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Book Review: The Moral Tradition of American Constitutionalism: A Theological Interpretation. by H. Jefferson Powell.

Jim Chen

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).

The Moral Tradition enriches a growing jurisprudence not ashamed to call itself Christian Legal Studies.[4] As the Biblical basis for his project, Powell chooses the familiar distinction between Caesar and God.[5] This concept, so often stressed in legal writing about religion and in religious writing about law, might be considered intellectually banal if it were not so thoroughly and frequently ignored in practice. Powell omits any direct discussion of social and legal issues popularly thought to be of special interest to Christians. Even when discussing substantive due process rights to contraception and abortion,[6] he never purports to prescribe a proper Christian view on the merits, a moralistic exercise in which even Supreme Court Justices sometimes indulge.[7] Powell alludes exactly once to the agenda of the so-called "religious right," and in rather unflattering terms at that: "The heedless subservience of much of American fundamentalist Christianity to nineteenth-century secular ideology demonstrates the inevitable result of attempting to think theologically in an intellectual vacuum."[8] His refusal to conscript God in discrete legal and political battles starkly contradicts both the secular state's claim that God "has favored our undertakings"[9] and religious groups' increasingly common efforts to translate abstract spiritual authority into tangible political power. The omission is conspicuous, perhaps deliberate. Powell seems to perceive a far graver threat than the law's episodic failure to conform to individual Christians' political preferences.

Powell's essential message is straightforward and striking, a combination of Shaker simplicity with distinctly un-Quaker aggression. Powell ruthlessly honors his commitment to a "theological" analysis of American constitutionalism based on "those aspects of Christian thought and action that are often separated

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4. Cf. 2 *Timothy* 2:15 ("Study to show thyself approved unto God, a workman that needeth not to be ashamed, rightly divining the word of truth."); 1 *Peter* 4:16 ("Yet if any man suffer as a Christian, let him not be ashamed; but let him glorify God on this behalf.").

5. Pp. 8 n.20, 11, 292; cf. *Matthew* 22:21 ("Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's"); Mark 12:17; Luke 20:25.

6. Pp. 173-81.

7. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 196-97 (1986) (Burger, C.J., concurring) (arguing that "[c]ondemnation of [homosexual conduct] is firmly rooted in Judeao-Christian moral and ethical standards"); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 471 (1892) (concluding that the Congress of "a Christian nation" could scarcely have intended to restrict churches' ability to hire foreign clerics).

8. P. 266. But cf. p. 260 n.6 ("[I]t is not the assumption or conclusion of this book that political activity undertaken in this polity in the name of Christ necessarily is theologically or ethically mistaken.").

9. The slogan *Annuit cœptis* appears on the Great Seal of the United States, which is depicted on the reverse of the dollar bill.

out as moral or ethical."[10] He doggedly poses an unfiltered version of "the faith question" to fellow Christians:[11] in whom do you place your faith, Caesar or God? For a Christian, the question necessarily answers itself. Powell's elaboration of the answer severely undercuts conventional efforts to reconcile secular lawyering with Christianity. Just as the Fourteenth Amendment did not enact Mr. Herbert Spencer's *Social Statics*, the resurrection of Christ does not command agreement with Judge John Noonan's *Persons and Masks of the Law*.[12] Forswearing any attempt to reconcile "the relation of love to power" within "the legal enterprise,"[13] Powell conducts a grinding assault on "[t]he temptation to ascribe theological value to the institutions and modes of thought of American constitutionalism."[14]

After declaring his disdain for "any unquestioning theological approval" of the constitutional status quo,[15] Powell mercilessly demonizes American constitutionalism. Although this tactic is less than sporting, it does help Powell focus his powers of demolition. Under Sanford Levinson's quasi-Christian taxonomy, Powell is a "catholic" in his willingness to look outside "scriptural" text as a source of doctrine, but an institutional "protestant" in his distrust of centralized, hierarchical interpretive authority.[16] By contrast, the American constitutional establishment emerges as the opposite over the course of Powell's narrative: constitutionalism develops a "protestant" obsession over texts while concentrating all power of moral pronouncements within the "catholic" institution of the Supreme Court. Unfortunately, this transparent dichotomy between Powell's own catholic-protestant virtue and the Supreme Court's protestant-catholic vice drains much of the suspense from *The Moral Tradition*. Unlike John Milton, whose dazzling, eloquent portrayal of Lucifer shed some doubt on the poet's stated quest to "justify the

10. P. 8 n.20.

11. Cf. Katharine T. Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 829, 837 (1990) (describing the technique of "asking the woman question" as the first method by which feminists "do law").

