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THE LEFT, THE RIGHT, AND CERTAINTY IN CONSTITUTIONAL LAW

GENE R. NICHOL, JR.*

I have grave doubts whether legal theorists such as Roberto Unger, Duncan Kennedy, and Mark Tushnet feel significant kinship with conservative constitutional advocates such as William Rehnquist, Robert Bork, and Edwin Meese on many aspects of American social and political life. Although the former group may entertain vague dreams of a utopian replacement for our present legal structure, the latter seems to yearn to turn the clock back to clearer, "simpler" times. But in at least one area of public discourse—the critique of modern constitutional decisionmaking—our friends on the right and the left seem to have a good deal in common.

Their clearest area of mutual enthusiasm, without doubt, is the notion that the malleability, pliability, contingency, instability, indeterminacy, and general uncertainty of constitutional decisionmaking render it unacceptable. It is hardly the case, of course, that critics of the far right and the far left of constitutional discourse use this "discretion" argument for the same purposes, or that they are motivated by similar political desires. Law has always enjoyed an acute kinship with politics. Further, it is no secret that both constitutional theory and constitutional adjudication are replete with often barely hidden agendas. Still, many of the critics' claims run surprisingly parallel.

My focus in this Essay is this area of apparent common ground—the indeterminacy objection. In my view, the claim that constitutional law is illegitimate, or a mere apology for the status quo, or an unacceptable threat of judicial tyranny, because it is, in a significant way, indeterminate, is itself inconsistent with our constitutional traditions. I explore four episodes of our constitutional history to make the case that the American brand of

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constitutionalism overtly embraces a good deal more uncertainty, discretion, and change than its critics give it credit for.

Although I am a far cry from a historian, in my view the attacks lodged by both originalists on the right and critical legal scholars on the left turn out to be profoundly ahistorical. For that reason, they miss much of the genius of our constitutional decisionmaking. I refer here to "genius" in what I think is its original sense: "peculiar or distinctive character," rather than a different, and perhaps more common use of the word, "extraordinary intellectual power." Very few people have accused our constitutional jurists of displaying "extraordinary intellectual power." Throughout two centuries, however, our constitutional tradition has proven more comfortable with and more embracing of malleability, contradiction, discretion, uncertainty, subjectivity and—not incidentally—optimism about the future, than the critics of either the far right or the far left of American constitutional discourse assume. As a result, the indeterminacy critique carries far less power than its advocates assert.

I. THE CRITIQUES

It takes no great legal mind, in fact it barely takes consciousness, to make out a claim that constitutional law is indeterminate. A fancy theorist may be required to demonstrate that all legal reasoning is unstable—that good lawyers and good judges can make any case or virtually any case come out any way they wish. But every first year law student has an exceptionally strong sense that *constitutional* law is unstable. No candid theorist can actually work *Brown*,¹ *Bakke*,² *Bowers*,³ *Buckley*,⁴ *Bowsher*,⁵ *Baker*,⁶ *Bethel*,⁷ *Brandenburg*,⁸ *Broadrick*,⁹ *Branzburg*,¹⁰ and *Bivens*¹¹ into a coherent whole and still say anything meaningful about the controversies presented. And that is limiting myself, obviously

1. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

2. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

3. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

4. *Buckley v. Valeo*, 424 U.S. 1 (1976).

5. *Bowsher v. Synar*, 478 U.S. 714 (1986).

6. *Baker v. Carr*, 369 U.S. 186 (1962).

7. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

8. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

9. *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

10. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

11. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971).

somewhat arbitrarily, to cases that start with a "B." Few constitutional rulings can be justified by unimpeachable reasoning from particularized values that the Framers unambiguously constitutionalized. The question for constitutional scholars, therefore, is what one chooses to do about that.

A. *The Right*

Critics from the right, unlike their colleagues from the left, present an appealing and forceful attack on much modern constitutional decisionmaking. Most frequently they draw upon what has been correctly called a "civics book"¹² understanding of the division of governmental authority in the United States. It is the function of the legislature to make policy. Courts only implement policies appropriately made by others. Judges enforce law; they do not make it.

Added to this fundamental point, of course, is a second and more controversial one. The Constitution contains many vaguely worded concepts—due process, equal protection, cruel and unusual punishments, freedom of speech, and freedom of religion. Decisions enforcing these provisions, even if seemingly consistent with their language, are legitimate only if they are clearly (that is, with a significant degree of certainty) based upon the Framers' specifically recorded understandings of the constitutional commands. If we make something out of the notion of equality that was not contemplated in 1868, we are making policy, not enforcing law. As Judge Bork has put it, "once a court abandons the intention of [the Founders], the court is necessarily thrust into a legislative posture."¹³ And a judge who looks outside history in this sense "always looks inside himself and nowhere else."¹⁴

An originalist, Bork has argued, avoids the difficulties of malleability, illegitimacy, and indeterminacy.¹⁵ Or as former Attorney General Edwin Meese stated, originalism is essential to "avoid . . . the charge of incoherence."¹⁶ The Founders "chose their words

12. See Michael J. Perry, *Interpretivism, Freedom of Expression, and Equal Protection*, 42 OHIO ST. L.J. 261, 276 (1981).

13. ROBERT H. BORK, *THE TEMPTING OF AMERICA* 81 (1990).

14. *Id.* at 242.

15. *Id.* at 257.

