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THEORISTS' BELIEF
A COMMENT ON THE MORAL TRADITION OF AMERICAN
CONSTITUTIONALISM

by Joseph Vining⁹

*The Moral Tradition of American Constitutionalism*¹⁰ is one of those rare works that leads us to face, at the center of law and legal thought, the largest questions about human life and human purpose. There is a special reader's shudder, a certain gestural shift in the chair, reserved for that moment of realizing where one is being led—not to the edge, but to the center, so that the questions become insistent, and whatever we and others say and do in the face of them becomes our response to them.

Writing of this subtlety has multiple strands being woven together. I can almost see Jefferson Powell's hands moving on the loom, with the various threads looped about his fingers and some of them held in his teeth. We must select questions and themes out of this sustained intricacy, and I suggest three: first, the impact on practical thought and action of what I will not blush to call cosmology; second, the nature and meaning of democracy, which runs as a theme from the beginning to the end of the book as it runs as a theme from the beginning of the United States to the present; and third, the implications of conclusions about constitutional law and constitutional practice for ordinary law and ordinary legal practice, which will take us to the pessimism voiced at the end of the book—if I may call it pessimism: Powell may think it rather a form of liberation.

These aspects or themes—cosmology, democracy, and the prospects for law itself—may allow us to edge toward the question this book presents most strongly, certainly most strongly for me, which is the place of true belief in the structuring and expression of legal, social, and what is called secular life. If we can edge toward that question of actual belief, which must be pertinent to a theological approach to the book, we can begin to tie the two parts of this symposium together.

I

William James prefaced his lectures on pragmatism with Chesterton's observation that "the most practical and important thing about a man is still his view of the universe. . . . [T]he question is not whether the theory of the cosmos affects matters, but whether, in the long run, anything else affects them."¹¹ Oliver Wendell Holmes, our own Holmes, was an example of the point. He was there with William James at the beginning of this

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¹⁰ H. JEFFERSON POWELL, *THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION* (1993).

¹¹ WILLIAM JAMES, *PRAGMATISM* 9 (Cambridge, Mass.: Harvard Univ. Press 1975) (1907).

extraordinary century, but he was not like James. Grant Gilmore remarked that "the real Holmes was savage, harsh, and cruel," living in a "bleak and terrifying universe,"¹² and if you have read Holmes's manifesto, *The Path of the Law*, you may remember him saying that law was "like everything else" in the universe, and "the postulate on which we think about the universe is that there is a fixed quantitative relation between every phenomenon and its antecedents and consequents." He ended *The Path of the Law* urging lawyers to "connect your subject with the universe," presumably as he had defined it.¹³ And now at the end of the century Powell has done just that in this work.

Powell's central thesis, so beautifully grounded in history, is that the foundation of the Constitution, or of constitutional thought if they are not the same—the term "constitutionalism" bridges the two—in "Enlightenment" premises portended the situation in constitutional theory he describes at the end of the book. I say "portend," because it may be there is nothing inevitable in history, including the history of thought. But in the form of understanding that is historical understanding, and in the matter of searching the equipment of one's own mind and the minds of others, we can see a connection between beginning and end. Eighteenth century mechanics portended public choice theory, which seems to take even the democratically elected legislature away from us as a source of law.

The only force within the mind holding this development back—and this for me is an equally important part of what Powell has brought out—is legal method itself. From beginning to end *The Moral Tradition* is a brilliant assessment of the inner tension in constitutional thought between substantive "Enlightenment" premises, if there can be said to be any substance to those premises, and common law method and its presuppositions. Powell describes common law method, which I myself would tend to call legal method, variously through the book, as analogical rather than deductive and rule-based,¹⁴ as inseparable from the minds and informed judgments of those practicing it, as not assuming the necessity of categorical distinctions between either and or, in and out.¹⁵ The presuppositions of legal method have been at war—that is not too strong a term—with the all-embracing mechanics, devoid of substance, ultimately quantitative, that Holmes gave a glimpse of within himself. They are presuppositions of a human language that is expressive rather than definitive, of mind that is not mere process, of voice and person beyond text or texts, of good faith in reading and in writing, of living value, of phenomena of experience that cannot be captured but are no less real than those that can be captured, of a spirit to things that is acknowledged and accepted by many, perhaps most, perhaps all in actual fact.

This is an inner tension that can be found, I may say, in computer science today. In the huge discussion that surrounded the chess match between Kasparov and the newly developed computer program "Deep

12 GRANT GILMORE, *THE AGES OF AMERICAN LAW* 49 (1977).

13 Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 465, 478 (1897).

14 POWELL, *supra* note 10, at 76, 95, 139, 249-51.

15 *Id.* at 86, 238.

Blue," Herbert Simon, one of the principal founders of cognitive science and the engineering of artificial intelligence, was interviewed and said in brief what he has been saying for many years: "The real issue is, What is thinking? The only way I know of answering that is that there are certain *things* that when humans *do* them, we say that person is thinking. If he makes a great chess move, we might even say he's thinking creatively. The *only* question is, *How* was it *done*?"¹⁶ I have emphasized "thing," "do," "how," "done," and "only" in Simon's response. The "only" question, for Simon, is a question of "how," which is a question of physical event in time and space, of doing. Questions of saying, questions of substance, are ruled out by presupposition, a priori. Against this is the shock of the equally distinguished computer scientist Joseph Weizenbaum, when his therapeutic computer program named Eliza, which he had developed as a parody, was taken completely seriously by psychologists and psychoanalysts across the country. His shock was such that he asked for two years' leave from MIT to write *Computer Power and Human Reason*.¹⁷

The insight of *The Moral Tradition* is the depth and distance of the roots of our current situation. The dynamic the book traces is legal method itself holding back the unfolding of the implications of the premises of "constitutionalism." And one question I think it can be useful to discuss is why legal method held back this development so long. Could it be that the labor of legal thought has been under an illusion, and legal thought is today laboring under an illusion? Could illusion, self-delusion, be so strong and last so long?

Or is it possible the truth is that common law method has been and is the belief, and the other, here designated "Enlightenment" premises, can claim only apparent belief? For while it is true in practical affairs that one can be ambivalent, where cosmology is in question perhaps one cannot be and is not, as even the father of pragmatism recognized. If cosmology were a matter of choice, it would be necessary to choose. The modern choice might be summed up in that word "only" in Herbert Simon's response to the question whether the computer program "Deep Blue" was thinking: "the only question," he said, the only question ever, is "how;" not of course "what," not, above all, "why." John Noonan has questioned Holmes's commitment to his own cosmology, which Grant Gilmore despised so much.¹⁸ It is being revealed that Isaac Newton himself did not believe in the singularity of his picture of the universe.¹⁹ If Holmes and Newton did not, are people today different: true believers? Are lawyers, judges, legal scholars?

The problem is presented not just by the history Powell weaves together, the oddness that substantive emptiness should have taken so long to make its presence felt, or I should say its absence. If common law

16 N.Y. TIMES, Feb. 18, 1996, at 17 (emphasis added).

17 JOSEPH WEIZENBAUM, *COMPUTER POWER AND HUMAN REASON: FROM JUDGMENT TO CALCULATION* (1976). For Weizenbaum's discussion of Simon, see *id.* at 128-31, 138-40, 260.

18 John T. Noonan, Jr., *The Secular Search for the Sacred*, 70 N.Y.U. L. REV. 642, 645 (1995).

19 See, e.g., RICHARD S. WESTFALL, *THE LIFE OF ISAAC NEWTON* 110-44 (1993). For examples and discussion, see BETTY JO TEETER DOBBS, *THE JANUS FACES OF GENIUS* 6-13 (1991); FRANK E. MANUEL, *THE RELIGION OF ISAAC NEWTON* 75-76, 99-102, 104 (1974); RICHARD H. POPKIN, *THE THIRD FORCE IN SEVENTEENTH-CENTURY THOUGHT* 172-202 (1992). On Newton, see POWELL, *supra* note 10, at 21-22.

method has a problem with a vision of social organization as points of naked will bound together by a system of property and contract, it is equally true that a system of property and contract of the kind lying at the base of so much contemporary economic and political theory has a problem with its dependence upon law. The problem, as Powell fully sees, is the problem of authority, of human language and what human language can and cannot do by itself.