12. John T. Noonan, Jr., *Persons and Masks of the Law* (Farrar, Straus & Giroux, 1976).

13. Id. at xii.

14. P. 8.

15. P. 8.

16. See Sanford Levinson, *Constitutional Faith* 27-53 (Princeton U. Press, 1988). Despite his willingness to consult extratextual sources of authority, Powell has stressed the importance of constitutional text. See H. Jefferson Powell, *Parchment Matters: A Meditation on the Constitution as Text*, 71 Iowa L. Rev. 1427 (1986).

ways of God to men,"[17] Powell relentlessly aims to expose the mocking imitation of divine order through secular law.

Powell's central proposition springs from an imaginative modification of Alasdair MacIntyre's catastrophe thesis, which posits that a rationalistic, individualistic society can never reach moral agreement.[18] Ironically, Powell notes, the "Enlightenment's parallel attempts to control irrational and violent action through the institution of the nation-state, and to replace irrational, tradition-dependent moralities with universal norms of reason" gave rise to an American constitutionalism that developed a moral tradition of its own.[19] Powell's description is neither novel nor problematic. The numerous grand theories in American law routinely justify themselves morally by claiming rational coherence. Indeed, many a grand theory invokes determinacy *as such* as its exclusive moral justification.[20] Moreover, legal scholars routinely study constitutional law as America's civic religion, complete with a sacred text, an ecclesiastical hierarchy, a chronically alienated laity, and occasional holy wars.[21] Instead, treating American constitutional law as a moral tradition has far more important *prescriptive* implications for Powell's project. If "Christian theology and American constitutionalism share the intellectual and social structure [that are] characteristic of moral traditions," they become "in a significant sense rivals or competitors" for believers seeking a "rational exploration of the nature of human community and of the good life."[22]

In short, Powell is arguing that American constitutionalism has aspired to provide a moral tradition akin to Christianity's. If so, the American constitutional system has committed nothing less than what C.S. Lewis has called "the essential vice, the utmost evil": pride.[23] Proud Lucifer aspired to a "throne above the stars of God,"[24] and proud Eve swallowed the serpent's deceitful

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17. John Milton, *Paradise Lost*, Book I, l. 25 (1667).

18. See Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* 6-8, 36-50, 253-54 (U. of Notre Dame Press, 2d ed. 1984); Alasdair MacIntyre, *Whose Justice? Which Rationality?* 335 (U. of Notre Dame Press, 1988).

19. P. 14.

20. See, e.g., Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989). The title speaks for itself.

21. See, e.g., Russell E. Richey and Donald G. Jones, eds., *American Civil Religion* (1974); Levinson, *Constitutional Faith* (cited in note 16); Thomas Grey, *The Constitution as Scripture*, 37 Stan. L. Rev. 1 (1984); George Kannar, *The Constitutional Catechism of Antonin Scalia*, 99 Yale L.J. 1297 (1990); Symposium, *Religious Dimensions of American Constitutionalism*, 39 Emory L.J. 1 (1990).

22. P. 14.

23. C.S. Lewis, *Mere Christianity* 94 (Macmillan, 1943).

24. *Isaiah* 14:13.

promise that she and Adam could become "as gods, knowing good and evil."[25] Just as J.R.R. Tolkien's evil Sauron molded grotesque orcs in a futile effort to imitate (or mock) God's creation,[26] the American constitutionalism that Powell depicts has generated a tradition of false, treacherous claims to moral cogency. The sin also implicates those who are complicit in wielding the Constitution's moral apparatus, for "[t]hose who put their faith in worldly order / . . . / Degrade what they exalt."[27]

The strength of this analogy ameliorates *The Moral Tradition*'s largely perfunctory recitation of the familiar doctrinal progression from *Calder v. Bull* to *Roe v. Wade*. Powell's historical survey nevertheless displays momentary flashes of brilliance. For instance, Powell convincingly illustrates how liberal rationalism subverted the traditional common law's "nonliberal, pre-Enlightenment, tradition-dependent form of rational argument about justice."[28] Common law as practiced by Cook, Selden, and Hale relied less on a hidebound system of Euclidean logic than on the fluid concept of *resoun*. By treating *resoun* as "that which is reasonable,"[29] "that which is just, fair, moral,"[30] or even "a believable story, an acceptable narrative,"[31] common lawyers in the early eighteenth century were employing techniques that twentieth-century jurisprudes often claim to have discovered anew.[32]

