines for which the Fourteenth Amendment forms the basis in constitutional law, administrative law, and health law is an effective way to communicate the sense of purpose identified in *Grutter* to law students. Specifically, students studying the Fourteenth Amendment have an opportunity to gain exposure to, if not an understanding of, the lived experiences of people from different backgrounds, races, religions, and sexual identities and orientations. Teaching the Fourteenth Amendment is an opportunity to challenge students to transcend segregated perspectives and persuade future members of the legal profession of the value in understanding how the law can promote or impede equality in the public sphere and the lawyer’s role in that process. In addition to becoming more effective lawyers, this process can prepare law students to become more engaged and thoughtful citizens.

As the most recent summer waned and I was thinking about writing this reflection, I recalled sitting on a Cape Cod beach in about 1987 reading Margaret

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1. 539 U.S. 306, 331 (2003) (“The Court has long recognized that ‘education . . . is the very foundation of good citizenship.’” (quoting *Plyer v. Doe*, 457 U.S. 202, 221 (1982))).

2. *Id.* at 332.

3. *Id.*

4. *Id.*

Atwood's classic dystopian novel, *The Handmaid's Tale*,⁵ for the first time. I was new to teaching law and remarked to my husband that if I ever had the opportunity to teach constitutional law, I would assign the novel for the class to read. The chance came much sooner than anticipated; however, in planning the course, a crisis of confidence about assigning the book gave me pause. How would I explain a decision to spend students' time and attention on a novel when a great many cases embodying the evolution of doctrine awaited study and discussion?

While I considered this question, I happened to notice a recently published law review article with the intriguing title, *Brontë, Bloom, and Bork: An Essay on the Moral Education of Judges*.⁶ In the article, Linda R. Hirshman argues that legal education should seek an antidote to unsatisfactory legal positivism⁷ by returning to the exploration of the humanities.⁸ Specifically, she writes:

Literature trains people in the reflection, consciousness, choice, and responsibility that make up the ability to engage in moral decisionmaking. It does so by presenting artificial, but concrete, universes in which premises may be worked out in conditions conducive to empathy but ambiguous enough to allow for the formation of moral judgment.⁹

Hirshman examines *Jane Eyre*, *The Scarlet Letter*, and *The Handmaid's Tale* to illustrate how literature serves as an effective vehicle to allow "citizens, lawyers, and judges" to develop the capacity to appreciate the perspective of people differently situated and to recognize unexamined assumptions.¹⁰ This scholarly endorsement of the relevance of literature to the study of constitutional law¹¹ reinforced my resolve, and Atwood's novel has appeared on my constitutional law syllabus with regularity ever since that first class, along with other materials that I will mention presently.

The Fourteenth Amendment, along with the Thirteenth and Fifteenth Amendments, began the process of rectifying one of the great wrongs embedded

5. MARGARET ATWOOD, THE HANDMAID'S TALE (First Anchor Books 1998) (1986).

6. Linda R. Hirshman, *Brontë, Bloom, and Bork: An Essay on the Moral Education of Judges*, 137 U. PA. L. REV. 177 (1988).

7. "Legal positivism is a philosophy of law that emphasizes the conventional nature of law—that it is socially constructed. According to legal positivism, law is synonymous with positive norms, that is, norms made by the legislator or considered as common law or case law." Kenneth Einar Himma, *Legal Positivism*, INTERNET ENCYCLOPEDIA PHIL., <http://www.iep.utm.edu/legalpos/> [<https://perma.cc/AAC6-EMQR>].

8. Hirshman, *supra* note 6, at 179.

9. *Id.*

10. *Id.* at 201, 208–09.