A character in one of Joan Collins's wildly popular best sellers—or rather a character of one of Joan Collins's ghost writers' wildly popular best sellers—advised, "Everyone's a user. Don't ever forget that, my little love. . . . If they're not a user, then they are a loser. And you're bloody well better off not havin' doin's with 'em."²⁰ Thomas Hobbes and Richard Dawkins²¹ could not have put it better. The difficulty is, as all practicing lawyers know when they are engaged in law and not talking about law, that just to enforce—through orders carried out, and without violence and sapping resistance—the merest contract against someone whose circumstances have changed or who has changed his mind, there has to be some claim of justice in the whole, and some claim of the victim, the loser, on the whole and identification of the loser with the whole. Milner Ball, Thomas Shaffer, my colleague Philip Soper wrestle with this in various contexts.²² Social mechanics, the polity as system, pictures contracts as bonds and shifts of bonds, property as a material thing, bonded or repelling. But contract and property are not this. The general imagery is almost always false to the truth of law, which is decision-making, drawing on language, and asking for deference.

There are times when I part from William James and his sense of the importance of a professed view of the cosmos, implying as it does something of a false dichotomy between the mind and the concrete world. We do exist, we live our lives, love, see beauty, defer, command. All the rest is just talk that comes and goes and makes no real difference. And there are other times I think it makes all the difference, and that we may stop because of it. Blake feared a form of death for humanity, at the beginning of the period of historical development laid out for us here. You may remember Blake's "Mock on, Mock on Voltaire, Rousseau:/ Mock on, Mock on: 'tis all in vain!" which ends "The Atoms of Democritus/ And Newton's Particles of light/ Are sands upon the Red sea shore,/ Where Israel's tents do shine so bright."²³ The question haunts me that haunted Blake—Do Israel's tents shine so bright? I am a child of the age, living not earlier but here at the end of the century and at the end of this book, and one moreover whose initial training was in science and who is consciously and constantly aware of the force of scientific method and its presuppositions. I know I am like many. Many of us, children of the age, may have to build

20 JOAN COLLINS, PRIME TIME, as quoted in Susan Shapiro, *A Trial That's a Little Bit Gothic*, N.Y. TIMES, Feb. 10, 1996, at A23.

21 THOMAS HOBBS, LEVIATHAN (C.B. MacPherson ed., Harmondsworth: Penguin Books 1984) (1651); RICHARD DAWKINS, THE SELFISH GENE (1989).

22 MILNER S. BALL, THE WORD AND THE LAW (1993); THOMAS L. SHAFFER, FAITH AND THE PROFESSIONS (1987); PHILIP SOPER, A THEORY OF LAW (1984).

23 THE PORTABLE BLAKE 142 (Alfred Kazin ed., 1976).

back our conscious or explicit sense of spirit and person by looking at what we do and say, taking what we say as a form of testimony, what we do as a form of gesture or dance, and approaching them as critics, analysts, historians, reporters, just as if we were outside ourselves and no longer had any privileged access to what we believe and think, our access having been blocked by decades of teaching and talk through which, from the inside, we cannot see either form or detail of what is beyond, only light coming through chinks and cracks.

II

The second thread of *The Moral Tradition* I might pull out for some discussion is that of democracy. Democracy appears again and again as an operative part of successive theories of constitutional adjudication: what Powell calls the "Modern Theory" symbolized by Holmes, with its deference to legislative outcomes; in the "footnote four"²⁴ era, with its focus on the maintenance of democracy; indeed at the very end of the book in Powell's own turn to majoritarian political processes. Throughout his discussion of the "negative case" for democracy and the "positive case," Powell is well aware that anyone making a case for or against, or partially for and partially against, is simultaneously constructing what it is that the case is being made for or against.²⁵ It is not at all what arises in its own strange way from a town meeting, a palpable occurrence that social psychologists study, or from a string quartet, that music critics discuss.

Reinhold Niebuhr observed that it, whatever "it" was around the world, was to be viewed in the end as principally a means of removing rulers from power.²⁶ In the United States what "it" is, as lawyers know but do not wish to emphasize, is a legal phenomenon, not something pre-legal or extra-legal like the weather, delivering results or material with which legal thought is to work, but intrinsically legal, woven out of continuing legal decisions and embodied in legal texts of which questions are asked and answers and arguments are returned through the exercise of legal method. Political democracy is not so ostentatiously a legal phenomenon as "shareholder democracy" in corporate law, that constitutional law of the private economic world. But the two are not wholly dissimilar. Whatever the outcome of hard-fought battles for votes, the outcome in "shareholder democracy" is clearly, quite self-consciously governed if not determined by constant decisions about agendas, slates, candidate qualifications, disclosure, advertising, funding, timing, quorums, voting qualifications, selling votes, patronage and proxies, choice of law, allowability of preliminary groupings, reorganization of voting units and all the rest through which unlimited alternatives are reduced to a few to be finally chosen among; and the effect of the numerical outcome with respect to those few is then modulated by fiduciary duties of officials and indeed of so-called majorities to the corporation itself and to minorities and nonvoting interests.

²⁴ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

²⁵ *E.g.*, POWELL, *supra* note 10, at 287.

²⁶ *Id.* at 278.

I have been struck by this ever since I served as a young hearing examiner twenty-five years ago at a national party convention, handling challenges to delegate credentials. In its complexity, its procedure and its substance, the work was not markedly different from my previous work in food and drug law. Certainly the rule of majority rule, that produces what we call the majoritarian, does not come into play until a stage when there are limited choices, organized alternatives, that are the product of a myriad decisions of law and are molded by the substantive values of law implicated in what Powell here calls the tradition. The majority, to which reference is so constantly made in discussion of democracy, is simply not there at all without enforcement of responsible legal decisions made under claim of authority.

Moreover, that most basic rule, the rule of majority rule—which is one statement of law that can perhaps be called a rule, because it involves numbers—can have no authority or claim on us if it itself is the product of a mindless system winnowing out alternatives and aggregating stated preferences (though they are gestural or linguistic phenomena) on some statistical basis. Even the rule of majority rule itself can have no claim unless it is a statement demanding attention and deference for some reason other than that it exists—that it is noise vibrating in the air around us.

I might take as an example of these linked problems in thinking about democracy Alexander Bickel's counter-majoritarian difficulty, which figures so in the history of modern constitutional theory.²⁷ What are called "the most memorable lines" written by Bickel, whom "many constitutional theorists take as their point of departure,"²⁸ were these: "[W]hen the Supreme Court declares unconstitutional a legislative act . . . it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens. . . . [T]he essential reality [is] that judicial review is a deviant institution in the American democracy."²⁹

But unhappily for the confrontation Bickel seeks to paint, what he calls "a prevailing majority" is not at all a group of "actual people of the here and now." They are not here, they are not now. They may be dead, sick, mad; as a group they are most certainly different from actual people of the here and now in any physical sense. And Bickel knew that the actions of voters at a particular time and place within a particular set of constraints are being given force at other times and places. One is tempted to think that Bickel's fame rested in fact upon his seeing that there is a difficulty when what he calls "the mystical" is taken away, and his then returning with what we need not call the mystical, but which is a product of assumptions that "essential reality" or "actuality" includes more than what

27 I was led back to Bickel by POWELL, *supra* note 10, at 170-72, and by Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995). On elected judges, see POWELL, *supra* note 10, at 171 n.399.

28 Croley, *supra* note 27, at 711 n.61; Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1, 9 (1989).

29 ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-18 (1962).

actually happens here and now. For he solves his "counter-majoritarian difficulty" by visualizing the judiciary as—or at least asking the judiciary to aspire to become—representative of our "better natures" or representative of the majority in "the long view" as it would act on "second thought."³⁰ Bickel may have lost faith at the end of his life that judges could represent the majority as it will eventually be.³¹ The fact remains that what is *there* without such representation, without judicial review, is not a given on the order of a physical sense datum in psychology or neurology, but always constructed, created by legal decision.

The question then is whether democracy can figure as independently as it does in the successive theories of constitutionalism before us, or whether, instead, the fate of politics itself is not bound up with the fate of the tradition.