Powell largely blames Blackstone for the loss of the common law heritage. "[L]iterary felicity" and "relative compactness" helped the *Commentaries* sweep across book-starved America, but they also injected Enlightenment-inspired "analytical 'philosophy' " into the common law at the time of the Constitution's framing.[33] Thus began liberalism's gradual capture of a common law based on "a process of reasoning that was disciplined without being determinate in a quasi-geometrical fashion."[34] But for Blackstone, American law might have retained the insight that conscious logic is only "the most superficial part" of human

25. *Genesis* 3:5.

26. J.R.R. Tolkien, *The Two Towers* 89 (Houghton Mifflin Co., 2d ed. 1965); see also J.R.R. Tolkien, *The Return of the King* 409-10 (Houghton Mifflin Co., 2d ed. 1965) (stating the origins of "orcdom").

27. T.S. Eliot, *Murder in the Cathedral* 30 (Faber, 1935).

28. P. 76.

29. Cf., e.g., Karl N. Llewellyn, *The Common Law Tradition* (Little, Brown, 1960); George P. Fletcher, *The Right and the Reasonable*, 98 Harv. L. Rev. 949 (1985).

30. E.g., Lloyd Weinreb, *Natural Law and Justice* (Harv. U. Press, 1987).

31. E.g., Kathryn Abrams, *Hearing the Call of Stories*, 79 Cal. L. Rev. 971 (1991).

32. P. 78.

33. P. 82 (quoting Thomas Green, *Introduction*, in 1 William Blackstone, *Commentaries on the Laws of England* 5 (U. of Chi. Press, 1979)).

34. P. 86.

thought.[35] In Powell's eyes, therefore, the boast that the "original and enduring American" model of law "sprang not from the philosophy of Nietzsche but from the jurisprudence of Blackstone" has far more rhetorical panache than historical accuracy.[36]

Powell might have more clearly distinguished between the institutional and the substantive dimensions of constitutionalism as a moral tradition. Powell skillfully documents how the antebellum legal elite denigrated and eventually suppressed Congress, the President, and even the legal academy as rivals in the Supreme Court's quest for exclusive authority to expound constitutional morality.[37] He is noticeably less successful in communicating how the judiciary has reoriented the Constitution's "moral compass" over time without abandoning the project of establishing an autonomous civil morality. In other words, although the Supreme Court secured institutional supremacy in constitutional interpretation at a relatively early stage, incorrigible political vicissitudes have constantly buffeted the substantive content of the Court's legal morality. But these moral shifts have never diminished the timbre of the Court's voice when it purports to speak *ex cathedra*. Powell never explicitly articulates this key point, leaving his reader to intuit the content of constitutional morality from a compact historical survey of the slavery-induced constitutional crisis, the brief rise and complete collapse of Radicalism, Lochnerism and the countervailing "modern theory," and contemporary doctrine of substantive due process. This flaw is especially crippling because the vernacular meaning of "morality" implies the existence of a fixed "moral anchor."[38] A "moral tradition" in Powell's sense, however, is necessarily dynamic, "constituted by an ongoing argument in which its fundamental

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35. Friedrich Nietzsche, *The Gay Science*, § 354, in R.J. Hollingdale ed. and trans., *A Nietzsche Reader* 66 (Harmondsworth, 1977); cf. F.A. Hayek, *The Use of Knowledge in Society*, 35 Am. Econ. Rev. 519, 528 (1945) (quoting Alfred North Whitehead for the insight that "[c]ivilization advances by extending the number of important operations which we can perform without thinking").

36. *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510, 2523 (1993) (Scalia, J., concurring).

37. Pp. 111-17; see also H. Jefferson Powell, Book Review, *Enslaved to Judicial Supremacy?*, 106 Harv. L. Rev. 1197, 1198-1204 (1993). Contra Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 Geo. L.J. (forthcoming 1994) (arguing that the President has the right—indeed, the obligation—to nullify judgments contrary to transcendently correct law); Michael Stokes Paulsen, *The* Merryman *Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 Cardozo L. Rev. 81 (1993) (same).

38. See, e.g., *Webster's Ninth New Collegiate Dictionary* 771 (Merriam-Webster, 1989) ("moral implies conformity to *established* sanctioned codes or accepted notions of right and wrong" (emphasis added)).

agreements are expressed, defined, and revised."[39] So significant a conceit deserves far clearer explanation.