16. Edwin Meese, Address Before the American Bar Association (July 9, 1985), in *THE FEDERALIST SOCIETY, THE GREAT DEBATES: INTERPRETING OUR WRITTEN CONSTITUTION* 9 (1986).

carefully . . . [and] debated at great length the most minute points."¹⁷ Therefore, in relatively precise ways, the meaning of the Constitution can be known.¹⁸

This rootedness—in fairly clear and particularized historical concepts of equality and liberty—allows people such as Gary McDowell to speak of "fundamental constitutional values"¹⁹ or a "constitution of fixed principles."²⁰ It also avoids, for Chief Justice Rehnquist, the dangers of a "living Constitution."²¹ (Though it seems to me that the Chief Justice's Constitution becomes fairly animated from time to time.²²) And perhaps more radically, it convinces Professor Lino Graglia that examples of actual unconstitutional practices are "extremely rare."²³ They can, as he states, "be difficult to find in a standard constitutional law casebook."²⁴ Constitutional law, properly understood, should be a matter of "little controversy or even interest."²⁵

B. *The Left*

What about the other side of the spectrum? Critical legal scholars claim, with some influence and even more frequency, that legal arguments are generally indeterminate. Skilled practitioners of the legal art can mount equally plausible arguments and counterarguments—sometimes even based on the same value—for the determination of legal disputes. Equally troubling, law, like the liberal society it mirrors, is shot through with

17. *Id.*

18. *See id.* at 9-10.

19. GARY L. MCDOWELL, *CURBING THE COURTS* 50 (1988).

20. *Id.* at 48.

21. William H. Rehnquist, *The Notion of a Living Constitution*, 54 *TEX. L. REV.* 693, 693 (1976).

22. *See, e.g.*, *Fullilove v. Klutznick*, 448 U.S. 448, 522-32 (1980) (Stewart & Rehnquist, JJ., dissenting) (arguing that a federal law favoring minority owned business contractors violated the Equal Protection Clause, which requires strict neutrality on the basis of race); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138-53 (1978) (Rehnquist, J., dissenting) (arguing that the designation of Grand Central Station as a historic landmark amounted to a "taking" under the Fifth Amendment because the designation imposed involuntary restrictions for the benefit of the public at a substantial cost to the owner); *National League of Cities v. Usury*, 426 U.S. 833, 835-56 (1976) (holding that Congress lacked the authority under the Commerce Clause to extend minimum wage and maximum hour protections to most state employees because of the interference with traditional state governmental functions in the federal system).

23. Lino A. Graglia, *Constitutional Mysticism: The Aspirational Defense of Judicial Review*, 98 *HARV. L. REV.* 1331, 1344 (1985) (book review).

24. *Id.* at 1344 n.26.

25. *Id.* at 1344.

contradictions and incoherencies. The list includes such notions as liberty versus security, self-determination versus community, economic empowerment versus restraint of the powerful, and even Duncan Kennedy's "fundamental contradiction"—that the "goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it."²⁶

In this arena, constitutional law is, of course, a sitting duck. The Constitution itself obviously embraces notions of liberalism and communitarianism, liberty and constraint, and, for that matter, liberty and equality which, at least at some level, clash or contradict. All rights claims, to make it worse, must be weighed against other governmental interests. So as Professor Tushnet has argued, "what counts as a right . . . invariably turns out [to be unstable] . . . produc[ing] no determinate consequences."²⁷ In addition, anyone who has pushed hard at *Marbury v. Madison*'s²⁸ premises shares at least some kinship with Tushnet's claim that "[j]udicial review . . . simultaneously creates the potential for the tyranny of . . . judges," leaving us with a "choice of dictatorships: sometimes the majority will be the dictator, and sometimes the judges will."²⁹

The constitutional law "project" for critical scholars, therefore, seeks to show that various forms of arbitrariness, generated by the conflict between the desires for economic growth and for restraint on powerholders in a capitalist society, permeate constitutional law. Professor Roberto Unger has pressed the idea further, claiming that constitutional argument and decisionmaking demand

a theory of [the] democratic republic that describes the proper relation between state and society. . . .

Without such a guiding vision, legal reasoning seems condemned to a game of easy analogies. It will always be possible to find . . . more or less convincing ways to make a set of distinctions . . . look credible.³⁰

26. Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 211 (1979).

27. Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363-64 (1984). Or, to state the argument differently, "[j]udges must choose which conceptions to rely on." MARK V. TUSHNET, *RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 57 (1988).

28. 5 U.S. (1 Cranch) 137 (1803).

29. TUSHNET, *supra* note 27, at 16.

30. ROBERTO M. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 8-9, 11 (1986).

Looking at both of these movements together, one discovers a good deal of shared real estate. Both camps build on the lessons of the realists, though the originalists may have less enthusiasm for their heritage. They demonstrate, with some power, that modern constitutional decisions, including the rulings of the Warren, Burger, and Rehnquist Courts, have employed large doses of judicial discretion. The decisions and the rationales they employ are, in general terms, constructed rather than deduced. Moving so freely in the realm of choice, at least for those enforcing the Constitution, is illegitimate. It presents, as well, the possibility of judicial usurpation. Constitutional controversies frequently implicate either contrasting or contradictory values, and no overarching theory demonstrates conclusively which value is to prevail or which institution should be allowed to have its say.