11. Hirshman's article examines *The Handmaid's Tale* to illustrate the implications of *Griswold v. Connecticut* and *Roe v. Wade*, and whether "our tradition of ordered liberty" would effectively prohibit depriving women of legal rights, including conscripting them for reproduction. See Hirshman, *supra* note 6, at 201, 208–09, 228, 224–30.

in the Constitution of 1789 by removing the legal protection for slavery¹² and establishing the principle that “[a]ll persons born or naturalized in the United States” are citizens of the United States and the States in which they reside with rights to liberty, due process, and equal protection of the laws.¹³ While the right to vote established in the Fifteenth Amendment introduced the assumption that only males would be the voters, the Fourteenth Amendment forms the basis for the notions of liberty and equality before the law and protects:

[The ability] of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.¹⁴

In defining the contours of these rights protected by the Fourteenth Amendment in the economic sphere, in protections for the exercise of choices in marriage and reproduction, and in protections from discrimination on the basis of race, gender, and other characteristics, the limits of the experiences of individuals, as well as the structured practices of the societal and legal institutions people encounter in daily life, confront the aspirations of the law and the problem of imbuing the general commitments to liberty, due process, and equality with specific substantive content.

Viewing legal issues with an appreciation for the differences in perspective and experience in mind is essential if members of the legal profession are to serve the public and promote justice. One of my goals in teaching the Fourteenth Amendment is to provide opportunities for students to learn about perspectives different from their own so that they understand the real stakes of court decisions and policy determinations. Exposure to different perspectives enables students to imagine how new legal approaches may or may not have the capacity to enhance justice and, at the same time, to develop an appreciation for the limits of the law. Any educational process strives to transform students and teachers far beyond the discussions or written work submitted for a course.

Opportunities for this type of learning are most evident in constitutional law because the doctrines governing regulation of economic activities, discrimination on the basis of race, sex, sexual orientation and identity, and the role of religion in civic life, directly involve evolving ideas about economic and social equality. Perhaps due to the passage of time, inadequate prior education about history and civics, or the deficits of collective memory, when I began teaching in the late 1980s, some students did not have a concrete understanding of the unequal bargaining power of employers and employees reinforced in

12. U.S. CONST. amend. XIII, § 1.

13. U.S. CONST. amend. XIV, § 1.

14. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

Lochner v. New York,¹⁵ how the law has historically circumscribed the roles of women, or of the separate but equal doctrine's assaults on the dignity of people of color.¹⁶ I viewed the challenge as how to connect doctrinal evolutions in cases like *Brown v. Board of Education*,¹⁷ *Loving v. Virginia*,¹⁸ and *United States v. Virginia*,¹⁹ to the lives of the people who challenged the legal constraints. The Holmes and Harlan dissents in *Lochner* help students focus on how the majority opinion failed to recognize that the bakers were not in a position to bargain effectively about working conditions and that the limitations on work hours and wages were an indirect form of public health regulation.²⁰ Comparing the majority opinion in *Lochner* with its focus on liberty of contract to the discussion of the individual's right to be free from having to buy health insurance in the Commerce Clause section of the more recent decision in *NFIB v. Sebelius* highlights the resilience of overarching legal and economic approaches to constitutional interpretation.²¹ In *Lochner* and *NFIB*, the Court privileges theoretical notions of liberty over restraints that may actually serve the interests of equality and liberty by providing people the opportunity to lead healthier lives.

To fill the gaps in historical understanding of legally mandated segregation, I introduce the discussion of equal protection by showing *The Loving Story*,²² a documentary about Richard and Mildred Loving, the couple who successfully challenged Virginia's statute prohibiting certain interracial marriages. The film captures the family life and personal story of the Lovings, describes the legal strategies through the lawyers who represented the Lovings, and contains news footage from the 1960s in which whites do not feel constrained to hide their support for the legally enforced segregation. After seeing the film, it is not possible for skeptical students to assert that segregation created equality or that racism—perhaps cloaked by assertions of religious beliefs or social comfort—did not motivate the legal regime. This recognition does not determine what the remedies to some forms of more subtle discrimination should be—such as affirmative action programs to promote opportunities for people of color in higher education and employment—but the discussion now can take place based on a shared understanding that segregation and discrimination are problems that the law should attempt to address.

In addition to the film, I try to keep an eye out for first-person accounts of experiences with segregation or interactions among people of different races.

15. 198 U.S. 45, 52–53 (1905).

