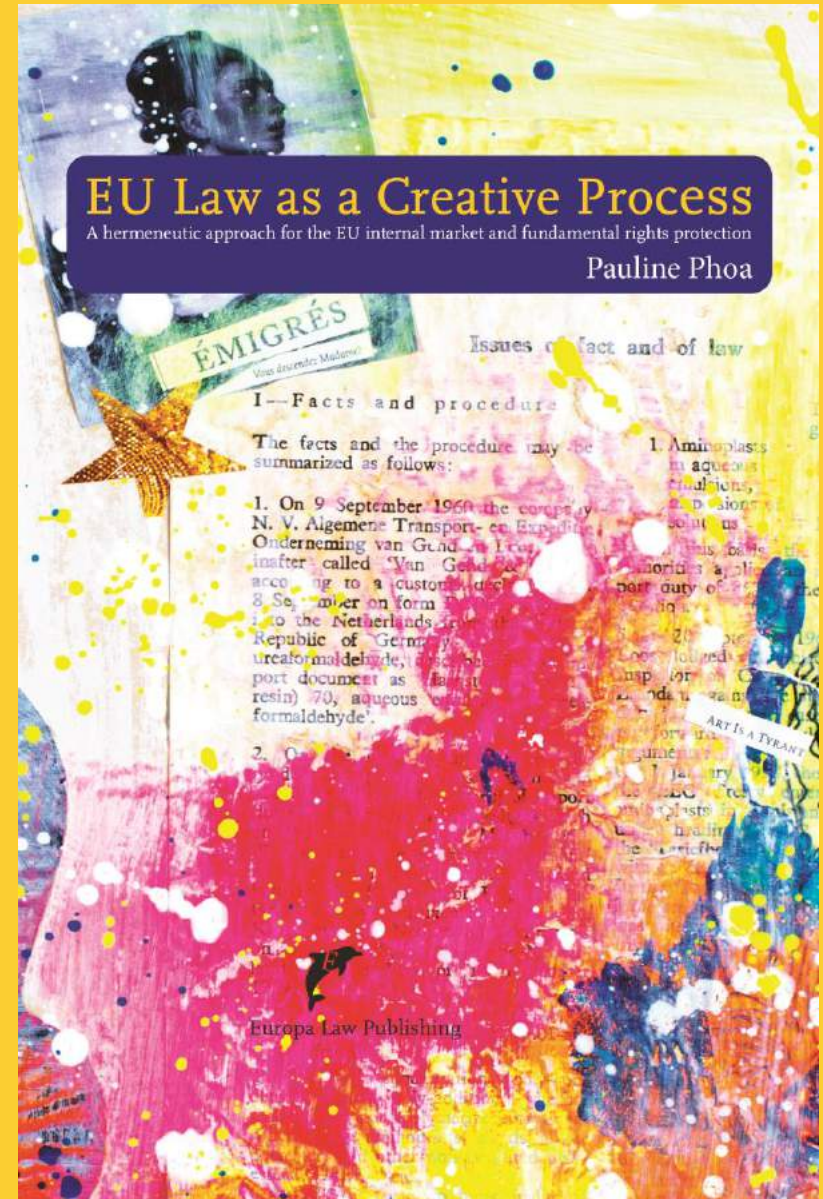


Guest lecture legal philosophy:

Narratives and worldviews in legal argumentation

Dr. Pauline Phoa

Assistant Professor, Utrecht University, the Netherlands







What is the thing we do with words?

Article 21 TFEU

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

Case C-184/99, Grzelczyk, para. 31:

"Union citizenship is destined to be the fundamental status of nationals of the Member States.."

What is the thing we do with words?

Clauses from an SPA:

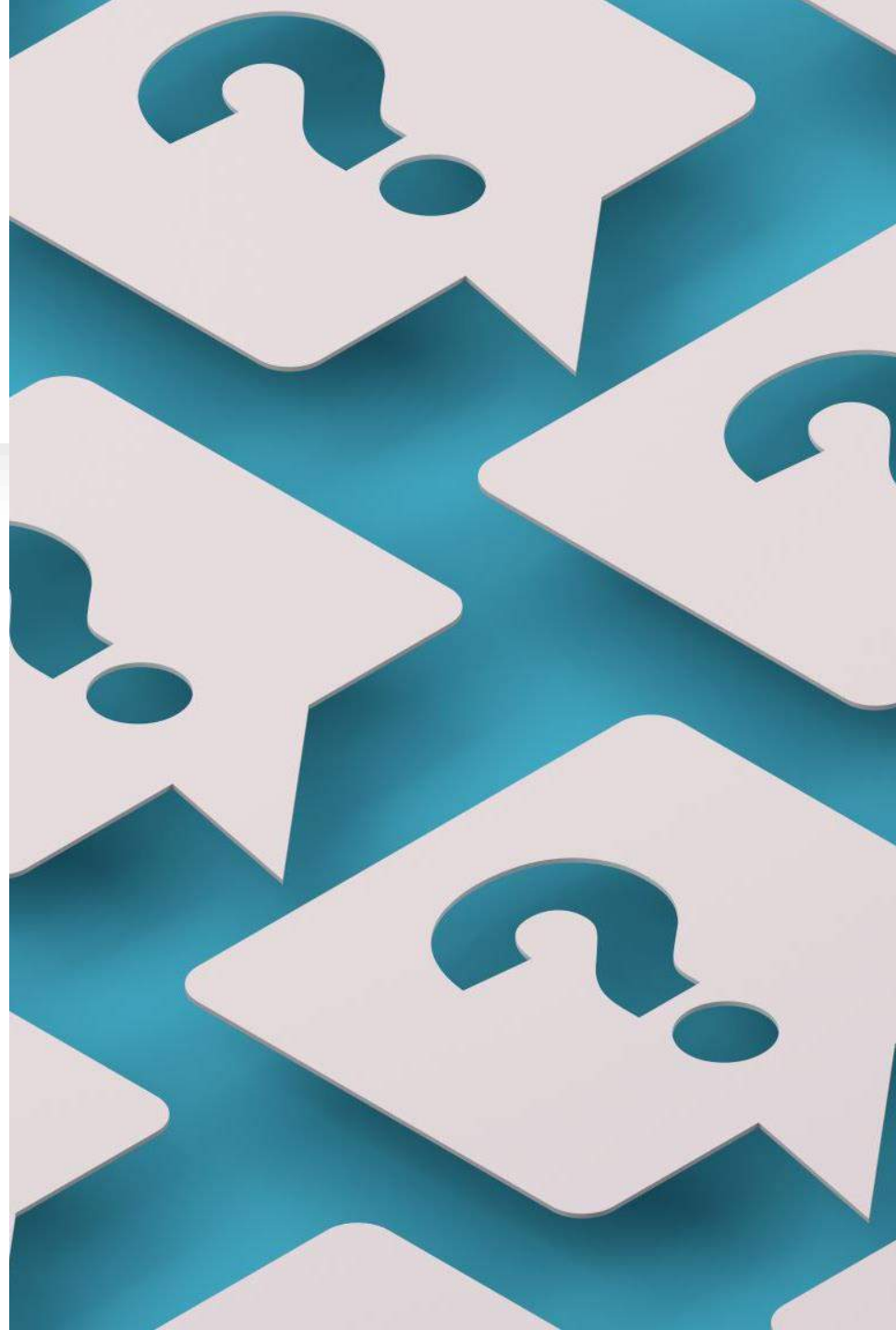
The Company, the Operating Subsidiary and the Sellers, jointly and severally, represent and warrant to the Buyer that the following statements contained in this Article are true, correct and complete as of the date of this Agreement and will be true, correct and complete as of the Closing (unless the particular statement speaks expressly as of another date or time, in which case it is true, correct and complete as of such other date or time), subject, in any case, to the exceptions listed in the Disclosure Schedules, etc:

What is the thing we do with words?

