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Book Review: The Interpretable Constitution. by William F. Harris Ii.

Rebecca L. Brown

Book Reviews

THE INTERPRETABLE CONSTITUTION. By William F. Harris II.[1] Baltimore: Johns Hopkins University Press. 1993. Pp. xv, 208. Cloth, $38.50.

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What exactly *is* the Constitution? William Harris tantalizes with a promise to take up that question that has long daunted constitutional theorists. He rightly suggests that the question logically precedes any theory about how interpreters should read the document. A sense of excitement accompanies Harris' claim to have identified the nature of the Constitution in such a way as to provide a philosophical framework for objectively evaluating various approaches to constitutional interpretation. Some interpretative theories will be shown to be right, some wrong. At last, it appears, someone has set out to resolve H.L.A. Hart's important conundrum that there is "no rule providing criteria for the assessment of its own legal validity,"[3] which has had such poignant application to the field of constitutional interpretation. But the results are disheartening.

Harris starts from the position that the constitutional debate over the last several decades has been misguided and lacking in moorings. The resulting discourse has thus become perversely rigid and riddled with unexamined assumptions, consequences that Harris—a political science scholar—attributes across the board to the study of law in general. Those who study and apply the law have done it wrong. Apparently legal academics, judges, and lawyers (and perhaps even Senators) all fall into the category of misdemeanants whom Harris, with palpable bitterness, collectively brands "professionalized law." The book has a real sense of "us"/"them" hostility, peppered with territorial war metaphors to suggest that constitutional theory has unjustifiably been annexed as a domain of the law. This usurpation has led to "the capture of the field by professionalized law," relegating the read-

1. Associate Professor of Political Science, University of Pennsylvania.
2. Professor of Law, Vanderbilt University.
3. H.L.A. Hart, *The Concept of Law* 104 (Clarendon Press, 1961).

ing of the Constitution to "parsing techniques legal professionals use to open black-letter snippets to their advantage." Thus, Harris believes, "[t]he first step toward a paradigm may be to break the tandem between, or . . . to disrupt the nesting of, constitutional theory and legal science."

In support of his assertion that constitutional theorists lack a guiding paradigm, Harris quotes a critique written by Sanford Levinson. And in the development of his own such paradigm, he borrows expressly from the "conceptual qualities" propounded by H.L.A. Hart, Ronald Dworkin and John Hart Ely. It strikes me as odd that he does not acknowledge that these thinkers are themselves denizens of the universe that he condemns *in toto*. The reliance on Levinson's critique is especially ironic in its testament to the heterogeneity of this world of "professionalized law," which certainly boasts thoughtful members who eschew the rigid at least as ardently as Harris himself does. Others who might be mentioned are not. As for Harris, his contempt for the "perverse rigidities" that mark the study of constitutional law has led him to construct a *two-axis model* for the resolution of interpretative problems! And that model is called The Interpretable Constitution.

My criticism of this work follows two paths. First, I will provide a short and accessible version of what I understand the theory to be and explain why I do not think the case has been made for its validity. But my more important objection to this book lies in the very concerns that apparently led Harris to write it: even if internally sound, the theory amounts to but one more illusory means for judges to avoid judging, to provide the façade of objectivity to the project of reading the Constitution—or, in this case, to the project of testing the legitimacy of ways of reading the Constitution.[4] This particular variation happens to offer a bit more leeway to the interpreter than does strict formalism, textualism, or intentionalism, but Harris' enterprise is by its very nature not different in kind. He wishes to seek out "right" ways to answer constitutional questions, ways that do not change according to who the interpreter is, ways that, by claim to "legitimacy," can rightfully displace "illegitimate" ones. It is this effort that I believe is misguided.

4. I should note that Harris does not view his project as being about judicial review at all; indeed, he believes that focus has been one of the factors to lead prior attempts at constitutional theory astray. In a footnote, he suggests that his matrix for resolving constitutional issues would apply equally well to any of the branches of government, or even to private constitutional "interpreters" if they were given the option to displace the courts in this regard.

