

BOOK REVIEW

CONSTITUTIONAL LAW AS THOUGH THE CONSTITUTION MATTERED

AMERICAN CONSTITUTIONAL INTERPRETATION. By Walter F. Murphy,* James E. Fleming,** and William F. Harris, II.***
The Foundation Press, Inc., Mineola, New York, 1986.
Pp. xxv, 1267. \$34.95.

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One easily might get the impression from taking a course in constitutional law or from dipping into judicial and academic discussion that the adjective “constitutional” has no true nominal counterpart. The words “the Constitution” appear often enough, to be sure, but an attentive law student soon realizes that the expression often is being used as a mere placeholder for the truly operative concepts: what the Supreme Court has held; what the “right” political theory requires; even what I (judge, lawyer, politician) prefer. At its least destructive, that perception of the meaning of constitutional law leads to what might be called “Court-positivism”¹—the almost automatic assumption that the Constitution is indeed “what the judges say it is.”² At its worst, the perception results in a cynicism about constitutional discussion that is personally and socially corrosive.

The extent to which Americans from every current political and philosophical persuasion share this perception of the Constitution’s emptiness must not be underestimated. Individuals on the left charge that constitutional discourse is a mere facade to cover the majority’s socioeconomic power relationships.³ Spokespersons for the right characterize

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1. See Powell, *Reaching the Limits of Traditional Constitutional Scholarship*, 80 NW. U.L. REV. 1128 (1986).

2. See C. HUGHES, ADDRESSES 139 (1908).

3. See, e.g., Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

their views as faithful to the Constitution,⁴ but the claim is illusory: simple majoritarianism and rigid historicism are both flights from dealing with an objectively real Constitution.

It is in this rather bleak setting that Walter Murphy, James Fleming, and William Harris have sounded the call for a return to the Constitution as an objective reality, in the classroom and, I hope, in the broader world as well. Their *American Constitutional Interpretation*⁵ is a coursebook⁶ that treats the Constitution itself as the subject of constitutional discussion, and not as a convenient tag for labeling Supreme Court decisions. I will first describe the contents and organization of the book. I will then comment upon its significance for legal education. I conclude with a discussion of the constitutional theory underlying the book, which I call "constitutional objectivism."

I. A DESCRIPTION OF *AMERICAN CONSTITUTIONAL INTERPRETATION*

Murphy, Fleming, and Harris have discarded the traditional casebook's shopworn arrangement of Supreme Court decisions under doctrinal headings.⁷ The authors provide three lengthy introductory chapters as well as essays prefacing each section in the main part of the book. In the first chapter, Murphy, Fleming, and Harris introduce the reader to some of the primary characteristics of constitutional discourse: the varying degrees of clarity in the constitutional text, the unavoidable potential for conflict in the text's provisions, the incompleteness of the Constitution, and the problems that arise from new concerns and unforeseen developments. They then lay out three basic questions around which the book is organized (p. 9):

1. WHAT is the Constitution that is to be interpreted?
2. WHO are the Constitution's authoritative interpreters?

4. For an excellent overview and critique of New Right constitutionalism, see S. MACEDO, *THE NEW RIGHT V. THE CONSTITUTION* (1986).

5. W. MURPHY, J. FLEMING & W. HARRIS, *AMERICAN CONSTITUTIONAL INTERPRETATION* (1986) [hereinafter cited by page reference alone].

6. The publisher is not marketing the book as a law school casebook, which is unfortunate if law teachers are thereby led to ignore it. One purpose of this review is to urge those who teach in law schools to disregard Foundation's marketing decision.

I use the clumsy term "coursebook" in preference to the familiar "casebook" or "textbook" because those other labels are misleading. *American Constitutional Interpretation* is neither simply a text written by the authors nor a collection of cases surrounded by supplementary material, but includes essays, judicial and extrajudicial opinions, excerpts from legislative proceedings, and so on. By its very form the book presents the reader with a broader and more accurate slice of American constitutional discourse than does the usual casebook.

7. In this respect, the authors have followed the lead of another important but radically different book by Paul Brest and Sanford Levinson. See P. BREST & S. LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING* (2d ed. 1983).

3. HOW can/should/do those interpreters accomplish their tasks?

The chapter concludes with a concise discussion of the purposes and techniques of reading judicial opinions.

The second chapter provides the student with another useful tool for thought and analysis. Murphy, Fleming, and Harris categorize the political theories at work in American constitutional discourse along a spectrum running from that of the "Pure Constitutionalist," who regards the Constitution's purpose to be the limitation of governmental power and the protection of substantive rights, to that of the "Pure Representative Democrat," who endorses majority rule so long as the appropriate institutional conditions—free and fair elections, universal suffrage, and free political discussion⁸—are met. The authors point out that the constitutional viewpoints actually held in our society usually fall toward the center of that spectrum, and that even the "pure" positions share a common commitment to individual dignity, equality of rights, and the prevention of official oppression. The chapter then illustrates the Constitutionalist versus Democrat dichotomy through a brief introduction to the constitutional thought of the founders, presented properly as debate and discussion, not unitary "intent."

The third introductory chapter gives the political and institutional background of contemporary constitutional discussion in a manner familiar to those who know Professor Murphy's earlier work. The core of the chapter consists of an examination of the procedural and political context of *Korematsu v. United States*⁹ as well as the intra-Court activities that preceded the resolution of that case. Students who read *American Constitutional Interpretation* will not be misled into believing the common classroom fiction that Supreme Court decisions descend from some judicial Mount Sinai untouched by human doubt, debate, or passion.