Powell's real strength lies in his ability to expose the rhetorical poise and political duplicity with which the Court adopts new moral paradigms. The Court may have momentarily prevented its revolution against *Lochner v. New York* from inflicting collateral damage on "discrete and insular minorities,"[40] but the self-dealing nature of constitutional morality quickly resurfaced in the Court's modern substantive due process decisions. In a novel twist on the Supreme Court's decisions involving contraception and abortion, Powell argues that *Griswold v. Connecticut* could be defended as a thoroughly traditional common law effort to nudge the fuzzy boundaries of vague constitutional "penumbras, formed by emanations" from specific provisions of the Bill of Rights.[41] To Powell, American constitutionalism's most recent intellectual crisis began a full year before *Roe v. Wade*, when the invalidation of a statute criminalizing the distribution of contraceptives to unmarried persons in *Eisenstadt v. Baird*[42] completed the Enlightenment's conquest of the Constitution's vulnerable morality. Having abandoned the project of incorporating "the disadvantaged into an enriched political community itself constituted in part by other communities (religious, familial, and so on)" through the admittedly "statist and 'rights' oriented" ideology of *United States v. Carolene Products*,[43] the Court in *Eisenstadt* "denied the legitimacy of any moral content to American political organization beyond the protection of the atomistic individual against intrusion."[44]

This is an oft-told tale, and to hear Powell retell it does have occasional rewards. Powell, however, is by no means the first scholar to note how modern jurisprudence has deified the law in an effort to fill the spiritual vacuum left by the Enlightenment. Harold Berman, for example, has identified three distinct strands of legal deification: positivists "deify the state," naturalists "deify

39. P. 24; cf. MacIntyre, *After Virtue* at 222 (cited in note 18) (noting that traditions "decay, disintegrate and disappear" when internal rational mechanisms fail or when they become corrupted by external influences).

40. *United States v. Carolene Products*, 304 U.S. 144, 153 n.4 (1938).

41. *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); cf. *Springer v. Philippine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting) (arguing that "[e]ven the more specific" provisions of the Constitution "are found to terminate in a penumbra shading gradually from one extreme to the other").

42. 405 U.S. 438 (1972).

43. *United States v. Carolene Products*, 304 U.S. 144 (1938).

44. P. 177.

the mind," and historicists "deify the people, the nation."[45] Powell's contribution is a ruthless exposé of the Supreme Court's attempt to deify itself, the liberal jurisprudence that it inherited from the Enlightenment, and the civil order embodied in the Constitution.[46] Thus, in light of the Court's claim that its "obligation is to define the liberty of all," the concomitant protest that the Court does not "mandate [its] own moral code" is patently fraudulent.[47] Within a constitutional catechism on abortion in which "liberty" is quite literally the first and the last word,[48] the Justices plainly view themselves as Alpha and Omega within the civic covenant that binds succeeding generations of Americans to the framers of the Constitution.[49]

Powell hits his stride in a methodical refutation of traditional scholars' efforts to "modify or reject the [constitutional] tradition's long-standing claim to autonomy . . . and instead explicitly identify constitutionalism as a form" of "philosophy, morality, or extralegal politics."[50] John Hart Ely's representation-reinforcing theory of judicial review[51] cannot liberate judges from the responsibility of making "substantive political and moral choices."[52] Bruce Ackerman's apology for morally desirable judicial decisions[53] rests on the implausible "political myth" of "a People that acts in identifiable ways and speaks in comprehensible tones."[54] A similarly hapless struggle to identify a national community swamps the neo-republican theories of Cass Sun-

45. Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 Cal. L. Rev. 779, 783 (1988).

46. Cf. Powell, *Parchment Matters* (cited in note 16).

47. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2806 (1992).

48. Id.at 2803 ("Liberty finds no refuge in a jurisprudence of doubt."), 2833 ("We invoke [the Court's obligation] once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty."); see also id.at 2807 (arguing that "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" merit the Fourteenth Amendment's full protection of the liberty interest in "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life").

49. Compare *Revelation* 1:8, 21:6, 22:13 with *Planned Parenthood v. Casey*, 112 S. Ct. at 2833.

50. P. 184.

51. See John Hart Ely, *Democracy and Distrust* (Harv. U. Press, 1980); see also John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 Yale L.J. 920 (1973).