“Knowledge” of a Person means, (a) in the case of an individual, the actual knowledge of such individual and the knowledge that such individual would be expected to have following reasonable inquiry, and (b) in the case of any other Person, the actual knowledge of any individual who is serving as a director, officer, partner, executor, or trustee of such Person (or in any similar capacity) and the knowledge that any such individual would be expected to have following reasonable inquiry.

Recurring themes/questions

- How do you reason well (in a foreign language)?
- How do you persuade?
- What is a contract, really?
- What is legal interpretation, really?
- How does a legal text interact with and create reality?

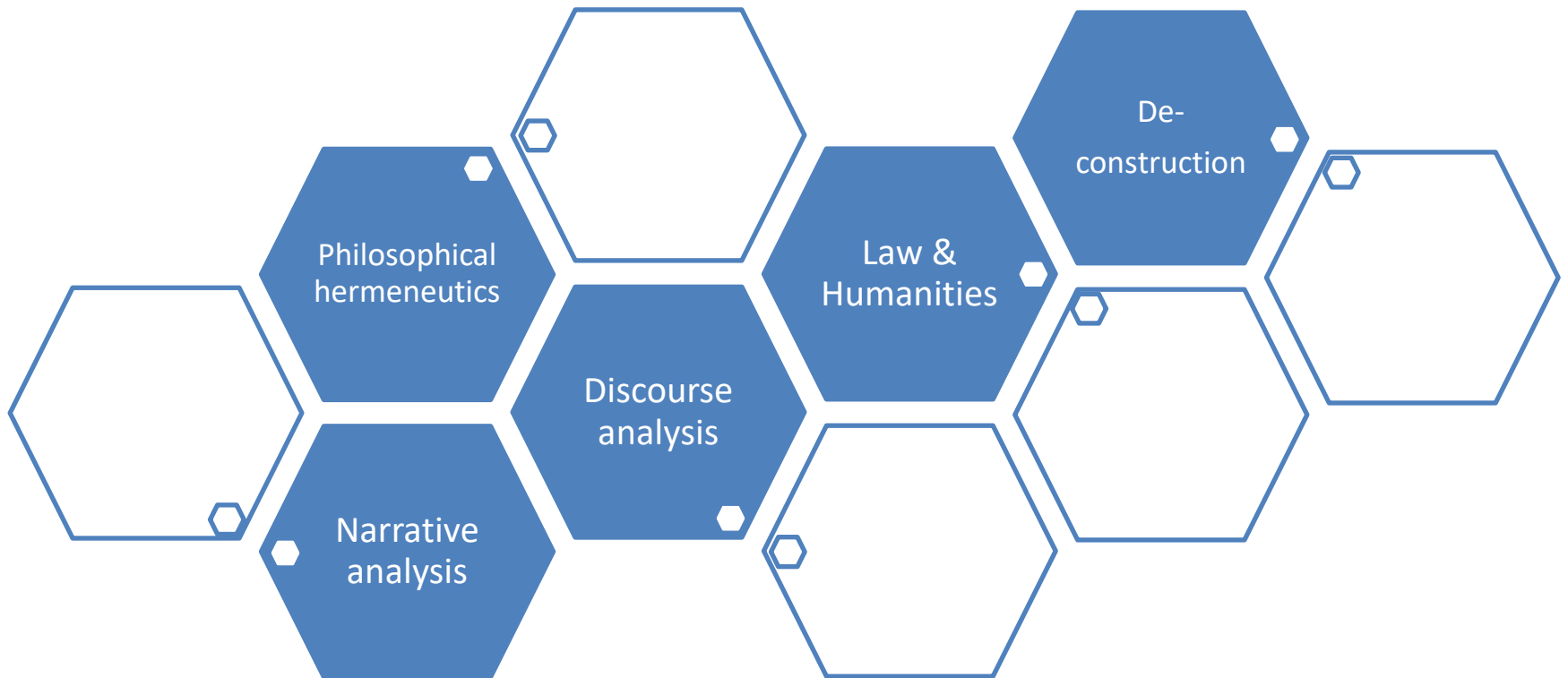




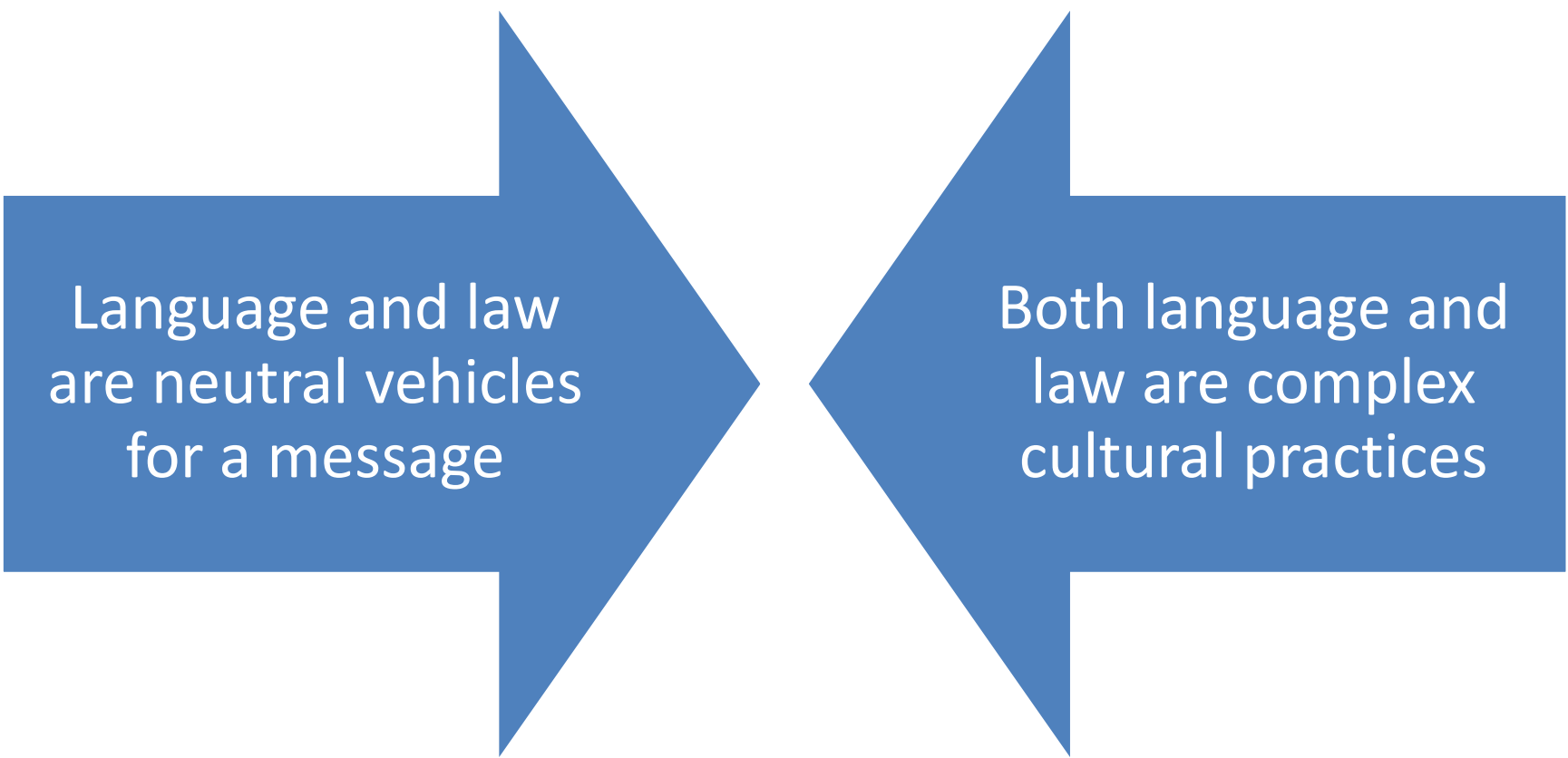
Again:
What is the thing
we do with words?

