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H. Jefferson Powell on the American Constitutional Tradition: A Conversation

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CONVERSATION

H. Jefferson Powell on the American Constitutional Tradition: A Conversation

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Jefferson Powell's recent book, *The Moral Tradition of American Constitutionalism*,¹ was the point of departure for a series of short papers and conversations held in March of 1996 at the Notre Dame Law School.

In a review published before our meeting, Professor Cathleen Kaveny, one of the participants, characterized Powell's book this way:

A professor of law and divinity at Duke, Powell argues that the history of American constitutional interpretation is most appropriately analyzed as a moral tradition within the conceptual framework of Alasdair MacIntyre's tradition theory. The fundamental purpose of his argument is theological in nature: heavily influenced by Stanley Hauerwas and John Howard Yoder, [Powell] aims to speak the truth about constitutionalism to members of the Christian community, thus enabling them to live more faithfully in American society.²

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1 Published in Durham by Duke University Press, 1993.

2 M. Cathleen Kaveny, *The Moral Tradition of American Constitutionalism: A Theological Interpretation*, 55 THEOLOGICAL STUD. 772, 772 (1994) (book review).

Another participant, Dean Mark V. Tushnet, in another published review, said:

According to Powell, "Christians have theological reasons for approving the role American constitutionalism has played in checking the abuse of power", but they must resist "the ancient Constantinian error of confusing Caesar with God."³

Dean Tushnet then described the book in somewhat more detail:

Powell begins with a long discussion of MacIntyre's concept of tradition as "an historically extended, socially embodied argument . . . about the goods which constitute that tradition." He stresses MacIntyre's point that traditions, because they "embody continuities of conflict," always run the risk of facing a crisis, in the form of an inability to use the tradition's resources to address "new inadequacies, hitherto unrecognized incoherences, and new problems."

American constitutionalism, considered as a tradition, faces such a crisis, according to Powell. Its crisis is, for him, "the result of historical developments in what was until recently a functioning tradition of rational enquiry." That tradition "arose out of an effort to minimize social strife and has been concerned throughout its history with constraining and directing the violence of the state so that the state in turn can control the violence of the society." It is characterized by two claims: that "it embodies specific moral commitments . . . and that it is autonomous with respect to moral argument and political preference (a claim that implicitly reinstates the Enlightenment assertion of neutral rationality)." This, however, is paradoxical, for the tradition claims to be and not be a morality. Recently, the tradition has confronted and failed to resolve this paradox.

How were the tradition's propounders able to overlook the paradox until recently? The reason, according to Powell, lies in the way constitutionalism accommodated arguments about its goods. For Powell, the constitutional tradition was a tradition of common law reasoning rather than of political theorizing. . . . [Common law reasoning] insisted on reasons rather than relying on authority, and thereby connected to the Enlightenment tradition. In addition, and this too is connected to the Enlightenment, the tradition was individualist and contractual. These elements led the constitutional tradition to focus on limiting the exercise of government power through reason-based law. . . . Powell supplements these largely liberal elements with elements drawn from civic republicanism and Protestant Christianity. Both, for example, supported a certain sort of pessimism about how much governments could rely on and harness citizens' virtuous behavior.

. . . .

In this formulation we can see the germ of constitutionalism's crisis: the common law was a tradition embedded in a common social life. As

³ Mark V. Tushnet, *H. Jefferson Powell, The Moral Tradition of American Constitutionalism*, 45 J. LEGAL EDUC. 303, 303 (1995) (book review). Excerpts from this review are used with the permission of Dean Tushnet and of the *Journal of Legal Education*.

that common social life disintegrated, so did the possibility of a constitutional tradition tied to the common law. Powell offers a number of what amount to case studies of common law reasoning in the constitutional tradition. I think it fair to say that the overall conclusion to be drawn from these case studies is that the constitutional tradition's common law element consisted of discussions among elite lawyers about the conclusions they as sensible people would draw from complex arrays of contested or contestable facts.

....

As Powell argues, there were "unresolved tensions" within the constitutional tradition, in particular the rationalistic, individualistic, and contractual elements associated with the Enlightenment. . . . Powell's historical narrative suggests that the common law elements prevailed over the Enlightenment ones through long periods of U.S. history, until the modern era when the crisis erupted. So, for example, in the antebellum period the disagreement "between Republican rationalism and Federalist (common law) traditionalism" was regularly resolved in favor of common law traditionalism. Abolitionists briefly interrupted the reign of common law traditionalism during and shortly after the Civil War, when they "tried—and failed—to rework the intellectual nature of the constitutional tradition." After they failed to "reintroduce[] liberal moral and political philosophy into constitutional law," the common law tradition regained its ground.

In the twentieth century what Powell calls Modern Theory replaced—perhaps better, attempted to transform—the constitutional tradition. Modern Theory was "a radically liberal argument; starting from the premise that the only legitimate public moral choices are those derived from representative government's aggregation of individual choices, Modern Theory left no space for tradition-dependent modes of making public moral decisions." Its crisis arose with the revival of substantive due process in *Griswold v. Connecticut*⁴ and the abortion decisions. Those cases, Powell argued, could only be justified with "a tradition of moral inquiry" that Modern Theory had attempted to displace, and that Justice Blackmun's opinion in *Roe*⁵ expressly rejected.

....

Powell summarizes his conclusion early in the book: "The Christian lawyer, school board member, voter, or victim must not be deceived by the false claims of American constitutionalism to 'establish justice,' but he or she need not reject out of hand one means that exists in this society by which the Christian can speak truth to power."

....

Powell emphasizes that this defense of democracy rests on the view that even policies made in the legislature by purportedly majoritarian decision-makers will in fact be made by a "relatively small political elite[]," not sharply distinguishable from judges. Powell's theological perspective therefore leads him to suggest that "there can be no general principle,

4 381 U.S. 479 (1965).

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

based on Christian commitments, for deciding in the abstract the proper balance between majoritarian and judicial decision making." In both institutions small political elites make the decisions.

According to Powell, this does not imply that Christians should make merely pragmatic judgments ("wait and see which institution provides the more acceptable answer"), because each such judgment evaluates an individual decision that has complex and "indeterminate systemic consequences." He rejects "strong support for judicial policy-making in the name of the Constitution," however, on the pragmatic ground that judges as elite decision-makers are unlikely to be systematically better than legislators as elite decision-makers.⁶

Dean Tushnet and Professor Kaveny characterized Powell's answer for Christians in somewhat the same way. In Professor Kaveny's words:

[Powell] urges Christians to reject the dangerous falsehood of a Christian constitutionalism. At the same time, he argues that Christian commitments strategically converge to support a general judicial deference to majoritarian decision making, along with a limited role for judicial activism designed to protect the voices of discrete and insular minorities and insure just and efficient governmental procedures.⁷

These introductory comments might render the conversation that follows a bit more intelligible than it would otherwise be. The conversation began with a presentation by Professor Joseph Vining. His remarks were followed by a free-flowing conversation, loosely orchestrated by Professor Robinson, among the participants. After a break, the conversation was restarted with a presentation by Professor Maura Ryan, followed once again by a loosely orchestrated conversation. We turn first to Joseph Vining.⁸

⁶ Tushnet, *supra* note 3, at 303-08.

⁷ Kaveny, *supra* note 2, at 773.

⁸ This published version of the conversation concludes with Professor Powell's public lecture, given on the occasion, on the notion of loyalty to the law. We reproduce the lecture last in this conversation, *infra* p. 82, in that it is later than the book. It was, however, presented the day before the conversation.

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

⁹ Hutchins Professor of Law, The University of Michigan.

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. Failinger: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 Kommers 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.

68 Robert W. Woodruff Professor of Law, Emory University.

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-

69 Associate Professor of Law, University of Notre Dame.

70 Director, Thomas J. White Center on Law and Government, University of Notre Dame.

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).

72 Professor of Law and Divinity, Duke University.

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.

And so the morning session ended. After lunch, the conversation resumed with a presentation by Professor Maura Ryan.

ON POWELL'S THEOLOGY

by Maura Ryan⁷⁴

In the final chapter of *The Moral Tradition of American Constitutionalism*, H. Jefferson Powell writes: "Christians cannot adopt the language of constitutionalism and remain faithful to their own social vision, but neither should they simply ignore the state of constitutionalism, for (like all legitimating languages) it can be used as the instrument of our critical and constructive communication with our rulers. But which constitutional language should we use to communicate when the rulers themselves seem unsure which they speak?"⁷⁵

How to speak the truth to power without endorsing its pretensions,⁷⁶ how to use constitutional argument to give voice to the voiceless, without being deceived by the false claims of American constitutionalism to "establish justice." Truth and power are old problems for the Church, but they take on new shape in the wake of what Powell calls the crisis in constitutional theory: In a time when the Court "lurches from decision to decision with no obvious rationale other than the specific substantive preferences of a majority of justices," what should Christians favor: deference to legislative decision or the exercise of judicial choice?⁷⁷

Rejecting the possibility of a "Christian constitutionalism," Powell defends a sort of "both/but" posture: Christians should support majoritarian process policed by limited judicial activism;⁷⁸ Christians should prefer democracy except where judicial nondeference protects avenues of minority leverage. Joining Alasdair MacIntyre's critical epistemology with the Christian social ethic developed in the work of John Howard Yoder and Stanley Hauerwas, he attempts a new, yea, a *truthful* reading of American constitutionalism as a moral tradition.

Of all the people in this room, I am probably the least qualified to offer comment on the success of Powell's project. I have no formal training in the law and I have but an amateur's grasp of American constitutional theory. Moreover, I am what you might call a "*Gaudium et Spes*"⁷⁹ Roman Catholic; my theological world view (my ethical imagination) has been forged in the optimism of the common good tradition, shaped by the conviction that "when, by the work of our hands or the aid of technology, [we] develop the earth so that it can bear fruit and become a dwelling worthy of the whole human family, and when [we] consciously take part in the life of

⁷⁴ Assistant Professor of Christian Ethics, University of Notre Dame.

⁷⁵ POWELL, *supra* note 10, at 277 (1993).

⁷⁶ *Id.* at 11.

⁷⁷ *Id.* at 277.

⁷⁸ *Id.* at 291.

⁷⁹ Professor Ryan's reference is to *Gaudium et Spes: Pastoral Constitution on the Church in the Modern World* (Second Vatican Council, 1965), in *CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE* 166 (David J. O'Brien & Thomas A. Shannon eds., 1992).—Ed.

society, we carry out the design of God."⁸⁰ Although I find the critique of so-called Constantinian Christian social ethics challenging, I remain an outsider. I cannot speak, therefore, as a lawyer might to Powell's diagnosis of the state of the constitutional tradition, and I cannot judge (as others in this room can) whether Powell has been successful in bringing John Howard Yoder's critical ecclesiology to bear on contemporary problems in constitutionalism.

But, if we can grant Powell less modest goals, if we suppose that he wants to appeal to a general audience of thoughtful American Christians and perhaps especially to those who are most likely to be seduced by the mask of constitutionalism (those clothed whether modestly or scantily in Constantinian Christianity)—if we can imagine, in other words, that he comes not just for the righteous but for the sinner—then the questions I bring to this project might be illuminating at least in some way. If I am exactly the sort of Christian likely to be seduced, then perhaps we can learn from what I do not yet see.

One can hardly deny some truth in Stanley Hauerwas's observation that "we live in a time of progressive dechristianization in which the temptation of the church is to accommodate to the prevailing culture rather than shape it."⁸¹ We can hardly deny the fact that it is difficult to enter explicitly religious language into contemporary American public debate, particularly when religious commitments are likely to conflict with presuppositions regarding the exercise of individual rights, or that there is a palpable gulf between the conclusion of many religious communities and religious persons and the "law of the land" on matters such as abortion and euthanasia. Whatever one makes of Powell's claim that contemporary constitutional theorists "offer little more than an apologia for rule by a liberal oligarchy," it is easy to share his concern that the possibility for genuine moral debate for the sake of the common good in the United States has been eclipsed by the pervasive and powerful languages of rights and privacy. Powell has brought into sharp relief the complex challenge facing contemporary Christians: Charged to do justice in the world, we must discern how to use the power of the world for good when the powers that be appear increasingly unconcerned with our concern. At a time when the risks of a simple or unnuanced identification of our American political system as the precursor or embodiment of the Kingdom of God seem especially clear, we find ourselves asking Audre Lorde's question: Can the Master's tools dismantle the Master's house?

Still, Powell's theological answer leaves me unsettled. To begin with, a great deal rests on an argument for an anti-Constantinian Christian social ethic that is, by his own admission, assumed rather than offered. The argument is familiar enough to those who know the contemporary literature in theological ethics: Since Constantine, when talking about government, we have assumed (as Jesus could not have) that we are talking about government of Christians and by Christians. We have thus lost the distance which Jesus maintained between his realism about power and his messianic liberty

80 *Id.* at 203.

81 STANLEY HAUERWAS, *AGAINST THE NATIONS* 9 (1985).

in servanthood. We have not distinguished between an ethic which can claim the authority of incarnation for the content of messianic servanthood and that other discourse which talks with rulers about their claim to be benefactors.⁸² To reclaim the distance, "Christian analyses of political structures and forms of thought must be shaped fundamentally by New Testament realism about the nature of government power and not by Constantinian assumptions about the compatibility of Christ and Caesar."⁸³ Such a realism entails attending to the fact that coercive exercise of power by society's rulers (dominion) is a given and that rulers invariably "seek to justify their exercise of dominion with the claim that their rule is morally legitimate and socially beneficent."⁸⁴ Obligated to "see and speak truthfully,"⁸⁵ Christians must neither accept secular standards of "political effectiveness and success,"⁸⁶ nor fall victim to the pretensions of secular power—they must not begin to tell themselves that the secular state serves or can serve true human welfare.

But Powell's simple assumption of the anti-Constantinian paradigm masks the radicality (even within Christian ethics) of the social/political critique at its heart. It is not, indeed, until we see why even Augustine went wrong that we understood how *deep* is the suspicion of secular power in this account. We learn in a footnote on page 283 that Augustine's practical political judgements are finally inconsistent with his anti-Constantinian impulses not because he fails to appreciate the limits of the state with regard to true human goodness, but because he fails to recognize the unavoidable problems that *all* coercion poses for the Christian norm of true community.

But arguing thus implies of course a notion of what "true community" means for Christians—it implies a position in an old and contentious debate concerning what exactly it means for the followers of Jesus to "take their signals from somewhere else." Powell does not need here to replicate Yoder's effort to articulate the meaning of the Church's obligation to "be like Jesus," but he does need to show why MacIntyre's or Augustine's or Noonan's⁸⁷ "Constantinianism" is not only incompatible with the perspective he has adopted, but *untruthful*, unfaithful to the story that shapes the church.

The subtlety of Powell's analysis of the relationship between power, coercion and violence in the context of American law makes even more clear the necessity of bringing to the forefront the more or less silent theological narrative that informs this work (that is, the underlying interpretive context within which we come to understand the distinction between power and coercion or how power and violence relate). As one reviewer observed, Powell's theological critique posits no distinction between judi-

82 JOHN HOWARD YODER, *THE PRIESTLY KINGDOM* 156 (1984).

83 POWELL, *supra* note 10, at 265.

84 *Id.* at 270.

