



AMERICAN
CONSTITUTION
SOCIETY FOR
LAW AND POLICY

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By Peggy Cooper Davis

July 2007

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Constitutional Interpretation as Structured Choice

Peggy Cooper Davis*

As I¹ think about what I might contribute to a discussion of the role of history in constitutional interpretation, I am drawn equally to two apparently disparate aspects of my scholarly work—constitutional history in the Reconstruction period and Lawyering Theory. Combining these fields—one the study of a historical period and its influence on constitutional adjudication, the other a methodological approach to understanding the practice and evolution of law—has taught me something rather specific about how history is—and isn't—used when lawyers and judges debate constitutional meaning. I began my historical research with the assumption that the story of how and why the Constitution was reformed during Reconstruction would be an obvious guide to interpreting the amendments (the Thirteenth, outlawing slavery; the Fourteenth, defining citizenship and establishing a charter of civil rights; and the Fifteenth, establishing universal male suffrage) by which it was reformed. Even the most ardent textualist would concede that interpreters of a constitution should not be unmindful of the authors' circumstances and purposes.² I discovered, however, that the history of constitutional reformation during Reconstruction has been largely neglected in constitutional jurisprudence. Lawyering Theory provided tools for understanding 1) why this history had been neglected and 2) what interpretive uses lawyers and judges can appropriately make of it. In what follows, I will demonstrate tools of Lawyering Theory as I consider these two questions.

But the burden of my essay is greater than this demonstration, for the demonstration illustrates a broader principle of legal interpretation. I call this principle, drawn from Lawyering Theory, the principle of structured choice. It has two parts: The first is that what we make of our Constitution, and what we make of our constitutional history, are matters of structured choice. The second is that we will never find a workable structure for constitutional interpretation until we learn to come more fully to terms with the element of choice.

I will first briefly describe Lawyering Theory as it has developed at New York University and some of the tools that it provides for analyzing the interpretive process. I'll next offer a brief account of how antislavery ideology motivated and influenced the design of the Reconstruction Amendments and how antislavery ideology came to be ignored in post-Reconstruction constitutional adjudication. I'll then return to Lawyering Theory, using its principle of structured choice to explain how Reconstruction's antislavery ideology might—and should—guide interpretation of our reconstructed Constitution. Finally, with the hope of drawing out my somewhat implicit, broader argument, I'll offer an imagined example of judicial reasoning that follows the principle of structured choice.

* John S.R. Shad Professor of Lawyering and Ethics, New York University. This Issue Brief was first released by ACS in July 2007.

¹ I argue in this essay for making the narrator visible in judicial opinions and in written and oral advocacy when stories are told about the development or interpretation of law. Because this argument applies as well to legal scholarship, I make it in the first person and try in other ways to avoid the legal scholar's convention of concealing authorial perspective.

² See ANTONIN SCALIA, A MATTER OF INTERPRETATION 23-24 (1997) (comparing textualism and strict constructionism).

I. Lawyering Theory

Lawyering Theory is the multi-disciplinary study of law in use. It is a study of the process rather than the outcomes of lawyering and judging. This kind of study evolved at New York University—as it did for the Legal Realists³—as a simultaneous examination of practice and pedagogy. More than twenty years ago, under the leadership of Anthony Amsterdam, we established an experiential component for our first year curriculum. We quickly realized that we lacked the theoretical underpinnings for teaching our students to use law, and, with collaborators like Jerome Bruner, Carol Gilligan and Peter Brooks, we began to try to develop those theoretical underpinnings.⁴ For example, we have used narratology, discourse analysis, and criticism to study formal and informal oral advocacy,⁵ written advocacy,⁶ and client interviewing and counseling.⁷ We have used relational psychology to expose barriers to effective interactive work.⁸ We have used narratology and cognitive psychology to analyze the work of persuasion in jury trials.⁹ And we have used all of these tools to study judicial decisionmaking.¹⁰

II. Reconstruction History

I came to Reconstruction history in the 1980s when, as a new family rights scholar, I wondered over the sense of tenuousness in post-*Lochner*¹¹ Supreme Court opinions establishing rights of marriage, procreation, and autonomy and security in the parental relation. I read the debates of the Reconstruction Amendments and found there clear statements of an intention that those amendments would guarantee the rights to marry, to procreate and to parent. The rationale for guaranteeing these rights was also clearly stated. The experience of slavery had sharpened our nation's understanding of freedom, making clear that measured liberty in familial engagement, personal expression and civic participation was a fundamental human entitlement.

³ See, e.g., Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947).

⁴ The most comprehensive published account of this work is ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* (2000).