From this point, of course, our friends part company. For those on the right, discretion and policy choice cannot be rendered legitimate. Speaking broadly, thirty-five years of "constitutional decisionmaking" have resulted in the imposition of a set of liberal political values on the American populace that could not be sustained (and has, in fact, frequently been rejected) at the ballot box. Either small or large segments of existing civil rights law (depending on the critic) should be dismantled. For the critical theorists, our contingent, constructed, and contradictory constitutional legacy serves merely to legitimate an otherwise indefensible and oppressive status quo. The solution is to abandon the enterprise—to scrap the "rights-talk"³¹—in favor, "come the revolution," of more authentic, unalienated, and transformative politics.³²

I care less about these proposed solutions than their underlying premise. Folded within these critiques is a heavy claim that the discretion, choice, and responsibility presented in constitutional adjudication, and the uncertainty and malleability that necessarily arise from those exercises of choice, remove constitutional decisionmaking from the umbrella of legitimacy in our governmental structure. I think that undergirding premise is wrong. I turn to several major aspects of our constitutional legacy to try to prove the point.

31. Michael J. Perry, *Taking Neither Rights-Talk nor the "Critique of Rights" Too Seriously*, 62 TEX. L. REV. 1405 (1984); Tushnet, *supra* note 27, at 1386.

32. See Peter Gabel & Duncan Kennedy, *Roll over Beethoven*, 36 STAN. L. REV. 1 (1984); Tushnet, *supra* note 27, at 1386.

II. OUR CONSTITUTIONAL LEGACY

A. *Madison*

In any constitutional history, Madison has to be a major, most likely *the* major, figure. Not surprisingly, given his brilliance and given the fact that he struggled perhaps more than any other American with the problem of what a constitution should say, Madison spoke with some specificity on the issues of certainty, predictability, and uniformity in constitutional interpretation. His views on the value of original intention provide a first and easy example of his belief in the malleability of constitutional law.

Madison, one will recall, refused to allow the timely publication of his notes on the constitutional convention.³³ They would, of course, have been very relevant to the constitutional disputes that marked both the Marshall Court and Madison's long public career. But Madison thought it preferable, in his words, to wait until the terms of the Constitution were "well settled by practice."³⁴

While debating in the Virginia ratification convention, Madison apologized for the fact that he had known some of the specific intentions of the Framers.³⁵ He conceded that this knowledge was a possible source of bias in his attempts to figure out what the Constitution meant.³⁶ Why? Because he was aware that "the document must speak for itself, and [that private] intention cannot be substituted for the established rules of interpretation."³⁷ Those rules of interpretation included the common law notion of "usus,"³⁸ that is, patterns of "actual government practice and judicial precedents."³⁹ These actions, not the specific goals of the draftsmen, would determine the intention of the Constitution. "It could not but happen, . . ." Madison wrote, "that difficulties and dif-

33. See Adrienne Koch, *Introduction* to JAMES MADISON, *NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787* ix (Ohio Univ. Press 1966).

34. Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), *reprinted in* 3 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* 228 (Philadelphia, J.B. Lippincott & Co. 1865) [hereinafter *MADISON'S LETTERS*].

35. See generally H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 *HARV. L. REV.* 885, 936-37 (1985).

36. *Id.*

37. Letter from James Madison to Martin Van Buren (July 5, 1830), *reprinted in* 4 *MADISON'S LETTERS*, *supra* note 34, at 89.

38. Letter from James Madison to John Davis (1832) (never sent), *reprinted in* 4 *MADISON'S LETTERS*, *supra* note 34, at 232, 242.

39. Powell, *supra* note 35, at 939.

ferences of opinion might . . . arise in expounding terms and phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate and settle the meaning of some of them."⁴⁰ The Constitution, for Madison, was a public document, and its interpretation was in the end a public process.⁴¹

No better example of this methodology in action can be found than Madison's decision not to veto the Second National Bank Act.⁴² Twenty years earlier, as a congressman rather than president, Madison had argued that a national bank was unconstitutional. When he signed the Bank Act as president, therefore, he was accused of expediency. He responded, though, that "the inconsistency is apparent only."⁴³ Two decades of contrary practice had rendered his private opinion irrelevant, in favor of what he called "a construction put on the Constitution by the nation, which having made it, had the supreme right to declare its meaning."⁴⁴ The accepted "use" of the Commerce Clause could not be separated from its proper interpretation.

Consider the process Madison envisioned. The "terms and phrases" of the Constitution are obviously subject to a wide variety of interpretations, at least in some instances. When courts, or other government actors for that matter, engage in constitutional interpretation, they will, of necessity, have a variety of options open to them. The choices they make and the extent to which the citizenry accepts those choices will fashion, over time, the "correct" interpretation of the charter. Its correctness would not be altered by a demonstration that the specific intentions of the Framers were otherwise. Apparently, Madison did not find debilitating the fact that skilled lawyers could stand before courts and develop "equally plausible counterarguments," or that the preliminary results were "unstable," or presented the "potential" for judicial tyranny (to quote our friends on the left).

There is a reason for that, of course, to which I turn at the conclusion of this Essay. Madison was charged with actually doing something. When you "have" to do something, perfection is set aside pretty quickly. Would it be surprising, Madison wrote, "if

40. Letter from James Madison to Spencer Roane (Sept. 2, 1819), *reprinted in* 3 MADISON'S LETTERS, *supra* note 34, at 143, 145.

41. Powell, *supra* note 35, at 941.

42. Act of March 3, 1819, ch. 73, 3 Stat. 266.

43. Letter from James Madison to C.E. Hayes (Feb. 25, 1831), *reprinted in* 4 MADISON'S LETTERS, *supra* note 34, at 164-65.