85 *Id.* at 264.

86 *Id.* at 279.

87 See JOHN NOONAN, *PERSONS AND MASKS OF THE LAW* (1976); *infra* text accompanying note 97.

cial authority, governmental power, and state violence.⁸⁸ And of course, he might respond, that is precisely the meaning of New Testament realism: dominion is fact; the coercive exercise of power by society's rulers is a given; the empirical state, even when aware of its limited nature, is at best a sphere of "negative order."⁸⁹

But there is an important difference between the claim that judicial authority rests on an appeal to force and the claim that the American constitutional order admits of increasing violence; indeed, resistance to the seduction of constitutionalism depends upon being able to see clearly just how pretention masks state violence. Moreover, on his own account, Christian realism does not require the demonization of the state; "Christians have no stake in denying the goodness of Caesar's acts when the latter are, in Christian terms, good."⁹⁰ But, once having accepted the fact of dominion, how does the Christian know when Caesar's purposes are or are not good?

In *The Politics of Jesus*, John Howard Yoder argues that

if the disciple of Jesus Christ chooses not to exercise certain kinds of power, this is not simply because they are powerful: for the Powers as such, power in itself, is the good creation of God. He chooses not to exercise certain types of power because, in a given context, the rebellion of the structure of a given particular power is so incorrigible that at the time the most effective way to take responsibility is to refuse to take sides in favor of the men who that power is oppressing Frequently the faithfulness of the Church has been put to the test the moment she was asked to follow the path of costly conscientious objection in the face of the world's opposition.⁹¹

Although we only glimpse it in this work, we can begin to construct the theological backdrop against which Powell's careful exposition of the descent of American constitutionalism into intellectual and moral incoherence becomes the tale of an incorrigible rebellion. As he points along the way to judicial deference to "evil legislation" (*Roe v. Wade*⁹²), the solemn constitutionalization of the right to die,⁹³ the Court's near-eagerness to address crime through death penalty jurisdiction,⁹⁴ he assumes an account of the Christian narrative which cannot accommodate societal permission for abortion, euthanasia, and capital punishment. We can see how the refusal to collaborate comes to mean standing beside all those who are victimized in a polity defined by protection of the atomized self, and how, if constitutionalism's rebellion takes the form of a dangerous moral incoherence,

88 Kaveny, *supra* note 2, at 772.

89 POWELL, *supra* note 10, at 284.

90 *Id.* at 265.

91 JOHN HOWARD YODER, *THE POLITICS OF JESUS: Vicit Agnus Noster* 185 (1972).

92 410 U.S. 113 (1973).

93 *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir.) (en banc), cert. granted sub nom. *Washington v. Glucksberg*, 65 U.S.L.W. 3085 (U.S. Oct 1, 1996).

94 *Herrera v. Collins*, 506 U.S. 390, 418 (1993) (under the Eighth and Fourteenth Amendments, newly discovered evidence of innocence which is probative yet weak will not prevent states from executing prisoners sentenced to death).

conscientious objection entails refusing to adopt its dangerous morality. We have here a complex form of Christian pacifism.

Powell's analysis of what an anti-Constantinian theological response to the crisis of constitutionalism requires is persuasive: Majoritarian processes policed by limited judicial activism clearly could provide the sort of structures wherein the Church can stand outside the order, as advocate for those who are oppressed, harmed or victimized in the social order, and in which it can, if need be, see and follow the costly path of conscientious objection.

But in the end, I am left uncertain why Christian social witness (understood in this way) requires an anti-Constantinian social ethic. In his visit to the United States last year, Pope John Paul II was not shy in invoking the language of the Great American Experiment or in calling Americans to renew their constitutional heritage in the service of human rights (especially poignant was his invocation of "American traditional values" on behalf of the immigrant). But a brief glance at the recent encyclical *Evangelium Vitae*⁹⁵ suggests that the Pope is neither seduced by liberalism nor unable to recognize and admonish the violent character of American law. (Indeed, in *Evangelium Vitae*, John Paul II argues that abortion and euthanasia ought to be opposed as acts of conscientious objection.) In the same way, working well within the prevailing political structure, the United States Catholic Bishops have consistently brought the voices of the poor, the alien, the unborn to the floor of public debate.

I will not quarrel with Powell's reservation concerning Michael Perry's vision.⁹⁶ But it is not obvious to me why attempts to work out a Christian rehabilitation of constitutionalism, such as we see in the work of Judge John Noonan, necessarily fail. Powell rejects Noonan's approach on purely formal grounds: "Like all forms of Constantinian social thought," he argues, it "commits a double-barrel error, simultaneously accepting as normative the coercive nature of the state, while overstating egregiously the significance of having individual Christians exercise the state's power."⁹⁷ But the most persuasive arguments against a Constantinian social ethic proceed on empirical grounds, showing that the Christian, having confused Caesar with God, no longer questions what Caesar wants. They show how the Christian who has made this error has become blind (as she inevitably must be) to the increasing irrationality and violence of the constitutional "order." That Noonan's Christianity is on a collision course with American liberalism is undeniable, and, as Cathleen Kaveny has shown in a recent article in the *Journal of Law and Religion*,⁹⁸ the protracted debate over abortion in the United States poses serious questions to Noonan's confidence in the close and ultimately harmonious relation between the developing

95 POPE JOHN PAUL II, *THE GOSPEL OF LIFE [EVANGELIUM VITAE: ON THE VALUE AND INVIOABILITY OF HUMAN LIFE]* (1995).

96 MICHAEL J. PERRY, *MORALITY, POLITICS, AND LAW* (1988), discussed in POWELL, *supra* note 10, at 208-24; MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982).

97 JOHN NOONAN, *PERSONS AND MASKS OF THE LAW* (1976), discussed in POWELL, *supra* note 10, at 276.

98 M. Cathleen Kaveny, *Listening for the Future in the Voices of the Past: John T. Noonan, Jr., on Love and Power in Human History*, XI J.L. & RELIGION 203 (1994-95).

moral vision of the Church and true human wisdom. But what are the clues we should look for that would tell us that Noonan has fallen into the unavoidable blindness of the Constantinian? Where are the signs that, confident in the ability of the Christian to achieve a personalized and compassionate justice, he is being led inevitably to the place where he cannot but fail the test of faithfulness? Where are the signs that here indeed, the Master's tools will not dismantle the Master's house?

CONVERSATION II

*John H. Robinson:*⁹⁹ Last time, those of us who are lawyers were kind of in charge. We knew what Joe [Vining] was talking about; we could cite chapter and verse. But now all of us are struck dumb. We're clueless. We're amateurs where Maura is a professional. She has either the utter graciousness or the irrational folly to take on talking to a group of lawyers about constitutional law, and she did it extremely well.

*Andrew W. McThenia, Jr.:*¹⁰⁰ It seems to me that what Maura is talking about goes back in some ways, to John Howard Yoder's question. What's wrong with the Constantinian way of doing things? I don't know the answer to that, but it seems to me there is a better defense for the Enlightenment project than we like to offer.

But, it seems to me, one of the things we could say about that Enlightenment project, is that it allows dissenting voices to be heard, in that it allows Jewish communities to talk about Hebrew Scripture, and it allows Mennonite communities to tell the truth to Caesar in his own language. That's not a small accomplishment. If the question is, what "footnote four"¹⁰¹ involves, then, it seems to me, that from the Hebrew Scriptures, people in that community can tell Caesar some things. And it seems to me that people in the Mennonite community can tell Caesar some things as well—some things about justice.

I think that's something to celebrate, not to feel bad about. I agree with some of the conversation, that there may be a collision course with questions like abortion; and I don't know the answer to that sort of problem. It also seems to me that those smaller communities (at least among those of us who are Christians) can't just act like we're victims. That's part of what's wrong with the politics of this election year, is there's too much victimology going on. We can tell Caesar some things, in Caesar's own language, but not in the language of our story. We can tell Caesar some things that might make Caesar more honest, whether that's Constantinian or not. But the world is not to be made right for us Christians. I don't think that's what our project is. Our project is somehow to learn how to tell the truth to Caesar and also go back into our faith communities and get

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¹⁰¹ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (Stone, J.), *discussed in* POWELL, *supra* note 10, at 159-73.

the strength to tell the truth. It seems to me, in those communities, we pray and we celebrate and we ask to somehow know how to serve. That's worth bringing to the table, whether it's Constantinian or not, and we don't have to be victims to do that.

Robert E. Rodes, Jr.:¹⁰² Maura spoke about *Gaudium et Spes*. It says that the church is a sign and a safeguard of the transcendence of the human person—in any situation. I think that that gives us a way of looking at justice; and justice, I think, for a lawyer, is, first of all, a concrete judgment on a particular situation. After we've done that, then we begin putting together the relation of that particular observation with the whole tradition. I think the four principles that Jeff laid down in his talk yesterday¹⁰³ are very useful in doing that.

I had the experience, a long time ago, of being a clerk for a very fine appellate judge. One day, he got into an argument he felt was leading to an unjust result, and he couldn't figure out how to get out of it. He said, "Bob, find me a way out of this." I spent the afternoon looking for a way out, and found one, and he put it in as his opinion. I think there's a lot of that goes on. We have an intuitive observation of right and wrong, and we test our principles by that intuitive observation. I think, as Christians, we may see the intuition more clearly—and use it.

I'm thinking of the case of the Kitty Kat Lounge, which is a big constitutional law case from South Bend.¹⁰⁴ While that case was going on, the *South Bend Tribune* did a profile on a topless dancer—who was supporting her family by topless dancing. The proprietor of the Kitty Kat Lounge was quoted as saying, "This woman is not an exhibitionist. A woman doesn't take her clothes off that way unless she's desperate . . ." Well, that never got to the Supreme Court, and I think maybe it should have gotten to the Supreme Court. Our business as Christians is partly bringing that kind of thing before the courts. That is a truth about our society, and I think, because we are Christians, we can look at it and form our legal doctrines around these observations. Again, I return to the scenario that Jeff laid out yesterday afternoon.¹⁰⁵ It seems to be quite inconsistent with the conclusion of his book. But I think it tells us how we can look at reality and turn our intuitive judgments into discursive reasoning.

I'm going to teach a jurisprudence class this afternoon and we are going to take up John Stuart Mill's *On Liberty*. After going over Mill *On Liberty*, I'm going to make a hypothetical case about a man with a bucket and a straight razor who goes down to Skid Row and says, "I'm buying ears for \$50 a pair." I don't think you can stop him without rejecting Mill. I think everybody who passes by would want to stop him. Again, you put your legal insights together, out of a Christian recognition of human transcendence, which is what *Gaudium et Spes* tells us we're supposed to be doing. You can put that together and make law out of it. That's certainly my project as a legal scholar.

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103 Professor Powell's lecture, given the day before the conversation, *infra* p. 82.

104 *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

105 *See infra* p. 82.

Thomas L. Shaffer:¹⁰⁶ Does it bother you at all, when you argue in court to stop the guy with the bucket and the straight razor, that the most effective argument might be that what he proposes to do is a danger to public health?

Rodes: That's not the most effective argument.

Shaffer: I know. But you and I, practicing law downtown, know what argument will work, and, with the judge we have for the day, the most effective argument might be public health. We could go in there talking about rights and dignity; it's not going to work. That's when he turns his chair to the wall. The craft we practice often is a disingenuous craft. I know perfectly well why you want to stop the guy with the bucket, but the way to do it is to help his victims.

Rodes: I might choose to make an argument that will be more up front with my reasons.

Shaffer: You'll lose.

Edward McGlynn Gaffney, Jr.:¹⁰⁷ What's wrong with doing both?

Laura S. Fitzgerald:¹⁰⁸ It seems to me that your two examples—the topless dancer and the ears—both support another conclusion. That is that courts may be the worst possible institutions for making these kinds of decisions, because courts typically, by their own process, are constrained to say yes or no. The fact you raised about the topless dancing—a woman does this when she's desperate—doesn't seem to me to be answerable by the First Amendment. But it may be answerable by decisions like: How are we distributing wealth? How are we taking care of people who are left to take care of children with no means but to dance in bars?

This is one of the advantages that legislatures have: they are allowed to look at alternatives and a cluster of policies to respond to the problem and actually consider a fact like the dancer's poverty. That fact, at least under current First Amendment jurisprudence, is close to irrelevant, although it is rhetorically very powerful.

Rodes: At one time, the right to sign a yellow-dog contract was as strong as the right to dance topless is now. For the same reasons.

Fitzgerald: Right, but my point is not that the topless dancing case was not answered somehow by the Supreme Court, because clearly it was. My point is that perhaps the idea that we lawyers have that courts are really great at answering these kinds of troubling questions is just wrong. Majoritarian processes, as manipulated as they can be, in fact tend to have an advantage, because they can look at the world as a whole, in context, within a web of other problems and other possible solutions. The Supreme Court cannot say, no topless dancing, and moreover you, State, have to pay for this woman's children, so they do not starve in the street. But the legislature might be able to.

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

108 Assistant Professor of Law, Washington and Lee University.

Marie A. Failinger:¹⁰⁹ Why didn't the City of South Bend take into consideration what these women *have*. I know the Indiana Legislature didn't do it. That is what it comes up to sometimes in these cases: people who have not been taken seriously, in a lot of different places, are finally in court. Everybody I represented when I was a legal services lawyer was somebody who had not been heard by any other system. The Indiana Legislature did not care beans about those people.

Imagine a client who says, I went to my poor relief office—to my township trustee—and I asked for money. The law says I am supposed to get it—through previous legislatures. We've got the law. The legislature would say, "So go to court and take care of it there. We're not going to listen to your plea that you're poor and you're—"

H. Jefferson Powell:¹¹⁰ But they had the law. It would have been a lot more difficult for the court to do something in the absence of a statute, because the court lacks the power to craft such a rule itself.

Robinson: By the way, I think that some people here—Bob [Rodes] and Tom [Shaffer]—have been successful in getting the township trustee to produce legislatively mandated money.

Failinger: Well that is what I did when I was here many years ago, and I cannot tell you how many times we went to the legislature to ask for relief from recalcitrant trustees. And year after year, they did not hear, and so finally we went to the courts. I understand there is litigiousness in our society and so forth, but for the people who are not heard, so often court has been the place where they have to go.

Fitzgerald: My point is not that our legislatures are always listening, but that we have a political system, an electoral system, and a system of constituent representation, which itself is supposed to be at least a parallel process for addressing these issues, for addressing issues of justice, equality, and starvation, and the kind of indignity that follows from the lack of those things.

It seems to me that part of the problem we have is that we are in fact only discussing the relatively easy question—with just a bunch of lawyers, people in the academic community, and within a tradition that, although rich, is relatively constrained. We're trying to decide the role of constitutional law when in fact the real action is going on in politics. In some ways, our real problem with the Constitution is to figure out how to make *politics* constitutional, not how to make good constitutional lawyers.

We're already within a tradition and, even with disagreements, it's a relatively small traditional spectrum, whereas the politicians who are running and creating communities, and making painful and powerful decisions like the one you are talking about—that political reality seems to be outside of any tradition that any of us lawyers can really put a finger on, in order to talk about how to make politics just, and how to make those politicians humble and fair. It's not that the legislature is more likely to give the

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110 Professor of Law and Divinity, Duke University.

right answer, but we lawyers are ignoring electoral politics and constituent-based politics altogether when we talk about what the Constitution should mean.