III

The suspicion that law may in fact be more pervasive than the terms of constitutional theory allow leads to the third large question raised by the sweep of Powell's work. This is the question of the implications of developments in constitutional law for ordinary law—environmental, admiralty, securities, corporate, tort, contract, property: I need not go on with a distilled list of law school courses or American Bar Association sections. To what degree do modern comments on constitutional law, and Powell's metacomment on these comments, speak to law itself, the everyday we know the absence of, what people in Liberia, for example, remember when it disappears?

I mentioned the pessimism of the end of the book, and its turn to majoritarian political processes. I suggested these processes might be less separated from ordinary law than is usually implied. Powell points out repeatedly as he maintains analytic tension (in a way, I should say, few contemporary analysts can or do) that whatever its "rationalist" or mechanistic principles, the Constitution contemplated law, ordinary law, indeed a continuation of law uninterrupted except for the substitution of a People for a King insofar as a King might be thought a source of law. In *The Moral Tradition* the inner tensions of the constitutional tradition lead to its decay. Suppose even that there never was a constitutional tradition. Where would we be? Where are we now, in ordinary, non-constitutional thought?

Twenty years ago, seeking a thread to carry me through some inquiry into the way legal thought personifies, and picking the jurisdictional aspects of judicial review of administrative action, I tried to put aside developments in judicial review of legislative action that were linguistically similar, because I did not want to face the question whether the constitutional texts could be taken seriously, whether they were in fact, as Alexander Bickel himself had suggested not long before,³² a form of high politics, disingenuous gaming, tactical moves, means justified by the end sought. And one could try to corral the implications of constitutional thought, say that it is

³⁰ *Id.* at 25, 26, 238-39; POWELL, *supra* note 10, at 170-72; Croley, *supra* note 27, at 765-69.

³¹ POWELL, *supra* note 10, at 172 n.403.

³² BICKEL, *supra* note 29, at 127-69; POWELL, *supra* note 10, at 171.

intrinsically different, despite *Marbury v. Madison*.³³ But the challenge Powell has traced runs too deep to do that. What is said here of constitutional law affects the ambient world of ordinary law, if our volumes of statutes are merely grammatical sentences, the product of petty bargaining that can no more be read for meaning than a pattern of tree branches; if judges in common law matters are unanchored in method, or tradition as Powell or Alasdair MacIntyre³⁴ or Jaroslav Pelikan³⁵ use the term; if judges, administrative officials, lawyers themselves delivering their opinions are only imposing their preferences and desires which they can do for the moment if they successfully avoid sparking violent resistance or playing into the hands of even cleverer manipulators.

Leon Kass, writing on biomedical ethics, observes and insists as he does that he intends no aid or comfort to the enemies of science or the friends of ignorance, "Liberal democracy, founded on a doctrine of human freedom and dignity, has as its most respected body of thought a teaching that has no room for freedom and dignity. Liberal democracy has reached a point—thanks in no small part to the success of the arts and sciences to which it is wedded—where it can no longer defend *intellectually* its founding principles. Likewise also the Enlightenment" ³⁶ Emotivism or moral relativism, the reduction of all, all, as in a Holmesian cosmology, to force in a brutal and terrifying world describable ultimately only quantitatively, leads in constitutional theory to majoritarian deference, then to a collapse of faith in democratic politics, and it can go on to sever language from mind and deny the materials with which ordinary legal method works.

But to follow this progression, one must believe that what I have called the mathematical form of thought is the only form of thought. To return to Leon Kass, not a lawyer or political theorist but a doctor writing about problems in medicine, and his observation that "liberal democracy, founded on a doctrine of human freedom and dignity, has as its most respected body of thought a teaching that has no room for freedom and dignity," we may wonder why this does not raise as much question about the teaching as about liberal democracy. As we stand apart from Jefferson Powell's book, at the end of it, and apart from the books and statements Powell traces and analyzes, we must wonder ourselves what to think and conclude, as each successive year of law students, newly appointed judges, new teachers of law, and, I shall add, newly empaneled jurors, must wonder and then decide for themselves what to think and conclude about law and legal authority. Powell does not believe that the mathematical form of thought is the only form of thought, that that is all there is. His critics might say, "Powell does not believe that, but so what? That *is* all there is." "Besides," they might add with a smile, "that that is all there is, is the only way to explain his believing one thing and us another." But do they believe what they say?

33 5 U.S. (1 Cranch) 137 (1803).

34 ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981); ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* (1988).

35 *E.g.*, JAROSLAV PELIKAN, *THE VINDICATION OF TRADITION* (1984).

36 LEON R. KASS, *TOWARD A MORE NATURAL SCIENCE: BIOLOGY AND HUMAN AFFAIRS* 7 (1988). I am indebted to Roderick M. Hills for the reference.

Of course the thought may come, What difference does it make to constitutional theory whether constitutional theorists believe their theories and the premises of their theories? But such a thought, that belief does not matter, is itself a little indication of the sway a certain form of thought has in the mind. They propose, "theorize" as it is said, and it matters not that they believe. All that matters is whether it works, predicts. The proof is a posteriori, after the fact: the proof of the recipe is in the pudding. The difficulty with this is in the notion of "what works" when it is transferred to human affairs. Peace, authority, mutual respect are not achieved only through manipulation. What the fact becomes is affected, determined indeed, by where you begin. Explanations or proposed explanations without belief simply do not reach law. A theory—again the word is telling, because it is a borrowed word—proposed without belief is much like a joke, like play; and in deciding what to do and how to act in serious affairs where much or all is at stake, you turn away for a time from the fun of it and the pleasure of the player's company.

And so it is not idle to ask, and in fact I think readers tacitly do ask, whether the legal theorist believes the theory. Jefferson Powell's dog Psyche appears in his acknowledgements, with a quote from Meister Eckhart that "those who write big volumes should have a dog with them to give them life."³⁷ Rationalists who own dogs, like Powell's Psyche, who nuzzle them and care for them and weep when they die, are not rationalists. They betray themselves. They are not emoting, even in their own eyes.

In fact, lawyers are notoriously misleading when they talk about law. They speak—we speak—constantly of rules, borrowing the language of physics, rules that carry with them a vision of discrete entities that can be manipulated logically, definitions that capture the phenomena they define, and intellectually coercive demonstration, from which the dissenter can escape only by accepting his own irrationality.³⁸ Lawyers speak the language of rules, but when they engage in law and are observed to engage in law, their rules are nowhere to be found. There is only a vast surround of legal texts, from which they draw in coming to a responsible decision, what to do, what to advise, what to order, which responsible decision of their own they may cast in the form of a rule, just before it takes its place among competing statements in the great surround of texts upon which other lawyers are drawing. Lawyers who favor the language of war over the language of rules in talking about law similarly betray themselves when they settle into work on any substantive field.

My favorite example of such uncalculated self-revelation is Grant Gilmore's fine little book, *The Ages of American Law*.³⁹ Whenever Gilmore talks about law he presents it as merely a process, or sometimes as what is "ex-

37 POWELL, *supra* note 10, at ix. The early nineteenth century Lord Chancellor, Lord Erskine, went much further. He had a goose that followed him around, and he kept in his library two leeches to whom he was grateful for medical reasons, giving them names and insisting that they had different personalities. Cristine Kenyon Jones, *Our Dumb Favourites and Their Protectors*, TIMES LITERARY SUPPLEMENT, Jan. 5, 1996, at 13.

38 On the special notion of mistake associated with rules, see POWELL, *supra* note 10, at 32-33. See also, on deductive forms of argument, JAMES BOYD WHITE, JUSTICE AS TRANSLATION 28-31 (1990).

39 GRANT GILMORE, THE AGES OF AMERICAN LAW (1978).

creted" by a process, or as a "mechanism" to provide some minimum stability, in which "the function of the lawyer is to preserve a skeptical relativism" (quipping along the way that "In Heaven there is no law. . . . In Hell there will be nothing but law"⁴⁰)—until he comes to his own field, commercial law. There he speaks in an entirely different voice. He speaks as a practitioner stating law from the inside, rather than as theorist characterizing law from the outside, full of confidence in his method and committed to his conclusions, putting aside this opinion or precedent, arguing for the weight of that opinion or statute, revealing as he works with legal materials his presupposition of mind and person extending beyond time and place and of the suitability of language, uttered in a good faith equal to his, for close and meticulous reading.⁴¹ I remember, when I first read a piece intended to trash (as was said) an area of substantive common law, my eye being drawn to the extensive footnotes, in which was displayed an admirable and delicate use of legal method to construct the law, which of course had to be done, and the doing of which was not open to any real criticism except that the presuppositions upon which the author was proceeding in his footnotes were so very different from those upon which he was proceeding in his text.