16. *Plessy v. Ferguson*, 163 U.S. 537, 540, 544 (1896).

17. 347 U.S. 483 (1954).

18. 388 U.S. 1 (1967).

19. 518 U.S. 515 (1996).

20. *Lochner*, 198 U.S. at 75 (1905) (Holmes, J., dissenting); *Id.* at 65 (Harlan, J., dissenting).

21. 567 U.S. 519 (2012).

22. THE LOVING STORY (Home Box Office 2012).

Accordingly, I have used a range of background materials at different times to contextualize the equal protection doctrine. One early piece I used was the account of Howell Raines, who was then the Washington editor of *The New York Times*, of his observations of, and conversations with, an African-American teenager who was a housekeeper in his family's home in Birmingham, Alabama. Raines described how this connection allowed him to see the blindness of Southern whites to the determination of African Americans to overcome segregation.²³ On the issue of educational equality, I will ask students to read a piece published last fall about the experiences of the first black students to integrate an elite Virginia prep school, and who drove themselves to succeed in an unfamiliar and not entirely welcoming environment.²⁴ Recent articles about the persistence of separate high school proms for blacks and whites in the South²⁵ will provide concrete and contemporary content to the problems of race in the United States in a context that is a memorable rite of passage for many law students. For local context, I plan to assign the series of articles researched and written by The Spotlight Team of *The Boston Globe* assessing Boston's image on race issues and evaluating the level of equality in specific sectors such as health care, higher education, sports, access to power, and in areas of the city where redevelopment is active.²⁶ By reading the series about the successes and remaining challenges of efforts to build a more inclusive community, I hope that students will see the city in which they live with more observant eyes and minds.

Some creative works by legal scholars also help provide experiential context and logical frameworks to inform a reading of the relevant cases. Randall Kennedy's article on the Montgomery bus boycott connects the Fourteenth Amendment analysis to issues of professional responsibility and the role of the lawyer in rapidly evolving circumstances.²⁷ Additionally, the article demonstrates the relationship between social movements and legal change, causing students to consider that law operates in relation to real events—that law is not merely an intellectual abstraction.

23. Howell Raines, *Grady's Gift*, N.Y. TIMES (Dec. 1, 1991), <http://www.nytimes.com/1991/12/01/magazine/grady-s-gift.html?pagewanted=al>. In April 1992, Raines's article was awarded the Pulitzer Prize for feature writing.

24. Mosi Secret, 'The Way to Survive It Was to Make A's,' N.Y. TIMES (Sept. 7, 2017), <https://www.nytimes.com/2017/09/07/magazine/the-way-to-survive-it-was-to-make-as.html>.

25. Sara Corbett, *A Prom Divided*, N.Y. TIMES (May 21, 2009), <http://www.nytimes.com/2009/05/24/magazine/24prom-t.html>.

26. The Spotlight Team, *Boston. Racism. Image. Reality.*, BOS. GLOBE (Dec. 10, 2017), <https://apps.bostonglobe.com/spotlight/boston-racism-image-reality/series/image/> (a series of seven articles examining the recent history of race relations in Boston in several sectors and identifying some solutions).

27. Randall Kennedy, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989).

Particularly useful in this regard is Martha Minow's work on how to think about "difference."²⁸ In the article *Justice Engendered*, Minow explores the dilemma of difference:

The risk of non-neutrality—the risk of discrimination—accompanies efforts both to ignore and to recognize difference in equal treatment and special treatment; in color- or gender-blindness and in affirmative action; in governmental neutrality and in governmental preferences; and in decisionmakers' discretion and in formal constraints on discretion.... What makes [the dilemma of difference] seem so difficult are unstated assumptions about the nature of difference. Once articulated and examined, these assumptions can take their proper place among other choices about how to treat difference.²⁹

The five unstated assumptions Minow identifies offer students an entry point in examining what exactly is the source of assertions of inequality, discrimination, or special treatment in a particular case and suggest options for resolving the dilemmas involved in determining how to promote equality.