I

The book endeavors to define what the Constitution is by resort to an elaborate metaphor between language and politics. This intriguing correspondence enjoys a long history stemming to classic liberal political theory and with roots more ancient. Better yet, it rings true. Intuitively we accept the notion that speech, either as historical or cultural narrative or as command, provides a foundation for the identity of a people, just as the social contract provides a foundation for its security and perpetuation. Harris reminds us that God created, with names, the separations that gave life to the universe and thus established political authority. He suggests that "communication (storytelling) is conducive to community (political life)." He quotes John Locke's observation that language "was to be the great instrument and common tie of society." And he resorts to the familiar platonic image of patterning the "polis" after the "logos" to establish the "primal interpenetration" of language and politics. The parallels between language and politics are striking and largely unexceptionable.

But for Harris this intuitive notion of parallels is only the beginning. He wishes to use the metaphor as a cornerstone for the project of identifying the true nature of the Constitution. In pursuit of that objective, Harris focuses on the work of Thomas Hobbes, from whom he derives the principle that words can be understood to bind action through the concept of a social contract. If one designates the social contract (a creature of language) as a source of political authority, one thus establishes a political order that can be grasped, through language, with the intellect. Civil power, then, is derived from the model of language, projected onto the political realm.

The real question is whether this still quite simple foundation can support the monumental edifice that Harris seeks to erect upon it. Expressly abstracting well beyond the work of Hobbes, Harris draws what he terms a "homology" (indicating a greater degree of identity than a mere analogy) between language and politics. He claims that "reasoning and governing are parallel first and second orders of the same calculus." This gives rise to a syllogism of sorts, in which the "natural person" or citizen is said to bear the same relationship to reason and language that the "artificial person" or polity bears to government and social covenants, respectively. That is, the mode of thinking and communicating for an individual is seen as the model for a polity's actions of regulating, and those who act for the polity repre-

sent those who reason as individuals. The act of empowering the polity constitutes *authority*, or, literally, *authorship* of the speech of the artificial person by the natural person. With a chart, Harris illustrates the parallels between the "first order," citizen and natural reason, on the one hand, and the "second order," commonwealth and governing, on the other.[5]

Harris turns next to the American Constitution. The history of its making and its express origins in the people correspond nicely to the theoretical construct of collective power and authority described above. The written Constitution both implicates (by being a social contract) and illustrates (by being written) the bond of language and power. Having established this profoundly metaphorical relationship, Harris applies to the political text what he views as the two essential features of language, namely authorship and intelligibility. Thus carried over to the analogue political text, the parallel attributes become authority and legibility. That is, if the metaphor is to hold, the constitutive document must be both authorized by the people (which ours was) and legible to it, which is made possible by the written nature of our Constitution and the process of public interpretation. "To erect a constitutional order with public writing is to ground it not only in political collectivity but also in individual intelligence"—a structure both authoritative and comprehensible.

Focusing on the concept that the constitutional order must be "legible" to the polity, Harris turns to the task of interpretation. "[B]ecause the Constitution styles itself as the 'word of the People,' constitutional interpretation should be addressed to the people at large . . . . They are speakers as well as listeners, and their status as the interpretive audience of the Constitution is reciprocal to the Constitution's bindingness on themselves and the polity that they are the constituents of." Harris claims that certain conclusions about interpretative methodology follow from this statement. Most important, it gives rise to the conclusion that the "true" Constitution does not only consist of the written text within its four corners, but also incorporates the political system that is created thereby. Thus the orders of language and politics that provided the initial metaphor are linked together to form a whole comprised both of a signifier (the linguistic order) and the thing signified (the political order)—the two constitutions. Only in such a relation between constitutional signifier

5. The chart reflects certain implications, such as that failure of language leads to absurdity while failure of political rationality leads to injustice. These interesting observations are not pursued.

and signified is there promise of true legibility. Thus, for Harris, it is both of these elements—the text and the polity—that make up the Constitution, and to which constitutional interpreters must be faithful. He denominates the former the Constitution with a "big C" and the latter the constitution with a "small c".