52. P. 189.

53. See 1 Bruce Ackerman, *We the People: Foundations* (Belknap Press, 1991); Bruce Ackerman, *Beyond* Carolene Products, 98 Harv. L. Rev. 713 (1985); Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453 (1989); Bruce Ackerman, *Discovering the Constitution*, 93 Yale L.J. 1013 (1984).

54. Pp. 201, 200.

stein[55] and Frank Michelman.[56] Powell reaches peak critical form when he snags Mark Tushnet[57] and Robert Bork[58] in the same intellectual web. Both Tushnet and Bork "want to reject liberal individualism and to recognize the role of the community in forming morality," but both eventually concede that no such community exists.[59] As Powell concludes, "[t]hat a leading socialist CLS professor and a 'conservative' Republican judge have so much in common at the most fundamental intellectual level tells us something very important about American constitutionalism."[60] Powell's effective application of the "trashing" technique echoes Tushnet's own exasperated conclusion about American constitutional thinking: "Critique is all there is."[61]

If Powell is amused at the failure of religiously neutral efforts to rationalize American constitutionalism, he becomes completely agitated when he examines "the assimilation of Christian social thought and action to the supposed constraints of political realism."[62] Just as Robert Bork warned against the political seduction of the law, Powell denounces the tempting of Christendom, the legal seduction of theology. Powell accordingly reserves his most virulent venom for "Constantinian" Christian scholars who "see in the American political system a precursor or embodiment of the kingdom of God."[63] Mild Constantinians such as John Neuhaus and John Noonan commit the "double-barrel error" of "simultaneously accepting as normative the coercive nature of the state while overstating egregiously the significance of having individual Christians exercise the state's power."[64] The archetypical Constantinian, Michael Perry, "effectively collapses Christian ethics into contemporary constitution-

55. See Cass Sunstein, *After the Rights Revolution* (1990); Cass Sunstein, *Beyond the Republican Revival*, 97 Yale L. Rev. 1539 (1988).

56. See Frank Michelman, *Law's Republic*, 97 Yale L.J. 1493 (1988); Frank Michelman, *Traces of Self-Government*, 100 Harv. L. Rev. 4 (1986).

57. See Mark V. Tushnet, *Red, White and Blue:A Critical Analysis of Constitutional Law* (Harv. U. Press, 1988).

58. See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (The Free Press, 1990).

59. P. 254.

60. P. 254.

61. Tushnet, *Red, White and Blue* at 318 (cited in note 56); cf. Arthur Allen Leff, *Law and*, 87 Yale L.J. 989, 1011 (1978) ("[A]ll we can understand, and that not very well, are the games we ourselves generate and eventually, but predictably, lose.").

62. P. 260.

63. P. 261. Powell borrows the term "Constantinian" from John Howard Yoder, *The Priestly Kingdom: Social Ethics as Gospel* 135-47 (U. of Notre Dame Press, 1984), and Stanley Hauerwas, *Christian Existence Today* 180-84 (Labyrinth Press, 1988).

64. P. 276 (criticizing John Neuhaus, *The Naked Public Square* (W.B. Eerdmans, 1984), and Noonan, *Persons and Masks of the Law* (cited in note 12)).

alism" and thereby undermines the church's ability "to engage in authentic Christian social criticism."[65]

Once Powell finishes administering an acid bath to theological apologies for the American constitutional order, a remarkable coincidence emerges. Constantinian jurisprudence is the Blackstonian beast reborn and swaddled in the vestments of illusory priestly virtue. All of the competing jurisprudential models depicted in *The Moral Tradition*—conventional constitutionalism, the Constantinian variation, and Powell's Augustinian alternative—view majoritarian politics as prone to violence. All three schools treat the political system as the product of the Fall, of the original sin that permeates all elected officials as they "pass[ ] from the stink of the didie to the stench of the shroud."[66] As a cure, Blackstone prescribed principled, rational judicial reasoning.[67] The defenders of the social morality that is American constitutionalism have done no more than debate the principles. Constantinian jurisprudence merely substitutes Christian ethics as practiced by virtuous judges for the liberal rationalism practiced by Blackstone's principled judges. Ultimately, both schools place their hope for redemption in the legal process. Confounded by the brutality of majoritarian politics, both Blackstonian and Constantinian jurists respond, "I know that my Redeemer adjudicates."[68]