The first assumption is that difference is intrinsic, not relational, meaning that the resulting comparisons can overlook "socially constructed meanings about what traits should matter for purposes of comparison."³⁰ A second assumption is using an unstated norm as a reference point for categorization, comparison, and analysis:

Women are different in relation to the unstated male norm. Blacks, Mormons, Jews, and Arabs are different in relation to the unstated white, Christian norm. Handicapped persons are different in relation to the unstated norm of able-bodiedness.... A notion of equality that demands disregarding a "difference" calls for assimilation to an unstated norm.³¹

The third assumption in Minow's analysis is that: "[T]he perspective of the person doing the seeing or judging [is] objective, rather than . . . subjective. Although a person's perspective does not collapse into his or her demographic characteristics, no one is free from perspective, and no one can see fully from another's point of view."³² The idea behind this assumption is similar to more recent explorations of implicit bias—the notion that every person's world view is based on certain assumptions or biases about the world and the other. A goal of contemporary diversity training programs is to help individuals learn to identify biases and assumptions and be aware of how biases affect their interactions with others and their decision-making—during law school and beyond.

28. Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10 (1987).

29. *Id.* at 31.

30. *Id.* at 32; *see also id.* at 34–38.

31. *Id.* at 32; *see also id.* at 38–45.

32. *Id.* at 32; *see also id.* at 45–50.

While one unstated norm is to treat the perspective of the observer as objective, Minow notes that another assumption is that “the perspectives of those being judged are either irrelevant or are already taken into account through the perspective of the judge.”³³ Minow notes that this assumption often leads to a bias in outcomes preferring the status quo—taking into account a different perspective would require societal change.³⁴

Finally, Minow notes that: “[c]onnected with many of the other assumptions is the idea that critical features of the status quo—general social and economic arrangements—are natural and desirable,” uncoerced, and good.³⁵ This fifth assumption puts the onus on the individual to understand the prevailing arrangements and to take responsibility for making choices consistent with the incentives or penalties reinforced by such arrangements.³⁶

While not to be confused with another doctrinal “test,” such as strict scrutiny, intermediate scrutiny, or rational basis review, asking what assumptions are involved in court decisions using the Minow framework is a useful way for students to evaluate the persuasiveness of a court’s reasoning in particular cases. The framework also provides a way for students to apply different doctrinal lenses to hypothetical situations and current controversies. Examining these unstated assumptions affords another mechanism for students to connect the impact of doctrine with the real arrangements by which individuals and organizations attempt to organize their affairs.

This exploration of difference confronts the question of what it means to be “equal.” Inevitably, someone in the class will assert confidently that treating people equally means treating people “the same.” In response, I ask students whether any among them read *A Wrinkle in Time* by Madeleine L’Engle in their middle school years. Many students will have read the book, and I ask them to think about the character Meg, who attempts to refute Charlie’s claim that everyone being equal means that everyone is alike, by stating that: “*Like* and *equal* are not the same thing at all!”³⁷ The purpose of referring to the colloquy is to remind students that the role of constitutional law is to give content to the general terms such as “equal protection” and “due process” that form the basis of the rights the Fourteenth Amendment guarantees.

One persistent myth is that societal and legal progress is linear—with an ever more inclusive realization of the ideals of equality embodied in the Fourteenth Amendment. A layperson could easily assume that once the Supreme Court determines that arrangements relying on the *Plessy* separate but equal doctrine are invalid, that all such arrangements in the public sphere magically

33. Minow, *supra* note 28, at 33; *see also id.* at 50–54 (citations omitted).

34. *Id.* at 54.

35. *Id.*

36. *Id.* at 54–55.

37. MADELEINE L’ENGLE, *A WRINKLE IN TIME* 154 (Square Fish 2007) (1962).

disappear. The sad history of efforts to realize the promise of *Brown v. Board of Education* in eliminating segregation in public education stands as a profound refutation of this myth.³⁸ Melissa Fay Greene's account of how the civil rights movement had bypassed rural McIntosh County, Georgia, in the 1970s and the awakening of the black community in overcoming the autocratic domination of a white sheriff in *Praying for Sheetrock* is a compelling account of the difficulties of translating law into real change.³⁹ In assigning *Praying for Sheetrock*, my goal is to challenge students to see beyond the headlines celebrating the advances of heralded landmark court decisions to how the decision will affect the functioning of communities and people's lives.