M. Cathleen Kaveny.¹¹¹ I would like to shift it back toward a theological analysis for a second or so. I felt that the invocation of the debate over pacifism was actually an extremely helpful move, because I think that debate provides illumination of some of the issues that are going on here, in our analysis of the proper participation of Christians and the Christian community in activities of the state.

Let's look at some of the interchanges on just war and pacifism, among, say, Paul Ramsey and Stanley Hauerwas and John Howard Yoder, on some of these issues. Would it help to think of the theological issues, to reframe them, in terms of two questions: a first order question, What is the purpose of the Christian community with regard to the broader society? And a second, subsidiary, question: What are the limits on the type of behavior we can engage in order to further that purpose?

It strikes me that one of the things that would be interesting to ask Professor Powell is: What is the nature of a good Christian community with respect to the broader society? In particular, is its obligation simply to bear witness to God? From this perspective, the obligation of the Christian community to work for social justice might be very attenuated. If so, that attitude is very different from that articulated by the Roman Catholic tradition, for example, in *Gaudium et Spes*, where there is a more positive obligation for social justice.

One can claim that the Christian community should be engaged in works of social justice in the world, while still opposing the use of violence. I remember that Professor Ramsey used to point to some of Professor Hauerwas's and Professor Yoder's work, at their objections to the use of force, in the context of just-war theory. One objection they commonly make is that force just doesn't work—it's not an effective tool. Ramsey never tired of observing that this objection is *not* based upon the nature and purpose of the Christian community. It's a pragmatic judgment about what's the most effective tool to achieve the same end. So, the first order question is what's the purpose of the Christian community?

The second order question arises only after we have settled the first order question. It may be the case that you can say, or we can all agree, that the purpose of the Christian community, and of Christians within that community, is to bring the light of social justice to the world. The second order question asks whether there are some limits on what we can do in furtherance of that end. A pacifist might agree on that whole vision of Christian community, but say that you can't kill anybody in order to realize it. A just-war theorist would say that you can kill, but you can't directly intend to kill the innocent.

A similar analysis would work with constitutionalism. For example, it is interesting to ask when John Noonan would need to resign from the bench. What type of behavior *can't* he engage in? It is one thing to be a

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Constantinian in a general sense, or to say that Christians can in principle be involved in building and maintaining institutions of the state. But the interesting questions lie in the details. What particular government, what particular state, are we dealing with? There is this country, and then there is Nazi Germany. A Christian's ability to collaborate with the institutions and goals of each would obviously be very different.

Furthermore, there is also a question about the precise nature of one's responsibility as a government official. Judge Noonan wrote an article in the *Stanford Law Review* called *Horses of the Night*.¹¹² Some of the lawyers and judges seemed to think that he was making a very fine—some people might say Jesuitical—attempt to distinguish between the responsibility of judges in direct appeals in federal capital-punishment cases, and the more attenuated responsibility of judges who sit on a federal habeas review of a state capital case. He suggested that the judges in the federal courts are not really responsible for the imposition of the death penalty in state cases. The responsibility of the federal judge is limited to whether the trial and sentence were constitutional or not. However, now that we have got federal death-penalty cases, the federal judges would seem more directly responsible for the imposition of the death penalty.

In short, I think it is one thing to talk about Constantinianism. The more precise and interesting questions are, What are the terms of a Christian's morally permissible engagement in this particular society? And when does even a good Constantinian Christian have to say enough is enough—I have to resign from the bench? And of course the most radical question would be—and the Nazi Germany case would exemplify it—when am I permitted to use the power that I hold for subversive ends, in order to achieve goals that are completely antithetical to the goals of the government that I work for? Such as staying on the bench so that you can help save the Jews, Gypsies, and the gays, and all of the people that are the targets, by subverting Nazi laws? At any rate, I think that those are the fundamental questions that are at stake.

Maura Ryan: Just to underscore what you just said, and to add to it another question that seems just as important: What is the point at which one's assumptions about the proper role of the community begin to require that you use the power of the state in ways that are antithetical to the ways in which you defined yourself as a community? A further question is, Where does the temptation lie? That has to be answered as well. It is easier to see in the question of simple pacifism than it might be if you're thinking about pacifism in this broader sense.

Shaffer: Could I intervene on that question, and on Cathy [Kaveny's], too. What is the assumption about the way those questions are answered? Are those questions asked in the faith community? Is the person guided primarily by advice from her sisters and brothers in the Lord?

Ryan: I think that is one of the questions that is unanswered in Jeff's final chapter. That is—there is at one point—I think it is in the discussion of John Noonan—you make the assumption that the individual Christian is

112 John T. Noonan, Jr., *Horses of the Night: Harris v. Vasquez*, 45 STAN. L. REV. 1011 (1993).

limited. There are certain kinds of particular limits to what an individual Christian is going to be able to do in the state. I take it that is different for what might be possible for the *community*.

So it would seem to me that you have to answer that: What is the locus of witness? And how does that relate to these other questions that we've been pointing to? If, in order to give effective witness, the community as such *is* the social ethic, as Hauerwas would say, well then you don't want to separate—you don't want to make grand claims about what the individual might be able to perceive to be the case.

Shaffer: Well, then we don't have to have Judge Noonan looking quite so lonely out there on the mountain, do we?

Randy Lee.¹¹³ It seems to me, Tom, pressing a lot of the same lines—that this is really helpful conversation. The relation between the church and the state is not subject to any general formulation. I think it is unhelpful to say—to use the word—"Constantinian," or "non-Constantinian," because it seems to be a matter of constantly making ad hoc judgments, casuistic judgments on how Christians engage in particular circumstances.

As Maura indicates, it might be a Christian's duty to go to court and help a person get relief if they are being evicted from their apartment. And it might also be a duty for a Christian to withdraw, to disengage from certain practices that have to do with, say, abortion or the death penalty or something like that. These are judgments that have to be made all of the time. When it gets down to specifics like this, I think it becomes less clear whether the church is Constantinian or not. It is just a matter of what practices does it take to make these decisions well.

Douglas Sturm.¹¹⁴ In response to the discussion so far, I would like to present three observations for consideration.

First, a critique of Christian exclusivism. In my judgment, we must, in this day and age, be keenly aware of religious pluralism as a fact and as a problem. Whatever our ultimate stance, we can no longer simply presuppose that Christianity, or some particular version of Christianity, is the only viable and sensible religious tradition. Yet in our discussion to this point, we have, I think, tended to privilege the Christian church without so much as posing the question about what exactly we mean. Since I am a United Methodist, I suppose I should be considered a Christian. But I find I have no sympathy with the Christian Coalition—either its theology or its politics. Moreover, I find myself collaborating with persons of diverse religious (even anti-religious) persuasions on issues of common concern: racism, sexism, classism. We need, I mean to suggest, to work on two related tasks: (a) to become more explicit about the precise meaning of Christianity we are espousing and how it diverges from alternatives and (b) to become more explicit about the precise meaning of interreligious collaboration, its character and its boundaries.

Second, a critique of Christian sectarianism. In my judgment, Christianity is not concerned about itself as an institution, even as a movement.

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Christianity instead points beyond itself to something that is not itself. Christianity points to a relationship between God and the world. In this case, by "the world" I mean to encompass the whole universe—all creatures great and small. Christianity refers to the moral impulse to engage wholeheartedly in a transformative process where the world, for whatever reason, diverges from the intentionality of divine love. To employ H. Richard Niebuhr's suggestive typology, Christianity, as I understand it, entails not so much the motif of "Christ against the world" as it does the alternative motif of "Christ transforming the world"—for the sake of the world's own well-being. We are, if directed by Christian insight, inspired to do what is necessary that all life may flourish. We may—we shall—confront all kinds of tragedies and limitations in pursuing that task, but we are driven to it as our vocation. From this standpoint, the concern of Christians is not to defend Christianity, not to make people "Christian," not to protect the church—but to infuse the structures of the world with the spirit of love that the world might become a genuine community of justice and peace. It seems to me, in that connection, that we should direct our attention to what that might mean in the formation of our common life—political, economic, social, cultural.

Third, a critique of the critique of Constantinianism. Given the lead of Jeff Powell and John Howard Yoder, we have up to this point directed much of our attention of Constantinianism as our *bête noire*. Constantinianism, I suppose, stands for tyranny, for arbitrariness in governance, for the abuse of power as manifested in the formation of the state, particularly when the state identifies itself as the center of religious authority. Certainly we must admit the state often functions in that way, sometimes explicitly and sometimes implicitly. Yet is there any good reason to think that the state is any less redeemable than any other kind of institution, economic or cultural? The critique of Constantinianism seems nowadays to be allied with political cynicism and with a principled anti-governmental sensibility. The state, it is thought, can do no good; all its policies and actions are suspect. Over against that kind of sentiment, I would aver that the state has its appropriate functions to fulfill in our life together and those functions include not merely the maintenance of law and order, but, beyond that, doing what must be done to promote the general welfare. In our concern with the evils of Constantinianism, we must not lose sight of the principle of the common good and what the state may properly do to honor that principle.

Indeed, given the perspective I am representing, perhaps we should be as concerned with other major institutions of our time as much as we are concerned with the character and limitations of the state. I refer specifically to transnational corporations that, in their drive for growth and profits, are wreaking havoc throughout the world. TNCs are imbued with their own value system—some might say their own religious commitment—expressed in their devotion to quantitative reasoning and utilitarian calculus. And that system, directly or indirectly, is resulting in the extinction of many species of life, even, one might argue, the ultimate death of the human species. If Christianity is, as I have asserted, concerned with the health and

welfare of the world, then it should be concerned not solely with abuse of power through the state and its agencies, but also with this other monster, whatever we might call it—maybe we should call it Mammon—manifested in the form of the global corporation. Mammon, while it often appears necessary for life, has become, in its dominant forms in our epoch an instrument of death, but it is held in such awe, we are reluctant to make it responsible to the higher law—which, as I would understand it, is the point of a rigorous constitutionalism.

*Mark V. Tushnet:*¹¹⁵ Two comments, both of which follow up on what Doug just said. One is a minor one, but I think that it may be important because it ties to something that Joe Vining said at the outset about the connection between Jeff's concern about constitutional law and ordinary law. It is hard to complain about the remark of the employer of the women at the lounge—people don't do this unless they are desperate—but that indicates the conceptual, analytic crisis: what it characterizes is not confined to constitutional law, because that's *contract* law. She is in that position because of the arrangement of private law in society.

Rodes: Actually, what she was doing was forbidden; that is why it went in front of the Supreme Court.

Tushnet: I understand that, but to the extent that there is the constitutional complaint, there is an underlying, sort of quasi-libertarian complaint, that says she should be allowed to do what she wants to do. Well, she does it, she is in the position that she is in, because of the array of private power in society which is governed by private law rather than government law in the way that we ordinarily think about this.

The second point again follows up on Doug's initial comment—and I want to put this in a way that captures the thought fairly strongly, although if I had more time I would qualify it in a lot of ways: For me, much of the discussion in this session has the air of a conversation—I think of it in my mind as law among the Bora Bora. It's interesting, and as an outsider I can profit from trying to figure out what it is. But the first and the major qualification is that it turns out that the Bora Bora have jurisdiction over a lot of folks who are not Bora Bora and they sort of worry about what the significance of that conversation is or how that conversation bears on them, and even how those of us who are not Christians ought to take this conversation, and what we ought to think of it.

Gaffney: The first thing I wanted to say was suggested by Cathleen Kaveny's very useful observation about Judge Noonan. She was asking under what circumstances a judge might recuse himself or even resign his commission. This comment brought to mind Bob Rodes's comment yesterday about the meaning of an oath, and Uncas McThenia's first question about the kind of community we are. Both of those comments were about integrity and the way that we go about the task of speaking the truth to power in language that Caesar understands. In short, I think that integrity

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is not only about feeling good inside or being able to live with oneself. It is also about witness to others.

For a long time I have suggested that biblical rhetoric should not be excluded from public discourse. But I am also prepared to acknowledge that if Caesar were to come to a *schul*, probably Caesar wouldn't know any Hebrew. He would not understand Isaiah or Amos or anything else like that. Or if Caesar came to the United Methodist Church—or any other Christian community—he may not understand Wesley—or the primary thinkers and writers of that other community. So we have a task and a duty of translating some of our concerns into language that the government or state officials can understand and grasp. And yet the reason I thought that it was worth mentioning Bob Rodes and Uncas McThenia again, is that when we try to do that, we are shut off very powerfully at the level of the Supreme Court discourse. I take it, that is why at the end of the most fragmentary chapter of Jeff's book, chapter four, Jeff is pressing the conclusion that after all the courts and constitutionalism are just another forum for Caesar.

I don't agree with Doug [Sturm's] conclusion. Let me offer an example. John Noonan represented Louis Negre,¹¹⁶ a very conservative Roman Catholic, who objected to military combat duty in the Vietnam War because he read *Gaudium et Spes*, the declaration of Vatican II on the church in today's world, to prohibit mass killing. Noonan defended Negre's beliefs as well grounded in the teachings of his community, but he did so as a lawyer using the language of Caesar. Noonan argued that the language of the statute of conscientious objection was a denial of the free exercise of Negre's right and was an imposition of an establishment of religion by giving a preference to Quakers or other types of pacifists. We should remember that just before the Negre case, the Supreme Court had pushed the envelope of the statute in a remarkable way in its draft cases.¹¹⁷ In *Welsh* it construed the statutory term "religious training or belief" to embrace almost any kind of commitment to almost anything. That is what happens when Tom Clark gets his hands on Paul Tillich.

The basis of Louis Negre's faith was that the dying of Jesus and his resurrection are a transcendent witness to a way in which he must regard other human beings. That is what it came down to. I got to know Louis. He was a very, very devout—dare I use the word Christian? He was a follower of Jesus, who found deep spiritual meaning in the fact that Jesus died for us and that he did not kill or enjoin us to join a campaign of messianic slaughter or something like that. If Jesus didn't kill, then Louis Negre decided that he couldn't kill in quite the way that his government was commanding.

But when Noonan tried that argument, it was met with absolute hostility and resistance from all on the Court but the son of a United Methodist preacher, Bill Douglas.¹¹⁸ Jeff is right in urging us to be careful about our

¹¹⁶ *Gillette v. United States*, 401 U.S. 437 (1971) (Negre was one of two petitioners in this appeal).

¹¹⁷ *Welsh v. United States*, 398 U.S. 333 (1970); see also *United States v. Seeger*, 380 U.S. 163 (1965).

¹¹⁸ *Gillette*, 401 U.S. at 463, 470 (1971) (Douglas, J., dissenting).

reconstructions of the past. And that must be a good thing to do on its own terms, because Noonan's experience in the *Negre* case suggests that we can't be sure that our efforts to dialogue with Caesar will be successful. I guess I am then left with the question of whether or not Catholics, just to identify my own faith community, can either be privatized or totally politicized, and my answer is that I think both of these alternatives are wrong. We are simply called to be faithful and to leave the results to God.