As an alternative to the Constantinians' Panglossian piety, Powell offers what he calls the Augustinian justification for democracy and judicial review. St. Augustine's jurisprudence denied that the moral value of a law had any necessary connection to the personal virtue of the secular lawmaker. Accordingly, "a good law can be enacted by a lawgiver who is not good," for such a "law is not evil just because it was made by an unjust and corrupt lawmaker."[69] Conversely, even virtuous "laws enacted for the government of cities" and nations may "make many concessions and leave unpunished many crimes which are nevertheless punished by Divine Providence."[70] For St. Augustine, the temporal glory of the Roman Empire—measured by "ample terri-

65. Pp. 276-77; see also pp. 208-24 (criticizing Michael J. Perry, *The Constitution, The Courts, and Human Rights* (Yale Univ. Press, 1982), and Michael J. Perry, *Morality, Politics, and Law* (Oxford U. Press, 1988)).

66. See, e.g., Robert Penn Warren, *All the King's Men* 49 (Harcourt, Brace, 1946; rpt. 1982).

67. See generally 1 Blackstone at **63-92 (cited in note 32).

68. Cf. Job 19:25.

69. St. Augustine, *The Free Choice of the Will*, in 59 *The Fathers of the Church* 63, 82 (Robert P. Russell trans. 1968).

70. Id.at 83.

tory and long duration"—did not vindicate the pagan religion of the early Caesars.[71] In Powell's modern city of God, democracy tempers the inherent violence of the secular state by reminding its leaders of the ephemeral nature of their power and by corroding the law's unattainable claim to transcendent truth. The influence of Critical Legal Studies is undeniable: Powell assumes that law embodies and inevitably enforces the political preferences of a privileged class, that law denies its own contingency, and that the law's claim to formal, discoverable coherence is noxiously fraudulent. Attempting to infuse theological rigor cannot cure the law's organic indeterminacy. In attempting to Christianize the secular state, Emperor Constantine's twentieth-century intellectual heirs have merely enabled the state to confiscate the rhetoric and moral authority of the church.

Ultimately, Powell's positive case—what he affirmatively exhorts Christian lawyers to do—consists of only a few, very modest propositions, all stated at a high level of abstraction. He starts from the initial premise that Christian theology provides "no general principle . . . for deciding in the abstract the proper balance between majoritarian and judicial decision making."[72] He nevertheless recognizes the need for some standard by which Christians can weigh the relative merits of judicial deference and of judicial activism. In rejecting the argument that insulation from political passions warrants a preference for adjudication over legislation, Powell makes a stark sociological observation worthy of Mark Tushnet: "Judges, and especially federal judges, belong overwhelmingly to an educated upper-middle class not notable for its responsiveness to Christian commitments."[73] Instead, the nominal possibility that the electoral process can reverse legislative decisions generally counsels judicial deference to legislative policy judgments. This scrap of humility has the Au-

71. 1 St. Augustine, *The City of God* 142 (Hafner Publishing, Marcus Dods trans. & ed. 1948).

72. P. 287.

73. P. 288; see also p. 288 n.113 (noting that "the education and professionalization of most judges . . . privatiz[e] whatever religious beliefs they hold and shap[e] their judicial behavior to conform to the deeply secularized and intensely individualistic values of their social class"); cf. Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* 1-11, 23-24 (Basic Books, 1993) (noting widespread hostility to religion in most intellectual circles); Sanford Levinson, Book Review, *Religious Language and the Public Square*, 105 Harv. L. Rev. 2061, 2062 (1992) (noting the relative lack of attention to "claims of exclusion and silencing made by those with strong religious commitments"); David M. Smolin, Book Review, *Regulating Religious and Cultural Conflict in a Postmodern America: A Response to Professor Perry*, 76 Iowa L. Rev. 1067, 1067-68 (1992) ("demand[ing]" that "academic and legal elites cease their repression" of "Christian traditionalists").

gustinian virtue of reminding the state's agents that their power is evanescent, that secular law can never pronounce transcendent truth. Out of a vast sea of possibilities suggested by the courts and the commentators, Powell extracts three exceptions to his general rule of judicial deference: protection of racial, religious, and other minorities under a *Carolene Products* rationale; a process-sensitive patrol against the suppression of free expression; and enforcement of the procedural due process ideals of reliability and regularity.[74] "There is no Christian constitutionalism," Powell concludes; "Caesar remains Caesar."[75]