- What are the 'materials' we work with?
- How do we use these materials in a specific case?
- In our textual 'performance': what image/vision do you express about yourself, about the litigants, and the world in general?

Theories & methodologies



Two views of language and of law



Language and law
are neutral vehicles
for a message

Both language and
law are complex
cultural practices

What is *Law and Literature*

- Historical connection between humanities and legal practice
- Legal positivism: *Law as science*
- Benjamin Cardozo (1925), John Wigmore (1908)
- James Boyd White: *The Legal Imagination* (1973) and other works.
- Jeanne Gaakeer, Robert Ferguson, Richard Weisberg, Greta Olson, Martha Nussbaum, Daniela Carpi, et al.

Law-in-Literature

Central focus is reading literary works

- Broad themes common to the law: forgetting/remembering, community/isolation, social classes, betrayal/loyalty, justice/injustice, etc.
- Empathy
- Professional ethics

What can a lawyer learn from literature?



Law-as-Literature

Central focus is reading legal texts as if they were literature: using the 'toolkit' of literary or cultural theory, such as:

- Narrative analysis
- Discourse analysis
- Deconstruction

- Pay attention to: author, context, reader, textual elements

What can a lawyer learn from literary theory?

Justice-as-translation

Two forms:

- Law and language: problems with legal translation between natural languages
- Legal philosophy/language philosophy: the law as a discursive practice, 'translating' interests and meaning in order to reach a new, shared 'story'



Narrative jurisprudence & Legal storytelling

Legal skills: rhetoric and
narrative

- How do you persuade your audience?
- The power of stories, voice, perspective, framing
- What story is the law telling us about the world and about ourselves?
- Who is left out of this story?





Diverse approaches, shared premises:

- Language is law's only tool;
- Law's instrument is an institutional language that imposes its conceptual framework on its users;
- Law and literature are both producers and products of a culture, and they reflect, and/or critique the prevailing societal convictions and conventions.

Law and Literature as research methodology: pitfalls

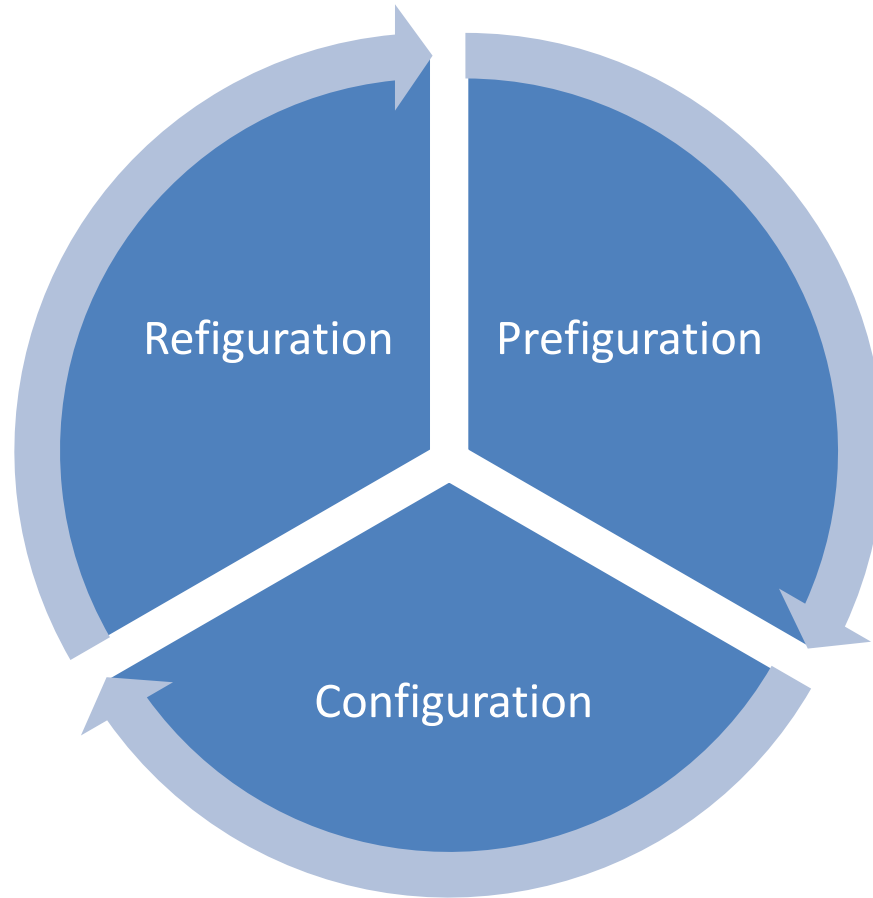
- Parochial/reductionist?
- Limitations of the “Western canon”
- Focus on the US: developing European Law&Literature
- Interdisciplinary research: doing proper research versus “going native”
- Humanities vs scientific aims: no objective truth about a process of interpretation