"American constitutional interpretation is, consequently, indispensably a two-text project." This is the principal claim of the book. Harris tells us that "[c]hanged meaning in the elements of the polity exercise a conformizing pull on the words of the document, and vice versa." The project of interpretation is for Harris the mediation of the two, so that the "relations in either text may be read with respect to the other." "The document is to be read in view of its project, the polity it casts forward into the world of performance." Thus, and this almost Elysian notion[6] seems critical to Harris, apparent gaps in the text "are not occasions for the hemorrhaging in of material or free-form impositions from outside the constitutional order, but instead serve as a mandate for reference to the other text."

Having thus described the constitutional enterprise, Harris goes on to lay out a framework for evaluating interpretative methods that are "justified" by it. This framework, supplying the title and apparently the objective of the book itself, seeks to reflect the interconnection between the "upper-case C" Constitution and the "lower-case c" constitution, between the language of the text and the political order created by that language.

The result is a two-axis model for interpretation. It is a model by which theories of constitutional interpretation can be evaluated by stacking them up against the designated aspects of the two texts and measuring their fidelity to one or the other. Moreover, the model ostensibly provides a way by which public authoritative interpretations of the text, such as those of the Supreme Court, can be justified as legitimate in their method—again measured by how faithfully they correspond to the constraints imposed by both texts. The claim is that only by confining decisions within this matrix can the interpreter lay claim to legitimacy of the project. The four quadrants created by the model are said to be the sole considerations that have been embodied in the writing or design of constitutional life, and there-

6. Harris' search for limiting principles is reminiscent of John Hart Ely's rejection of external sources of constitutional values, in favor of a search for the few, mostly procedural, values implicit in the constitutional design. See John Hart Ely, *Democracy and Distrust* 73 (Harv. U. Press, 1980). On the aesthetically important question of the appropriate adjective to describe Ely's work, see John Hart Ely, *Democracy and the Right to be Different*, 56 N.Y.U. L. Rev. 397, 397 n.2 (1981).

fore are the sole approaches that qualify as interpretation of the C/constitution.

The y-axis carries "positivism versus structuralism," and the x-axis "immanence versus transcendence." Harris defines the terms as follows. Positivism focuses on words and clauses, while structuralism, in contrast, emphasizes coherent designs and wholes. Immanence means residing within or arising from the text of the document; transcendence, in contrast, means coming from beyond the document. Thus, the matrix creates four quadrants: "immanent positivism (roughly, 'plain words'); immanent structuralism ('structure of the document'); transcendent positivism (roughly, 'spirit of the words'); and transcendent structuralism ('logic or structure of the polity'; 'structural fundamental values')." Examples of how each of the four categories applies suggest that they correspond quite closely, if not perfectly, to the variations on textualist and dynamic interpretation totally familiar to those well-versed in the literature today. Indeed, Harris acknowledges that the immanent/transcendent antinomy reflects quite closely the "interpretive/noninterpretive" approaches to judicial review described twenty years ago by Thomas Grey.

The one new twist in Harris' approach is his claim that his four categories comprise the *only* cognizable sources for constitutional interpretation because only they are derived from the upper-and-lower-case "C" constitutions that he has defined as *the* Constitution in the book. Four examples of authorities that Harris claims are excluded from legitimate interpretation by his model are the intent of the framers, the consensus of the people, the justice of political theory, and the rightness of natural law—unless those factors can be shown to be in some way subsumed by the text or structure of the document itself.