Finally, I think Chapter Four of Jeff's book is tantalizing, but not very complete. Perhaps because I am working at Valparaiso as a Roman Catholic among Lutherans, I find myself reading more and more Reformation literature. I recently reread *The Babylonian Captivity*,¹¹⁹ which I find to be exactly in concert with what Maura started this off with, *Gaudium et Spes*. If what we do, if all that matters is faithfulness for the glory of God, then that radically changes the vocation of every single one of us. In this vision there is no hierarchy or caste system in Christian spirituality. Questions about who is on top and who is below, or who is more important and who is not, are big distractors from the more urgent question of how all Christians exercise their priestly and prophetic vocations. In Luther's vision every task, whether of a lawyer, or a judge, or whoever, contains the possibility of openness to grace.

Maybe this way of thinking about vocation would be a useful way of conceiving of what it is that we are trying to grapple with here, in the whole enterprise of your book, Jeff. It seems to me that there are several voices that are missing in that last chapter. Luther would be one. I think that John Courtney Murray would be another.

Lee. John [Robinson], if I were a wiser person, I would defer to your gentle and articulate suggestion to allow those who know something of theology to carry this segment of the conversation. However, good judgment has never been enough to deter me from storming into uncharted waters.

What has piqued my curiosity in this arena is Jeff's point about the seduction of the Christian heart by the legal system.¹²⁰ Our discussion here today has only fueled that curiosity. As I listen to this discussion, the questions I hear asked are these: Do we, as the Body of Christ, approach Caesar legislatively or judicially? and, How do we, as Christians, prod Caesar to do what needs to be done? I wonder if there is not an alternative question that we should be asking.

Let me go back to Laura [Fitzgerald's] example.¹²¹ There we have a desperate woman who is doing a lot of erotic dancing, not of her choice but out of her financial desperation, and we ask, Should the political system have provided her with material goods, or should the legal system now step in and give her the opportunity to help herself?

119 Martin Luther, *The Babylonian Captivity* (1520), reprinted in *THREE TREATISES* (A.T.W. Steinhauser trans., 1970).

120 POWELL, *supra* note 10, at 7-8. "American constitutionalism, with its powerful rhetoric of 'justice' and 'equality,' has tempted Christians from the beginning to treat the American political system as theologically unique, the reflection in the political realm of Christian moral principles." *Id.*

121 See *supra* p. 51.

I would add to these two questions this third alternative: Why hasn't the Body of Christ stepped forward and told this woman, "We will give you an alternative. We will give you an opportunity to support yourself in another way." Where is the Body of Christ in our thinking? I believe that one result of the seduction to which Jeff refers is that we look to the government as this third party that we have to mobilize to heal the world. I wonder if instead we should be asking ourselves how we neutralize the government so that the Body of Christ is in a position where it can go and use its resources to heal the world of its wounds.

If you all would bear with me for a moment, I have an anecdote, told in mass last week, that touches on this point. There was a woman one day praying alone in a church. She had no funds, no resources, no assets, but she needed two dollars to pay for medicine for her sick child. A man outside the church overheard her prayers through a window and felt moved to help. He reached into his pocket and pulled out what money he had left on him after having bought a pack of cigarettes for himself.

The man went into the church and handed the woman the money, saying to her, "I know your plight, and I want you to have this." The woman thanked the man, and he left. She carefully counted the money and found that the man had given her a dollar and eighty-five cents. The woman bowed her head once more and prayed, "Lord, next time could you cut out the middle man?"

Some, I'm sure, will hear that story and think it suggests that if people try to solve problems without the government, they will always come up fifteen cents short. I prefer to think that it calls us to look beyond a governmental middle man and trust that Christ's Body in the world is sufficient to address the world's problems. Such a view should not seem revolutionary. St. Teresa of Avila, for example, called each of us to be more than the conscience of the state. She called us to be the eyes, the feet, and the hands of Christ in the world.¹²²

Sturm: The blunt fact is that if we consider the Body of Christ in its empirical manifestation—as particular congregations and churches scattered here and there throughout a population—there is no way that poverty can be adequately overcome through the immediate actions of those groups. They may, to be sure, engage in important acts of charity: soup kitchens, food banks, thrift shops, housing projects. We should not overlook the constructive impact of such acts in our everyday life. But, given the limited resources commanded by those congregations and churches, there is no way such acts can resolve the problem of poverty throughout the human community. If we are concerned, for example, to tackle simply the issue of hunger—of assuring that no one will starve—we need a massive transformation of our global economic system. That, I would like to think, is an implication of the Universal Declaration of Human Rights and that, I would argue, is one of the paramount works of charity, properly understood, for our time.

¹²² "St. Teresa's Prayer," on John Michael Talbot, *Heart of the Shepherd* (Sparrow Corp. 1987).

Lee: I appreciate your concern, but again, let me acknowledge, and fall back on, my theological naïveté. I am one of those people who believe that when a child brought five loaves and a couple of fishes to Jesus, He fed the masses;¹²³ and in that light, I think that we give away the ball game when we say we do not have faith that the Body of Christ can solve the world's problems.

I think that we, as Christians, have an obligation at least to try to be the hands with which Christ feeds and heals people today, and, therefore, our first response should always be what can we as the Body of Christ do to solve this problem. If we find that there is nothing that we can do, then let's go talk to Caesar, and say, "Caesar, you have a problem, and justice or compassion or even God wants it solved." Maybe God wants us sometimes to go talk to Caesar, perhaps to keep us humble, perhaps to evangelize Caesar. But I think we have an obligation first to ask how we mobilize the Body of Christ to deal with these problems.

Rodes: You are trying to get charity for the victims of injustice—rather than justice. That's the problem you face.

*Teresa S. Collett:*¹²⁴ Two answers. Number one, the empirical record on political intervention being able to eliminate human suffering is certainly no more impressive than the record of the church's intervention. So why do you put your faith in Caesar, rather than God? Based on empirical evidence, I find this choice rather odd. My second response is based on one of the lessons I have learned from one of the scholars at this conference: Justice is a gift that we give each other. The best the state can give us is only the pale substitute of political coercion and right conduct. If I want justice in the world, the appeal is not to Caesar; the appeal is to each other.

Sturm: I think of the state as the agency of the political community—an agency through which community organizes itself and does its work. And the question is whether or not the state does the work it is supposed to do. Like whether a lawyer does the work she is supposed to do. Like whether a teacher—which I have been all of my life—does the work I am supposed to do. And often times we don't, and we should be called therefore to the bar—a wonderful phrase—to be told, "Hey, you know, you are not a teacher genuinely." The old rectification according to Confucius: "You are not really a father. This is what a father does." The state is there as an agency of the community as a whole, in order that the life of all may flourish.

So I can't think of Caesar as something external. That is part of my problem. Maybe you're of the Yoder camp—sorry about that, John—and I am more in Maura [Ryan's] camp.

Shaffer: I think that a lot of the discussion diminishes the pervasive importance—all through American history, and right now in American civil religion—of the claim that America is the kingdom of God. This is

¹²³ See, e.g., *John* 6:1-14.

¹²⁴ Professor of Law, South Texas College of Law; Visiting Professor of Law, University of Notre Dame.

God's New Israel, as Jefferson said. And that started a long time before the Social Gospel movement, and it is not diminished, at all, right now.

We had the Star Spangled Banner as the recessional in our church, the Sunday after the Fourth of July last year. And if you look at this chap who wouldn't stand for the national anthem at the basketball game, and all the redneck comments we heard around that issue—"I am a faithful Christian and I believe in religious rights, but," he said, "this is *America*." I think, Mark, that's Bora Bora. That's what ought to worry Jews, if it doesn't. American civil religion. The rest of us are just trying to figure out what the church ought to do about it.

Kenneth Craycraft:¹²⁵ I would like to speak to an earlier comment about Mennonites saying no to Caesar in Caesar's tongue. The government would love the practical implications of a Hauerwasian type of position—*until* they went to fight a war. Then the state wouldn't be very happy about it, when the state needs to exercise violence, and needs people who are going to do it for the state.

Also, I wonder about it in terms of how Caesar likes it that any community that is substantial, that's large—if you put it in those terms—how the state likes it when that community is a group of people who tell one another that the laws of Caesar are laws that are not adequate to their understanding of the world. I used to live in Northeast Ohio, very close to large Amish communities, in which the only reason they are allowed to say no to Caesar, in Caesar's terms—if indeed it is in Caesar terms; I am not so sure that it is—is because there are not that many. If there were more, then maybe Caesar would have to say, "Perhaps we're no longer going to allow you to say no to us in our terms."

Moreover, saying no to Caesar in Caesar's terms or Caesar's own language, itself seems fraught with all sorts of dangers for the church, because language, among other things, constitutes communities. To say no to Caesar in Caesar's terms, the language that we use, is not just an expression of who we are, but also has a constitutive effect on what we become. There is always that danger of forgetting one language in the process of using another.

Rodes: We're talking about community, talking about the Christian community, and then there is talk about church and the state and church and Caesar. It seems to me that the church and the state are both institutional manifestations of one community. I have a family that consists of Christians and non-Christians and various other alternatives. I think many families are like that. I think that my understanding of the community in which I live is like my understanding of my family. We are all in this together. There are those of us who are right, and those of us who are wrong. We are all here together. The church is an institutional form within that community, and the state is another. I think when the Lord said that if He found ten just men in Sodom, He would spare Sodom, He didn't say if He found a community of just men in Sodom He would spare Sodom.

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It is our identification with the society in which we live that is part of the witness to Christ in our society. The church is an institutional form, of which I am a member, which has some juridical presence that I look to, and try to organize myself around the rules of, and so is the state.

I understand Tom [Shaffer's] objection to American civil religion, which I think is a perversion of that. What I see in *Gaudium et Spes* is that we are all in this together, and our witness is to the civil community in which we find ourselves.

Failinger: I was going to say something about a similar theme, following on Ed Gaffney's issue. What I found interesting around the room is the identification of "outsiderness." The two of you argued that Christianity was privileged and that a Christian was an insider. A lot of other people argued that Christianity was an outsider group. I would pursue the vocational notion that, wherever you are, you have to always test yourself, and your institution, as well as to be faithful to your institution. The sort of paradoxical thinking that Lutheranism does with this problem gets you out of that dilemma. I think that when you start saying that it is us against Caesar, there is no self-critique. And you don't know if you are an insider or an outsider. You might start pretending that you are an outsider, when in fact you're making exactly the same moves as an insider; you have the same kind of power. You might not also realize that you have an outsider responsibility when you are in the elite. You might just forget about that. You might not make that move, when you should, because you have realized that you are an insider as the inside-outside critique goes, and therefore give up on outsider critique. I think that is a better way of thinking about it.

Graham Walker:¹²⁶ I wanted to speak to the outsider question, too. I was very happy that Mark [Tushnet] phrased it the way he did. It seems to me the answer to the question may be much more subtle than it appears.

I have been in groups where law was discussed, where I, too, felt like it was "law among Bora Bora," and I am usually the outsider. Actually, with at least a couple of you in this room identifying yourselves as not being Christian, this has become one of the few places where the Bora Bora and the alternative tribes have talked to one another at the same table, which I find gratifying.

Now, if you are in a group where the strictly secularistic approach to law is assumed to be the neutral territory, that is a situation hard to break out of. What you can't break out of there is the spurious claim that those who consider law from a non-religious point of view somehow have an impartial, neutral understanding of things. Whereas the fact is, as Joe Vining pointed out, that at a high level, all discussions of law involve some commitment to, some understanding of, the whole that we are a part of. It just happens that this group of Bora Bora has been fairly explicit about its view of the whole. Being a Christian doesn't seem that ambiguous to most of those around this table who would identify themselves as such. I am not a

¹²⁶ NEH Fellow, School of Social Science, Institute for Advanced Study, Princeton, New Jersey.

Roman Catholic, but I am certainly one with those who believe that a certain male human being, at a certain moment in history, was the incarnate Word of God, and a sufficient revelation of the character of the ultimate being behind everything. The Christian story is specific, not nebulous.

What makes it so hard in our current situation to talk about the justification of legal order as a whole, is that some stories are explicit about their commitments, and others are not. So it may be that we need to have talks among the Bora Bora and between the Bora Bora, and other tribes, but when the other tribe doesn't admit to being another tribe, the discussion becomes very difficult indeed.

Moreover it seems to me that the concern that Mark voiced, and which others have voiced, about exclusion of the non-Bora Bora turns out to be a concern which has perhaps very historical roots in a certain Bora Bora doctrine—the outcast and the alien being special objects of concern for those who stand within the theological tradition of Judaism and Christianity.

Collett: One of the things I liked about what Maura [Ryan] said, and also I liked about the book, is that they point out the only way I see us as having a common language, without going back to the Enlightenment. It is having the common commitment to truth. That is the only way I think we can define when we have to opt out.

I worry about that a great deal with my law students: Can I be a lawyer in this culture? Can I be a lawyer in this system? Could I have been a lawyer in Nazi Germany? I think that many of my students, going beyond sectarian concerns, see that the only way to create that truly inclusive language, without forcing people into false languages, is to talk about truth, of which our knowledge is only partial, and to accept that your description of truth (as long as you accept the moral commitment to honestly convey it) may well be more accurate than mine, because of the vision you have of your particular aspect. What we need to construct is a fuller understanding of truth.

If I as a lawyer have to deny the existence of ultimate truth, I think that is when I have to opt out, as a believer of whatever faith; I think that's when civil disobedience has become mandatory. Maura brought that up. I think that's when John Noonan opts out. In fact, this summer he was asked to recuse himself because of his Catholicism, and he said, "No, you can't separate my faith from who I am." Judge Freeman, a Mormon, arrived at the same conclusion. I think that it is an issue that is very timely.

Robinson: We're now going to ask Jeff to respond to the instruction he so tactfully received. Then we'll respond, to make sure that he got the lesson.

Powell: Thank you so much. This is an incredible experience. Actually, one of the remarkable things about this conversation is that it is actually a conversation. One of the reasons I look forward with somewhat negative emotion to faculty workshops is that so often they seem not to be conversations but opportunities for people to occupy airspace in succession, or sometimes simultaneously, and this has been very different from that, and I thank you so much for the time and thought and concern you

have shown about matters that are important, even though the vehicle we used to discuss them was full of flaws.

I want to start with Joe Vining's third question, the question about the implications for the rest of law, and any conclusion we might draw about constitutional law from the arguments I made in the book. I think there are very profound conclusions or implications that arise, that I think we do face, in the wake of the substantial decay of an earlier tradition grounded in what Joe calls legal method. We face profound questions of how to go about the day to day administration of a lot of law.

I take Cathy [Kaveny's] point that judges still look like they are getting things done, and they certainly get decisions made. But I think, across the broad spectrum of the law, issues about how—for example—to go about interpreting statutes have become exceedingly difficult. As recently as the 1970s, the courts could still issue opinions, with straight faces on the judges' heads, about interpreting statutes in the public interest, or interpreting statutes liberally in accordance with their remedial purposes. That language has largely disappeared from judicial opinions because it has been laughed and ridiculed to death, or virtually so.