If you go back to the beginning of the era *The Moral Tradition* covers and to that seminal figure Hobbes, whose impact on modern discussion about law has been profound, you find an elaborate view of human language presented in the first half of *Leviathan*, making human language mathematical in character, its reference separate from its speaker, its normative content a representation of meaningless physical flows of emotion—the view of language that is the necessary foundation of positivism. When you move to the second half of *Leviathan* and to Hobbes's own engagement with and discussion of "civil law," this view of language is nowhere to be found, indeed is incompatible with what Hobbes is earnestly arguing.⁴² How then is the first half of *Leviathan* to be read? If you jump from the beginning to the end of the modern era, or the end for us alive today, and pick up the strongest statement of scientific positivism, presented as a system of belief rather than a methodological stance, which many think is Jacques Monod's *Chance and Necessity*, you see in one paragraph the by now well-known summation, "Any mingling of knowledge with values is unlawful, *forbidden*." But then only a few paragraphs away you see Monod speak feelingly of "evil," of "crimes" and "criminal lies."⁴³ Who

40 *Id.* at 1, 14, 110-11.

41 *See, e.g., id.* at 31-32.

The obvious solution to *Swift v. Tyson* was to have pointed out that the only authoritative statement of New York law on the preexisting debt question had been by Chancellor Kent in *Coddington v. Bay* (as well as in his *Commentaries*). Careless dicta in the Court of Errors and subsequent confusion of a few lower court judges were entitled to no weight. Thus the law of New York coincided with that of the rest of the civilized world and there was no need to go any further.

Id.

42 HOBBS, *supra* note 21, at 85-87, 100-18, 321-28.

43 JACQUES MONOD, *CHANCE AND NECESSITY: AN ESSAY ON THE NATURAL PHILOSOPHY OF MODERN BIOLOGY* 164, 175-76, 179 (Austryn Wainhouse trans., 1971). For an immediately contemporary example of similar uses of language, see JEAN-PIERRE CHANGEUX & ALAIN CONNES, *CONVERSATIONS ON MIND, MATTER, AND MATHEMATICS* (M.B. DeBevoise ed. and trans., 1995).

is he to speak of evil? How can he, after what he has said? Or rather, I think we should say, he does, he does speak of evil, and so the question for us is how we are to read what he has said before. Lawyers are trained to do just this with witnesses, and I think we should do more of it with our own testimony. Our ear, so finely tuned to apparent inconsistencies on the witness stand, in judicial opinion, in statutory language, might turn to ourselves and particularly our discussion of law in general, our own statements about the nature of the experience we create for ourselves and for others during our working hours.

IV

Whatever may be concluded about whether theorists believe what they say, or, more precisely, what theorists do and do not believe when they are each read as a whole, there is the additional question how what the theorist believes or does not believe (to bring it right home, what you or I sitting here believe) is connected to the belief or unbelief of those who do law, constitutional or ordinary.

If we move from the secondary literature to the primary texts of law, and seek our evidence directly, we take ourselves back to the problems, methodological, even epistemological, we touched upon in looking earlier at the cosmological thread. They seem to me strangely deep, and special to the developments we discuss here. If, beyond constitutional theories, the central texts of constitutional law themselves contain assertions that there is no capacity in us to read or write authoritative texts, then there is no capacity in us to read or treat as authoritative the texts that assert there is no such capacity—they certainly can make no claim to authority: they have burnt the bridge to themselves as they have burnt the bridge to authority, and left us as if they were not there. And the question then becomes, what else is there if they are not there?

Only legal method gives an enshrining of atomistic individualism in Supreme Court opinions any force. Quite aside from the fact that the enshrining is in one opinion and not another, in some or many but not all, in those of one era but not all eras, in majority opinions, concurring opinions, plurality opinions, it is legal method that leads us to look at them at all, pay attention to them, pay close enough attention even to begin drawing out their “rationalism” from the tumble of words in them. To the extent that what they say makes legal method foolish or impossible, they lose their force, inevitably, regardless, without our doing. And one might think they are not to be feared—no more feared than the figure of a man in the corner of a busy room who says, apparently believing it, that he is not there and does not exist. If he denies as well your own capacity to see, and he himself clearly has no stick or gun and is physically harmless, he would necessarily lose out in the competing claims upon your attention.

And again, determining whether primary texts of law “in general” deny the reasons for reading them at all would itself pose a special question of method: one would not determine the matter statistically or by poll, but by some sense of representativeness of—of what? A phenomenon that denies its own existence?

I suspect that law may be a phenomenon which we, in our tradition and institutions of legal study, do not understand very much better than literary criticism understands literature. Law may be equally tough to eliminate by our understanding of it, because it is driven, as is literature, as is religion, by imperatives of life. Jaroslav Pelikan has testified that, in his research into the history of Christian tradition, he would now emphasize far more than he did when he began his studies "the nonverbal, or at any rate the nonconceptual, element of tradition," and he refers to Cardinal Newman's rather radical openness to "the faith of uneducated men," the question, in Newman's words, "how much of the ecclesiastical doctrine . . . was derived from direct Apostolical Tradition, and how much was the result of intuitive spiritual perception in Scripturally-informed and deeply religious minds."⁴⁴

But in a world of thought and action that is so textually based, I still think that what is in the minds of the highly trained and the consciously self-reflective is important. And so I keep returning to the importance of the question of belief. It is important even in its negative form, the question of what is not believed as a total and all-embracing vision of human affairs and of the cosmos that includes the theorist. Recognizing what is not believed does not carry us through to home, if it cannot be yet said or articulated what *is* believed, individually, or in general, here at the end of the century. But it leaves us open to advance as we can.

I had a bout of sleeplessness in college—perhaps it was from my first encounter with all-embracing scientific rationalism. Most remarkably, instead of pills for insomnia I was given Wordsworth's book-length poem *The Excursion*⁴⁵ to read at night in the hope it would put me to sleep. There were only a handful of good lines in it, I was told, and I would know what those were when I got to them. I did. Apparently everyone does. They must have remained with me at some level. Recently I came across them again entirely by chance, without looking for them. They begin when the universe is compared to a seashell held to the ear speaking of "central peace, subsisting at the heart of endless agitation."⁴⁶ And Wordsworth, who you remember was present in a sense at the French Revolution, at the time of the very beginning of the tradition of American constitutionalism, when "bliss was it in that dawn to be alive,"⁴⁷ goes on to speak to his readers then and to us now:

Here you stand,
Adore, and worship, when you know it not;
Pious beyond the intention of your thought;
Devout above the meaning of your will.
— Yes, you have felt, and may not cease to feel.
The estate of Man would be indeed forlorn
If false conclusions of the reasoning Power

44 PELIKAN, *supra* note 35, at 16, 30, 38, 40.

45 WILLIAM WORDSWORTH, *THE EXCURSION* (Oxford: Woodstock Books, 1991) (1814).

46 *Id.* at 192, Book IV, lines 1146-47.

47 WILLIAM WORDSWORTH, *THE PRELUDE* 440, Book X, line 693 (J.C. Maxwell ed., Harmondsworth: Penguin Books 1971) (1805).

Made the Eye blind, and closed the passages
Through which the Ear converses with the heart.⁴⁸

CONVERSATION I

John Howard Yoder:⁴⁹ I had the privilege of advance access to this text, and so the challenge of following it is a good way, for me at least, to try to get on board. I think it's safe to use the image of "trying to get on board" when everybody has their own way of being inter- or trans- or cross-disciplinary.

My first scholarly publication was in the field of law. It had to do with an Amish man who sued his church for shunning him. The court in Wayne County, Ohio, awarded him five thousand dollars for mental pain. I got my hands very dirty in the county law library, which apparently nobody else used, trying to do background work in the law of religious associations, sometime in 1948. I've been trying to understand how legal people think ever since. It's a privilege to be in this institution with people like Tom Shaffer and John Robinson around.