Harris does not voice a preference for one "quadrant," or interpretative approach, over another. Rather, he suggests that a judicial decision which could use as many of them as possible would be more sound than one which used fewer. One indication Harris offers for the value of his model is that it would tend to refute those theorists who claim to have *the* exclusive path to constitutional truth, his position being that there is no such thing. While truth of outcome is beside the point to Harris, he does have a clear concern for the true method of getting there.

II

The theory is not set out as an argument. It is a series of observations, but little effort is made to support or justify each of

the steps that build toward the conclusions—either with external support or with an internal logical claim to inevitability. The most important of the gaps in argumentation comes in the defense of the major assertion of the book, that the Constitution "really" consists of two texts and two texts only, the written text and the evolving societal unwritten text. While this is a provocative suggestion, it seems to me that Harris has not made the case for it.

In starkly simple terms, the book offers four propositions. In reverse order, starting from the conclusion of the book, the first (#1) is that interpretation must be confined to considerations implicit in the two texts, written and unwritten. This is true because, second (#2), the Constitution must be legible to the polity. This is true in turn, because, third (#3), the Constitution is a written delegation of political authority by the people. And this is true because, fourth (#4), language and politics are different orders of the same human endeavor. So stated, the four propositions manifestly do not proceed logically from one to the other. Indeed, the entire first half of the book (devoted to proving #4), which demands that the reader arduously follow a byzantine chain of reasoning expounded in the most opaque writing, strikes me as unnecessary to the stated project of establishing proposition #1. One has no need to accept the laboriously crafted language-politics "homology" (#4) to accept the uncontroversial proposition that our Constitution was a delegation of power by the people (#3). It seems to me that Chief Justice Marshall said as much in *Marbury v. Madison*[7] and *McCulloch v. Maryland*,[8] that the champions of originalism have frequently proclaimed as much,[9] and that theorists of all stripes have accepted the notion as given.[10] And the idea that the people who granted the power must be permitted to understand the consequences of that grant (#2) again does not depend on any ethereal argument based on

7. 5 U.S. (1 Cranch) 137, 177 (1803) ("if [an act contrary to the Constitution is law], then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.").

8. 17 U.S. (4 Wheaton) 316, 403 (1819) ("The government proceeds directly from the people.").

9. See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 144-46 (Free Press, 1990); Henry P. Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 Colum. L. Rev. 723, 724 (1988).

10. See, e.g., Bruce Ackerman, *We the People: Foundations* 6 (Belknap Press, 1991); Richard A. Posner, *Bork and Beethoven*, 42 Stan. L. Rev. 1365, 1369-70 (1990); Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. Chi. L. Rev. 1127, 1150-51 (1987); John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920, 949 (1973); Thomas C. Grey, *Do We Have an Unwritten Constitution?* 27 Stan. L. Rev. 703, 705 (1975). See also *The Federalist No.* 22 (Hamilton).

philosophical abstractions about language. It simply follows, and has followed for years under the rubric of "rule of law," from the notion of government by consent.[11]

Thus, the book could just as well have begun with the claim that the Constitution consists of two texts, the written text and the political order. Yet if one considers the proposition that way, it becomes clear that it has no support. The critical step in the analysis—that legibility necessitates the two-text theory—is not logically grounded in the rest of the argument. I am left with the large question of *why* the two-text theory is the only way to make the law of the land comprehensible to the people. This book does not answer that critical question.

The two-text idea, from which stems the entire model for interpretation, arises solely from the fact of a written constitution. And, although the book is full of phrases about "American" constitutionalism, the only distinguishing feature about American constitutionalism that is identified is the written form of the Constitution. The fact that our Constitution is a written document undergirds all of the author's metaphors about language, legibility, and interaction between document and polity—in short, everything that supplies the basis for Harris' construct. He does not point to anything about the nature of our document, except its constitutive purpose, that is relevant to his attempt to define the true nature of the framers' project. Thus, it would seem, any written constitution would share in common with ours the fundamentality that Harris emphasizes as well as the interpretative approaches that he describes. And conversely, it would seem, any polity formed on a basis other than a written constitution would not share fundamental qualities with ours. The former Soviet Union, then, must be said to have had more in common with American constitutionalism than does England, a proposition that does not seem facially plausible. Yet Harris gives all-important status to writtenness, and none to the nature of what is written or how it has been understood over time. A project that claims to embark on discovering the true nature of the American constitutional order should go deeper.