⁵ See Ty Alpert, et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1 (2005); Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992); Peggy Cooper Davis, *Law and Lawyering: Legal Studies with an Interactive Focus*, 37 N.Y.L. SCH. L. REV. 185 (1992); Peggy Cooper Davis, *Performing Interpretation: A Legacy of Civil Rights Lawyering in Brown v. Board of Education*, in RACE, LAW & CULTURE: REFLECTIONS ON BROWN V. BOARD OF EDUCATION 23 (Austin Sarat ed., 1997); Philip N. Meyer, “*Desperate For Love*”: *Cinematic Influences Upon a Defendant's Closing Argument to a Jury*, 18 VT. L. REV. 721 (1994); Philip N. Meyer, “*Desperate For Love II*”: *Further Reflections on the Interpenetration of Legal and Popular Storytelling in Closing Arguments to a Jury in a Complex Criminal Case*, 30 U.S.F. L. REV. 931 (1996); Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case*, 47 STAN. L. REV. 39 (1994).

⁶ See Anthony G. Amsterdam, *Telling Stories and Stories About Them*, 1 CLINICAL L. REV. 9 (1994); Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 LEGAL STUD. F. 7 (1996).

⁷ See Peggy Cooper Davis, *Contextual Legal Criticism: A Demonstration Exploring Hierarchy and "Feminine" Style*, 66 N.Y.U. L. REV. 1635 (1991).

⁸ See Peggy Cooper Davis & Aderson Belgarde Francois, *Thinking Like a Lawyer*, 81 N.D. L. REV. 795 (2005); Peggy Cooper Davis, *We Can Do Better*, 14 YALE J.L. & FEMINISM 263 (2002).

⁹ See NEAL FEIGENSON, *LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS* (2000).

¹⁰ AMSTERDAM & BRUNER, *supra* note 5; Peggy Cooper Davis & Carol Gilligan, *A Woman Decides: Justice O'Connor and Due Process Rights of Choice*, 32 MCGEORGE L. REV. 895 (2001).

¹¹ *Lochner v. New York*, 198 U.S. 45 (1905).

I saw the imprint of anti-slavery ideology written clearly on the project of constitutional reconstruction. The liberty promised by the Fourteenth Amendment and extended to all by the interaction of the Thirteenth and Fourteenth Amendments *was understood as slavery's opposite*. Enslavement turned on denying natal ties; to be a slave was to be the property of a master rather than the child of a family. Freedom required that the right of family be restored to slaves and guaranteed to all. Enslavement turned on denying rights of self-determination and self-definition; human property lost its value if it could not be controlled. Freedom required that a measure of personal autonomy be restored to slaves and guaranteed to all. Enslavement turned finally on the denial of political status; slavery was, in Orlando Patterson's terminology, civil death. Freedom required that political voice be restored to slaves and guaranteed to all.¹² All of this caused me to wonder all the more at the thin and insecure prose with which Supreme Court justices had announced—and sometimes limited—these rights.

The cause was not hard to find. From *Slaughter-House*¹³ forward, the Court was implicated—albeit more subtly as time went on—in a comprehensive and in large part racially motivated campaign to repudiate Reconstruction and all that it represented. We will wonder less at the Court's failure to acknowledge the anti-slavery impetus of the Reconstruction Amendments when we recall Chief Justice and former Klansman Edward White sitting with President Woodrow Wilson, members of Congress and colleagues on the Court enjoying an advance screening of *The Birth of a Nation*. Thomas Dixon's engrossing depiction of how black lechery, ignorance, and vindictiveness were overcome by a Klan sworn to end the humiliation and vice of Reconstruction was intended as political propaganda, and it succeeded as such.¹⁴ Scholars, journalists, political figures, educators and historians who shared Dixon's view effected a revisionist rejection of Reconstruction and the antislavery ideology by which it was driven.

The rejection of antislavery as a central principle of our re-founding deprived us of a normative compass that would serve us well in interpreting the constitutional guarantees of liberty and citizenship. I have argued over the last 20 years for taking up that lost compass.

On one of the many occasions when I made this argument, a distinguished law professor begged to differ. How, he asked, can you urge us to find a normative compass in the ideologies of the United States anti-slavery movement? Don't you know that many of the most ardent supporters of the Reconstruction Amendments were incapable of imagining or accepting principles of racial equality?

My response—by no means original—was that we have, and ought to acknowledge, a choice about how we will apply the lessons of Reconstruction history. We can choose to apply the principles for which the Reconstruction Amendments stand precisely as we think members of

¹² For a more complete articulation of this argument, see PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1997).