Ironically, for someone who has rejected a Christian theory of Critical Legal Studies as a "nightmare" that would subordinate faith, hope, and love to " 'fuller forms of self-assertion and attachment,"[76] Powell has outlined a CLS approach to Christian Legal Studies. Powell finds no aspect of law more theologically pernicious than its "language of permanence, of settled decision, of absolute political value."[77] To lend the language of divine immanence to the law is to confer the attributes of God on law. What Duncan Kennedy condemns as reification of the law,[78] Powell decries as deification of the law. According to Powell's theology, there may be no greater jurisprudential offense than this blasphemous transformation of the Gospel of John: "In the beginning was the Word, and the Word was with the Law, and the Word was Law."[79] The Supreme Court's acceptance of constitutionalism as the American social morality erects legal altars "to [an] unknown god," in defiance of the Christian precept that the "lord of heaven and earth, dwelleth not in temples made with hands."[80] Constantinian jurisprudence, Powell argues persuasively, can no more nullify the law's idolatry than the hands of Israel can shape a graven image pleasing to God.[81] Arguably, a consciously Christianized constitutionalism might be even worse

74. Pp. 289-91.

75. P. 292.

76. H. Jefferson Powell, *The Gospel According to Roberto: A Theological Polemic*, 1988 Duke L.J. 1013, 1026 (quoting Roberto Unger, *False Necessity and Anti-Necessitarian Social Theory in the Service of Radical Democracy* 575 (Cambridge U. Press, 1987)).

77. P. 289.

78. Cf., e.g., Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 Am. U. L. Rev. 939 (1985).

79. See *John* 1:1; cf. Kannar, *The Constitutional Catechism of Antonin Scalia* at 1320 (cited in note 21) (describing this formula as "the short and simple recipe for a catechetical Constitution").

80. *Acts* 17:23-24.

81. Cf. *Exodus* 32 (describing Aaron's creation of the golden calf); Steven D. Smith, *Idolatry in Constitutional Interpretation*, 79 Va. L. Rev. 583, 610-13 (1993) (using the biblical account to illustrate the allure of idolatry in law).

than the purely secular variety. The historical Caesar that Powell vilifies is, after all, Constantine the pious *princeps*, not Diocletian the maker of martyrs.

Like many of its counterparts in the secular CLS movement, Powell's theological theory is far more effective as a weapon of destructive description than as a tool of constructive prescription.[82] Powell has concocted a legal theory so corrosive that it virtually consumes itself. *The Moral Tradition* dissolves even its own limited case for Christian judicial activism. In endorsing *Carolene Products*' model of judicial review, Powell overlooks the well-established tendency of discrete and insular minorities to convert judicial shelter into political advantage.[83] Powell also understates the politicized nature of the judicial process itself.[84] At its extreme, his reductionist theory erases any possibility for stating a theologically sound Christian agenda within the legal process. Total human depravity infects the courtroom and the campaign trail equally. The cure lies not in the "works of righteousness which we have done," but in the mercy and irresistible grace of God.[85] From this perspective, Christian lawyering consists simply of seeking justice, loving mercy, and walking humbly with God.[86]

Whatever its flaws, Powell's critique of constitutionalism does follow sound theological instincts. He reminds the other leading figures of Christian Legal Studies of the dangers of apologizing too readily for the law. When asked whether the Roman state should crucify the presumed King of the Jews, the chief priests of God's chosen people responded, "We have no king but Caesar."[87] Even in its silence, *The Moral Tradition* may also have a message for Christians in the legal laity. Perhaps unintentionally, Powell's repeated invocations of the compassion embod-

82. Cf. Richard Michael Fischl, *The Question That Killed Critical Legal Studies*, 17 Law & Soc. Inquiry 779 (1992).

83. See, e.g., Daniel A. Farber & Philip P. Frickey, *Law and Public Choice: A Critical Introduction* 12-37 (U. Chi. Press, 1991); Bruce Ackerman, *Beyond* Carolene Products, 98 Harv. L. Rev. 713 (1985); Geoffrey Miller, *The True Story of* Carolene Products, 1987 Sup. Ct. Rev. 397.

84. See Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 Harv. L. Rev. 802, 814-23 (1982); Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 Yale L.J. 1219, 1229-33 (1994); cf. Jim Chen, *The Mystery and the Mastery of the Judicial Power*, 59 Mo. L. Rev. 281, 293-302 (1994) (arguing that self-dealing political behavior also infects judicial staff).