I think that Harris underestimates the complexities of both texts. In particular, he shortchanges the "small-c" constitution, the political order in which we live. It seems optimistic in the extreme to expect that the values of the contemporary polity will

11. See Joseph Goldstein, *The Intelligible Constitution* 19 (Oxford U. Press, 1992); Sanford Levinson, *Judicial Review and the Problem of the Comprehensible Constitution*, 59 Tex. L. Rev. 395 (1981).

provide determinate limits on the interpretation of constitutional language.[12] Other scholars have debated at length about what types of authority accurately embody the values of our political and social community.[13] To assert that this sphere, the political order created by the Constitution, excludes "the consensus of the people," for example, seems an arbitrary limitation on the interpretative task. Similarly, to claim legitimacy for the consideration of "structural fundamental values," while dismissing as illegitimate "the justice of political theory," would need further support to be a persuasive delineation of appropriate bounds of interpretation.

Perhaps the most original and provocative aspect of the theory—the claim that, even given a wide toleration for both formalistic and dynamic approaches to interpretation, there are still categories of sources that are out of bounds—is not supported by the metaphor that gives rise to it. Harris is not careful to explore and respect the natural limits of a metaphorical argument. His two-text theory arises from the analogy between language and governance, and a concomitant need for the governing rules to be intelligible to the polity. What is intelligible, according to Harris, is the text of the document and the nature of the polity itself. Anything else is unintelligible and therefore *illegitimate* as a consideration in interpreting the Constitution. But how does the metaphor supply limiting constraints that invalidate other considerations? It is one thing to say that as language enjoys intelligibility, so might government also enjoy intelligibility of government to the governed. But it is quite another to argue that the principle of language—intelligibility—supplies the *only* legitimate objective of constitutional government and that it can be provided in only one way. Analogical reasoning does not lay claim to the power to define so categorically.[14] As a reason for this limitation on the interpretative process, Harris states, with a formalism reminiscent of that which he criticizes in others, that

12. See Sanford Levinson, *Constitutional Faith* 72 (Princeton U. Press, 1988) ("What explains our contemporary uncertainty (some would say 'crisis') in regard to the Constitution is the assertion of fundamentally different values within the political realm."); Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* 62 (Harv. U. Press, 1988) (political disagreements create different reading of language).

13. See generally Mark V. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 Mich. L. Rev. 1502 (1985).

14. See Cass R. Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 744 (1993) ("At most, analogical thinking can give rise to a judgment about probabilities, and often these are of uncertain magnitude."). I understand that there may be an important difference between metaphor and analogy for some purposes, see id. at 748 n.26, but I do not believe the difference is relevant to this discussion.

any other factors would not be true to the genre of the constitutional project. The fundamental characteristics of the constitutional order which give rise to these fine distinctions in legitimacy are not made clear.[15]

Without this limitation on sources, what remains is a call to read the Constitution to include meanings that arise from its own terms, from its structure, express or implied, and from outside its four corners but implicit in the nature of the political order that it establishes. This idea has been voiced in many forms before, in opinions of Supreme Court justices as well as in academic literature. Justice Douglas, for example, called for constitutional recognition of the values that "emanate from the totality of the constitutional scheme under which we live" in his famous dissent in *Poe v. Ullman*.[16] Justice Cardozo spoke of "immunities . . . implicit in the concept of ordered liberty,"[17] while Justice Harlan urged "continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise application of the great roles that the doctrines of federalism and separation of powers have played [in] preserving American freedoms."[18] Owen Fiss has called upon the judiciary "to give meaning to our constitutional values";[19] Christopher Eisgruber would have the courts look for a "shared American belief" that the constitutional text may reflect;[20] and Paul Brest has stated that "the practice of constitutional adjudication should enforce those, and only those, values which are fundamental to our society."[21] In general, I think that Harris is insufficiently appreciative of the degree to which contemporary literature on constitutional interpretation has already come far in the direction that he advocates.[22]

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15. In his introduction, Harris expressly declares war on the values represented by clarity of expression, as antagonistic to his enterprise.