The public choice folks, the economic analysis folks, and political critiques of various sorts have left that very traditional, very central aspect of legal method—the confidence that one can interpret legal documents or doctrines in accordance with broader common or public interest—in tatters. That confidence has been shattered. I think it is a crucial question what we do to regain it in some fashion, or substitute something for it, and I am not optimistic about how well in the long term the legal system will be able to conduct itself in the absence of finding some means of doing that.

I think that the problem goes beyond law in the strict, narrow sense. I see it as a lawyer and not a direct participant in the policy debates all the time in Washington, as policy debate itself suffers from an inability to articulate the claim that something is for the public good, something will be for the benefit of the *res publica*—except for the claim on the evening news, not taken very seriously by anyone, cynical in its very articulation.

That kind of thinking, as opposed to the ceremonial and ritualistic and cynical statements for the news, has come upon hard times, and that has profound consequences for the conduct of public affairs. If there is no *res publica*, on what basis do we make our decisions—other than the results of naked power struggle?

So I think that there are profound implications in Joe [Vining's] third question, a question that dovetails with the question about implications that was John Howard Yoder's question. Well—I am rephrasing it in a way that you didn't put it—are we being too quick to beat up on what Joe was calling the mathematical forms of thought, and what I call the rationalistic forms of thought. My answer is a form of confession and avoidance, an old legal technique. I think that John [Yoder] is probably right. It is possible—not on Joe's part but on mine—to seem too negative about rationalistic thought, and that is a mistake. It is a mistake, primarily, because I think John's suggestion is exactly right: The Enlightenment's origins, the origins of modern rationalistic thought, are in substantial measure the product of

understandable and indeed wise historical response to the horrors of early modern Europe. Religious struggle led, eventually, very slowly, to an understanding of the horror of oppressing religious and ethnic minorities, and so on.

So that rationalism's rules, Enlightenment style liberalism, are defensive strategies designed to ward off the dangers of totalizing traditional forms of thought and political practice. I also thought that Ed Gaffney made a very nice point, about the way in which the deontological modes of thought govern thinking being a way of paying respect to difference, both in the sense of actually enforcing on oneself recognition of others' differences, and a respect for them, in concrete decisions, and more generally as a systemic way of providing us with a means of talk and resolution of conflict and decision that transcends that particularities of—to use common jargon—thicker communities or moralities.

Within the law, I want to say one thing about that: Rationalistic thinking clearly has an important part. I don't want to throw it out. My point here is to reverse what I take to be the common arrangement of concentric circles in people's thinking: instead of rationalistic thought being the broad, overarching category, it is one particular mode of cognition with its own value and its own limits that exists alongside others in the law and indeed elsewhere. So that I am not—although I suppose the book may suggest—I am not saying that no lawyer should ever craft a rigorously deductive argument, but only that that is not the whole of, or even I think in the end the center of, traditional legal method. And that if it comes to be treated as such it is dangerously reductionist.

That brings me to another thought. When I was doing my Ph.D. I was at a seminar once, sitting next to one of the relatively few people in the program who shared views similar to mine. Someone was opening up with both barrels on Kant, and my colleague leaned over and said, "Oh dear, another round of Kant bashing," which was very common in the sort of Ph.D. program that I did my doctorate in. Well, I don't think there is any place for Kant bashing. My concern is that rationalistic modes of thought have become—in any of number of different forms—traditional liberalism and public choice theory, just to take two examples—the overarching schemas by which people attempt to guide thought and action. It is a dangerous reductionism, one which seems to me reduces to a thin level the rich complexity of human thought and action, and in particular which risks turning our faces away from the fact that life is lived in the particular.

Somebody—I think it was Bob Rodes—said that for lawyers what really matters in the end is getting the particular judgment won, in the particular case. I had a very enlightening discussion years ago, in a conversation in an interdisciplinary seminar at the University of Iowa, in which I had been engaged in a fairly heated exchange on whether there was any truth to the notion put forth by E.P. Thompson that the way in which a certain set of English statutes was applied in the eighteenth century had played some relatively benign human role, although admittedly a limited one. After the seminar was over, I went up to the political theorist with whom I had been arguing and said I supposed the basis on which we seemed to be disagree-

ing was that I put a lot of value in the fact that Thompson's argument, accepting it to be historically correct for the moment, was that in a substantial number of cases these laws, as administered by the lawyers, actually protected particular people from particular bad things happening to them. To which the political theorist responded, "That doesn't matter. In the end, the law is going to bow before political power." And I said, "You're right, and it does matter. It mattered because the bad things didn't happen to those particular people." I think one of the dangers of the reductionism that tempts us today is that it moves us to levels of high theory, moves us away from the importance, and indeed, for Christians, the utter transcendent importance, of the particular and the individual.

I want to turn now to Joe [Vining's] second question, about the nature and meaning of democracy. I completely agree: Democracy is not a given. It is a construct, and indeed within the American constitutional tradition it is a legal construct. And one of the things which the book does very poorly is lay out the way in which the judges were in fact constructing that reality, while oftentimes, particularly since 1937, acting as if they were protecting a preexistent reality. You can see that in decisions like the patronage cases, in which the Supreme Court in the name of the First Amendment has substantially limited the ability of political officials to employ patronage powers to hire and fire their supporters.¹²⁷

From one perspective—and I don't want to argue it either way at the moment—this is a great gift. You no longer have the mayor getting into office and firing everybody on down the line. From another perspective which seems to be equally incontrovertible, what those patronage decisions do is significantly reconstruct what local democracy is in fact. That may be good, but one thing that was not noticed by the Court—by the bare majorities that did this—was that it was in fact reconstructing the meaning of democracy: the majority's mind was on other matters.

Joe asked the question whether the fate of politics is tied up with the fate of tradition. My answer is, Yes. You're absolutely right. I think I underappreciated the point lying behind the question when I wrote the book. I'd like to plead that yesterday's lecture¹²⁸ was a very small down payment on trying to think through my answer to Joe's question.

Laura Fitzgerald made a nice point, one that I have done a little bit of work on in an article published a couple of years ago in the *Virginia Law Review*. Your point was this: that our problem really is how to make our *politics* constitutional. How to reconstruct a sense of the political sphere. The political sphere is one in which an argument could be, But that is contrary to the Constitution's demand for laws that pursue the general welfare. We need to find ways to make that kind of argument salient. And make it salient in the sense that it is not just a "political" point, in a derogatory sense, but is a constitutional argument sounding in the political arena.

One other thought in response to your second question, Joe: As I suggested yesterday, law, and particularly public law, is a means by which the

127 *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976); see also *O'Hare Trucking Service, Inc. v. City of Northlake*, 116 S.Ct. 2353 (1996).

128 See Professor Powell's lecture, given the day before the conversation, *infra* p. 82.

community constitutes itself. I think it was Ken Craycraft who spoke about how language establishes a community. That is exactly right. The language of American public law is one of the central means by which the American community exists. Of course, in some sense, the American polity exists as a fact about physical and psychological force. If you doubt it, argue with the I.R.S. on April sixteenth. There's a fact. But the American political community like all political communities aspires to go beyond that, and the American public law is a means by which the community seeks to realize itself as community, and indeed as democracy or whatever. Indeed, that process defines what it means to say that this is a polity ruled by the *demos*.

As a quick footnote, the thing I don't want to endorse—and maybe no one is hearing me say this, but let me make it plain: Some people writing constitutional theory today take care of the perceived problem of judicial review versus democracy by redefining the word democracy so that the word simply becomes whatever it is you approve of. I don't think that is a useful move. It just means the word doesn't have any critical meaning.

I now want to turn to Joe's first point which was about the impact on practical thought of cosmology. And that directly brings me to Maura Ryan's powerful questions and comments about the theological basis of this book. A number of you pointed out in gentle terms the relatively thin and fragmentary nature of chapter four. You're right. I simply agree with you.

I want to start by saying that I am in total agreement, Maura, with what I take to be your assertion that a very important aspect of Christianity is Christianity's commitment to the reality of the common good and our obligation to seek the common good. I am reminded of this, actually quite frequently, given the kind of work I do as a lawyer, whenever—I am an Anglican—I am in church. Almost invariably we pray for the common good. Nowadays, I hardly can participate in that prayer without thinking about the fact that a substantial body of my fellow academic lawyers do not believe there is any such thing. Definitionally. It does not exist.

Christians don't have that option. We are committed about it all the way down. All the way down to an even more fundamental set of beliefs about God and God's nature, to there being a human common good, and a human common good that does not just exist on an abstract general level, but actually exists in terms of the concrete communities in which Christians and others find themselves. My objective in the book was not to find some way to recommend that we escape Doug Sturm's point about the secular world, which would be perfectly happy for Christians to become quietist. I don't want us to become quietist. Quite the opposite. The question is how can we, consistent with our substantive commitments, pursue with our fellow human beings—who are not members of our religious community—the common good. A large part—perhaps not all, but a large part—of what I mean by anti-Constantinian thinking is to try to find a way

to express the Christian commitment to action for the common good within the bounds of other Christian commitments.¹²⁹

I have a number of thoughts that I have failed within the time available to put in any coherent order. The deepest thing may be something that worries me a great deal, and it worries me in several different directions. I think there is a very great danger that we will collapse realities that are eschatologically one but diverge in this time between the ages—the secular and the sacred, to use terminology the apparent polar oppositeness of which I don't want to endorse at all. It is not yet the case that the earth is the Kingdom of God, and it is emphatically not the case that the United States of America is the city on the hill, contrary to what a recent president often told us. I think it is vitally important as a matter of truthfulness, and vitally important in order successfully to repair and heal this particular political community, as well as the world at large, that we not make the mistake of collapsing together things that are not yet united, and have not yet been reconciled.

There are differences or distinctions. Tom Shaffer's concern about American civil religion is one aspect of that. American civil religion is one massive conflation of things that are not yet one. Within constitutional theory, sometimes by people like Michael Perry who are Christians, sometimes by people who are not religious, we see a similar collapse of distinctions between the perfect community and the perfect constitution in a totally just society, and the realities, possible realities, of the actual American constitutional order. That is one of the central things that I am trying to get at when I talk about—when I used to talk about—anti-Constantinianism.

One incredibly important point has been put on the table, and I am very glad it was, by Mark Tushnet. Non-Christians are right to fear Christian social power. They are absolutely right. Christian social power has been used again and again in history in evil ways. The starting point for Christian truthfulness and Christian social witness is to recognize that and to be aware of it, and to let that fact shape our action. It is not in the end a surprising fact, it seems to me: evil is at its most powerful closest to the altar, from a Christian perspective; that fact is one we just have to deal with. We have to deal with the rightful fears and concerns of non-Christians, the non-Christians who are our brothers and sisters and members of the political communities in which God has placed us.

That by itself is an incredibly powerful point, and it connects with another point: The way I put it to myself is that it is important for us to recognize the legitimate, if limited, integrity of the secular or the penultimate. I don't believe that Christianity denies the integrity of the secular. This is a point made by St. Thomas Aquinas: Grace does not destroy nature; the secular and penultimate have their own created reality and goodness, and it is part of Christian social witness to understand the distinctions

129 What I had in mind were Christian commitments to respect for difference and the other, to non-coercive social relationships, and to opposition to totalizing claims of authority by the state.

between the ultimate and the penultimate. To learn properly to respect that which is not ultimate.

This is the point Randy, Teresa, and I were talking about last night. I was asked: Suppose I were a justice on the Supreme Court, and the country adopted a constitutional amendment—well crafted by good lawyers so as to leave no loopholes—eliminating across the board any constitutional protection for free speech. The question was whether the amendment was constitutional, substantively constitutional. (We were assuming that the amendment was legitimately adopted.) I was asked whether I would vote to hold, on some theory like Walter Murphy's, for example, that the amendment was unconstitutional because contrary to the basic structure of the American constitutional order.¹³⁰ My response assumed that no one was going to ask me the prior question: whether it would bother me all that much.

Assuming that I think that this amendment was so awful that I would be tempted, would I so vote? And my answer was: No. In the end the reason my answer is no is that I think that—and this is a debatable judgement, I know—it seems to me that this particular penultimate secular political order has chosen to structure its fundamental law in such a way as to permit itself to radically change its fundamental law by processes, and were I then to stand in the way, to use power that the very order gave me to prevent that order from doing that, I would be failing to respect the appropriate integrity of that secular political order. Even if I thought that what it was doing was contrary to my higher commitments, the question would be a difficult one, which might then raise the question of my resignation.

Maura Ryan and Randy Lee both pointed out that one of the concerns that I was raising was a concern about Christian resistance to the seduction of constitutional law, and the American political order, its pretensions, and so forth. I think that is something that we need to keep a hold of. Whether at any particular time we should be more worried about being too pessimistic about what can be done within and through the American political order, or whether we should be more worried about being corrupted by it, is a question that I agree with Mike Baxter about. There is no general answer. The answer will always be situation specific.

One theme that I heard again and again in the discussion, and I have got to do a lot more thinking about it, is a theme that I have an easy way out of being worried about: It is to say that I am a Protestant in a group that is largely Catholic, so that what I am hearing is an old Protestant-Catholic dispute. But I think that is wrong. When people talk about Christian social witness, people often seem to assume that there will be a single unitary Christian social witness. Well, I don't think so, not on a lot of things. I don't believe, on a lot of issues, including issues that you and I feel very strongly about, that there is a single, not debatable, without any doubt, Christian answer.

I don't think there are on a lot of issues, including incredibly important ones, single Christian answers, not just empirically, based on the obser-

130 WALTER F. MURPHY ET AL., *AMERICAN CONSTITUTIONAL INTERPRETATION* 191-92 (2d ed. 1995).

vation that Christians occupy places on all parts of the political spectrum, but because I don't think that a lot of questions resolve themselves unmistakably within Christian terms that as a Christian I am bound to accept. I am—and here the Protestant rears his head for a moment—I am fearful traditionally, historically of us forgetting that, that there is not on many things a single answer. Indeed I think that one of the greatest gifts that the Christian community has to give the secular communities in which Christians live is a model of how community can exist, be created by, and be constituted by substantive commitments—not just thin process agreements of how we are going to talk, but substantive commitments, ones that really matter. Yet at the same time permit, foster, encourage, live through and by, disagreement and debate. Now we have not been, I think, notably successful at modeling that sort of community for ourselves, or for anyone else; but if we were to do so we would, I think, be truer to what we are called to be, and we would be serving the common good which we share with our non-Christian brothers and sisters, by modeling a political community that the wider political community has not achieved and in fact seems to me to be thoroughly retrograde about.

We have the problem of violence, coercion, all of those issues. I am not a pacifist. On the other hand, I think that the use of violence as a means of maintaining or achieving social order has to always be problematic for Christians. That is a waffle word; coercion ranges somewhere between impermissible and evil totally, to permissible and evil, a necessary form of participation and guilt. One of the things that my use of the anti-C[onstantinian] word is meant to remind me of is the fact that I think that there is not any way to avoid coercion entirely, short of sectarian withdrawal. There is not any way, given the fact that I am not called to withdrawal, but I am called to be a part of the broader human community. That involves me in the messy, dirty, violent realities of that community. I don't escape my responsibility for that, and in the end I don't achieve some sort of moral purity, doing otherwise.