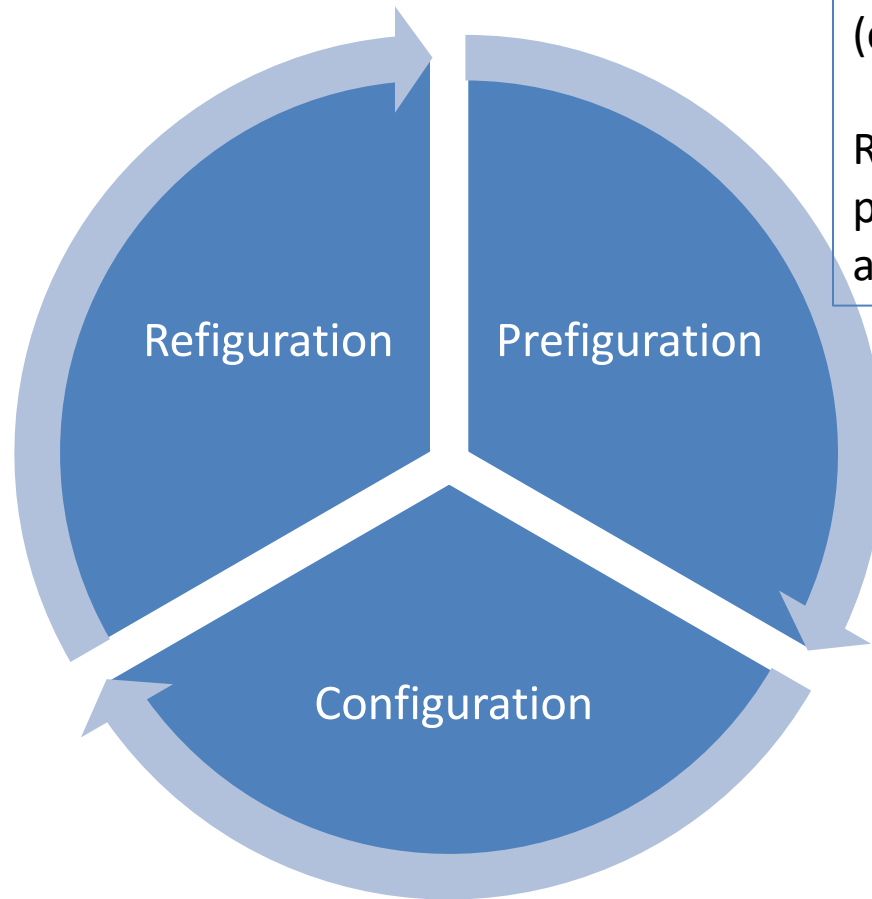
James Boyd White: “*One fundamental characteristic of human life is that we all tell stories, all the time, about ourselves and others, both in the law and out of it.*”

Robert Cover: *“We inhabit a nomos - a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void. (...) No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.”*

Hermeneutic philosophy



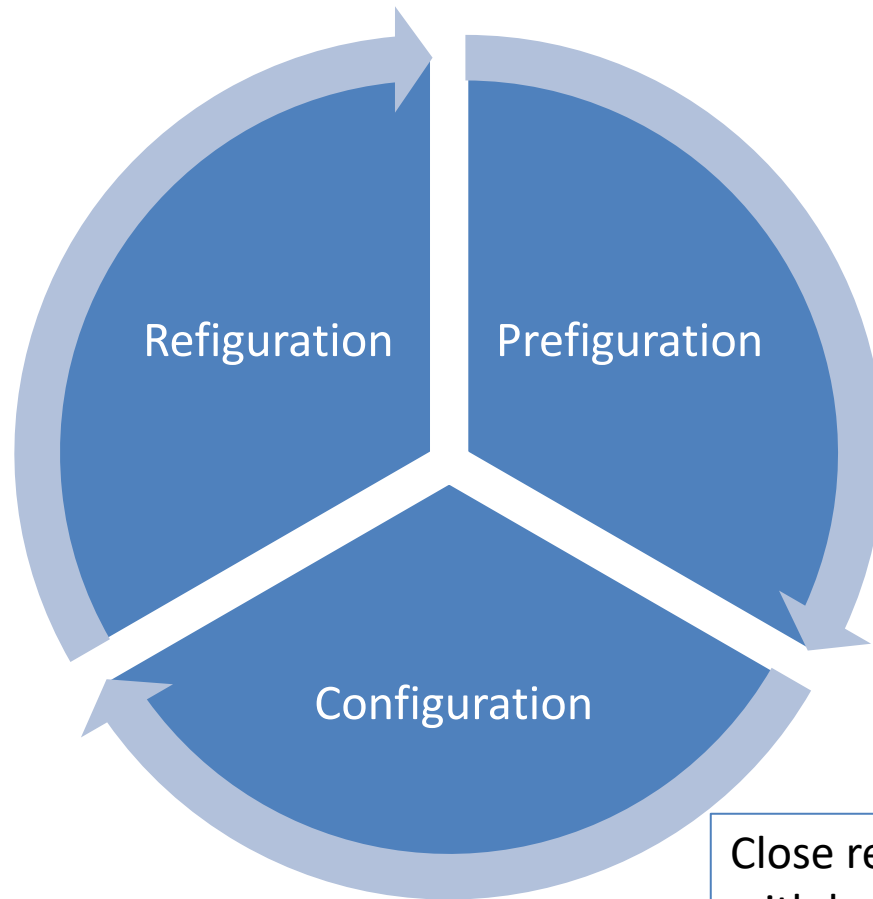
Hermeneutic philosophy



Reflection on the Self
(court and reader-self)

