In 1988, a legal appeal from the Iowa judicial circuit reached the United States Supreme Court. One of the fascinating aspects of the case Coy v. Iowa is the way that the legal doctrine at its center—the right of a defendant “to be confronted with the witnesses against him”—is described and explained by the Court. Writing for the majority, Justice Antonin Scalia supports the Court’s decision to define the term “confront” as a face-to-face encounter with a line from Shakespeare’s *Richard II*:

> Shakespeare was thus describing the root meaning of *confrontation* when he had Richard the Second say:
>
> ‘Then call them to our presence—face to face, and frowning brow to brow, ourselves will hear the accuser and the accused freely speak.’¹

There is nothing out of the ordinary about Scalia’s use of analogy in the exposition of a legal principle. Such a rhetorical strategy is used regularly within formal legal discourse and is not surprising, given that law shares with literature its grounding in language and narrative. Scalia’s point of departure from judicial convention and tradition, however, occurs when he uses Shakespeare’s play as a kind of dictionary. Scalia’s citation of *Richard II* exposes how the history and authority of some legal doctrines are rooted not just in legal precedent, but also in literature. More broadly, it illuminates how, as Kieran Dolan puts it, “literature combines with other modes of cultural discourse to authorize and validate law, and makes it relevant and meaningful.”²

Justice Scalia is not the only contemporary figure, of course, to highlight the influence of literature on law. Peter Goodrich argues that contemporary law “is literature which denies its literary qualities.”³ For Derrida, literary criticism and theory furnishes the framework and tools for reading law. As such, literature serves as the “privileged thread for access to the general structure of textuality.”⁴ The literary character of law is rooted in the notion that social institutions and cultural formations inform legal development just as much as they are influenced by it. As Pierre Bourdieu writes, “It would not be excessive to say that law creates the social world, but only if we remember that it is the world that first creates the law.”⁵

The critical reassessment of the relationship between literature and law is viewed as a natural outgrowth of Deconstructionist theory. For Scalia,
however, the formative powers of literature may be less of a postmodern invention than a premodern one. Scalia’s father was a professor of romance languages at Brooklyn College for thirty years and a translator of Dante. In his father’s books, Scalia would have encountered a very different understanding of the relationship between literary production and legal theory and practice.

In parts of medieval Europe, including fourteenth-century England, the making of some forms of law was a fundamentally literary enterprise. Aaron Tugendhaft’s provocative essay illustrates that the same claim may apply to Late Bronze Age Ugarit. Tugendhaft argues that the poetic formula of the fourteenth-century B.C. Baal Cycle gives way in crucial moments to engage with political customs and practices described in contemporaneously produced royal letters. Particularly important is the way that the poem portrays the process by which the storm god Baal changes status within the pantheon of Ugaritic deities. In the beginning of the poem, Baal is described as being unrelated to the rest of the gods. The disparity between the deities is reflected in the text through Baal’s repeated complaints that he lacks a house “like the gods.” Baal’s eventual acquisition of his own house is the material needed to graft the god into the divine household. Baal’s transformation from outsider to relative is legitimated by the poetic interpolation of the term “brother.” When Anat delivers the good news—that Baal will be given a house “like your brothers”—the goddess adopts Baal into the family of Athirat and, in doing so, entitles the god to all of the rights and privileges that come along with new status.

Tugendhaft notes that the scene that follows in the poem—Baal’s housewarming party—bears a striking resemblance to the ceremonial feasts described in Late Bronze Age political and legal documents. Specifically, the banquet invitations that were shuttled between royal households during this era often address rulers as brothers. Tugendhaft argues that the inclusion of this particular terminology in official legal and political documents functions as a sort of political strategy that satisfies two rulers’ mutual need to “articulate a shared recognition of their equal status and legitimacy.” The Baal Cycle’s recruitment of the same term thus presents the audience with a way to consider “the ideological claims prevalent in the Late Bronze Age and how they line-up with experienced political realities.” Poetry legitimates royal rule by rendering transparent the process by which political alliances are formed and kingship norms established.