44. Letter from James Madison to the Marquis de Lafayette (Nov., 1826), *reprinted in* 3 MADISON'S LETTERS, *supra* note 34, at 538.

under the pressure of all these difficulties, the Convention should have been forced into some deviations from the artificial structure and regular symmetry, which an abstract view of the subject might lead an ingenious theorist to bestow on a Constitution planned in his closet or in his imagination?"⁴⁵

Madison also referred to the "terms and phrase *necessarily used*"⁴⁶ in constitutional construction. Being quite a linguistics student himself, Madison no doubt employed the term "necessarily used" by design. Speaking in *The Federalist*, he wrote that at least "three sources of vague and incorrect definitions . . . *must* produce a certain degree of obscurity" in the interpretation of the Constitution.⁴⁷ First, the "indistinctness of the object[s]"⁴⁸ regulated hampers clarity. Governmental powers, restraints, and concepts are not exactly "works of nature"—certain in and of themselves, both in terms of their existence and in their susceptibility to scientific description. Second, if we can get beyond this problem, consider "the imperfection of the organ of conception,"⁴⁹ namely mankind. Precise limits between "common law, the statute law, the maritime law, [and] the ecclesiastical law," for example, "remain still to be clearly . . . established in Great Britain, where accuracy in such subjects has been more industriously pursued than in any other part of the world."⁵⁰ Not to mention the fundamental differences between the "three great provinces, the Legislative, Executive and Judiciary"—in which a profound "obscurity . . . reigns . . . which puzzle[s] the greatest adepts in political science."⁵¹

Finally, there is, in Madison's view, the "inadequateness of the vehicle of ideas."⁵² Language, or "the medium through which the conceptions of men are conveyed to each other," provides "a fresh embarrassment."⁵³ All new laws are "indeterminate"—"though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, [they] are considered as more or less obscure and equivocal, until their meaning [is]

45. THE FEDERALIST No. 37, at 238 (James Madison) (Jacob E. Cooke ed., 1961).

46. Letter from James Madison to Spencer Roane (Sept. 2, 1819), *reprinted in* 3 MADISON'S LETTERS, *supra* note 34, at 143, 145 (emphasis added).

47. THE FEDERALIST No. 37, *supra* note 45, at 237 (emphasis added).

48. *Id.*

49. *Id.*

50. *Id.* at 236.

51. *Id.* at 235.

52. *Id.* at 237.

53. *Id.* at 236.

liquidated and ascertained by a series of particular discussions and adjudications."⁵⁴

These are not the words of a theorist who thinks that constitutional decisionmaking can be performed by rote. Nor are they the ideas of one who thinks that nonmechanical judicial interpretation is, by definition, a usurpation of power. Madison brings to mind, instead, Alexander Bickel's dictum that "[e]ven when law pretends to be a science, it is not, after all, mathematics."⁵⁵ He accepted play in the joints of constitutional interpretation because, in short, he saw no other option, or at least no other viable one. The critique from the right—that all interpretive moves beyond the specific intentions of the Founders are illegitimate—Madison rejected explicitly. In my view, Madison would have repudiated much of the critique from the left as well, but here perhaps with what lawyers used to call a general demurrer. There is contradiction, there is discretion, there is choice, and there is even the potential for tyranny. How could it be otherwise? But what system could be proposed to operate more beneficially?

B. The Ambitious Role of the Early American Lawyer

This section broadens the focus of the Essay from one Framers, even if he is the most important one, to a wider sense of the lives and values of early American statesmen. I have in mind particularly one subset of the first few generations of American political decisionmakers—lawyers and judges. From time to time, I hear complaints about the pervasive influence of lawyers. Lawyers, the rumors go, not only run the judiciary, but also the legislature, the executive branch, political parties, and everything else associated with power. In my view, there is not that much truth in the broad claim. I know that our legislature in Colorado is not dominated by lawyers, in fact they are few and far between. The same is true, I seem to recall, in Virginia. I at least know that when I am in Denver lobbying for more money for the law school, I wish that there were a lot more lawyers to talk to. Apparently normal people do not think a strong case arises for significant public sacrifice in order to produce more lawyers.

But things were different in this country during the period from the Revolution to the Civil War. Twenty-five of the fifty-

54. *Id.*

55. ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 97 (1978).

six signers of the Declaration of Independence, for example, were lawyers. Thirty-one of the fifty-five members of the constitutional convention were members of the legal profession. Perhaps most surprising to us, thirteen of the first sixteen American presidents were lawyers. That is an amazing statistic, of course. I somehow doubt that today a lawyer could be elected president of the United States. These figures, however, illustrate a point made in a great book written by Robert Ferguson, *Law and Letters in American Culture*.⁵⁶ In Ferguson's view, lawyers "completely . . . dominated[d] American politics until the Civil War."⁵⁷

So what? Ferguson also demonstrates convincingly that early American lawyers and judges shared a much different view of the roles of law and the legal profession than those that prevail today. That view, which I will describe, has fallen into desuetude. Still, it sits uneasily with a claim that the art of judging, particularly constitutional judging, which so directly implicates our efforts at societal self-definition, is a mechanical enterprise that must be clearly rooted in what has been decreed before. Early American lawyers used a different vocabulary than we do, one of natural law and God-given justice. They also saw themselves as engaged in a different enterprise than the one we typically espouse—they were "discovering" the "natural" order of social and political relations.