The challenge that I sense in this conversation is not, though, between theology and the law as a discipline, but a larger intellectual challenge in how we use our heads at all, together. This is instantiated in the way the Powell book draws on MacIntyre, who's neither a theologian nor a lawyer—just someone who talks about how we process meaning problems.

I was struck by the patternedness in the paper. There are numerous ways in which what Joe calls mathematical reasoning or theory seems to me to pull the carpet out from under its own feet. There are several different images like that. You have a person standing in the corner, who tells us he's not there. If it is the case that these critical moves and analytical moves, making things more objective or abstract and analytical, do undermine the reality of ordinary practice, of ordinary law, if it is the case (as Powell shows) that when lawyers talk about law, they talk about rules, but when they *do* law, they don't talk about rules—could we learn more about the inappropriateness of theory to do whatever it is we're trying to do? That's the point on which I wasn't clear from either the major book or the paper.

If the effect of the Enlightenment move—although it takes 200 years to work out its impact—is to pull the carpet out from under the capacity for meaningful discursive community, why do we do it? Is it really only a process which is self-defeating? Do we then only avoid coming to that conclusion because we are slow-witted, or because other people are carrying on their daily life in a more wholesome way? Then keep the intellectuals from doing the damage they are potentially committed to doing. Or is there perhaps some positive role for this analytical process, which we misunderstand when we use it in such a way as to cut off the rest of the picture.

⁴⁸ WORDSWORTH, *supra* note 45, at 192, Book IV, lines 1147-55.

⁴⁹ Professor of Theology, University of Notre Dame.

What I didn't find in the sweeping portrayal of disfavor, in the paper and in the book, is something that would help me as a layman to know why all of this debate seemed to be necessary to all kinds of people, if what it does ultimately is to tell everybody that what we are doing is the wrong thing, and we're asking questions that deny the only cosmology on the basis of which the meaning of our community life is sustained.

It follows that I would look for additional explanation of why it is serviceable that we would make these critical, intellectual moves. That wouldn't primarily say that, if we did them well, we cut the floor out from under our feet, since there might be some right way to do it.

I was very surprised to find at the end of the Powell book his reference to something I wrote thirty years ago on another subject,⁵⁰ and yet maybe it will serve as an illustration of my question: If democracy is good because the people are good, and the voice of people is the voice of God, which is the ordinary grade-school understanding of why we need democracy, then it's self defeating and idolatrous and apparently false.

If, on the other hand, democratic structures are one way in which a persecuted minority, of abused Jews or Christians, or anybody, can defend themselves against the oppressiveness of the power structure, which is an implication of a Niebuhrian description of our society, then the affirmation of democratic process has a critical negative function, that is not dependent on it's being a saving truth, but just the defensive truth.

I'm wondering whether in a broader sense we can think of the Enlightenment project not as enlightenment, but as a defensive strategy, whereby embattled communities keep somebody else from overpowering them.

Tom Shaffer said he was sorry that this meeting was held too late to invite Constantine to it. We do have a heritage that is noticed as part of the history in the book, but the critique of which we haven't gone through. What is, after all, wrong with the Constantinian tradition? That the right people will get the right truth and impose it on everybody by a minimum violence? That's legitimate. What's wrong with that? Well, maybe, Enlightenment is helpful to figure out what's wrong with Constantine.

Thus I'm looking for a way to affirm (or simply to accept when it's so well said) this critique of the mathematical mode of thinking. And yet it provides an important defense against other modes of thinking, those that are less aware of the mysteries of evil, mysteries of oppression of individual people, against which I think these mathematical modes help the defenders.

Robert E. Rodes, Jr.:⁵¹ One distinction that keeps occurring to me is the distinction between jurisprudence and legal philosophy. Jurisprudence is the lawyer's account of philosophy and theology. Legal philosophy is a philosopher's account of both. In other words, law has a place in a philosopher's account of the world, or a theologian's account of the world. Philosophy and theology both have a place in a lawyer's account of what he does for a living. The latter is jurisprudence, which is what I like to think of

50 POWELL, *supra* note 10, at 260-92 (1993) (discussing JOHN HOWARD YODER, *THE PRIESTLY KINGDOM* (1984)).

51 Professor of Law, University of Notre Dame.

myself as doing. And the former is something that is done in other parts of the University. It's not what I do.

That distinction is important. The questions I am asking are: What laws ought there to be? How do I tell good laws from bad laws? Why do we have some laws and not others? And what difference does it make to the clients we serve? In a way, that cuts out some of the inquiry. That is, looking at Jeff's book, I saw a description of a tradition, followed by a theological critique of it. I said to myself: Why do we owe anything to this tradition? Why not trash it from the inside as we go, rather than set it up on its own terms and then criticize it?

I was surprised, yesterday, to find Jeff engaged in exactly the enterprise I thought he should have been engaged in in his book.⁵² In his lecture, he talked about fidelity to the law and said, "What do we, as professionals, owe to our profession?" He ended up by saying, "What we owe to our profession is to relate the texts that we are given to work with to the values we share and finally to our commitment to the word of God," which is exactly the relation between the church and the world that I get out of the Second Vatican Council's *Gaudium et Spes*. That is, we who are engaged in secular occupations, whether plumbing or law, are in dialogue with the church and the church learns from us what we learn from the world. I had the feeling that it's a different enterprise than the one that is involved in Jeff's book and the one we have been talking about this morning.

Marie A. Failing:⁵³ When I was reading the book, I was convinced that the common law was going to be the victor at the end, and I was very surprised to see that it wasn't. Then it struck me from our conversation after your lecture that maybe you're right with respect to politics. That is to say, in politics we instantiate some of the ritual of common law.

I was thinking about Pat Buchanan, and why he doesn't win. Why people like him don't win. I think perhaps it's the same reason that we have academics who can take very strong stances on issues; but when a regular lawyer comes along, she is probably not in the camp of any of the particular constitutional theorists. There's a ritual to law that lawyers understand, having been to law school. They understand that when you make a full argument, you destroy the other person's argument, and what comes out, in the process of negotiation, is somewhere in between.

I think our political life probably is somewhat similar to that.

We have very strong figures, who make very complete arguments. I don't know Pat Buchanan well enough to know if that's right as to him, but he strikes me as that kind of person. He's making a very complete argument, but it's not a very moderate argument, at least as people perceive him. He's been pigeonholed as being not a moderate, and therefore, when the electorate looks at him, they see basically a theorist who has to be modified in order to deal with realities in life. So I wonder if, in that sense, our politics has followed our legal practice. We're common lawyers in political life. We may have instantiated that part of legal practice as well.

⁵² See Professor Powell's public lecture, given the evening before the conversation, *infra* p. 82.

⁵³ Professor of Law, Hamline University.

The word that struck me as odd, in the book, was the word *crisis*. I saw all the theorists that Jeff talked about in his book as being engaged in precisely the dialogue that you, Bob, were talking about, within the tradition, just as I think the people who are running for office right now are also engaged in that dialogue within the tradition. They're bringing out different aspects of it for us to consider and think seriously about. What we will come out with in terms of the way to go is not parallel to any particular form of thought that any of them embody.

Douglas Sturm:⁵⁴ At the outset, I must be clear that I speak from outside the legal profession—although I speak as one with intense interest in and some acquaintance with the theory and practice of law.

A profession is, in part at least, delineated by access to a specialized body of knowledge. For that reason, lay persons address professional matters with hesitation. And yet, since the presumed purpose of the professions is, in the long haul, to enhance our common life, surely lay persons are warranted in making some judgment about the impact of professional practice on the quality of that life.

In that connection, the moral category that I have missed so far in our discussion is justice. Justice, John Rawls has reminded us, is the first virtue of social institutions. Justice, in some meaning of that long-honored category, has been, in the minds of citizens and jurists over the centuries, intimately associated with the practice of law. Yet I search in vain for any explicit attention to the meaning of justice in Jefferson Powell's elegant theorizing or in Joseph Vining's eloquent commentary.

Consider the final section of Joseph Vining's commentary where he addresses the vital importance of the question of belief in the ordinary practice of law. That's a significant observation. As Paul Tillich, the eminent Protestant theologian, insisted, we all live out of some form of faith, some kind of ultimate concern that infuses and informs all that we say or do. But that formal proposition, by itself, begs the critical question of legitimacy. Not all forms of faith are equivalent. Even *Mein Kampf* is a confession of faith, but we are now deeply shocked when anyone so much as intimates that [Hitler's] confession is legitimate.