Reflection on required
pre-understandings +
assumptions/norms

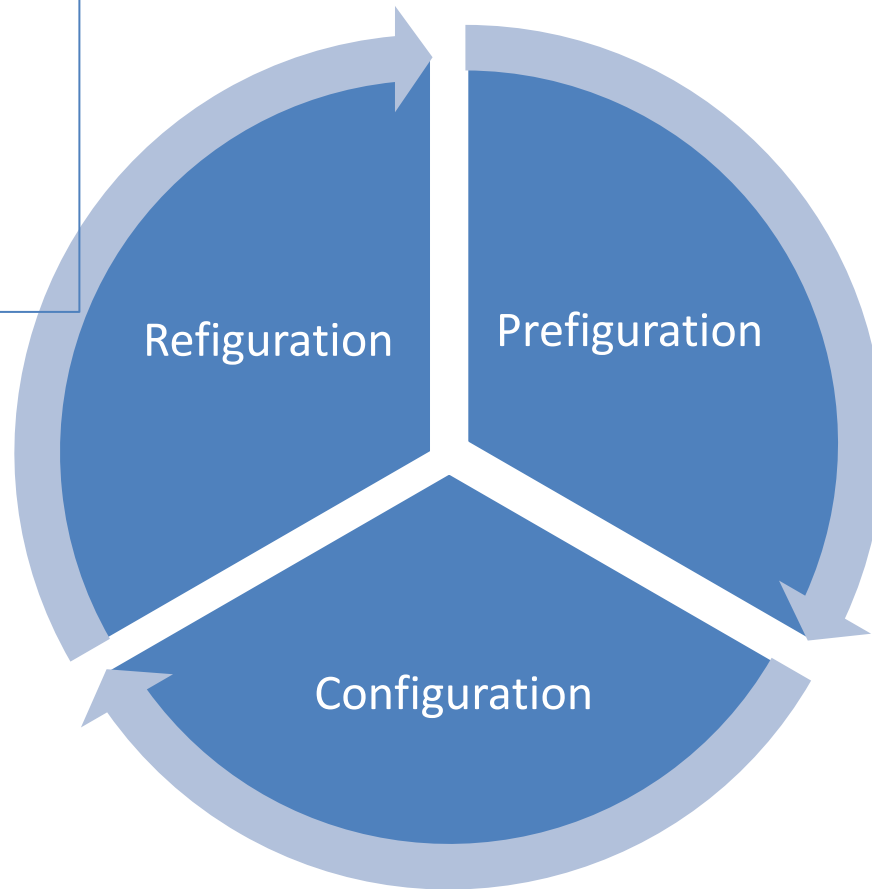
Hermeneutic philosophy



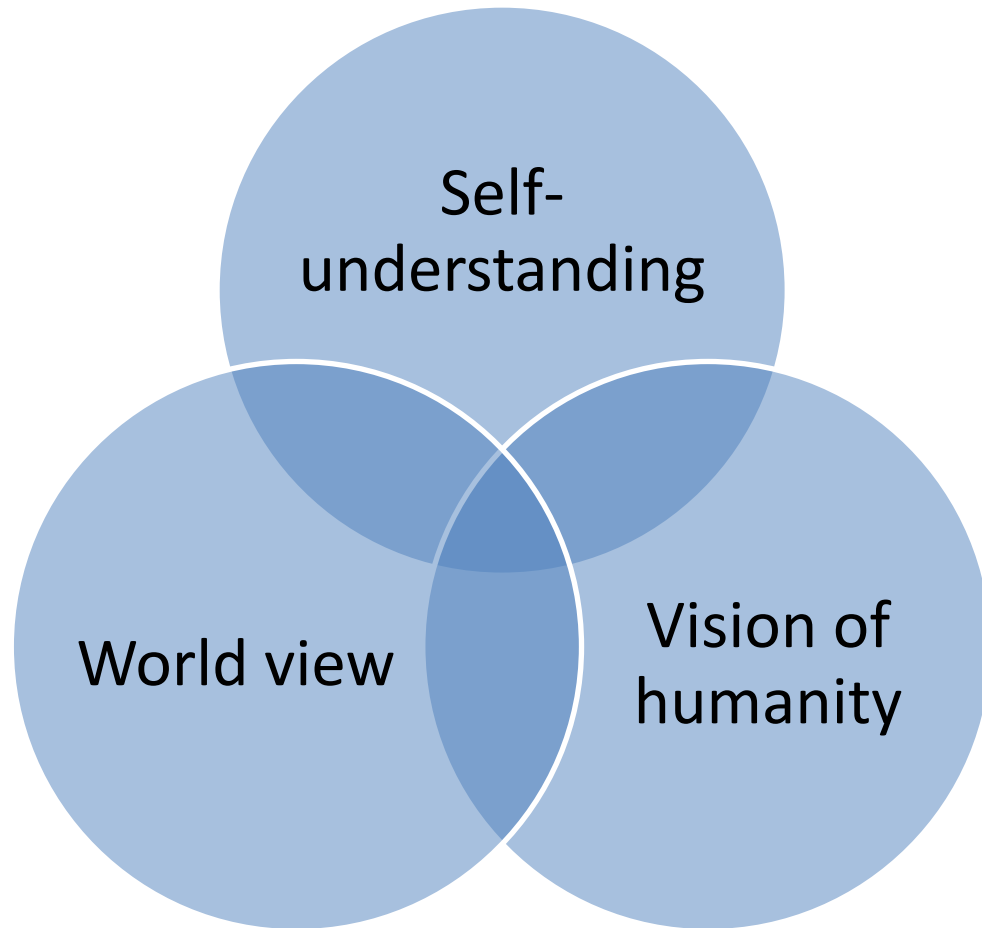
Close reading of specific text
with help from literary
theory / methodologies

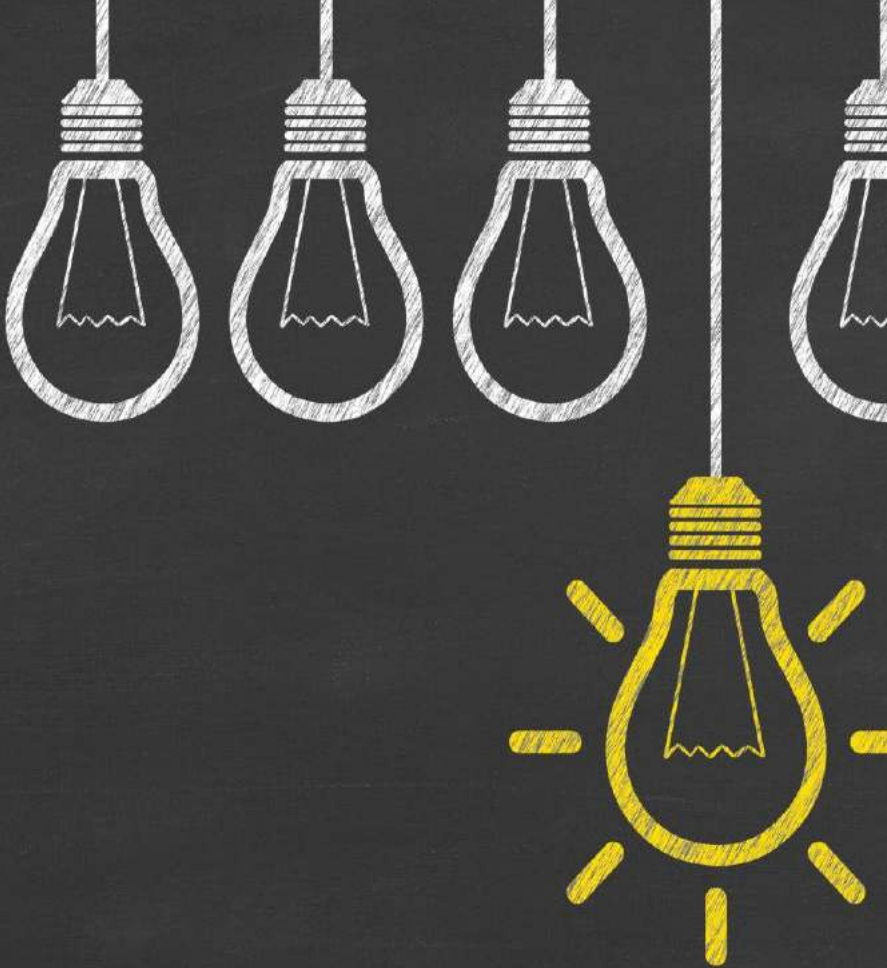
Hermeneutic philosophy

How does the newly gained understanding translate into a new case/context?