Doug Sturm and other people raise the question of justice. Where is that in this discussion? A couple of thoughts about that: The law doesn't exist for itself. I think that self-contained notions of law are destructive, utterly in the end. One of the ways that you can characterize what the law exists for is to use the word "justice." Getting down to particularities, the American legal tradition, and indeed the very tools and methods of legal method that Joe Vining and I have been talking about, are themselves laden with what are sometimes implicit moral and political commitments of all sorts. So that there is no escape into a world of process. We indeed are always going to be dealing with questions of justice, and we will deal with them better if we are aware of that and if we tackle them head on. Recognize that we are in the world, an unpleasant world sometimes, and unsettling all the time. Real decisions have to be made that really affect people, hurt people, maybe help people sometimes.

I was very struck by Marie Failinger's analogy or metaphor about legal method as our liturgy; I rather like that, although you took it in a different direction than I would have taken it. I thought I heard you saying that

there is our liturgy—which is how we express how we think—and then there is what we believe. I think that is more of the way that you formulated it, rather than the way you want to ultimately define it.

Failingler: Yes.

Powell: The formulation itself would not quickly occur to a prayer-book Anglican since it is the liturgy itself which is the only real expression, not just of what Anglicans do when they express their Christian faith but in fact it is the only formulation that Anglicans recognize as having authority to state the Christian faith. I think that is true; that is why I like so much your metaphor. That is true of the law's liturgy, of legal method. It is not just a way of expressing or trying to point towards the substantive commitments; it is in fact the carrying out of those substantive commitments.

That brings me to my final thought. Despite all that is said about American law, in the end it is human law, and it is human justice, and I think Christians, actually I think everybody, is called to seek human justice as far as it is within our power. Our power that is limited by our limited and narrow and fallen visions, as well as other external limitations to our abilities. We are called on to seek in human justice to approximate divine justice, but were we tempted to think that we can close the gap altogether we would be starting out on a path that will mislead us. However uncomfortable, that's the way it is. What will feel like compromises sometimes—and no doubt be compromises, given the conditions in which we live—tells us to acknowledge that that's the way it is. That is what it is to be human beings in this particular fallen but graced world.

Shaffer: If I understand you right, Jeff, you think that the substantive discussion of common good in American society now is not likely to be successful. I suppose the exception is that America seems to get together pretty well on who they want to kill, or who they want to keep out, but not on much else. I think it is very sad that Mr. Buchanan thinks of himself as more an American than Irish, for instance. The Irish have always been able to get together on more than who they want to kill and who they want to keep out.

You make the suggestion that the faithful should model—the church should model the common good for the civil community. I take it from the context that you mean procedurally. My favorite example of that is Yoder's hermeneutics of peoplehood, about the way a New Testament community discusses things. A very particular example, but, I take it, something like that is what you mean. I wonder if you would say that the faithful community should model the common good discussion substantively, that is on what the common good is. I think that *Gaudium et Spes* leads to that. That is, we will talk together—the faithful will talk together. The faithful will go out and bring in the experience of the wider society. Then we will decide, when the door is relatively closed. We will then decide what the common good requires, and then we will go out and advance it in servanthood.

Maybe that is meant by John Yoder's use of a biblical quotation from Jeremiah, that you seek the faith of the city, seek the good of the city. That

it is the captive people, there in Babylon who will talk about what the good is, the common good they will seek. Now does that make any sense at all?

Powell: Yes. I agree with you—

Shaffer: If you can't in the wider society discuss the common good, you have to discuss it somewhere, and that means that you will come up with a relatively sectarian notion of what the good is that is common.

Powell: I don't know about the very last point; but up until there, I agree completely. I had in mind, when I was talking about that, the modeling—indeed fostering—of a genuine, caring community, along with sharp and substantive disagreement. But at the same time I completely agree that the faith community can and should model debate over substantive questions. To take the biggest bull by the horns, the question of abortion and its link to all sorts of other questions; about the distribution of wealth, the way we deal with illness, etc. All of those questions are ones in which the broader community is at loggerheads, bitterly divided, and as to which I would hope that the Christian community could model, because not all Christian communities agree on those issues.

We can model ways of thinking how do we get at these problems? And how do we juggle the different concerns that in the broader world, and among us, are treated as though they should be held apart? So that, for example, you are only going to stand up for the right of the unborn, and I am only going to worry about the tragic plight of the thirteen-year-old girl. We should model bringing these sorts of concerns together, so that we can think about them truthfully.

One of the things that I think we should learn from our experience, and can model from our experience, is that models of the common good that think of it, like models of democracy, as some pre-discussion given, so that the common good is lying out there and in some literal sense is simply to be found—It is under that rock—are wrong. Or, if they are right, they are right in the mind of God, which is not directly accessible to us. The common good is something that is in substantial measure going to be shaped and made reality by us together. That does not mean that it is a relative concept. I am not making it up; but it is not something that is just out there for objective ascertainment.

Walker: That suggests to me, though, where the analogy between the community of the Body of Christ and the political community will generally break down. The Body of Christ has substantive commitments in common, with its disagreements subsidiary to those common things. That Jesus is Lord, I guess, is one way of stating the common thing, and the Christian community does not debate whether or not Jesus is Lord. That is a comparative-religion debate, not a debate within the Christian community of the Body of Christ.

This is unlike the debate in the political community, where if there is agreement around some common goods that are labeled as such, the very identity of those goods is under discussion. Would you agree that makes the analogy inapt, that makes the analogy limited?

Powell. The analogy is limited, and all modeling possibilities are limited, I agree with both of those points. I am not sure we are disagreeing on that at all. A couple of thoughts: One is that unlike some people I am very close to personally, and intellectually in a lot of ways, I don't think the secular community's common commitments are quite as thin and shallow as they are often portrayed to be. Somebody mentioned earlier today Rawls and his idea of overlapping consensus. I think there is some significant body of agreement.

Also, what I said a moment ago in response to Tom Shaffer is not meant to suggest that the common good is an entirely constructive matter, as if, after careful thought about it, we decided that rape and pillage were good, and mercy and justice were bad, then that would be our common good. No. I don't think that is the case at all. I want to avoid the mistake of having in mind one error to reject and therefore moving too far to the other side of the boat and then capsizing.

My concern is this: Lawyers in America have sometimes thought, in a naïve fashion, that the common good is simply out there to be scientifically discerned—by a lawyer—certainly not by a politician.

*James T. Burtchaell, C.S.C.*¹³¹ A number of people here have identified themselves as *Gaudium et Spes* Catholics. I am tempted to identify myself as a *Credo in unum Deum* Catholic. I will just say I am a *Lumen Gentium* and *Gaudium et Spes* Catholic.

MacIntyre's account of authentic traditions, practices, and virtues supposes that they are vital elements of an enduring community. The common law—an amalgam of traditions, practices, virtues—was the progeny of such a mother-community, for it was unified more by the Catholic Church than by Britain, whose ethnic diversity was being stabilized during the era when the English were subduing their unwilling Celtic neighbors in Wales, Ireland, and Scotland into a forcibly United Kingdom. The Catholics were community with enough of a common conscience to sustain a common law. It was a community with a reliably shared sense of analogy strong enough to develop its sense of justice out of a past it both honored and reconstructed.

What assured the disintegration of the common law was the disintegration of its mother-community, the Catholic Church. It fell apart slowly, but decomposition was well advanced before the Enlightenment begot the common law's new rival: liberal American constitutionalism.

The common law had had older rivals: the various Continental laws that blended the Roman codes with national customaries, and the canon law. Canon law was the nearer rival. The two jurisprudences had matured together, by the concurrent assemblage of their respective great collections. The canon law had more breadth and the common law more compactness, in that the one writ ran so much farther than the other. The common law had the greater freedom to grow and flourish, since its sovereign's statutes left more room to adjudicate than did the canon law's sover-

¹³¹ Father Burtchaell is former chairman of the theology department and former provost of the University of Notre Dame. He now resides and writes in Princeton, New Jersey.

eign's decretals. But in the long pull the British common law grew in vigor and breadth—and then emigrated to America, and encountered here the oppressive influences of the Enlightenment, the industrial revolution, a cybernetically empowered national state, and contractual individualism, which all combined to savage and suborn the government, the economy, the family, and their traditional patroness, the Church.

Constitutionalism has proved to be such a devastating rival not because it adhered to a fixed, documentary norm, but because in the guise of a merely procedural code that offered peaceable neighborhood to all parties regardless of their faith or fidelity, it has proved instead to be the mistress of a new creed with disciplined allegiance by doctrinaire believers, a creed meant to be imposed on all citizens with a vigor and zeal beyond that of Constantine, or Justinian, or even Decius.

The present epistemological crisis, or impasse, is not a muscle spasm that has disabled the traditional contention between the substantive tenets of the common law and the procedural rules of constitutional interpretation, but the long-delayed discovery by some descendants within that Church that liberal constitutionalism has become a bully, and that its Enlightenment imperatives are after all much more substantive than procedural. These Catholics were loath to notice constitutionalism's inclination toward what Justice White in 1973 described as "raw judicial power."¹³² Their political future feels the early chill of a long and bleak winter, now that the political order has become the predator, not the protector, of the family, the workplace, and the Church.

An illusion has been broken: that this political community was a fellowship wherein we all—or at least most of us—could find enough community to feel at home. We had thought ourselves still bound by enough common understandings and aspirations to be able to wrangle together (as MacIntyre has described). We had never imagined that so many of our fellow culturemen would regard our Christianity as an identity we were expected to repress. Those of us who did once believe ourselves at home here—who are more disposed to judge the nation's culture by our faith than our church's culture by our ethnicity—ought now to know that our citizenship in this unstable national coalition will be bearable only if we hold to our faith more fiercely, and contend for our standing as a religious people bound by a closer, shared sense of justice to our fellow communicants across the world than to our fellow citizens in this land. This adopted nation must now be less a haven than a wild, where we must feel like awkward and wary immigrants.

Jews have seasons when they felt more at home here, and less at home here. We have usually helped them by alarming them often enough for them to take good care about themselves and their own solidarity. But nobody has been doing that for us.

I conclude with an image: Everybody knows that John Quincy Adams hated Andrew Jackson, and all those other people who, from the time they got drunk and trashed the White House on inauguration day, began to do

¹³² Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting). Although it appeared in *Doe*, Justice White's dissenting opinion applied as well to *Roe v. Wade*, 410 U.S. 113 (1973).

that to the whole country. Adams ran for and sat in the United States House of Representatives. He sat there as a reproach to the Jacksonians, voted down on everything. Of course, the burnt stump of the New England aristocracy hated what was going on, and he knew what he counted for there. But it didn't bother him. He didn't get his identity from any congressional majority. I think that is probably a better patron for the way we ought to be.

I had a classmate who worked at the Pentagon at the time the Catholic Bishops first circulated the draft of their letter on peace, which was really a letter on nuclear arms. And he told me that when it first came out—the first week—the Navy began to make plans to withdraw Catholic officers from command positions on nuclear submarines, because all of a sudden they were stricken with the thought that Catholics were all security risks. Fortunately or unfortunately, as you see it, within a few weeks they didn't worry anymore. They realized that there was no risk at all. Catholics weren't paying any attention to the Bishops, because the Bishops had been trying so long to preach to the Oval Office that they stopped preaching to the Catholics, on grounds that perhaps only Catholics could understand.

So I was struck by that story, and wished that my fellow Catholics were more of a security risk. I think that what's going on under the guise of constitutional interpretation is as oppressive an imposition as our history books tell us about. And we will find the gumption and the inspiration to stand up to it only as a community of belief, not as individual voters or believers. As a Catholic, I wish that we weren't right now at the other perigee of our cycle, where we have been so anxious to prove ourselves unquestioning in our loyalties to some very bad law.

Failinger: The thing that disturbed me about your comments, Jim, was the move that I now see so many people making: law is the thing to blame for everything. I don't think law caused the crisis of the church. I don't think that law caused the crisis of the family, I don't think it maybe helped those things. Constitutionalism is the actual word you used: I think maybe it did not help matters in very discrete, particular cases; but it is putting a lot of weight on constitutional law to try to expect it to reverse the course of the world.

In that sense, I think the focus on legislation is a more appropriate focus. It does have a broader aspect to it. Constitutional law is very limited. It has a broad vision, but a limited remedial power. I think that we shouldn't make the mistake of choosing constitutional law as the thing to be dumped on.

One of the things we were talking about is what difference would it make if we thought about our own faith traditions in relation to constitutional law, or any kind of law? I think one of the reasons we don't do that is that most of us don't know much about our faith traditions. Most of us don't articulate the kind of thing that Harold [Berman] was talking about—what historical tradition do I come from? And why has that made a difference in law? How could it make a difference in law? If we could be more religiously or theologically competent, I think that we could contribute more to this conversation about what constitutional law could be.

Shaffer: I think it is the case though, that, if what you say is true, it is because law is a god that failed. If you look at the golden era of American lawyers, they put that kind of faith in the Constitution. David Hoffman, for example, speaks of lawyers serving the Constitution as in a temple, and lawyers are the priest in this temple. He derives a little ethic from that, but he says that always the Constitution comes first. It is the god.

Walker: We also have to take seriously in that context the power that the Constitution has in shaping, in telling us a story. It is more often the case that we are shaped by traditions than that we shape traditions. Traditions, including constitutional traditions, make claims upon us that we don't have, that we have not chosen. So the story that the Constitution tells us about who we are and who we aspire to be has to be open to criticism and judgment.

Failing: I just don't think that the constitutional story is very monolithic.

Harold J. Berman:¹³³ The constitution of David Hoffman¹³³ was also common law. There was for him no great contrast. Isn't that so?

Shaffer: If the constitution was on the high altar, in the center of the cathedral, the common law was on the side altar. I think that Jeff was right about that. Those lawyers used common-law method in practicing constitutional law.

Gaffney: On this talk of the worship of the constitution, by the way, there are a lot of texts gathered by Alex Bickel in his Holmes lectures at Harvard Law School.¹³⁴ Bickel talks about the corporate lawyers of the late nineteenth and early twentieth century who praised the sacred character of the constitution as stretching its beneficent powers over America "like the outstretched arm of God himself." Robert Bellah would later find in the political discourse of great American presidents the kernel of what he called the American civil religion. But what these Wall Street lawyers had in mind, of course, was that the constitution was to be revered as sacred or worshipped as divine to the extent that it secured the property interests of their clients. This fact gets us back to the question of knowing which kinds of gods to believe in, and when idolatry should be called idolatry. So there is a danger on that path.

I thought there was a very important point that you made, Harold, about how a tradition is continuous. And Jim really hit that one powerfully too when he spoke of the coherence and cohesion found in the glue of shared narrative. To be sure, the American narrative is full of hubris, and arrogance, and exclusion, and is demeaning to lots and lots of peoples. Nonetheless the continuity of the American tale strikes me as a very important point. For this reason, Jeff, I was rather jarred by your answer to the proposal of an anti-free-speech amendment, because however you go at it, I am sure you think of life as more important than speech.

133 Robert W. Woodruff Professor of Law, Emory University.

134 ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970).

Maybe we can use a different hypothetical, and take a different crack at it. Suppose we had all of the process values in place for the super majority to do an amendment that would enable the Nuremberg laws. Then, I guess, to get back to what Cathy Kaveny said this morning about John Noonan resigning from the bench, might a judge, under your theory of American law as it is now practiced and experienced, sign death warrants and send people off to the camps to be exterminated under these laws?