Now I would like to think that over the centuries of the legal tradition, including the centuries of common law tradition, there is something resident within the grand concept of law that prods our social consciousness and our social practice beyond genocide, beyond anti-semitism, beyond slavery—beyond all those institutional forms that are so egregiously unjust. In keeping with the spirit of the natural law tradition, I would like to think that there is something to which the legal profession, in concert with our common humanity, is to be held morally subservient.

The law, that is, contains within itself a principle that goes beyond itself, that is both in it and outside it. In the same manner, I suggest that the Constitution of the United States of America reaches beyond itself for its own justification. That's why the preamble—which enunciates the point and purpose of the Constitution—is important in understanding and inter-

54 Professor of Religion, Bucknell University.

preting the Constitution as a whole and in its several parts: "We the People of the United States, in order to form a more perfect Union, establish Justice, ensure domestic Tranquillity, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and to our Posterity, do ordain and establish this Constitution for the United States of America." The Ninth Amendment, similarly, is intended to indicate that this document and all the practices that it authorizes are meant to be devoted to a higher or, if you will, a deeper principle: "That enumeration in the Constitution, of certain rights, shall not be construed to deny or to disparage others retained by the people."

It is attention to that kind of higher principle—that resides in law even as it surpasses and stands critically over all that we do in the name of law—that I am missing in our discussion so far. I am using the term "justice" in its most encompassing sense to indicate it. Joseph Vining rightly distinguishes the reason of common law from the kind of "mechanistic reason" that we find in, say, René Descartes or in Thomas Hobbes and suggests that common law reasoning is more responsive to the needs and concerns of our everyday life. But even the reasoning of common law has, at certain times and places, been employed to sustain some utterly inhumane and unjust practices—for instance, the enslavement of African peoples and the subservience of women. The legal profession at its best is pledged to hold the reasoning of common law susceptible to considerations of the higher principle of social justice, the principle that holds us answerable to the suffering of peoples throughout the world. Here I would draw an analogy between the medical profession at its best and the legal profession.

If this thought has any merit, then we shall need to enter into current debates over the meaning and justification of social justice and how social justice is related to the practice of law.

John Haughey, S.J.:⁵⁵ I'm wondering whether a turn to the *subject* might be a more fruitful category to start from, rather than the Enlightenment. Where is the subject, the person in this whole lawyering process? Kierkegaard's insistence on authentic subjectivity might be a good category here—as opposed to unauthentic subjectivity. Or maybe even a more useful idea is to get to this difference between acting from belief and acting—well, performing actions—from unreflective behavior. I have found Lonergan interesting on the difference between rational consciousness and rational self-consciousness.

Maybe a helpful distinction would be Newman's idea of the difference between an assent to notions, and real assent: I can live my whole professional life assenting to notions, and I can master many notions in order to achieve success in my profession, and yet what I believe in relationship to those notions is a card I never play, a hand I never show. Whereas real assent has to do with belief—so that my personhood is extended into professional life by what I am doing. These are briefly three categories that go back to Joe [Vining's] concern about what is being believed, in these actions. So, a turn to subject, and authentic subjectivity, rational self-con-

55 Professor of Theology, Loyola University, Chicago.

sciousness, or the distinction between notional and real assent might contribute to the conversation.

Thomas L. Shaffer:⁵⁶ If you think about ordinary law, as Joe was talking about it, I don't think that an ordinary lawyer thinks of loyalty to the law in terms of real assent. The image that came into my mind when John [Haughey] was characterizing what Joe said, was the image of an associate justice of the Indiana Supreme Court, one day, after we had been subjected to a tirade from the chief justice at the time, who was a despicable bigot. We had all listened to the tirade, all afternoon. After it was over, the associate justice showed us out. He was an Indiana country lawyer. I wanted to ask him why he didn't say anything, but I didn't. But, as he showed us out, he wanted to say something, and, still, did not want to be disloyal to the chief justice, as, maybe, he should have been. He said, "Well, I'll tell you. I just try not to make things worse."

That is very much an ordinary lawyer's sentiment. There is, somewhere in there, an assent to the law. But if you ask that ordinary lawyer, "Do you *believe* in it?" he wouldn't know what you are talking about.

Failing: The point I was trying to make is that there is a difference between what you believe and your liturgy. It seems to me that common law is somewhat like our liturgy. It is the way we talk about what we believe in, not what we believe in. I think that your question still remains after we decide that the common law method is the way we go about practicing what we believe. If *that* is what we believe, but we do not have a way to talk about it, we have a problem. That is why I think common law is a virtue of our practice. That was my point.

I think that politics reflects this more than we think. That we have a ritual for talking about what we believe in. One of the ways we do that is for people to make these very defined arguments, which they may themselves not fully believe in, but for the point of putting it out before us, as a way of our rethinking what we believe in. It is a ritual structure for discussing what we believe. It doesn't give any substance; common law does not give any substance to what we believe; and we should be modest about that. We shouldn't believe that it is the thing. But not to have such a structure for talking about it would be a real problem. We would have wars: that is exactly what we had when we had slavery; we didn't have any ritual structure to talk about it. Whatever problems *Brown*⁵⁷ had, there was a structure for working through what we believed about that thing; it was very different from the Civil War, in terms of the violence.

Randy Lee:⁵⁸ While reading the book, I found it to be not so much an effort to define justice, as an effort to articulate a process through which justice can be defined. I think Professor Vining did a good job of drawing out half of the equation Jeff was going after, and I think that half is honesty in the process: in constitutional debate, one has to believe what it is one is saying if we are going to come to a just result.

56 Robert and Marion Short Professor of Law, University of Notre Dame.

57 *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

58 Associate Professor of Law, Widener University, Harrisburg campus.

The other half of the equation I got out of Jeff's book is that we have to approach the process of seeking justice with humility: It is not enough that one believes what one is saying. In addition, a person must be humble enough to accept that he or she could be wrong. I think ultimately that is why Jeff defers to democratic process—because he understands that sometimes each of us is going to be wrong. If there is potential for a person to be wrong, then she must be willing to back off from her beliefs and defer to others.

One of the things I really loved from the book was Jeff's observation that "What unites participants in a MacIntyrian tradition is as much the problems they think important as the answers they think correct."⁵⁹ That to me really calls for humility—that we are not in the process simply because we believe that we are right, but we are in the process because we believe the questions being discussed are appropriate. People are to engage in this process because they believe that it is only through our participation in the process with others, in that exchange of ideas that we are going to get the right answer. What matters is not that one brings the right answers to the process; it is that one participates in the process honestly and humbly. That kind of participation is what will get us to the right answer.

Edward McGlynn Gaffney, Jr.:⁶⁰ One other thing might be added, and that is the connection between overlapping communities and what John Rawls has called "overlapping consensus."⁶¹ Responsive, appropriate modes of discourse show respect for difference, and enable us to search for answers to the kind of hard questions that Doug put to us, that faiths or pseudo-faiths may be heresies, that some religious judgments may be wrong. This is not simply a view espoused by Roman Catholics. Eastern Orthodoxy said this of Rome in 1054. And the Protestant Reformation most assuredly said this of Rome. And these judgments about Roman Catholicism are not just historical relics confined to the eleventh or the sixteenth century. They are current attitudes with contemporary effects. Almost any century is replete with examples of violence stemming from these judgments and attitudes toward the beliefs and faith systems of others.

So we need to focus sharply on John Yoder's question about meaningful community. If the whole philosophical enterprise is to destroy that question and to reduce us only to our solitary selves, then we're nowhere.