¹³ *The Slaughter-House Cases*, 83 U.S. 36 (1872) (holding that the Fourteenth Amendment's guarantee that states would not deny "privileges and immunities of citizenship" did not protect basic civil rights but pertained only to rights uniquely pertinent to national citizenship).

¹⁴ For a full account of official involvement in disseminating the message of *Birth of a Nation*, see JOHN HOPE FRANKLIN, *The Birth of a Nation: Propaganda as History*, in *RACE AND HISTORY: SELECTED ESSAYS 1938-1988*, at 10 (1989).

the Reconstruction Congress and ratifying conventions would have applied them. If we make that choice, we will conclude that the Amendments permit bans on interracial marriage, or on what Justice Scalia likes to call homosexual sodomy, or on mixed-race schooling. But we can also choose to think broadly about liberty. To think of it as encompassing a continuing struggle to define the appropriate entitlements of free citizenship. To think of it as slavery's opposite as that concept is understood over time. *Neither choice is logically necessary or dictated by the Constitution's reconstructed text.* And this takes us . . .

III. Back to Lawyering Theory.

It is hard for us to own up to choice in the law.

As litigators, we know that judges make choices, but we dare not ask them to choose in our favor. We believe that we are on firmer ground, and that we serve our clients more effectively, when we argue that logic and precedent *compel* judges to rule in our favor. And so, even in hard cases we bend to habits of argumentation that presume determinacy, and we do our best to state our claims in certain terms: "The law is this or that, and it applies—or does not apply—indisputably in the case at hand."

In an essay that challenges lawyers to understand more deeply the narrative qualities of our work,¹⁵ Peter Brooks recruits Henry James to describe the limits and perils of this certain-sounding talk. Brooks, an early and regular Lawyering Theory collaborator, uses James to open our eyes to the discursive techniques by which we deny choice. In doing so, he helps us to see how lawyers and judges might replace our discourse of dueling certainties with a discourse of acknowledged and disciplined choice.

James disliked the "omniscient narrator" who speaks from a god-like perspective to tell readers what "is." He preferred, and created, narrators whose voices and perspectives were visible. This is apparent even in his early work. The narrator of *Daisy Miller*, for example, uses first person pronouns. This somewhat personalized narrator puts an arm around the reader's shoulder, referring to Winterbourne, the central character, as "our friend" or "our young man"¹⁶ and steps back from reportorial certainty to allow Winterbourne to turn inward and present his own perspectives on a scene. As a result, the reader is able to speculate and make judgments rather than be told. The following passage exemplifies all of this as "our" narrator invites speculation about Winterbourne, about Miller, and about the worlds they inhabit:

Winterbourne wondered how . . . [Daisy Miller] felt about all the cold shoulders that were turned upon her, and sometimes found himself suspecting with impatience that she simply didn't feel and didn't know. He set her down as hopelessly childish and shallow, as such mere giddiness and ignorance incarnate as was powerless either to heed or to suffer. Then at other moments he couldn't doubt that she carried about in her elegant and irresponsible little

¹⁵ Peter Brooks, *Narrative Transactions: Does the Law Need a Narratology?*, 18 *YALE J.L. & HUMAN.* 1 (2006).

¹⁶ HENRY JAMES, *DAISY MILLER AND OTHER STORIES* 39, 54 (Jean Gooder ed., Oxford University Press 1998) (1878).

organism a defiant, passionate, perfectly observant consciousness of the impression she produced. He asked himself whether the defiance would come from the consciousness of innocence or from her being essentially a young person of the reckless class. Then it had to be admitted, he felt, that holding fast to a belief in her “innocence” was more and more but a matter of gallantry too fine-spun for use. As I have already had occasion to relate, he was reduced without pleasure to this chopping of logic and vexed at his poor fallibility, his want of instinctive certitude¹⁷

James wrote in this way because he believed that nearly any visible narrator, regardless of perspective, is preferable to what he called “the mere muffled majesty of irresponsible authorship”¹⁸—irresponsible, on James’s view, because, as Brooks tells us, “[N]o one takes responsibility for how things are seen and known.”¹⁹