Narratives in law





Where can we find
this vision of humanity
or Self-understanding
concretely?

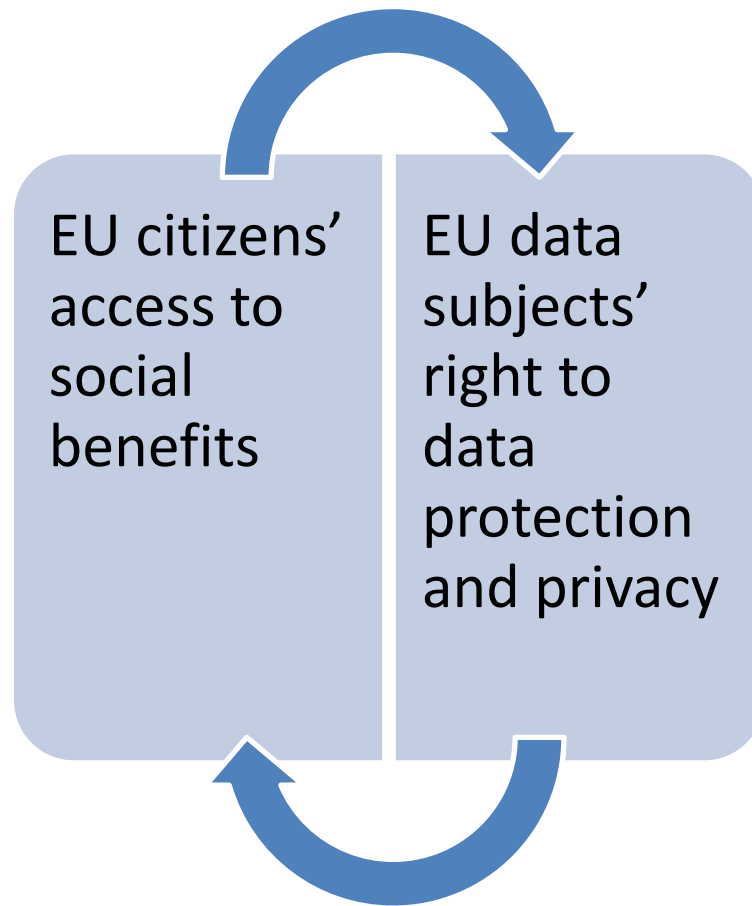
- Facts
- Proportionality review
- Interpretative space
- Intensity of judicial review
- (EU-specific) Relation
secondary vs primary law
- Burden + standard of proof
- Assumptions...

Assumptions/fictions

- People viewed as (conscious, reasonably well-informed and circumspect) consumers
- People as hyper-responsible *self-entrepreneurs*
- Property
- Power
- Human rights as emancipatory instrument



Narratives and worldviews in law : balancing fundamental and social rights in a digital age

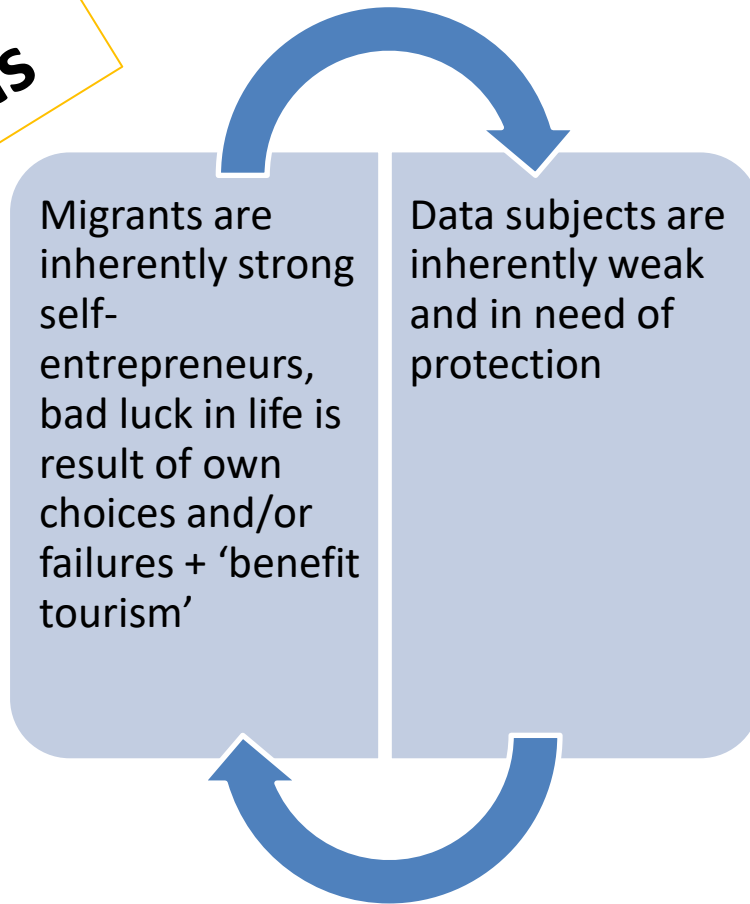


Narratives and worldviews in law : balancing fundamental and social rights in a digital age

Assumptions

Migrants are inherently strong self-entrepreneurs, bad luck in life is result of own choices and/or failures + 'benefit tourism'