I really did want to stress how strongly I am in agreement, Randy, with your view of humility. I found that virtue well embodied, Jeff, in the way you address one theorist after another in your book. You do so with clarity, with respect, and with fairness. Then you show what is lacking, what is failing in that vision or that view. But your searching for the truth among various claims is marked by a humility that I think is admirable. For example, Mark Tushnet is here at a conference about a book that fairly addresses many of his concerns as a scholar, and yet criticizes him. It may be

59 POWELL, *supra* note 10, at 30.

60 Dean and Professor of Law, Valparaiso University School of Law.

61 John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1 (1987).

part of what Doug [Sturm] has asked for. We do need to sharpen our views of what faithfulness or integrity or faith or belief is, but as we do so we also need to be reminded of the higher duty of charity, which according to St. Paul, is greater than faith.⁶²

*Mark V. Tushnet:*⁶³ A number of things have occurred to me. I'll confine myself to two or three. The first is a minor one, coming from the invocation of Constantine here, and MacIntyre's invocation of St. Benedict.⁶⁴ In my tradition we leave the door open for those people—around this time of year, actually—if they happen to wander in.

The thing that is most in my mind in this conversation so far is this: I have formulated it in the following, strongly counter-factual hypothetical: Imagine that I was a judge faced with a death penalty case, and I know that as a matter of positive law the death penalty is not per se unconstitutional. Now, I know that I am a good enough technical lawyer that I can detect in any death penalty trial constitutional error sufficient to reverse the conviction, or the sentence, or whatever I care about. So I know that I could write an opinion reversing the judgment in this case and in any capital case.

Now I have to move from that hypothetical to a sense of myself that says I wouldn't feel right, although I would be doing this in a technically acceptable manner, doing it within the modes of acceptable reasoning. And somehow I have this feeling that Judge Reinhardt⁶⁵ can't feel good about what he does in death penalty cases, because what he wants to do is say that the death penalty is unconstitutional, and he can't do that. It seems to me that the observations about authenticity are in this ballpark.

It also seems to me connected to the effort to identify something that either limits the use of tools of Enlightenment rationality or our understanding of the limits of their utility. I guess I would want to say, in the situation I have described, in the literature of constitutional theory that reaches the point we have, there is a lot of discussion about prudence and judgment and *phronesis*, and practical reasoning, and all that sort of thing, which is to my mind not terribly helpful, precisely because the same tools of Enlightenment rationality can be turned against those concepts as were turned against the things that led people to look for those solutions.

It seems to me that the difficulty in the counter-factual hypothetical that I posed is that, of the stuff that is on the agenda for lawyers to think about, both Enlightenment rationality and the common law method understood as in some way associated with the idea of authenticity, have run out. And I really don't know what there is after that.

*Donald P. Kommers:*⁶⁶ I would like to go back to something John Yoder had to say. If I understand him correctly, he was raising a question about the difference between particular issues and facts or theory. That question occurred to me when I read Jeff's book. When I started to read the book, I thought he was going to talk about particular moral issues such as abortion,

62 1 Cor. 13:2.

63 Carmack Waterhouse Professor of Constitutional Law, Georgetown University.

64 ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 245 (1981).

65 Hon. Stephen Reinhardt, U.S. Court of Appeals for the Ninth Circuit.

66 Joseph and Elizabeth Robbie Professor of Government, University of Notre Dame.

capital punishment, welfare, and things of that nature. But he resists that approach and discusses constitutional theory at a very high and abstract level.

It seems to me that there is a divergence between fact and theory, or between particular issues and constitutional theory. The constitutional theories which seem most prevalent today are almost deliberately designed to negate the relevance and importance of particular communities, in the sense that MacIntyre is talking about: we cannot come to valid moral conclusions about particular issues unless we come to those conclusions out of some particular community that has good pedigree and historical validity.

So the question is: How do we as Christians resolve the various and particular issues that arise in American constitutional law. Now, after reading Jeff's book, I know why he resists talk about particular issues: it's because this would be a form of Constantinianism, and he wants to avoid that. But it seems to me that he makes—with all due respect, Jeff—the same error that Mike Perry makes in his book and that is that he wants to vindicate a particular political agenda. By the way, you describe Mike Perry as a Christian constitutional theorist. I think he is anything but that, in part because he writes at such a high level of generality that almost anything is tolerated in the political or moral community. For example, he has defended obscenity and pornography as moral visions; and if we are really to respect individuals, we have to respect all of these competing moral visions. This reduces—although Perry would deny it—this reduces his theory to a kind of moral relativism that is just running wild.

And what is even more interesting about his theory is that he defends judicial review because it brings about the right outcomes, in his mind, as opposed to what would happen if many of the issues we as Christians are concerned about were to be decided within the framework of the democratic process.

Now, it seems to me that Jeff is doing something very similar here. He is concerned about outcomes. On his last page, he defends majoritarianism because it is more likely to bring about the right result than would be the case if judges made these decisions.

So: What really is the connection between theory and fact? Is there any constitutional theory out there that would help us come to terms with these issues? In this sense, I guess I am sympathetic with John Noonan's view, as Jeff describes it in his book.

I was impressed with your talk yesterday,⁶⁷ Jeff, because I think you said that the bottom line was how can we better adjudicate the tension between politics and law. Maybe you don't need *any* theory. Maybe this is what you're saying, in the final analysis, when you talk about the death of constitutionalism. I take it that you're talking about the death of constitutional theory. I guess that would be your view, too, Mark. Maybe the approach needs to be much more of a pragmatic one, in which we try to decide these things within the framework of rational argument, from our varying perspectives, and with no more value compromise than we Christians can live with.

67 See *infra* p. 82.

Harold J. Berman.⁶⁸ Mark Tushnet asked where we go after Enlightenment rationality and legal method have left us where we are. Donald Komers now speaks of a pragmatic approach to some of the moral issues we face in the law. I would like to introduce another element into this. Donald defended John Noonan. I am going to defend, I guess, Richard Neuhaus—not that I agree with him on everything but because I noticed that Jeff Powell linked Noonan and Neuhaus together as Constantinians.

I would like to defend Constantine. I think he was a great man! He saved hundreds of thousands of Christians from death and persecution in Diocletian's terror against the Christians. And then he organized the Nicene Council and brought unity against Arianism, which I don't think anybody here is for.

Jeff Powell's definition of Constantinianism, at the beginning of the book, would make us all against it. He defined it in a way which would subordinate spiritual considerations and values and goals to the material. And then later the vitriol against Constantine increases; at that point I wondered if St. Augustine was not a Constantinian; whether Luther was not a Constantinian.

What needs to be added in this dialectic and tension between morality and politics, or justice and politics, are the resources of history. Justice in the law is one thing—what Jesus called the weightier matters of the law, which Jeff Powell referred to at the end of his talk: justice and mercy and faith.

And politics—legal politics, or what we now call “policy”—is another thing. Politics includes pragmatic considerations, but it also includes analytical consistency. The technicalities, the “mint and dill and cumin” in our law, have a normative significance. But there is also—and this is what I missed in the book—a very strong historical element. The common law is not just the technique of adjustment. It is not just analogy and non-categorical thinking. It has also great respect for precedent and historical experience. It is not the justice that Holmes called “experience,” which is basically politics, but historical experience, that is the life of the law.

I don't see how you can talk about the Constitution simply as an Enlightenment document. There was a great tension in America, at the end of the eighteenth century, at the time of the Revolution, between the traditionalists, who wanted for the colonists the rights of Englishmen, which were traditional rights, which were communitarian, which were Anglican and Puritan and Calvinist, as against the *philosophes*, the so-called Enlightenment people, of whom Jefferson is usually considered to be the most outstanding. They were primarily Deists and rationalists and individualists.

And that tension is in the Constitution itself, which preserved the common-law method, in the corpus of which is the whole history of the rights of Englishmen carried over into America. The Declaration of Independence expresses this in Jeffersonian terms, with its unalienable rights of, presumably, the individual, but then it goes on in the style of the English Bill of Rights of 1689—the historical rights of the English people, a community, rooted in historical experience.

Our Constitution reflects this tension again and again. We are not just a democracy, in the sense of majority rule. We are an Aristotelian system of the one, the few, and the many. We have a leader, the President of the United States, who can rule like a king at times. We also have the Supreme Court, and the legal profession, who are part of the elite—and we also have majority rule. Aristotle called this combination the best combination a polity could have.

We are struggling with this combination. On the traditional side, the elite side, our deeply Christian and religious heritage is also reflected in the Constitution. I think this reflects a tension between the seventeenth century English revolution and late eighteenth century Enlightenment rationalism. The tension is part of our historical experience and our tradition.