Powell: I actually think that, with all respect, those kinds of hypotheticals are not particularly troubling because they address the point at which any decent human being is going to say, Look, what decision is the most effective way to respond to this monstrous evil? I don't know what your most effective response would be if you were a judge in that circumstance. It is going to depend on things like, If I stay in this position, and therefore am part of this administration, can I effectively defeat part of what this evil system wishes to do, or in fact do I simply become part of its functioning? Those are questions that can't be answered—

Gaffney: It is not as easy as you make it to be. I take it that was the point of Bob Rodes's serious question about whether he could retake an oath in the 1990s. He could do what Thomas More did: "Let's see the statute, and see whether or not I can take the oath." He could do that type of thing. Or he could say, "Oh well, I took that oath back in the forties, and you know *Roe*¹³⁵ wasn't on the books then." But for someone like Bob Rodes, the deliberate, intentional taking of life is a very serious, big, large issue. I deliberately wanted to give you an easy question. But one could then ask, "Why do you distinguish your answer from the abortion question, or the free-speech question," as to which I take it you're prepared to say that if the court issues *Roe v. Wade*¹³⁶ or if a constitutional amendment put an end to free speech as we know it, that ends our discourse, ends our narrative, and ends our ability to be continuous.

Powell: It is always open and indeed obligatory upon any human being faced with monstrous evil to find the appropriate way to respond to it.

Gaffney: Well, why are not these things of that order? And, if speech is of that order, then why not religion?

Powell: These questions—the answers, if they were to reach the level of that order, are too specific to the situation for us to have in the abstract an answer. I don't have any useful answers, because it depends on the particular circumstance.

I am willing, for the purposes of the hypothetical, to say, "Okay, I assume the elimination of free speech rights from the Constitution," which would not, by the way, eliminate free speech. All that it means is that courts are not going to strike down statutes that attempt to restrict free speech, so I don't know that it produces, off the bat, any results that I think are evil.

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

136 *Id.*

Gaffney: Wouldn't it be within the power of the government to penalize people for speaking their minds and hearts?

Powell: Sure, sure.

Gaffney: Well, penalizing people for speaking their minds and hearts comes awfully close to penalizing the free exercise of religion, because religious speech overlaps with political speech all the time. They cross over and overlap. That is why I was curious about whether your view would extend to the protection of the free exercise of religion. It is one thing when the court radically diminishes judicial protection of free exercise in *Employment Division v. Smith*.¹³⁷ It is quite another when you have an overt constitutional amendment that expressly reverses the First Amendment. The Congress can reply to *Smith* and did so, of course, in the Religious Freedom Restoration Act.¹³⁸ But your hypothetical, the one that you led with, was a different one. Suppose we had in place all of the processes whereby we could get rid of judicial protection of free speech. I understood your point. It wouldn't be that people couldn't say anything anymore. But they would go to jail if they said things the government didn't like.

Walker: If such laws were passed.

Gaffney: If such laws were passed. And I guarantee you that in many municipalities with which I am familiar they would be passed, and they would be passed tomorrow morning.

Collett: But I think the fuller answer would depend on where our loyalty lies. Does it lie with the positive law? Does it lie with some concept of natural law? Where does our loyalty lie as lawyers? My answer to the hypothetical is that I must cast the fifth vote to allow the elimination of political speech. I, too, believe political speech is the basis of political community: if I can't talk to you—this involves the points we made earlier—if we have no ability to talk, then we have no ability to create community.

I find casting such a vote a horrifying idea. Therefore, as I hand in my opinion, I simultaneously hand in my resignation and join the revolution. But in deciding how to vote, the question is: Can I corrupt the institution that, in part, makes it possible to govern ourselves in such a way that, if political means are successful in reversing such foolishness, the next person who occupies this seat may vote to disregard the reversal? Do I deny the people's ability to make the wrong decision through the power that they gave me? What I heard Jeff say is that he agreed with me. He casts the fifth vote. Perhaps you don't even cast the fifth vote; perhaps you resign before you cast the vote—but you don't corrupt the institution; you resign and fight the revolution, if that's what is necessary.

Powell: I agree with that. The reason I resist Ed Gaffney's hypothetical lies in something I have already said. I just want to repeat it: Loyalty to the law, loyalty to the particular office that one exercises in this particular secular political order, or any other, is not an ultimate faithfulness. It is subject to higher and deeper commands and obligations, and at some point one

137 494 U.S. 872 (1990).

138 42 U.S.C. §§ 2000bb to 2000bb-4 (Supp. V 1993).

plainly has conflicts such that one must—and I am not saying that it would be easy in many circumstances—but one is under an obligation to act in whatever is the wisest and most effective way to resist the evil. That is why in the end I don't want to answer the question: because it doesn't have any answer that is anywhere in between recognizing that one must fight monstrous evil and knowing enough facts about what I should do in a particular circumstance.

Here the conversation was brought to a close. Professor Powell's lecture, which appears next, was given the day before this conversation.

*LOYALTY TO THE LAW:
POLITICS AND THE PRACTICE OF PUBLIC LAWYERING
IN THE UNITED STATES*

by *H. Jefferson Powell*¹³⁹

I want to talk today about a concept that I'm going to call loyalty to the law. What does it mean to be committed to the law, to bear it allegiance, to reach legal conclusions faithfully? Indeed, is any of this possible? And, if possible, is it desirable? Should any of us wish to be the sort of person who is loyal to the law?

This is my ultimate topic, but I hope you will bear with me if we go about exploring it in what may seem a somewhat circuitous manner. Let me add that this indirect approach is not the product of perversity, but of the manner in which the question of loyalty to the law has arisen in my life, first as a teacher of constitutional law and then, over the past several years, as a lawyer for and in the federal government. This has not been for me an abstract question at all, and I am afraid that it will quickly become apparent how far I am from a clear answer. But then that is part of the point of a gathering such as this, to listen as well as to speak.

I

It is one of the oldest boasts of the United States political system that it establishes a government of laws and not of men. This assertion, in substance or in the very words, runs throughout the political discourse and the constitutional documents of the era of the Revolution and the early Republic. In part the assertion set up a contrast between European tyranny and American freedom. In the old world, Americans told themselves again and again, government was the master, driven by the arbitrary will of monarch or ministry. In the new world, in contrast, government was the servant, its officials the mere functionaries of laws that were themselves the expression of the sovereign freedom of the people. "A government of laws and not of men" quickly became critical as well as celebratory, a norm against which to measure the success and even legitimacy of American government as well. The political system of the United States dethrones men in favor of laws to the extent that it successfully subjects the men and women unavoidably entrusted with power to the constraint of written laws, and above all to the supreme law of a written constitution. When Jefferson attacked Hamilton's bank bill in 1791 as unconstitutional, he characterized it as not only exceeding Congress's powers but as a denial of any legal limit whatever to those powers: "to take a single step beyond the boundaries . . . specially drawn around the powers of Congress" by the written law of the Constitu-

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tion, Jefferson wrote, "is to take possession of a boundless field of power, no longer susceptible of any definition."¹⁴⁰

In the early Republic, the principle of a government of laws and not of men was often employed as an argument going to the substance of a political dispute. Almost at once, however, the principle acquired an institutional gloss. Even in a government of laws and not of men, officials often must act at discretion, according to will or policy, and when they do their actions generally are beyond legal question, however subject to moral or electoral constraint. When those same officials act subject to legal rule, in contrast, their actions are open to judicial review and correction because, in Chief Justice Marshall's famous pronouncement, "[i]t is emphatically the province and duty of the judicial department to say what the law is."¹⁴¹ In short, the distinction between law and politics, so familiar and so central to subsequent constitutional discussion, was born.

Just as the contrast between "a government of laws" and one "of men" was never a neutral category scheme, but rather a form of evaluation and criticism, so from its beginning the dichotomy of law and politics operated as a commendation of law and a condemnation, however muted, of politics. Behind the contrast of law and politics lies a contrasting set of images the more powerful because they are unacknowledged. The sphere of judicial decision according to law is the realm of reason and judgment, not force and will, the realm of cool and disinterested obedience to the laws and to the people from whom the laws derive their authority. The sphere of politics, on the other hand, is the realm of ambition, faction, self-interest, and struggle; of choice, not obedience; passion, not reason. However odd for a political system built ostensibly on the political enfranchisement of the people, almost from birth American political culture incorporated a distrust of politics.

As I've already suggested, the translation of laws versus men into law versus politics served and shaped the emergence of the judicial review of political action. Judicial review is often thought of in terms of its utility in the protection of individual rights. Important as that function has been, however, the still more fundamental role of public law has been to separate the spheres of law and politics, by defining and limiting the realm of politics by legal rule. Despite the existence of broad arenas in which legislative and executive will and policy hold sway, the American political order is a "government of laws and not of men" because public law pronounced by courts controls the boundaries of the political sphere. As Justice William Johnson wrote in 1808, "[i]n a country where laws govern, courts of justice necessarily are the medium of action and reaction between the government and the governed."¹⁴² Judicial enforcement of public law, Johnson explained, is the means by which the political order gives institutional reality to the supremacy of law over politics.

140 Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank* (Feb. 15, 1791), reprinted in H. JEFFERSON POWELL, *LANGUAGES OF POWER: A SOURCEBOOK OF AMERICAN CONSTITUTIONAL HISTORY* 42 (1991).

141 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

142 William Johnson, Public Statement (Aug. 28, 1808), in POWELL, *supra* note 10, at 236.

The courts do not pretend to impose any restraint upon any officer of government, but what results from a just construction of the laws of the United States. Of these laws, the courts are the constitutional expositors; for laws have no legal meaning but what is given them by the courts.¹⁴³

After the earliest period, there was only sporadic disagreement with the general assertion that the courts could and should safeguard the government of laws by policing the boundaries of the political. Consensus on the theory, however, did not mean agreement in practice, and almost from the beginning those disappointed by the courts' interpretations of the Constitution and laws have frequently concluded that the problem lay in the perversion of legal judgment by the political preferences of the judges. The courts' interpretation of the laws can become a mask, Americans quickly came to fear, for the surreptitious reimposition of a government of men. Jefferson's attacks on Federalist judges as "the corps of miners and sappers" undermining republican government are well known.¹⁴⁴ Judges, a Philadelphia newspaper explained in criticizing one of Jefferson's judicial appointees, can "give the law an explanation perverting its intention" in accordance with "their own perverse will" through "the wretched subtrefuges and equivocations of this subtle class of men."¹⁴⁵ If the courts are to protect law from politics, therefore, it has always seemed necessary to find some means for preventing the judges from becoming politicians themselves. Selected through politics, the judges must nevertheless be loyal to the law.

One solution to this problem is exemplified by the explosion of writing in constitutional theory over the past couple of decades. A great deal of this scholarship is plainly driven by the fear that the legitimacy of our government of laws and not men has been put in question by unconstrained judicial choice. And the solution proffered by the theorists has been to conceive of the problem as one of technique, of spelling out the correct methodology for ensuring legitimate, law-rather-than-politics decisionmaking on the part of the courts. True, the theorists acknowledge, nothing prevents a dishonest judge from ignoring the correct method, or pretending to follow it while in fact insinuating his or her political preferences into a court's decisions. But agreement on the correct method would enable the honest judge to avoid inadvertent political willfulness, and permit others to detect and demonstrate the presence of political choice.

Despite the remarkable intellectual energy that has been directed to this search for a technique of decision that ensures loyalty to the law, the search has been a failure and I believe there is no realistic hope that the goal can be reached. There is no agreement on the correct theory, and the more prominent the candidate the more withering has been the criticism. Further the one consistently telling criticism of each proposed methodology has been its inability in fact to constrain judicial choice. Even on their

143 *Id.* at 237.

144 *See, e.g.*, 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 546 (rev. ed. 1928).

145 *Philadelphia Aurora*, reprinted in POWELL, *supra* note 10, at 232.

own terms the theories either permit wide latitude for political choice or effectively abolish judicial review altogether. And finally, the judiciary as a whole has shown absolutely no inclination to bring its administration of public law within the confines of any particular theory or technique.

The judges' lack of interest in the work of the theorists is a fact that I think deserves more attention than it gets from most scholars. An important source of this judicial attitude, I think, is that the judges have always intuited what the theorists are reluctant to admit, that there is no technological means of excluding politics from law. The traditional judicial approach to achieving loyalty to the law has been moral, not technical, in character. By a set of ideas and images, American judges have endeavored to cultivate loyalty to the objectivity, rationality, and neutrality of law, and distance from the passion, willfulness and self-interest of politics. And the most powerful image which they have invoked is that of the judge as the disciplined spokesperson of an apolitical law.

Law professors often speak contemptuously of "oracular" theories of judging, and indeed some expressions of the judge as *lex loquens* cannot be taken too seriously, but the criticism is too shallow and contempt is out of place: much of the time what is being expressed is a profoundly moral commitment to acting not from and on behalf of the judge's personal politics or faction but in service to the community, to the government of laws and not of men. This image, of the judge or court as speaking for the community, is very old. Writing in 1794, in one of the very first cases of judicial review of legislation, the great Jeffersonian jurist Spencer Roane wrote that in cases of public law judges "are bound to decide, and they do actually decide on behalf of the people."¹⁴⁶ Two centuries later, a federal circuit judge wrote for his court that "[j]udges speak the voice of the law. In doing so, they speak for and to the entire community."¹⁴⁷ Invoking this image does not make it so, of course; the implicit hope has been that incorporating it into a complex, ongoing tradition of thought and discussion might make the image part of the judge's life, shaping or reshaping the springs of decision.

To a moral commitment to act for the community as a whole and in service of its governance by law, American judges have usually added a commitment to act with a cautious mistrust of their own freedom from the subtle pressures and appeals of political preference. Consider, for example, Justice Harry Blackmun's comments in his opinion in *Furman v. Georgia*,¹⁴⁸ a seminal death penalty case. Rejecting arguments about the inefficacy and barbarity of capital punishment, Blackmun wrote

This, for me, is good argument, and it makes some sense. But it is good argument and it makes sense only in a legislative and executive way and not as a judicial expedient. [I]f I were a legislator, I would do all I could to sponsor and to vote for legislation abolishing the death penalty. . . . I do not sit on these cases, however, as a legislator We should not

146 *Kamper v. Hawkins*, 3 Va. (1 Va. Cas.) 20, 39 (1793).

147 *League of United Latin Am. Citizens v. Clements*, 914 F.2d 620, 628 (5th Cir. 1990) (en banc), *rev'd sub nom. Houston Lawyers Ass'n v. Attorney Gen.*, 501 U.S. 419 (1991).

148 408 U.S. 238 (1972).

allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great.¹⁴⁹

Observers often dismiss this sort of language as naïve or written in bad faith: the very judge who piously utters such platitudes this time will be pressing his or her "personal preferences" in the next case. Once again, however, I think that the criticism is partially correct but too shallow. Justice Blackmun and the many judges who have expressed similar sentiments are not asserting a Pollyanna-like unwillingness to acknowledge the role of personal preference and prejudice in judicial decisionmaking but something rather the opposite: a kind of asceticism of the mind and will that is meant to respond to and check the "temptations" of politics.