But the "project" they envisioned was clearly an all-encompassing one in which the legal profession played a crucial, creative, and initiating role. It, like Madison's view of the rigors of constitutional interpretation, is a central feature of our constitutional tradition. It cannot be squared with the claim that uncertainty and discretion render the judicial enforcement of constitutional norms illegitimate.

Let me give a few examples. Listen to the way colonial Americans described the education necessary for lawyering. In a 1794 lecture given at Columbia University, Chancellor James Kent demanded that aspiring lawyers "master the Greek and Latin classics as well as moral philosophy, history, logic, and mathematics" because only by being "'well read in the whole circle of the arts and sciences'" could they form "'an accurate acquaintance with the general principles of Universal Law.'"⁵⁸

56. ROBERT FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* (1984).

57. *Id.* at 17.

58. *Id.* at 28 (quoting James Kent, *An Introductory Lecture to a Course of Law Lectures* (delivered Nov. 17, 1794), *reprinted in* 3 COLUM. L. REV. 330-43 (1903)).

Joseph Story claimed that the democratic lawyer must constantly "‘drink in the lessons and the spirit of philosophy.’"⁵⁹ Rufus Choate preached that a would-be practitioner must "[s]oak [his] mind with Cicero,"⁶⁰ because literature and politics were inevitably merged in the lawyer's general call to "civitas," or the obligation to serve the higher sense of civic and public purpose.⁶¹ Key constitutional Framers James Wilson claimed that the true lawyer possessed a "‘philosophy of the human mind’ that allowed him to ‘become well acquainted with the whole moral world’ and to ‘discover the abstract reason of all laws.’"⁶²

Jefferson, whom we forget was generally understood in his day as the country's greatest legal scholar, wrote that "‘history, politics, ethics, physics, oratory, poetry, [and] criticism [are] necessary . . . to [become] an accomplished lawyer.’"⁶³ Of course, Jefferson also prescribed a plan of law study that included, each day, intensive study of three languages from eight o'clock to noon, politics and history in the afternoon, and poetry, criticism, rhetoric and oratory from "‘Dark to Bed-time.’"⁶⁴ That, you will notice, included no time for nightly visits to the taverns of Williamsburg.

Jefferson, of course, studied law for five years. But there were also a great many Patrick Henrys in colonial America—"Blackstone" lawyers briefly trained in a law office, who practiced from three "legal sources": Blackstone, Shakespeare, and the Bible. Lincoln was the last Blackstone lawyer to be president of the United States—we have never done so well, before or since. Still, these practices were outside what has been called the "controlling aspirations of [the American] intellectual elite."⁶⁵ Even here, the point is the same for my purposes. Early American lawyers and

59. *Id.* at 66 (quoting Joseph Story, *A Discourse Pronounced at the Inauguration of the Author as Dane Professor of Law in Harvard University, August 25, 1829*, in *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY* 528-29 (William Wetmore Story ed., Boston, Little, Brown 1852)).

60. *Id.* at 75 (quoting Rufus Choate, *quoted in* CLAUDE M. FUESS, *RUFUS CHOATE: THE WIZARD OF THE LAW* 222 (1928)).

61. *Id.* at 72-78.

62. *Id.* at 60 (quoting James Wilson, *Lectures on Law Delivered in the College of Philadelphia in the Years 1790 and 1791*, in 1 *THE WORKS OF JAMES WILSON* 90-91 (Robert Green McCloskey ed., 1967) [hereinafter *WORKS OF WILSON*]).

63. *Id.* at 28 (quoting letter from Thomas Jefferson to Daloney Terrell (Feb. 26, 1821), in 15 *THE WRITINGS OF THOMAS JEFFERSON* 318-23 (Andrew A. Lipscomb & Albert E. Bergh eds., 1905)).

64. *Id.* (quoting Thomas Jefferson, *quoted in* 11 *THE WORKS OF THOMAS JEFFERSON* 420-26 (Paul Leicester Ford ed., 1905)).

65. *Id.* at 29.

judges—unlike their modern day counterparts—were schooled in, and *employed in their practices*, general knowledge. “Technical” legal competence paled in importance compared to skills of oratory, eloquence, philosophy, politics, religion, and literature. Indeed, as Ferguson has written, “[o]ne can hardly exaggerate the importance of general learning in early American law.”⁶⁶ There was “a remarkable symbiosis between law and literary aspiration.”⁶⁷

This meant, as Chancellor Kent argued, that lawyers were seen as “‘*ex officio* natural guardians of the laws,’ and ‘sentinels over the constitutions and liberties of the country.’”⁶⁸ In John Adams’s view, it was the responsibility of lawyers to “proclaim ‘the laws, the rights, [and] the generous plan of power’ delivered down from remote antiquity.”⁶⁹ James Wilson, one of the Constitution’s principal draftsmen, wrote that the true lawyer “ranged not without rule, but without restraint, in the rich, the variegated and the spacious fields of science!”⁷⁰

This vision of law at least partially explains to students of constitutional history some surprising phenomena: the fact, for example, that Justice Joseph Story (perhaps our preeminent judicial constitutional theorist) would describe the goal of judicial reasoning as the realization of “‘the splendid visions of Cicero, dreaming over the majestic fragments of his perfect republic.’”⁷¹ Or that John Marshall’s greatest constitutional opinions failed to cite a single case. As Ferguson has written, “[e]ach argument was grounded instead upon appeals to the *principia* of American civilization and upon the grand, inclusive style [of] Blackstone.”⁷² Early Americans were obsessed with self-definition, and the development of judicial review went a long way towards establishing a lawyer’s hegemony over the description of republican ideals.