Accepting the notion that poetry authenticates kingship norms in fourteenth-century B.C. Ugarit may enable us to nudge Tugendhaft’s argument into making an even bolder claim: namely, that the Baal Cycle not only offers its readers a vehicle through which to reflect on contemporary political events, but also works with established legal and political
institutions and agents to construct and revise paradigms of royal rule. Archeological evidence seems to offer provisional support of this idea. According to Tugendhaft, one of the features that distinguishes the Baal Cycle from other surviving Bronze Age literary texts is that the stone tablets upon which the poem was written were unearthed “side-by-side with diplomatic treaties, edicts, and political correspondence.” The physical proximity of these documents demonstrates the simultaneity with which imagination and language mutually reinforce legal and literary spheres.

The questions that Tugendhaft asks about fourteenth-century B.C. Ugarit—What does literature have to do with lawmaking? To what extent can literature create law and how does poetry both participate in and record historical change?—are the same as those being asked about medieval England, and for largely the same reasons. Ugaritic law survives in royal correspondence and other political documents. The form in which most royal law was preserved in fourteenth-century England was the statute book. Beginning in the 1290s, these informal records of the king’s command were mass-produced by commercial stationers and teams of copiers for reference use by landowners, judges and especially common lawyers. Donald Skemer counts more than four hundred surviving copies of medieval statute books. Assuming, as Ralph Hanna does, a two percent survival rate and an English population of approximately 3 million, the country would have been “utterly suffused with statute collections, about one copy for every three hundred people.” The sheer number of statute books in circulation would have made them the most ubiquitous book in fourteenth-century England except for the Bible and liturgical volumes. It is safe to say then, that statute books served as a dominant voice in defining what law was.

The contents of medieval statute books reveal fascinating clues to the nature and form of royal law in the Middle Ages. Most of these manuscripts contain statutes from Magna Carta (England’s first) to the 1285 Statute of Westminster. Surprisingly, a small but important number of these books also contain poems. For example, interspersed among the statutes contained in London, Public Record Office, 164/9 are three prophecies, eleven lines of unidentified verse, a liturgy, and several saints’ lives. Similarly, Harvard Law School, HLS MS 59, which dates to the same period, contains the core set of thirteenth-century statutes, plus an abridged version of the contemporaneous poem Roman de Brut. Written in the same hand and language (Anglo-Norman) as the statutes that it accompanies, this poem seems not only at home among such legal forms, but in some ways, is indistinguishable from them.

If the content of medieval statute books makes it difficult to say with any certainty what law was in fourteenth-century England, the content of so-called literary manuscripts makes it equally hard to define the term
“literature.” Bodleian Library, MSS Douce 132+137 serves as a compelling case in point. This booklet manuscript, dated to the 1260s and described by Hanna, contains the thirteenth-century romance Horn and three Anglo-Norman imaginative texts: Marie de France’s Fables, Robert Grosseteste’s instructional poem Le Château d’amour, and Guillaume le Clerc’s Bestiary. It also includes several statutes and related legal documents, including Magna Carta, the Statute of Merton, and the laws of Henry I.13

The confluence of poetic and forensic texts in medieval English documentary culture is manifest not only in the forms in which the manuscripts in which poetry and statutes appear, but at least in one case, in the language of the law itself. The Statute of Treason of 1352 was designed to cast a wide net over established offenses against the king as well as to umbrella future, still unformulated forms of treachery. It is partially for these reasons that the seminal law makes it a felony punishable by loss of life and property to, among other things, “compass or imagine the death of our lord the king.”14 While legal commentators agree that the phrase generally signifies the intent to kill the king as opposed to the act of really doing it, the forms that “imagining the king’s death” can or cannot take is left unstated, and thus open to wider interpretation.

The ambiguity regarding the meaning of the term “imagine” in the Statute of Treason stems in part from the fact that the word is a legal neologism. While the term had been part of the philosophical and literary lexicons for centuries, the first time that the word enters into England’s official legal vocabulary is through the 1352 statute.15 England’s poetic tradition thus serves as both a precedent for the term’s legal usage and an implicit agent in the construction of its meaning. A famous passage from Chaucer’s The Knight’s Tale serves as a representative example of an interpretative model. In his exploration of Mars’s pagan temple, the narrator of the poem comes across a terrifying mural painted on the wall of the edifice. The gruesome scene exposes the process by which crime is born: “Ther saugh I first the derke yimagining/Of Felonye, and al the compassing . . . /The tresoun of the modrynge in the bedde” [There I saw the dark imagining/ Of Felony, and the compassing . . . /The treason of murder in the bed].16