This myth of inexorable forward progress can lead, also, to complacency about the need for lawyers and citizens to be vigilant in guarding against intrusions on rights. Here is where *The Handmaid's Tale* can be used to enrich the syllabus. As an aside, I warn students against taking the shortcut of watching the 1990 film adaptation because the film takes, in my view, a simplistic approach to the moral dilemmas the novel explores.⁴⁰ Atwood's novel posits the overthrow of the U.S. government by a militant religious group.⁴¹ Society is plagued by rampant environmental damage and a precipitous decline in fertility rates.⁴² The religious group creates the nation of Gilead which imposes a rigid social hierarchy, including eliminating the independent rights of women.⁴³ Fertile women are impressed into service as "handmaids" for powerful leaders of the Gilead regime in an effort to increase procreation.⁴⁴ The novel invites students to examine how current Fourteenth Amendment doctrines regarding racial, economic, and gender discrimination, as well as policies on access to reproductive health care services, would address the many discriminatory aspects of the Gilead regime and the ways in which doctrine could be used to justify the dystopian vision of Gilead. Any utility of such doctrines, of course, depends on a functioning constitutional order—which is not the case in Gilead. *The Handmaid's Tale* delivers a powerful message about the protections of a constitutional order that, in ordinary times, are easy to take for granted. I hope to impart to students that the existence of constitutional law to govern political

38. Renée M. Landers, *The Unrealized Promise of Brown v. Board of Education*, 48 BOS. B.J., May–June 2004, at 2, 2 (arguing that while the *Brown* decision has not led to an end to segregation in education, it was the catalyst for ending other legally authorized forms of racial discrimination).

39. See MELISSA FAY GREENE, PRAYING FOR SHEETROCK (1991).

40. THE HANDMAID'S TALE (Metro-Goldwyn-Mayer 1990). I confess that I have not watched the new Hulu television series based on the novel, although critical reaction suggests that the series may do a better job of capturing the complexities of the issues of political, religious, gender, and economic oppression that the novel explored.

41. See ATWOOD, *supra* note 5, at xiv.

42. *Id.*

43. *Id.*

44. *Id.*

and social arrangements, however imperfect, is a crucial bulwark against tyranny and oppression.⁴⁵ Derrick Bell's exploration of race in the United States through a series of fables and scenarios in *And We Are Not Saved* can also be useful to examine fundamental assumptions about legal rights.⁴⁶

Administrative law and health law, which I also teach, involve opportunities to approach Fourteenth Amendment doctrine in exploring procedural due process, substantive due process, and equal protection. As in constitutional law, aspects of each subject invite students to explore how legal rules affect differently situated people differently. For example, in administrative law, studying the constellation of procedural due process cases such as *Goldberg v. Kelly*⁴⁷ and *Mathews v. Eldridge*⁴⁸ requires a person to think about the limitations economic hardship and disability inflict on a person's capacity to function as a citizen and to work to actualize the human aspirations so well described in *Meyer v. Nebraska*.⁴⁹ People with low incomes or disabilities are further confronted with the challenges of interacting with administrative bureaucracies such as welfare agencies, Medicaid programs, the Social Security Administration, and the Veterans Administration, which each have goals not perfectly aligned with serving the intended beneficiaries of the programs and which operate under unique political constraints. The point is to try to recognize the applicant for benefits or the terminated beneficiary as a human, not among the anonymous undeserving poor that Lawrence M. Friedman describes in *A History of American Law*.⁵⁰ Friedman describes the roots of attitudes and the legal provision for the poor in the Elizabethan poor laws imported to the American colonies, and how in the nineteenth century these origins translated into programs to help people who were "clearly blameless" such as veterans, the sick, and the old.⁵¹ This history places the administration of social insurance and

45. On January 20, 2018, the author received an e-mail from a student she taught in the early 1990s at a different university, which stated as follows:

As I marched today at the 2nd women's march, I reflected, yet again, on the fact that you taught the Handmaid's Tale in Con Law II. Over the years, this has been one of the greatest things I discuss when talking about my . . . [legal] education.