66. *Id.* at 66.

67. *Id.* at 25.

68. *Id.* (quoting James Kent, *Address Delivered Before the Law Association of New York City* (Oct. 21, 1836), in *MEMOIRS AND LETTERS OF CHANCELLOR JAMES KENT* 235-36 (William Kent ed., Boston, Little, Brown 1898)).

69. *Id.* at 18 (quoting John Adams, *A DISSERTATION ON THE CANON AND FEUDAL LAW* (1765), reprinted in *3 THE LIFE AND WORKS OF JOHN ADAMS* 445-64 (Charles Francis Adams ed., Boston, Little, Brown 1850-56)).

70. *Id.* at 65 (quoting 1 *WORKS OF WILSON*, *supra* note 62, at 69-70).

71. *Id.* (quoting Joseph Story, *Progress of Jurisprudence, An Address Delivered before the Members of the Suffolk Bar, at Their Anniversary, September 4, 1821, at Boston*, in *THE MISCELLANEOUS WRITINGS OF JOSEPH STORY*, *supra* note 59, at 215).

72. *Id.* at 23.

This concept of the law and lawyering, quite obviously, has not survived. Jacksonian democracy questioned the legitimacy of such an ex officio élite. Emerson, Thoreau, and Whitman launched a cultural assault on the notion of civic republicanism. For Thoreau, the virtue of lawyers was "‘the virtue of pigs in a litter, which lie close together to keep each other warm.’"⁷³ Around the same time, Emerson claimed that "the world is nothing, the man is all."⁷⁴ Whitman, on the other hand, wrote "I give you myself, before preaching or law."⁷⁵

By the 1840's, oratory came to play a less significant role in the courtroom. Jurisprudence became more technical and positive. John Marshall, Joseph Story, Daniel Webster, and James Kent died despairing over the fate of their country. By the end of the nineteenth century, Oliver Wendell Holmes would deride what he called "‘Story's simple philosophizing.’"⁷⁶ He referred to lawyers as that "‘little army of specialists’"⁷⁷ and declared war on his predecessors, writing: "For my own part, I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether," so that we could "convey legal ideas uncolored by anything outside the law."⁷⁸ The idea of stripping legal norms of everything outside the law would be heartening to critical scholars of both the right and the left. It would not, however, have been even comprehensible, much less desirable, to an early American lawyer.

That is exactly the point. The founding generation had an antiquated vision of the force, character, and process of law. I do not suppose that we would want to recapture that. Still, the notion that judges can act appropriately only when their decisions are based clearly upon unambiguous dictates of positive and specific legal commands was as far outside the range of experience of early American lawyers as their natural law aspirations are to us. Jurisprudence was an all-encompassing science which

73. *Id.* at 239 (quoting Henry David Thoreau).

74. Or, to put it another way, "in yourself is the law of all nature." Ralph Waldo Emerson, *The American Scholar*, reprinted in 1 *THE WORKS OF RALPH WALDO EMERSON* 112-13 (Edward W. Emerson ed., 1883).

75. WALT WHITMAN, *Song of the Open Road*, in *THE LEAVES OF GRASS* 158 (1900).

76. FERGUSON, *supra* note 56, at 288 (quoting Oliver Wendell Holmes, *The Use of Law Schools: Oration Before the Harvard Law School Association at Cambridge, November 5, 1886, on the 250th Anniversary of Harvard University*, in *THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES* 40-41 (Mark DeWolfe Howe ed., 1962)).

77. *Id.* at 290 (quoting Holmes, *supra* note 76, at 36).

78. *Id.* (quoting Oliver Wendell Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 464 (1897)).

sought to bring human relations in line with the commands of a sophisticated and still-unfolding moral universe. There was, I suggest, no single, well-marked, and closely channelled road to the achievement of Cicero's republic. But that did not make constitutional law illegitimate.

C. *The Fourteenth Amendment*

My last two ventures into constitutional history will be more brief and more pointed. Both involve the Civil War and its amendments; and, if anything, they present interpretive issues that are even more pervasive than Madison's thought or the ethos of colonial lawyers. The first discussion concerns the history of the Fourteenth Amendment itself. The Due Process and Equal Protection Clauses of the Fourteenth Amendment make up the heart of modern constitutional law. Fourteenth Amendment rulings such as *Brown v. Board of Education*,⁷⁹ *Roe v. Wade*,⁸⁰ and *Frontiero v. Richardson*⁸¹ have spawned a significant industry of constitutional theorizing. Debate over the way the Fourteenth Amendment should be interpreted is, to a significant extent, the debate of modern constitutional law. Some advocate a tight interpretive stance, allegedly based on intention. Others seek the vigorous use of the "majestic generalities"⁸² of the Amendment in order to improve our social order.

But what was the purpose of the Amendment? Professor William Nelson has written an excellent book addressing that question.⁸³ The best answer appears to be that the Framers of the Fourteenth Amendment, when compared to our uses of the provision, were speaking to a different sort of audience, using different sorts of concepts, for different purposes, and with contradictory rationales. The likely case is that first and foremost the reconstruction Congress was seeking to codify, in dramatic terms, its victory over the South. By guaranteeing federal privileges and immunities, due process, and equal protection, the Framers could say, most effectively, that the regime of the pre-war South could

79. 347 U.S. 483 (1954).