This is not a tradition in Alasdair MacIntyre's sense; it is the actual historical experience of the common law and of the Constitution, which the judges turn back to in order to find normative significance. It is not just the past which is preserved, but it is an ongoing, historical process in which lawyers look to ongoing past experience as the source of the law.

It is interesting to explore, as Jeff said, why the courts pay little attention to the debates going on among the professors. The professors are debating positivism and natural-law theory, while the judges are also following a historical jurisprudence, and the judges ask: Haven't we had this case before? What does our past experience tell us? What do the precedents say? Now, Mark [Tushnet], it is partly because some of our judges are trying to weaken the doctrine of precedent, but in most cases, in ordinary law, in cases we deal with all the time, we all want to know what would be consistent with the past, because we still believe that like cases should be treated alike. That is the fundamental principle of the common law.

If God is working in history—not merely in morality, not merely in politics, but also in history—then the law has a past and a future dimension, and not merely an inner and an outer dimension. For me, Christianity is historical, coming out of the Jewish prophetic tradition, which also is historical. I think somehow a Christian theology of law must ask where we are historically, what is the will of God with respect to our historical development.

We look at these questions not merely in terms of morality and politics; we also ask where we are situated in time. That may be one of the ways out of this tension we all feel between rationality and the common-law tradition.

*M. Cathleen Kaveny:*⁶⁹ I apologize for coming in late. I had to teach this morning. So if this question has been answered, tell me about it.

*John H. Robinson:*⁷⁰ None has been answered.

Kaveny: I am still trying to get some of the basic pieces of the argument into shape. One of the things I am not entirely clear on is this: Why can we talk about the constitutional tradition as a distinct tradition? Sec-

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ond, What counts as evidence of epistemological crisis, in the context of that tradition?

The two questions are somewhat interrelated. The more broadly you define a tradition, and the more practices and institutions it encompasses, the less likely that any dispute, at any level in those institutions, with respect to a particular thing, is going to be a sufficiently large disruption to count as a crisis.

On the Ninth Circuit there are twenty-eight judges. These judges decide not just constitutional questions, but broader sorts of federal questions as well, which are interrelated in a complex way with constitutional questions. Whatever disagreements they may have on specific constitutional questions are set within a broader framework of agreement that moderates the effect of that disagreement on the tradition. So, if you define the tradition as federal law, rather than as the American constitutional tradition, any one problem is going to be, I guess, less serious.

What Judge Noonan has said to me is that, because there is so much real-time agreement amongst the judges, about how to handle ninety-five per cent of the ordinary-time cases, they have a way of situating an issue on which they can't agree, so that it does not erupt into a crisis.

And that brings me to my second question: What really counts as having a crisis in a tradition? You might say that *Roe*⁷¹ has brought about a crisis point. Not so much because of the intellectual disagreement over abortion's moral and legal status, as because we've seen outbreaks of violence about it. What counts as being a sufficiently grave problem, as precipitating a crisis, as opposed to just having ordinary unresolved disputes, amongst people who have limited vision of what the truth is?

H. Jefferson Powell:⁷² Joe Vining has raised the question of what the implications are for what he called ordinary law—the rest of law—of what one says about constitutional law. I think that connects up to your first question. It is a very important question. I had trouble, when I was writing the book, deciding exactly how to tackle it.

There really seem to be two overlapping, but neither concentric nor perfectly the same, circles. One is the realm of American constitutional thought, which is neither limited to what goes on within the courts nor limited to strictly law-type discussions. It is much broader; it takes place in other settings, and has aspects that are not law-like in the narrow sense.

And then the other circle is constitutional law as adjudicated by courts—or, perhaps better, constitutionalism as articulated and discussed in legal terms. What gets done there is all strictly legal, although lots of the things we talk about never get into court. So there is a problem of execution, if you want to think about these questions. These circles, although they overlap, are not identical.

I thought it worked to treat constitutionalism as a distinct tradition, in some sense in order to get around the problem of dealing with the overlapping but not perfectly contiguous circles. I think it also may work, to some

⁷¹ *Roe v. Wade*, 410 U.S. 113 (1973).

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degree, because constitutional law does have some distinct aspects or elements to it. I still remain of the view that large parts of constitutional law are not in working order, as compared to contracts, which I also teach, where I have a great deal more comfort in trying to get my students to understand the law. There are problems around the edges, in contracts, and there are things I don't like, but it is nonetheless a well-functioning system.

Shaffer: The reason for that is that you're not so solemn about it.

Powell: That's probably true.

What counts as a crisis? I think the book suffers from two errors, both of which are characteristic of many constitutional law professors, myself included: (1) Paying too much attention to the Supreme Court and (2) paying too much attention to other law professors.

I think if there is unmistakably a crisis among constitutional law scholars—crisis does not have to necessarily mean something bad; it might be something fruitful—it is that we plainly do not have what we had, among many people, in the fifties. We had some raw sense of what the discussion is supposed to be. If you look at some of the people I wrote about—or perhaps use other folks—who are doing constitutional theory now, one thing is that their theories go all the way down. Turtles all the way down. And many times they seem to be talking about radically different things. So much so that I wonder why we talk about Robert Bork's positivism as if it were the same sort of enterprise as David Richard's moral-historical philosophy? They don't look very much alike.

Kaveny: I teach contracts, too. And it is a coherent subject. You're talking about one thing. When you're talking about constitutional law, you're talking about a range of topics that are drawn together by the fact that somebody happened to—a couple of hundred years ago—sit down and write all these ideas about how we're going to run a country, together, in one document. So that's one problem in talking about constitutional law as an intellectual enterprise.

Then the other issue is on the "institution" side. Maybe we're not looking at this broadly enough. Maybe the academy and the judiciary have very distinct functions in our society. We have to tie the crisis—as I read MacIntyre—to the institutions that carry the traditions. From his perspective, you can't analyze institutions and practices separately. So perhaps what we need to do is look at the issue more holistically, that is, look at the legal-intellectual complex in which constitutional law is carried on. Maybe one of the functions for us folk here in the academy is to kind of push the envelope, in a way, to bring out the extreme implications of things. Then judges can take our ideas and reintegrate them into the "normal science" of the law, in a way that furthers creativity but also is tempered with responsibility. So, maybe, just looking at how bad the debates are in the academy isn't the test for whether the traditions and the institutions that carry them are working appropriately.

Powell: Two other thoughts. One is that a probably more interesting intellectual way of defining the tradition, if I were going to do so without

pushing in a certain direction, would be to think of the tradition as involving the interpretation of normative documents that are not court cases. What I have in mind here is that I think there is a parallel—in some ways a far more important problem in American law—about statutory construction. The Supreme Court is riven, sometimes within a single justice's work and sometimes between justices, over methods that are in the end irreconcilable. Since so much of the work of American lawyers has to do with interpreting statutes, that would be important.

I think if I wrote the book over, I would try to look at the problem we have come to have with interpreting documents—the constitution, statutes, etc.—when we are no longer comfortable doing so with the tools of what Joe [Vining] was calling legal method. We have radical reform suggestions—some aspects of public choice, economic analysis—these are proposals for radical reform. I take Justice Scalia's approach to statutory construction to be a proposal for radical reform. All because of the perception that, to some degree, we do not know fully what we are doing.

Your point about the fact that the judges are successfully going about their business, in most of their cases, is a very good one, a powerful one. Within the sphere of constitutional law, there does seem to be, in the judicial area, some considerable evidence of strain. I think the Supreme Court's own cutting back on the number of cases it hears, and the shift toward much drier, statutory questions—which I think they probably ought to be dealing with; I'm not criticizing the positive side of that—reflects a discomfort that transcends the patent political disagreements among the justices.

Another example of stress within the judiciary: if you look at what the Supreme Court says about substantive due process, the legal doctrine under which *Roe v. Wade*,⁷³ for example, is characterized, you get a very different sense about the fate of that doctrine from what is going on in the lower federal courts. The lower federal courts are busily creating an ever-growing law of substantive due process. The Supreme Court, at the top, was doing things that the usual con-law course—which only looks at Supreme Court cases—would say tended to cabin in and shut off substantive due process. And I think that kind of disjunction between what the majority of the high court has been trying to do, and what the lower courts are doing, is another sign of stress.

73 410 U.S. 113 (1973).