Judges, like lawyers, fall easily into the mode of “irresponsible” authorship. To illustrate this, let’s use James’s narrative insights to examine the authorial voices in *Lawrence v. Texas*,²⁰ the case in which the Supreme Court overruled *Bowers v. Hardwick*²¹ to rule that criminalization of adult consensual sodomy violates the Fourteenth Amendment protection against excessive infringements of liberty. To simplify the analysis, we will limit it to a consideration of how assertions are framed. We’ll use a somewhat narrow definition of framing as choosing words that introduce and provide context for an assertion. And we’ll restrict our analysis to three types of frames, all of which are common and revealing in legal talk. We will consider first the mental state verb frame. This is a frame that calls attention to the speaker’s, or to another authority’s, mental processes, establishing the assertion as a product of someone’s thought rather than an isolated fact. “I think X.” is perhaps the simplest example. Notice how these mental state verbs hedge an assertion. The hedge in the mental state verb can be mitigated (After careful analysis, we have concluded X.), but it is always there. Our *Daisy Miller* narrator does not use self-referencing mental state verbs in the passage above. But Winterbourne’s observations and conclusions are regularly framed by mental state verbs: Winterbourne doesn’t announce or report; he wonders, finds himself suspecting, doesn’t doubt, asks himself, and feels one thing or another.

We will also consider the authority frame. This is a frame that rests the speaker’s assertion on the authority of someone other than the speaker. In legal discourse, some authority frames can be decisive with respect to the validity of an assertion: “This Supreme Court of the United States has recently held that. . . .” But they can also be dismissive of the framed

¹⁷ HENRY JAMES, *DAISY MILLER AND OTHER STORIES* 69-70 (Jean Gooder ed., Oxford University Press 1998) (1878). These techniques of the visible and less than certain narrator are also nicely captured in the following:

The finest gallantry here was surely just to tell her the truth; and the truth, for our young man, as the few indications I have been able to give have made him known to the reader, was that his charming friend should listen to the voice of civilized society. *Id.* at 54.

¹⁸ Brooks, *supra* note 16, at 9 (quoting HENRY JAMES, *THE GOLDEN BOWL* (1904)).

¹⁹ *Id.*

²⁰ 539 U.S. 558 (2003).

²¹ 478 U.S. 186 (1986).

assertion: “The Plaintiff wrongly asserts that. . . .” As we have seen, authority frames are used in the *Daisy Miller* passage to offer Winterbourne’s perspective to the reader, and they are usually paired with mental state verb frames.

The last frame we will consider is not a frame *per se*, but the *absence* of both mental verb and authority frames. In silence—“The law is X.”—or with the flourish of a descriptive frame—“We must accept that the law is X.”—the speaker who withholds mental state and authority frames takes on the muffled majesty of irresponsible authorship: Nobody thinking or believing; just the word of god. James gives us the word of god in the *Daisy Miller* passage, but only to introduce his character’s obviously fallible ruminations, as in the “Winterbourne wondered. . . .” with which the passage begins.

The opinion of the Court in *Lawrence* is structurally and linguistically complex, and I am certainly unable to do it justice here. It is admirable in so many ways that I hesitate to critique it. Still, even a limited frame analysis reveals that it is locked in the pose of certainty. Although the opinion from time to time drops into the world of mental verbs (and although these drops are fascinating and important to the overall impact of the opinion) its crucial passages are in the voice of certainty. The opinion begins with a string of absolutes in the voice of god:

Liberty protects the person from unwarranted intrusions into a dwelling or other private places²²

Freedom extends beyond spatial bounds.²³

Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.²⁴

And the crux of the holding is contained in a series of pronouncements that are artfully placed under the wing of controlling authority,²⁵ and unmediated by mental states:

[I]ndividual decisions by married persons . . . are a form of ‘liberty’ protected by the Due Process Clause²⁶

[T]his protection extends to intimate choices by unmarried as well as married persons.²⁷

Whereupon, the majority declares that *Bowers* “was not correct.”²⁸

²² *Lawrence*, 539 U.S. at 562.

²³ *Id.*

²⁴ *Id.*

²⁵ The majority’s decisive language is a quote of an earlier statement by one of the members of the majority. This self-referencing authority frame introduces an embedded frame attributing what follows to controlling Supreme Court precedent. Then come the assertions quoted above.

²⁶ *Lawrence*, 539 U.S. at 578.

²⁷ *Id.*

²⁸ *Id.*

Scalia in dissent is equally certain in his crucial passages—he speaks from omniscience or on the authority of the Court itself, and his authority frames are declarative rather than speculative:

[T]here is no right to ‘liberty’ under the Due Process Clause²⁹

We have held repeatedly . . . that *only* fundamental rights qualify for . . . so-called ‘heightened scrutiny’ protection.³⁰

As I’ve said, this certain-sounding talk is natural to opinion-writing. It is understandable that judges will want their decisions to seem inevitable and indisputably right. In many ways, we all want their decisions to seem inevitable and right, for the legitimacy of the Court’s authority appears to depend on it. I think of the massive resistance to the Court’s decision in *Brown v. Board of Education* and shudder to think what resistance might have followed a decision that seemed more tentative. Legitimacy seems to demand certainty.