Perhaps the most flamboyant exponent of what I take to be the judges' own traditional answer to the law and politics problem was Felix Frankfurter. Frankfurter's opinions while a justice on the Supreme Court often discuss at length the judge's duty to subordinate his individuality as a political person in order to be able to speak for the legal tradition, but his most striking image was formulated in private correspondence.

I have an austere and even sacerdotal view of the position of a judge on this Court When a priest enters a monastery, he must leave—or ought to leave—all sorts of worldly desires behind him. And this Court has no excuse for being unless it's a monastery.¹⁵⁰

The picture of Supreme Court justices as political monks is so extreme and so imprecise a description of their actual behavior that it may seem a bit silly, but I believe that Frankfurter was stating in his typically overheated way a view broadly shared in the American legal tradition. Judges should put away politics when they ascend the bench and their failure to do so is a fall from the purity of the law to which they should profess loyalty.

As I've no doubt already indicated, I have a great deal more sympathy with the judiciary's moral resolution of the problem of loyalty to the law than I do with the various solutions by technique of the theorists. Even in overstatements like Frankfurter's monastic imagery there is a sort of high moral seriousness, a noble aspiration to subordinate self to the needs of the community. But in the end, the judges' approach is not an answer, or at least not a complete one, for several reasons. First, many observers would say that the judges' efforts to exclude politics from law by moral effort have not been notably successful over time and in any event are in an advanced stage of decay at present. A line of moral thought unable to shape decisively the moral practices to which it is directed is of dubious value to anyone.

Secondly, the judicial aspiration of abstention from politics renders incoherent or impossible the judicial task in cases in which the standard tools of legal interpretation do not provide a clear resolution, that is to say,

149 *Id.* at 410-11 (dissenting opinion).

150 Felix Frankfurter, quoted in Mark B. Rotenberg, *Politics, Personality and Judging: The Lessons of Brandeis and Frankfurter on Judicial Review*, 83 COLUM. L. REV. 1863, 1863 n.1 (1983).

the very cases we are worried about. Phrased as the judges often put it, the injunction to make decisions according to law and not politics is by itself empty. Viewed apart from the interpreter's broader moral and political commitments, the "law" to which the judge is instructed to adhere is indeterminate in such cases, a cipher, incapable of guiding decision.

Fundamentally, however, I am not satisfied with the judiciary's solution because it is flawed in its very conception. To explain what I mean, let me ask you to recall the basic argument up to this point: the United States's political order aspires to be a government of laws not of men. In order to safeguard this aspiration, the political order has accorded public law, administered by the courts, the tasks of separating the spheres of law and politics and of confining the political by the legal. And judges have striven to enable themselves to execute these tasks by trying to renounce the political out of loyalty to the legal. At each step there is a dichotomy and a choice, and at each step after the first, the dichotomy and choice denigrate politics. Inscribed in the entire enterprise, as indeed in the parallel efforts of the constitutional theorists to specify a methodology of decisionmaking, is a fundamental fear and dislike of the political, of the world of passion, interest, disagreement, struggle, compromise, choice.

It is a bit startling to notice that a political order rests on a devaluation of the political, but the problem goes deeper than paradox or irony. The mainstream American legal tradition's understanding of loyalty to the law is fundamentally Manichaeian. The implicit images it ascribes to politics will be familiar ones to the theologians here: the American legal tradition has restated in a modern and institutional context the ancient dualistic dislike of the world of change, passion and particularity, and it has revived as well the ancient dualistic solution of sharply dividing the eternal and the temporal, the pure and the dirty, the spiritual and the earthly. Ancient Jewish and Christian opponents of dualism could have predicted the consequences. The American legal mainstream's implicit strategy for achieving the deepest moral purpose of the system of law has been to identify a spiritual elite and then to impose on that elite an insupportable and ultimately disabling demand for purity. The resulting mix of arrogance, failure, self-deceit, and loss of faith should be no surprise.

One conclusion that could be drawn at this point is that the problem of loyalty to the law goes all the way back to the starting point I identified at the beginning of this lecture: the ambition of establishing a government of laws and not of men. If men were angels no government would be necessary, Madison wrote.¹⁵¹ But men and women are not angels, and any government they fashion will be a matter of politics, a government of men and women and not of laws. There can be no autonomous role for law in society, and consequently no place for loyalty to it. There are political, moral and spiritual demands on our capacity for faith and commitment, but the notion of professing allegiance to the law is empty or pernicious.

151 See THE FEDERALIST NO. 51 (James Madison).

II

The conclusion I've just outlined as a possibility has a number of adherents within the legal academy. At first glance, indeed, it seems to present a coherent if admittedly nontraditional understanding of the role of judges: at least in cases with a controversial political aspect and a debatable resolution, judges are simply politicians, who must and should act to advance their own views of the best political outcome. I don't want to dwell on the numerous objections to this view, which are amply stated in the voluminous theoretical literature. Let me simply note two points. In addition to all the other objections, the view of judge as simply politician seems to me to define the office of judge in a morally objectionable light. At least as long as the ideal of a government of laws and not of men retains its cultural significance, judges who understand themselves to be politicians *must* make decisions at times that are faithless to what the political community as a whole views as their duty. This is a recipe for personal moral catastrophe. It is the conclusion that for judges to do their jobs they must decline to keep faith with their fellow citizens.

The other point I want to make is that I do not think the judge-as-politician view can be confined to some set, small or large, of politically controversial decisions. Once accepted, I think that this position will eat up all reasons for subordinating one's "personal" beliefs about the right outcome in any case to the outcome that ostensibly results from application of traditional legal argument. Once the aspiration of loyalty to the law is emptied of meaning, it is difficult for me to see why a judge should decline to follow her political inclinations whenever she can. And in short order, I suspect that judges would not feel any hesitancy in doing so, regardless of whether their inclinations rest on high moral principle or narrow partisan allegiance. If we surrender the aspiration of loyalty to the law, we will indeed give up any distinctive place for law at all.

III

At this point, I want to turn away from judges and consider a branch of the legal profession with which I have first-hand experience: public lawyers—by which I mean lawyers who are government officials although not judges (or legislators, let me add). Public lawyers have historically been understood to act at least in part on the basis of loyalty to the law, and yet at the same time they carry out their duties within a political branch of the government and in response to political officials. Indeed, most public lawyers at the decisionmaking level within the federal government are political appointees who serve at the pleasure of a senior political officer.

The deep dualism of American thought about law and politics has created two schools of thought on the role of the public lawyer. On the one hand are those who assimilate the public lawyer to the common image of private counsel as primarily the servant of the client, not of the law. As one commentator has asserted, no doubt quite accurately, the ordinary president "expects his attorney general . . . to be his advocate rather than an

impartial arbiter, a judge of the legality of his action."¹⁵² Taking this view to its logical extreme, the lawyer for the government should not be expected to profess any genuine loyalty to the law: she is, and her words and deeds should be interpreted as those of, a partisan. There is on this view no real problem of tension between law and politics because the public lawyer's true allegiance is to politics and her relationship to law purely instrumental.

The opposite view is held by those who believe that public lawyers, like judges, are above all called to put loyalty to the law above any commitment to the politics of the administration in which they serve. In recent years this perspective has been associated in particular with the office of the United States Solicitor General—a well-known book called that officer “the tenth justice”¹⁵³—but the image of the public lawyer as a quasi-judicial figure is often applied quite broadly. Many descriptions of President Ford's distinguished attorney general, Edward Levi, capture this image. “He is not a partisan. He is beholden to no one. For too long politics has been permitted to intrude into the Justice Department.”¹⁵⁴ He provided “thoughtful, nonpolitical and highly principled leadership.”¹⁵⁵ (Note how that sentence juxtaposes and almost equates the “highly principled” with the “nonpolitical.”) Levi himself stated his ambition to “make clear, by word and deed, that our law is not an instrument of partisan purpose.”¹⁵⁶ This view of the public lawyer as apolitical shares the same nobility of purpose as the ideal of the apolitical judge, and it suffers from the same problems. The problems are exacerbated by the fact that unlike federal judges, public lawyers, at least high-ranking ones, are as an institutional matter clearly within the realm of the political.

The law/politics dichotomy produces, even more clearly for public lawyers than for judges, a debilitating and ultimately unworkable split between different aspects of their job. Let me illustrate by referring to three major tasks of the office in which I serve.¹⁵⁷ We spend much of our time advising political officials how those officials can achieve their policy goals within the bounds of the law. A second important duty consists in predicting how courts, legislators or others will evaluate the lawfulness of proposed action by the executive branch. Perhaps most importantly, we regularly address questions of lawfulness *per se*.

None of the activities I've just mentioned can be done well—none of them ultimately can be done at all—if politics is truly to be excluded from the undertaking. The tracing of a satisfactory path to a policy objective through lawful means is often fraught with choices that are themselves political and moral in nature, and the task often requires that the lawyer

152 Arthur S. Miller, *The Attorney General as the President's Lawyer*, in *ROLES OF THE ATTORNEY GENERAL OF THE UNITED STATES* 52 (Luther A. Huston et al. eds., 1968).

153 LINCOLN CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* (1987).

154 Quoted in NANCY V. BAKER, *CONFLICTING LOYALTIES* 143 (1992).

155 *Id.* at 150.

156 *Id.* at 145.

157 At the time I gave this lecture, I was Deputy Assistant Attorney General for the Office of Legal Counsel, United States Department of Justice. The views I express, of course, are not necessarily those of the Department of Justice.

share the objective, at least for the purpose of devising and providing advice. Accurate prediction about whether other governmental entities will accept the lawfulness of a proposed action or policy depends in part on informed and ultimately political judgment about how the individuals who make up those other entities will balance issues of law, policy and partisanship. And like judges, we sometimes encounter questions of law that have no determinate answer based on the legal materials narrowly construed and that as a result require the interpreter to go beyond those materials to the deeper moral commitments of the American political order. Unlike judges, however, public lawyers cannot displace political responsibility for their legal conclusions in the name of judicial deference to democratic choice and to elected officials—considerations that by definition do not apply to someone who is not a judge and who is ultimately responsible to elected officials who exercise power by virtue of democratic choice. Politics is inseparable from public lawyering.

At the same time, effective public lawyering is not simply politics, or advocacy for politicians. The politics that is inseparable from public lawyering is not mere partisanship, nor is its purpose to advance the personal fortunes of the officials who are the public lawyer's immediate "clients." Public lawyers are called to be lawyers, not campaign workers or even policy analysts. Let me illustrate. Even the most brazen political officer in our culture scarcely can assert that the law places no limits on his or her discretion to act. Implicit in the political question How can we achieve this goal? is the awareness that law, or if you please, people's understanding of the law, is going to channel any plausible response. And ultimately, although politicians do not like being told no, to an extent perhaps surprising to those outside government, they are unwilling to act against legal advice. They expect to be told if the legal justifications for a proposed action or policy are implausible. The public lawyer who views law as nothing more than a set of rhetorical tools to be used in whatever manner necessary to serve his or her political masters is an unsatisfactory servant in the long run. One cannot engage successfully in the tasks of the public lawyer simply by saying what will satisfy the political questioner in the short term. And finally, with considerable frequency, the question the public lawyer is asked is simply, What is the law; is it lawful to do this or that? What the political client often wants is law, not simply politics. To do her political job, the public lawyer must find some way to be loyal to the law.

The public lawyer is thus in much the same quandary as the judge: there is no way to exclude politics in the sense I am using that term, by technique or by moral effort, and yet the very shape of her tasks assumes that law is not simply politics.

IV

I've now wound my way back to my starting point: what is loyalty to the law? Most of the answers in wide circulation are deeply unsatisfactory, including the despairing or cynical conclusion that there can be no such loyalty. What are we to do? What, to be personal, am I to do when I return to my office later this week?

The answer, I think, begins with attempting to reject the dualism of good law and dirty politics that has dominated our thinking on these matters. The ideal of a government of laws and not of men—or at least any ideal worth having along those lines—does not require the rejection of the realm of policy, choice, faction, debate, compromise. The realm of politics has all of those features, and because men and women are indeed not angels, it is therefore a realm in which the selfish, the partial, the partisan and the unreasoning can exercise their sway. But the political means by which men and women of limited vision and imperfect sympathy struggle together to shape their common life are not in themselves evil: they are rather the necessary conditions of any common, human life that is not ruled by tyranny, naked or cloaked.

At the same time, the common life of the political community is imperfect and stands under judgment. At our best, our successes are partial and our agreements fragile. The political struggle can and predictably will produce injustice, oppression and neglect much of the time. Understood rightly, the ideal of a government of laws is the search for a solution—however partial and itself political—to the pathologies of politics. The American answer historically has been to channel a significant part of political debate into the structured and stylized form of politics that I've been calling public law. Loyalty to the law is the public lawyer's commitment to the political as more than simple factional struggle, as an activity that transcends civil war by other means, as part of the political community's effort to realize itself as a community. Over a significant range of the political questions with which this society must deal, the potential answers to those questions are stated and decided through the language of the law.

Like any language, American public law shapes and limits what can be said. To be recognized as a proposition of law, a moral or political claim must be articulated through the modes of legal argument, which therefore provide a sort of grammar for legal debate. Furthermore, a great many hypothetical propositions of law are grammatical, if you will, but implausible, in the sense that very few speakers of the language would take them seriously. Most importantly, like any language, American public law is incoherent without a commitment on the part of its speakers to good faith communication. We do not have to agree on our policy choices in order to do law together, but we do have to share a desire to make law work as a means of communication and debate. Loyalty to the law is a commitment to maintaining the law as a functioning system of argument, as what Alasdair MacIntyre terms a tradition, "an historically extended, socially embodied argument" constituted by "continuities of conflict."¹⁵⁸

Since this inquiry's origins lie in my personal experience, let me close by reflecting on some of what I have come to understand loyalty to the law to mean for the public lawyer. To be loyal to the law, I need to insist that the propositions of law I advance are grammatical and plausible, articulated through the complex modalities of legal argument and capable of being taken seriously by a fair-minded listener. This responsibility is part of what I owe to my contemporaries, not just those in the administration I

serve but the administration's critics as well. Beyond being plausible, in order to be loyal to the law, I need to take seriously what has been said before. I am part of a conversation, one that involves the judges and public lawyers of the past. Their reasoning and their conclusions often do not determine my judgments, but my commitment to the task I have inherited from them imposes a duty to understand and account for their views and decisions. Again, to be loyal to the law, I must keep faith with the future. The arguments I make and the advice I give can clarify or obfuscate, build up or corrode, the common language of the law that I will hand on to my successors. Finally, to be loyal to the law, I must remember the limits of the law. I have in mind—in part—the law's manifold flaws as a means of common deliberation, its frequent failures to achieve its goals, the temptations it poses to manipulation and heartlessness. But the law's virtues are as limiting as its flaws. The law is a craft, but woe to the lawyer who builds her life on pride in her skill at her craft. Loyalty to the law as a self-contained system is ultimately destructive, of the lawyer and of the law. It becomes forgetful of the weightier matters of the law: justice, mercy, and faith. It becomes a betrayal of the wider loyalties to which we are summoned, to our brothers and sisters, to God.