Data subjects are inherently weak and in need of protection

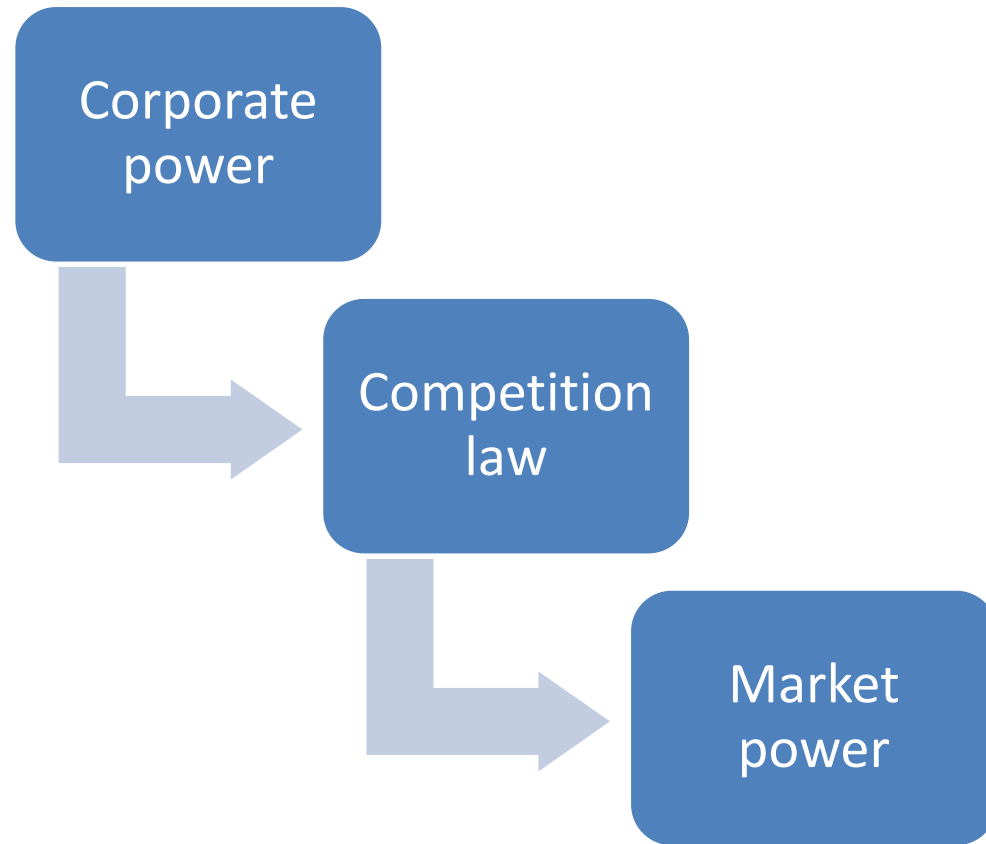


Narratives and worldviews in law : balancing fundamental and social rights in a digital age

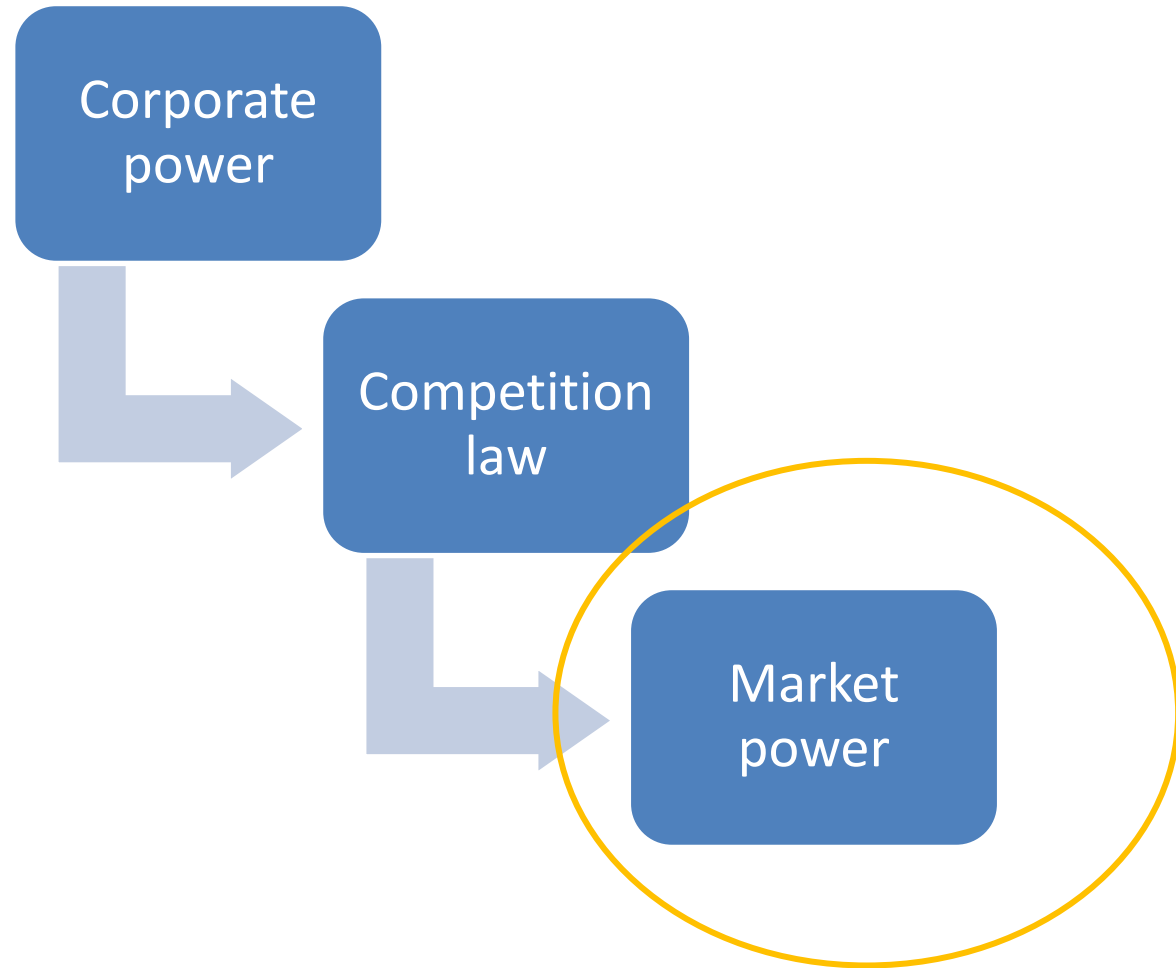
Legal consequences



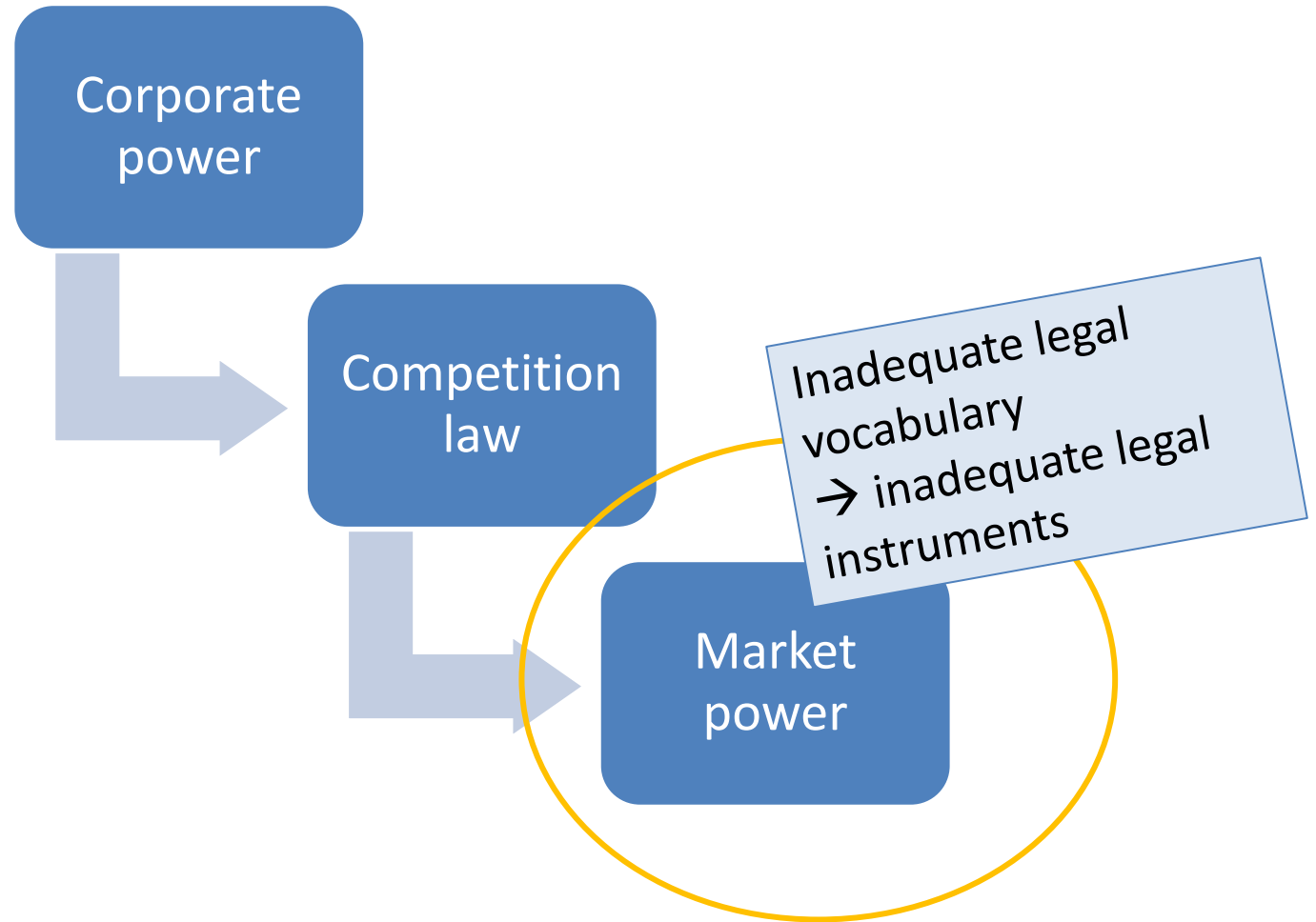
Narratives and worldviews in law : addressing silences in the law