16. 367 U.S. 497 (1961).

17. *Palko v. Connecticut*, 302 U.S. 319, 325 (1927).

18. *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring in judgment).

19. Owen Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1, 14 (1979).

20. Christopher L. Eisgruber, *Justice and the Text: Rethinking the Constitutional Relation Between Principle and Prudence*, 43 Duke L.J. 1, 40 (1993).

21. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 227 (1980); see also Alexander Bickel, *The Least Dangerous Branch* 24 (Bobbs-Merrill, 1962) ("government should serve . . . certain enduring values"). For a contrary view, see Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353, 396 (1981) ("It is, therefore, fundamentally wrong to believe that one can ascertain the meaning of the constitution by asking: 'Is this what America stands for?' ").

22. This is true even regarding Harris' position on which interpretative approach should be followed in a given case. He advocates the use of as many different modes of

But I question the wisdom of the project. At bottom, what Harris has attempted to do, I believe, is to create a middle ground between those who would say that the text of the Constitution must be the sole source of guidance in applying the document's terms (with or without an accompanying focus on original intent) and those who open up the inquiry so broadly that they cannot lay claim to any real grounding in the document itself. Both extremes are troubling at a theoretical level. The textualists are troubling because they artificially constrain the development of the polity, deifying the morally dubious status quo of two centuries ago and depriving subsequent generations of choices and judgments, except as they may be reflected in constitutional amendments.[23] The utterly unfettered interpretative approaches, on the other hand, have been accused of losing sight of all grounding and consequently bestowing too much discretion on those who render the so-called interpretations.[24] Harris has made a valiant effort to harness the determinacy of the one to the dynamism of the other.

Yet the problem with Harris' solution to this venerable dilemma lies in the very idea that appropriate constitutional theory could possibly, or should conceivably, be cabined in a two-axis model. The project brings to mind Robert Nozick's "tower" image of the grand theory:

> Philosophers often seek to deduce their total view from a few basic principles, showing how all follows from their intuitively based axioms. The rest of the philosophy then strikes readers as depending upon these principles. One brick is piled upon another to produce a tall philosophical tower, one brick wide. When the bottom brick crumbles or is removed, all topples, burying even those insights that were independent of the starting point.[25]

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interpretation as possible. This was Richard Fallon's point, more or less, in Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189 (1987), and shares some important common ground with the legal pragmatists in the catholic sweep of its recommended interpretative sources. See Daniel A. Farber, *Legal Pragmatism*, 72 Minn. L. Rev. 1331 (1988). See also Rebecca L. Brown, *Tradition and Insight*, 103 Yale L.J. 177, 214-216 (1993) (suggesting reliance on a broad variety of authorities in the interpretative process).

23. See, e.g., Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 Harv. L. Rev. 127, 804-05 (1083); Brest, 60 B.U. L. Rev. at 27-08 (cited in note 20).

24. See, e.g., Ronald Dworkin, *Law's Empire* 157-58 (Belknap Press, 1986); Bork, *The Tempting of America* 145 (cited in note 9); Monaghan, 56 N.Y.U. L. Rev. at 356-68 (cited in note 21).

25. Robert Nozick, *Philosophical Explanations* 3 (Harv. U. Press, 1981). See Farber, 72 Minn. L. Rev. at 1336-37 (cited in note 22) (discussing weaknesses of foundationalist philosophical analysis).