But our attraction to certainty may be motivated by more than a desire that judicial decisions seem legitimate. Jerome Frank made the psychological speculation that indeterminacy is denied by lawyers and judges because we crave the comfort of an all-knowing and always wise father.³¹ My work with Gilligan allows us to expand on Frank’s psycho-dynamic critique of the certainty pose. In her more recent work, Gilligan challenges Freud’s choice of the Oedipal myth as the model of human psychological development. Gilligan tells us that this choice—establishing the mother as the dangerous siren against whom the psyche must fortify itself—normalizes an undesirable, two-step developmental process: The relational world of early childhood (associated with the mother) is stigmatized and charged with negative emotion, and emotional separation is designated as a central goal of maturation.

This developmental model encourages us to privilege rule-bound and detached decision-making processes and to distrust those that require us to work relationally and consider context and particularity. It makes us skittish about engaging different perspectives and talking through an open choice and deeply comfortable with going to our corners and coming out with truth claims. And all of this leads to rhetoric that denies choice.

Frank thought, of course, that infantile craving for certainty was no excuse for failing to own up to the choices we inevitably make in the law. A choice that is denied, he argued, can not be a considered choice, and unconsidered choices are likely to be poor ones.

The expanded psycho-dynamic critique grounded in Gilligan’s work magnifies our concerns about the certainty pose. If, as Gilligan suggests, our aversion to relationship, complexity, context and choice has the emotional charge of a developmental trauma, it may be harder to let go of than the Peter Pan anxieties that Frank described. But the difficulty may be worth brooking.

²⁹ *Id.* at 592 (Scalia, J., dissenting) (emphasis not added).

³⁰ *Id.* at 593.

³¹ See JEROME FRANK, *LAW AND THE MODERN MIND* 13-21 (1930).

If the Realists were right that explicitly considered choices are likely to be better choices, then there is value in moderating lawyers' and judges' rhetorical claims of certainty. Gilligan's work doesn't only instruct us about the difficulty of stepping back from the world of apparent certainty; it also suggests ways of overcoming the difficulty. We overcome it by diving into the often troubled waters of relationship. By sharing reasons and acknowledging the choices we make in light of those reasons. If we give up the false comfort of certainty and take a plunge into candid, relational legal discourse, we might just improve the quality of our advocacy and our decisionmaking.

Candor about choice improves the quality of advocacy and decisionmaking because it requires that choices be defended by reasons. Responsible decisionmaking in a world of admitted indeterminacy is not free-form but structured and disciplined in relation to the history, purpose and function of the laws being interpreted and in relation to defensible theories about the needs and workings of our social order. Decisions that are well defended in these terms may, in the end, seem more legitimate than those that are made to sound certain. This is so because lay and law-trained readers alike know that the sound of certainty is often a pretense and that open and honest deliberation is ultimately more trustworthy.

Let's just imagine what more open and honest deliberation about constitutional meaning would look like. Let's imagine grounding an important Supreme Court decision in admitted choice. And let's imagine structuring that choice in relation to a contemporary understanding of constitutional history, the purpose and functions of the Fourteenth Amendment.

Imagine these words in the opinion for the Court in *Lawrence*:

We must decide whether the Fourteenth Amendment protects the liberty of two adult men to have an intimate, consensual relationship without threat of criminal sanction.

The Fourteenth Amendment was conceived in the aftermath of the Civil War to define citizenship in a reconstituted Union and to describe its attributes. Congressional debates concerning this Amendment (and companion measures) were full of allusions to the constraints on liberty and civic participation that defined slavery and full of commitments to the principle that it is wrong to impose those constraints categorically and without special cause on any fellow human being.

We acknowledge that the terms of the Fourteenth Amendment are vague, that the intentions of its drafters and supporters were various, and that the attitudes and practices of many, if not most, people in the newly reconstructed union continued to reflect hierarchical beliefs about race, gender and sexuality that are in tension with the antislavery principle. Nonetheless, we believe it is consistent with our highest national values and continuous with our history of experiencing and then rejecting slavery that we

adopt the antislavery principle as a guide for interpreting the Fourteenth Amendment guarantees of citizenship, liberty and equality.

For the reasons that follow, we conclude that liberty, understood as slavery's opposite, presumes a measure of personal autonomy with respect to thought, belief, expression, and association.

This introduction might frame a persuasive and grounded account, albeit not an inexorable argument, of why consensual, intimate partnerships should not be criminalized on account of the sex of the parties. And it might help us learn, finally—all these years after we all became realists—how to reason together rather than feign certainty.