80. 410 U.S. 113 (1973).

81. 411 U.S. 677 (1973).

82. William J. Brennan, Speech to Text and Teaching Symposium, Georgetown University (Oct. 12, 1985), reprinted in *THE FEDERALIST SOCIETY*, *supra* note 16, at 11 (1986).

83. WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* (1988).

not constitutionally be resurrected. Beyond that, in Nelson's view, they were largely uninterested in issues of bureaucratic enforcement of the Amendment's commands. Those are our concerns, not theirs. They wrote "to reaffirm the lay public's longstanding rhetorical commitment to general principles of equality, individual rights and local self-rule."⁸⁴

Of course, to our present sensibilities, these three concepts—equality, individual rights, and local control—are not only vague and amorphous, but in many instances they are contradictory. But the Framers of the Amendment, for several reasons, were not inclined to clear up these potential conflicts. First, it was less clear to them than it is to us that the principles would actually collide. One needs a stronger sense of the actual operations of an equality concept, for example, to understand what other concerns it might subsume. Second, they were not speaking to philosophers and legal theorists. They were not theorists themselves. The language of Section One⁸⁵ was designed for persuasion, not intellectual coherence.⁸⁶ Most fundamentally, the Amendment was seen as a rhetorical commitment, charging the nation to do its duty concerning the newly freed slaves and loyal unionists. Third, real and unreconciled disagreement about the nature of the equality demanded by the provision persisted. The ambiguity and the capaciousness of the Amendment's terms allowed the Framers to retain the support of political coalitions that concurred only in vague ideas, not specific programs.⁸⁷

To give examples of this amorphous process is easy. Mixing notions of liberty and equality, Justice Chase declared that the most fundamental of natural rights was the power to exercise the same rights as others.⁸⁸ Congressman Bingham, a drafter of the Amendment, constantly referred to the equality of natural rights.⁸⁹ The higher law/natural rights basis of the provision also, ironically by our lights, included concepts of duty: God required

84. *Id.* at 8.

85. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

86. Cf. NELSON, *supra* note 83, at 60-63.

87. See *id.*

88. *Id.* at 22.

89. *Id.* at 73.

that people behave in various ways.⁹⁰ Some supporters indicated that equality meant an equal place in terms of "intelligence and virtue."⁹¹ Others claimed that, at most, the phrase recognized an equal need for physical protection by the government.⁹² The suffrage issue was a particularly warm potato. For example, the Ohio Republican Party in 1866 openly advocated black suffrage in some counties, and in some opposed it.⁹³ National leaders decided not to settle the question because most would assume that "their" Amendment was the one that had passed. Charles Sumner wrote that Section One was "like a sign on the highway with different inscriptions on each side, so that people approaching the sign from the opposite directions necessarily see it differently."⁹⁴

What, then, are the demands of certainty in interpreting such a provision? Originalists apparently would allow only the ideas on which all or virtually all Framers agreed. But this lowest common denominator approach codifies a supposed compromise that did not in fact exist; or, more accurately, it is not a compromise at all. Why should it be the case that the least ambitious interpreters, in every instance, win the day? Critics on the left must assume, in turn, that any constitutional provision that is subject to such varying interpretations cannot actually be deemed law; it is too malleable, uncertain, indeterminate, subject to manipulation. But can you imagine any conclusion more at odds with the perceptions of the American populace? When we enact a constitutional amendment, whatever else we may have in mind, we all think we are doing something that will have an impact in the real world.

D. Lincoln and Aspiration

The final historical foray this Essay addresses is, in my view, the most important one. If we back up a few years to the period just before the Civil War, Lincoln's vision of the Constitution moves to center stage. What a telling vision it is. Recall that one of the central questions addressed in the Lincoln-Douglas debates in 1858 was the meaning of the Declaration of Independ-

90. *Id.* at 23.

91. *Id.* at 87.

92. *Id.* at 88-89.

93. *Id.* at 143.

94. *Id.*

ence and, less directly, the way that the Declaration's goals should affect the meaning of the Constitution itself. Responding to Judge Douglas's claims for "popular sovereignty" and support for the *Dred Scott* decision,⁹⁵ Lincoln demanded that we "readopt the Declaration of Independence, and with it the practices and polic[ies] which harmonize with it."⁹⁶ In Lincoln's view, our constitutive principles were more basic and more profound than the specifics set forth in the constitutional text. Framing an illustration based upon Biblical metaphor, he explained:

There is something back of [the Constitution and the Union] entwining itself more closely about the human heart. That something, is the principle of "Liberty to all"—the principle that clears the *path* for all—gives *hope* to all—and . . . *enterprise* and industry to all.

The *expression* of that principle, in our Declaration of Independence . . . was the word "*fitlyspoken*" which has proved an "apple of gold" The *Union* and the *Constitution*, are the *picture* of *silver*, subsequently framed around it. . . . The *picture* was made *for* the apple—*not* the apple for the picture.