While eschewing the rigidity of foundationalist legal theories, Harris has erected his own tower, one brick wide.

The danger of such a tower, in my view, is that it tends to appear to supply answers to difficult questions, without actually doing so. Thus, the judge is invited to mask her judgments behind a veil called legitimacy—falling into the proper quadrant—when in fact she has made a choice about what influences she will consider to be dispositive in her decisionmaking process. This escape route for the judge to avoid judging contributes nothing to the legibility of the constitutional order. Indeed it fosters disingenuous decisionmaking and diminishes the public's understanding of what its judges are doing, just as surely as those who modestly promise to "faithfully interpret the Constitution" and "avoid the tendency to legislate from the Bench."[26]

Harris' is admittedly a strange type of foundationalism, yet foundationalist it remains in its quest for a unified principle that would provide the only legitimate basis for constitutional decisionmaking. The funny thing about this particular brand of foundationalism is that it contains within it some heterogeneity, some breadth and some room for flexibility within the confines of the matrix. The effort to provide some latitude to otherwise cramped theories of interpretation is a noble one. But if its flexibility and non-foundationalist attributes are to be seen as its redeeming features, then one must ask why the matrix? It seems to me that the model, in purporting to limit the scope of legitimate inquiry in interpreting the Constitution, is artificial and superfluous.

Perhaps Harris did not intend to make a contribution to the field of interpretative theory at all, but rather wrote this book to respond to his own felt need to justify the amazing fact that "human beings can create and regulate a political world with words." I share his awe, and indeed intrigue at the same observation was instrumental in my own decision to pursue law, rather than philosophy or linguistics, as a profession. Thus, while I would not minimize the miraculous nature of the phenomenon that captivates Harris, I think that to a member of the legal community the marvel of words binding action is akin to watching a toddler learn to speak: we feel the wonder that such a thing *can* happen, but we have no doubt that it *does* happen. Indeed, the ability of words to control behavior and bind human action is a

26. President's Remarks Announcing the Nomination of Clarence Thomas to Be an Associate Justice of the Supreme Court of the United States and a News Conference in Kennebunkport, Maine, 27 Weekly Comp. Pres. Doc. 868 (July 1, 1991).

premise underlying all law—common, statutory, regulatory; oral and written—not just constitutional law. Thus, the great lengths to which Harris goes to explore the possibility that a nation can be bound with words is reminiscent of angels and the pin.

At the same time, Harris is not touched by a tension that I believe legal theorists do feel some concern for: the belief that, at the end of the day, there remains a need for a constitution to have some effect as law. That is, a theory must aspire ultimately to bear in some way on the resolution of real questions that arise in actual cases. Although Harris recognizes that "[t]he constitutional order is not just a construction for the mind, like a work of fiction or poetry, or even, somewhat less emphatically, a work of political philosophy," he nevertheless does not consider any part of his abstract undertaking to include even the aspiration to an answer of any constitutional question. He avows that, for him, interpretation is "a way of looking at the political world." Sheepishly, I must confess that such an approach to the project of interpretation leaves me ultimately unsatisfied.

THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM: A THEOLOGICAL INTERPRETATION. H. Jefferson Powell.[1] Durham: Duke University Press. 1993. Pp. ix, 296. $39.00.

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Just as the Gospel reminds Christians that "the last shall be first,"[3] the observation that "less is more" surely does not damn H. Jefferson Powell's most recent work with faint praise. In *The Moral Tradition of American Constitutionalism: A Theological Interpretation*, Powell launches an unapologetically Christian attack on America's long-standing civic faith in constitutional law. Powell's core message—that there is no such thing as a Christian approach to constitutionalism—heralds a radical and powerful new model for understanding the relationship between personal Christianity and public law.

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3. *Matthew* 19:30, 20:16; *Mark* 10:31; *Luke* 13:30 (King James).