85. See *Titus* 3:5-7.

86. See *Micah* 6:8.

87. *John* 19:15. But cf. *Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 114 S. Ct. 2481 (1994).

ied in the Beatitudes[88] and the Great Commandments[89] deliver a timely message to a Christian community prone to fall into the trap of placing "sins of the flesh" at "the centre of Christian morality," prone to forget that "a cold, self-righteous prig who regularly goes to church may be far nearer to hell than a prostitute."[90] Even if short on specifics, Powell's tract may inspire theological introspection in an age when religious social activism too often suggests that Christianity has no relevance after birth and before death.

The historical schism between Western and Eastern Christianity provides one final gauge by which to judge *The Moral Tradition*. Whereas the Western church has traditionally aspired to become the state, the Eastern church has sought to transform the state into the church.[91] Having endorsed MacIntyre's catastrophe thesis, Powell expends minimal energy in implicitly dismissing the "Western" sort of social activism most often associated with contemporary political campaigns overtly seeking the support of Christian voters. In distinct but equally inimical ways, both secular constitutionalists and Constantinian jurisprudes have been working toward an "Eastern" transfiguration of the positive state into the church. Exalting America's liberal social morality effectively treats the constitutional state as a substitute for the church, a secular competitor for ecclesiastical authority. Likewise, Constantinian jurisprudence seeks to redeem the state by making it a vassal of the church, a novice to be taught the church's more virtuous morality. According to Powell, neither response warrants Christian support. Worldly power was one of the temptations that Satan offered Christ.[92] Christ declined, instead founding a countervailing kingdom that is explicitly "not of this world."[93]

The Roman Empire's implementation of Western law on Eastern soil provided the historical context in which Christianity itself emerged. Ever the historian, Powell argues that the relationship between Caesar and God has scarcely changed since Christ's first sojourn on earth. *The Moral Tradition* shows how

88. See *Matthew* 5:3-7:27; *Luke* 6:20-49.

89. See *Matthew* 22:36-40; *Mark* 12:29-34; *Luke* 11:25-28.

90. Lewis, *Mere Christianity* at 80 (cited in note 23); see also *John* 8:7.

91. See Fyodor Dostoevsky, *The Brothers Karamazov* 66 (Constance Garnett Heinemann, trans. 1968) (" '[T]he Church is not to be transformed into the State. That is Rome and its dream. . . . On the contrary, the State is transformed into the Church, will ascend and become a Church over the whole world—which is . . . only the glorious destiny ordained for the Orthodox Church. This star will arise in the east!' ").

92. See *Matthew* 4:8-10; *Luke* 4:5-8.

93. *John* 18:36.

American constitutionalism has elaborated the realizable rules and formal rationality of Roman law[94] into a full-blown, self-contained system of social morality. In America as in Rome, the legal apparatus of the secular state continues to ask, "What is truth?"[95] Powell's accomplishment is a powerful demonstration that neither twenty centuries of legal evolution nor twenty decades of American constitutionalism bring Caesar any closer to answering this question on his own.

BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS. By Carol M. Swain.[1] Cambridge, Mass.: Harvard University Press. 1993. Pp. xii, 275.

Daniel A. Farber[2]

For the past twenty years, the federal courts have been vigorously engaged in racial redistricting. Recently, this involvement was attacked by the only black member of the current Court. In his concurring opinion in *Holder v. Hall*,[3] Justice Thomas challenged the conceptual basis for race-based reapportionment. A contrary view, represented by writers such as Lani Guinier, is that current judicial efforts do not go nearly far enough. This viewpoint is exemplified by Randall Kennedy's harsh review of *Black Faces, Black Interests* in *Reconstruction*.[4] Notably, this debate about redistricting is not merely taking place between blacks and whites but also among blacks themselves—Kennedy, Guinier, and Swain are all African American.

Unlike many other contributions to this debate, the Swain book is richly empirical. Besides the multiple-regression analyses that are the staple of modern social science, Professor Swain presents the results of several years of patient interviews with

94. See generally Rudolph von Jhering, *Der Geist Des Romischen Rechts* § 4, at 50-55 (1883).

95. *John* 18:38.

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2. Associate Dean of Faculty and Henry J. Fletcher Professor of Law, University of Minnesota. Although I haven't burdened this review with citations to their work, my knowledge of this area is based largely on the work of Kathryn Abrams, Phil Frickey, Lani Guinier, and Sam Issacharoff.

3. 114 S. Ct. 2581 (1994).

4. Randall Kennedy, *Blacks in Congress: Carol Swain's Critique*, 2:2 Reconstruction 34 (1993).