The ease with which the word “imagine” lends itself to figurative manipulations in late fourteenth-century literary culture invited and created a hermeneutic milieu where readers were encouraged and even compelled to interpret the Statute of Treason’s prohibition to imagine the king’s death literally (that is, through the letter of the statute) as well as literarily. The document thus articulates the desire to stop the production of insurgent narratives in their earliest embryonic stages by repressing the inclination of thoughts to multiply and divide, replenish, and ultimately coalesce into narrative form. Within the command not to imagine
the king’s death, however, is the instruction to do just that. The only way that one can know what it means not to commit this crime is to commit it in one’s mind. Specifically, one must construct, like Chaucer’s narrator does, a mental picture of what it might look like, where it would happen, and in what form it would take. Simply put, one must imagine it.

By authorizing its subjects to think outside the letter of the law, the Statute of Treason demonstrates its ability to do the same. Through the interpolation of the vocabulary of the imaginary into the letter of the law, the statute articulates a level of social and cultural awareness never before demonstrated by formal jurisprudence in England. Specifically, it demonstrates an acute consciousness of the interplay between diverse modes of knowledge. Law and literature combine in the medieval period to invent models of royal authority that inspire statute law and serve as paradigms of its writing. These models, in their turn, significantly influence definitions of literary agency and authority, conceptions of personal and national identity, and the construction of royal personhood.

Situated alongside the Baal Cycle, these examples from medieval literary culture simultaneously highlight scholars’ reliance upon existing disciplinary fields and argue for the need to step outside of them. Specifically, the way that the existing field talks about literature and law and the relationship between them (through the language of appropriation, interpolation, and intervention) are inaccurate and distorting when applied to premodern cultures because such terms and their accompanying ideologies assume a transgression of boundaries that does not exist, at least not in the same way that it does today. The keywords (to borrow Raymond Williams’ formulation) of “law” and “literature” obfuscate, rather than clarify and illuminate the relationship between poetic production and legal discourse in ancient and medieval communities. Scholars’ sweeping use of the term “literature” to refer to all things imaginative (I count myself as a repeat offender) belies the fact that the term “law” was shape shifting in medieval culture. Similarly, the word “literature” did not appear in the English vernacular until the fifteenth century, and then in an unlikely place: not in a poem, but in a prose chronicle.¹⁷

Tugendhaft’s essay redresses the tendency to view literature and law in ahistorical ways by constructing a predisciplinary history of literature and law, one that recovers the literary character of legal discourse. Constructing a new linguistic and methodological framework for thinking and talking about the relationship between poetic production and political discourse in early historical periods promises to open up new ways of understanding how knowledge is produced and organized in the ancient and medieval worlds, and beyond.

In thinking about the literary foundations of premodern law, it may be worth remembering that America’s own charter of liberties, the Declaration
of Independence, has a similar literary history. Following its adoption by the Second Continental Congress on July 4, 1776, a handwritten draft of the declaration, signed by John Hancock, the President of the Congress, was sent down the street to the printing shop of John Dunlap. Throughout the night, 200 copies of the document were printed, today known as Dunlap broadsides. Most of these copies were distributed throughout the colonies, but one was sent to a magazine editor in England. The Declaration of Independence first appeared in printed form in England in the August 1776 issue of The Gentleman’s Magazine, a kind of eighteenth-century New Yorker. The document appears in the middle of the periodical, surrounded by a book review of Gibbon’s History of the Rise and Fall of the Roman Empire, several short poems, and an opinion essay titled “Qualifications of a Siberian Hairdresser.” Through its publication in a text that contains conventional literary forms, the Declaration invites its reader to read the document alongside conventional literary forms, and in the same way as them.

This fragment of American legal history works to bridge the gap between Ugaritic myth and Scalia’s use of Richard II. Viewed within the broader context of literary-legal engagement across the ages, Scalia’s claim about the formative influence of literature on law is not timely, but rather timeless.

Notes
7. Ibid., 89.
8. Ibid., 90.
9. Ibid., 99.
10. Ibid., 92.
13. Ibid., 47, 84.
14. 25 Edward III, stat. 5, c. 2.