So let us act, that neither *picture*, or *apple* shall ever be blurred or bruised or broken.⁹⁷

Of course, drawing this link back to the fountainhead of the Constitution—the Declaration—was not the end of Lincoln's sojourn. He realized the seeming inconsistencies of the Declaration. As Martin Luther King, Jr. reminded a century later: "that document was always a declaration of intent rather than of reality."⁹⁸ Slavery was only the grossest of the realities that haunted it. The "all" who were created equal were, at best, white, propertied, protestant males. Lincoln argued, though, that the Framers of the Declaration

did not mean to assert the obvious untruth, that all were then actually enjoying . . . equality, nor yet, that they were about

95. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

96. Abraham Lincoln, Speech at Peoria, Illinois, in Reply to Senator Douglas (Oct. 16, 1859), reprinted in *SELECTED WRITINGS AND SPEECHES OF ABRAHAM LINCOLN* 44 (T. Harry Williams ed., 1943).

97. Abraham Lincoln, Fragment on the Constitution and the Union (Jan. 1861), reprinted in 4 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 169 (Roy Basler ed., 1953).

98. Martin Luther King, Jr., *WORDS OF MARTIN LUTHER KING* 52 (Coretta S. King ed., 1983).

to confer it immediately upon them . . . They meant simply to declare the *right*, so that *enforcement* of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which could be familiar to all and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence.⁹⁹

The problem with the *Dred Scott* decision, then, was not just that it sought to bind the nation to a particular course in dealing with its most devastating problem. *Dred Scott* itself, in Gary Jacobsohn's words, "failed to acknowledge the moral dimensions of American constitutionalism."¹⁰⁰ In Lincoln's view, it failed to reflect the "national striving to fulfill the substantive ideals of the Constitution and the Declaration of Independence."¹⁰¹ That aspiration was the "leading object"¹⁰² of the government for which the Civil War itself was fought.

But how can the aspirations of American constitutionalism be squared with the certainty critiques of the left and right? Our vision of "liberty," in Lincoln's words, will be "constantly looked to, constantly labored for, . . . constantly approximated . . . though never perfectly attained."¹⁰³ Its "approximation" is, by definition, an imperfect process, one that moves with the developments of our culture, allowing "enforcement . . . as fast as circumstances should permit."¹⁰⁴ It assumes, even, "partial and temporary departures, from necessity."¹⁰⁵ It will not be pristine and neatly consistent and representative of the latest trends of political philosophy. It is, after all, the movement of a nation and a culture, like law itself.

99. Abraham Lincoln, The Dred Scott Decision, Speech at Springfield, Illinois (June 26, 1857), *reprinted in* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS 361 (Roy Basler ed., 1946).

100. GARY JACOBSON, THE SUPREME COURT AND THE DECLINE OF CONSTITUTIONAL ASPIRATION 8 (1986).

101. *Id.* at 95.

102. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *reprinted in* SELECTED WRITINGS AND SPEECHES OF ABRAHAM LINCOLN, *supra* note 96, at 125, 139.

103. Letter from Abraham Lincoln to H.L. Pierie and others (Apr. 6, 1859), *in* ABRAHAM LINCOLN: HIS SPEECHES AND WRITINGS, *supra* note 99, at 361.

104. *Id.*

105. Lincoln, *supra* note 102, at 140.

III. CHOICE

I have tried to show, in general terms, that the indeterminacy critique—the demand for certainty—sells short our constitutional tradition. At best the critiques are partial, for the need to make choices will always be with us, and the need to explain why certain choices are preferable to others cannot be successfully, or courageously, put aside. In the broadest sense, Holmes was right when he wrote that in law “certainty generally is illusion and repose is not the destiny of man.”¹⁰⁶ The straight fact is that constitutional decisionmaking, like all legal decisionmaking, is value-laden. As Charles Black has written, “to ask that constitutional law be free from value judgments thus implicated is to ask that it not be law.”¹⁰⁷ And the general principles that make up the central features of our Constitution, as Madison acknowledged, produce uncertainty in law, not certainty. The “whole subject-matter of jurisprudence,” as Justice Cardozo concluded, is “more plastic, more malleable, the moulds less definitively cast . . . than most of us . . . have been accustomed to believe.”¹⁰⁸ To say that the judicial enforcement of sometimes ambiguous constitutional provisions is illegitimate is to argue for a different historical course than we have taken. And we have been wise, at least on this optimistic front, in the choice that we have made.

This is, of course, part of a broader point. Holmes complained about scholarly theorists saying that “the academic life is but half-life, . . . utter[ing] smart things that cost you nothing . . . from a cloister.”¹⁰⁹ We do not have to intentionally beat up on theorists to openly recognize that most of law, like most of life, is choice. As Holmes also reminded, “life is an art not a thing which one can work out successfully by abstract rules.”¹¹⁰ Madison, Jefferson, Marshall, Story, Lincoln, Brandeis, and Warren knew that. They also knew, as Adlai Stevenson wrote, that “to act with enthusiasm and faith is the condition of acting greatly.”¹¹¹ We should remember that lesson ourselves.

106. Holmes, *supra* note 78, at 466.

107. CHARLES BLACK, *DECISION ACCORDING TO LAW* 80 (1981).

108. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 161 (1949).

109. Letter from Oliver Wendell Holmes to Felix Frankfurter (July 15, 1913), *microformed on OLIVER WENDELL HOLMES JR. PAPERS* (University Publications of America).

110. Letter from Oliver Wendell Holmes to Lady Castletown (June 18, 1897), *quoted in* SHELDON NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* 217 (1989); *see also* CARDOZO, *supra* note 108, at 166 (“I have become reconciled to the uncertainty, because I have grown to see it as inevitable.”).

111. PORTER MCKEEVER, *ADLAI STEVENSON: HIS LIFE AND LEGACY* 257 (1989).