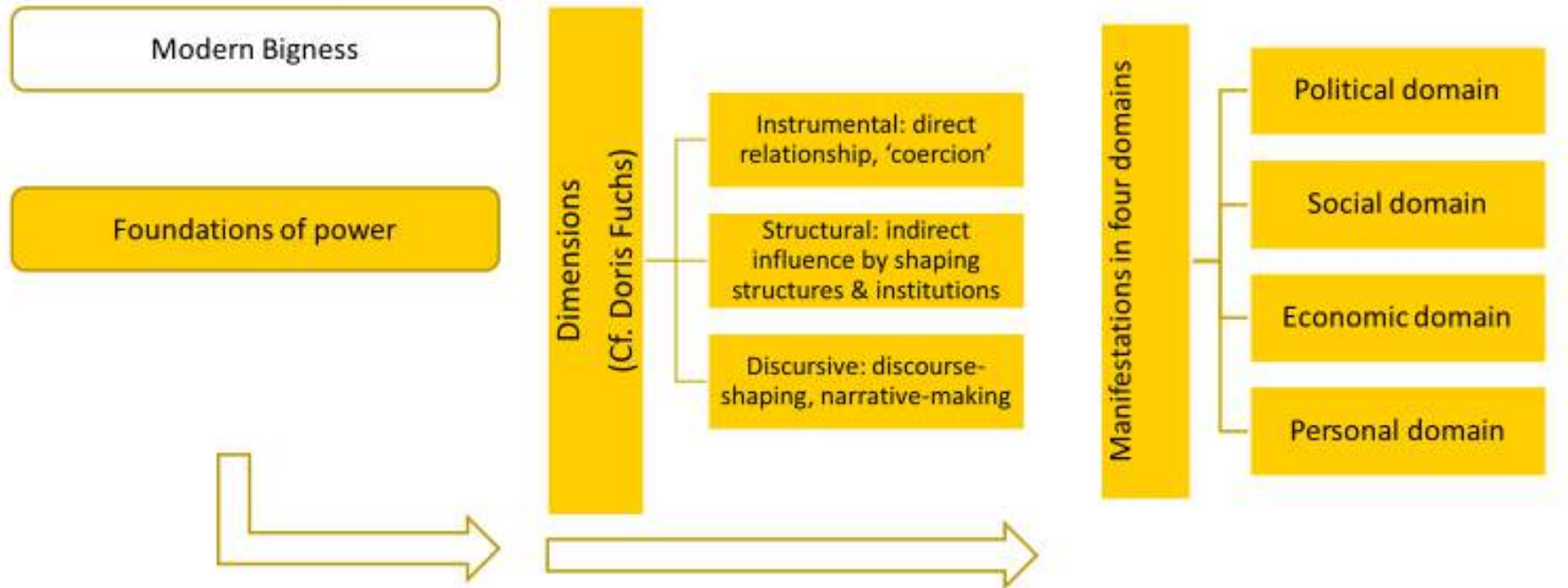
Narratives and worldviews in law : addressing silences in the law



Narratives and worldviews in law : addressing silences in the law



Narratives and worldviews in law : addressing silences in the law



A. Gerbrandy and P.S. Phoa, "The Power of Big Tech Corporations as Modern Bigness and a Vocabulary for Shaping Competition Law as Counter-Power", in M. Bennet et al., *Wealth and Power – Philosophical Perspectives*, Routledge 2022

Human/nature



Relationship
humankind –
nature
(dominion /
agency /
interconnection)



Property rights,
resource
exploitation and
responsibilities



Economic
narratives of
growth and
consumption vs
degrowth and
planetary
boundaries

Interested? Read more:

- P. Phoa, “EU Law as a Creative Process – A hermeneutic approach for the EU internal market and fundamental rights protection”, Zutphen: Europa Law Publishing, 2021
- P. Phoa, “Narratives in Flux: Legal Language, Digital Technologies, and the Climate Crisis”, *Comparative Law and Language*, 2023, Vol. 2., No. 2.
- P. Phoa and J. Gaakeer, “EU Law and *Law and Humanities*: a novel method inspired by Paul Ricoeur and James Boyd White” (with J. Gaakeer), forthcoming in 2024, in: T. Nowak et al., *Interdisciplinary Research Methods in EU Law: Challenges and Opportunities*, Cheltenham: Edward Elgar Publishing.
- White J B, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (1st edn University of Chicago Press 1973 - 45th anniversary edition, Wolters Kluwer 2018).
- JB White, *When Words Lose Their Meaning* (University of Chicago Press 1984).
- JB White, *Heracles’ bow: essays on the rhetoric and poetics of the law* (University of Wisconsin Press 1985).
- JB White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (The University of Chicago Press 1990).
- JB White, *Acts of Hope* (The University of Chicago Press 1994).
- JB White, *The Edge of Meaning* (University of Chicago Press 2003).
- P Ricoeur, *Interpretation Theory: discourse and the surplus of meaning* (Texas Christian University Press 1976).
- P Ricoeur, *Hermeneutics and the Human Sciences* (Cambridge University Press 1981).

Questions?

Thank you for your attention!

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**Utrecht
University**

Sharing science,
shaping tomorrow