E-mail from Julia Thompson, to Renée M. Landers, Professor of Law, Suffolk Univ. Law Sch. (January 20, 2018, 15:56 EST) (on file with author). The author had not had any contact with the former student in the intervening years.

46. DERRICK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987).

47. 397 U.S. 254 (1970).

48. 424 U.S. 319 (1976).

49. 262 U.S. 390, 399 (1923) (recognizing that acquiring knowledge, engaging in occupations of life, marrying, establishing a home, raising children, and worshipping God are "essential to the orderly pursuit of happiness by free men").

50. LAWRENCE M. FRIEDMAN, HISTORY OF AMERICAN LAW 89–90, 212–18, 488–95 (2d ed. 1985).

51. *Id.* at 213–14.

support programs in the context of attempts by local governments, the states, and federal policy to separate the stereotypical, and perhaps apocryphal, able-bodied person unwilling to work, from the unfortunate who deserve society's beneficence. While also useful in discussing some of the Fourteenth Amendment doctrine relating to regulation of the workplace and welfare rights, this history explains the role of power—and the lack of it—in giving effect to legal rights through administrative procedure.

Similar questions about distributive justice confront students in health law. Friedman's historical account of health care programs is useful in explaining why the United States is an outlier among industrialized nations in providing access to health care and other social and public services that contribute to health status and health care outcomes. Giving content to the concept of "liberty" protected by the Fourteenth Amendment is a central component in examining the contours of public health programs and rights under private insurance policies. Returning to the *Meyer v. Nebraska* formulation of the goal of protections for liberty and equality in the Fourteenth Amendment,⁵² students must ask whether government neutrality or governmental intervention of some form will enhance the ability of people to actualize the aspirations the Court identified. Does a requirement to purchase health insurance constrain the liberty to choose, or does such a requirement enhance liberty by providing access to health insurance—and a potentially more productive life through better health? In this context, examining comparative materials about the rationales for more robust social insurance programs in other Western democracies can inform our notions of what liberty and equality might entail under the Constitution. As with the use of literature and first-person accounts, the comparative approach invites students to examine policy choices in the "other universes" Linda Hirshman describes.⁵³

Similarly, the tension between honoring individual religious beliefs and imposing effective public health policies in areas such as required vaccinations, advanced directives for resuscitation measures, assisted suicide, organ donations, and access to contraception and abortion services are recurring themes in a health law course. The Minow framework about unexamined assumptions is particularly useful in identifying the different perspectives involved and what role the law should take in resolving disputes—which perspectives to privilege and for what reasons.

Recently, I received an invitation from the Latin American Law Students Association at my law school asking me to participate in a "roundtable discussion of diversity and other topics relating to the Latin American

52. See *supra* note 14 and accompanying text.

53. See *supra* note 8 and accompanying text.

community” sponsored with the Women’s Law Association.⁵⁴ The invitation stated: “Many of your students have described to us how your teaching method is one that encourages diversity and provides a greater understanding of our many differences.”⁵⁵ One of the most profound rewards of teaching law is the occasional moments when students let you know that they understand and appreciate what you are trying to do in the classroom. By exploring the issues of difference in the classroom, I hope to expand the range of perspectives students are able to see and help them practice the difficult conversations and decisions that will be part of their lives as lawyers and citizens. This approach has the added advantage of practicing the skill every effective lawyer must possess—that of anticipating the arguments and perspectives of opposing parties whether in resolving disputes, heading off avoidable conflict, or reaching agreement in transactional negotiations.

54. E-mail from Tabitha L. Roman, Sec'y, Latin Am. Law Students Ass'n, to Renée M. Landers, Professor of Law, Suffolk Univ. Law Sch. (Nov. 15, 2017, 14:35 EST) (on file with author).

55. *Id.*

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