The heart of the book begins with section II (chapters four and five). Section II addresses the authors' first question (p. 81): "WHAT is the Constitution?" In chapter four, the authors introduce the debate over textual versus extratextual interpretation. By introducing this issue with *Calder v. Bull*,¹⁰ the authors strike a blow against the ahistorical notion that Earl Warren and his colleagues invented those methods of constitu-

8. The authors' brief discussion (pp. 30-32) of the substantive values held by the "Pure Representative Democrat" which are necessary to render the process-oriented theory workable lays the groundwork for their consistent refusal to accept—or to impose on students—the analytically unhelpful dichotomy between process and substance.

9. 323 U.S. 214 (1944).

10. 3 U.S. (3 Dall.) 386 (1798).

tional interpretation that look beyond the document's four corners. *Calder* is followed by a series of substantive due process cases that the authors skillfully use to explore the history and limits of attempts to define "the Constitution" as something equal to or greater than the 1787 document and its amendments. Few constitutional law courses begin with cases like *Calder* and *Griswold v. Connecticut*,¹¹ but the innovation makes logical and pedagogical sense in that it compels the student to consider the fundamental question of what is the constitutional "text" that is to be interpreted.

Chapter five addresses the related question of "continuity and change": Does the Constitution, however defined, consist of a set of commands or principles fixed at the time of its adoption and amendment? If not, in what sense does the Constitution retain an objective identity across time and through the vicissitudes of history? To further the discussion, the authors present a variety of viewpoints: Holmes's evolutionary nationalism in *Missouri v. Holland*,¹² the debate over the authority of historical understanding in *The Minnesota Moratorium Case*,¹³ the role of changing standards in eighth amendment and equal protection decisions, and the Burger Court's invocation of longstanding practice in the legislative chaplaincy case.¹⁴ The chapter ends with the juxtaposition of radically opposing viewpoints: Chief Justice Rehnquist's intentionalism and Professor Dworkin's concept/conception distinction.

Section III addresses the authors' second question (p. 182): "WHO shall interpret the Constitution?" Murphy, Fleming, and Harris present this question as a twofold inquiry, asking who interprets for the national government and who does so for the federal system. Under each sub-heading, the authors outline the historically viable answers. The question of who resolves intrafederal constitutional disputes is developed in a wide-ranging set of materials, including such unusual treats as the 1802 United States Senate debates over repealing the Midnight Judges Act, Lincoln's First Inaugural, and speeches by Professor Tribe and Judge Noonan on the Human Life Bill, as well as *Marbury v. Madison*¹⁵ and *Katzenbach v. Morgan*.¹⁶ As to who is the authoritative interpreter for the federal system, the authors focus on the historical debate between proponents of state sovereignty and proponents of federal judicial supremacy, and include presentations of the states' rights position well-

11. 381 U.S. 479 (1965).

12. 252 U.S. 416 (1920).

13. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

14. *Marsh v. Chambers*, 463 U.S. 783 (1983).

15. 5 U.S. (1 Cranch) 137 (1803).

16. 384 U.S. 641 (1966).

known to historical scholars but often unfamiliar to law students: the chapter pairs the Kentucky Resolutions of 1798, an excerpt from one of John C. Calhoun's treatises, and the Southern Manifesto of 1956 with *Martin v. Hunter's Lessee*,¹⁷ *Ableman v. Booth*,¹⁸ and *Cooper v. Aaron*.¹⁹

Three-quarters of the book is devoted to the third question posed by the authors (p. 286): "HOW does one interpret the Constitution in a coherent and intellectually defensible manner?" This fundamental question is introduced by a superb and imaginative organizational chapter (chapter eight), where Murphy, Fleming, and Harris provide the student with a three-part hierarchical outline of interpretive methodology. On the highest level of abstraction and generality are what they label "approaches to interpretation." An "approach" embodies answers to the authors' first two questions, that is, it involves decisions for or against text-bound interpretation and for or against acceptance of constitutional change. In addition, the authors suggest, an approach also involves a basic vision of the Constitution either as a set of constraining rules for government or as a collection of aspirations for society as a whole (pp. 290-91).

The intermediate level of interpretive methodology consists, in the authors' terminology, of "modes of analysis"—the ways in which an interpreter "utilizes [an] approach[] in the enterprise of constitutional interpretation" (p. 289). The generally accepted modes described by the authors include verbal, historical, structural, doctrinal, prudential, and purposive (or teleological) analyses.

In contrast to the possible approaches and modes of analysis, which may be intuitive or unacknowledged, the lowest level of interpretive method involves the conscious adoption of interpretive techniques. The choice among techniques, like the selection of modes of analysis, is not unlimited or purely tactical. Murphy, Fleming, and Harris acknowledge that the interpreter's approach influences and shapes the employment of particular analytic modes, while the modes constrain the choice of technique. The authors propose for the student six commonly used techniques: literal interpretation, deduction, induction, framers' intent, stare decisis, and value balancing. An appendix to the chapter explains why the authors reject certain frequently invoked dichotomies as unhelpful.²⁰

17. 14 U.S. (1 Wheat.) 304 (1816).

18. 62 U.S. (21 How.) 506 (1859).

19. 358 U.S. 1 (1958).

20. The book as a whole exposes the unproductive character of disputes framed according to dichotomies such as strict versus liberal construction, judicial activism versus judicial restraint, substance versus procedure, and interpretivism versus noninterpretivism (pp. 313-16).

The bulk of *American Constitutional Interpretation* consists of chapters nine through seventeen, which explore in detail the methodology of constitutional interpretation. The authors first present a structural analysis of intrafederal disputes. As in other sections of the book, the ordinary (*United States v. Curtiss-Wright Export Corp.*,²¹ *The Steel Seizure Case*,²² the War Powers Resolution,²³ and *INS v. Chadha*²⁴) coexists with the extraordinary (*The Flying Fish*,²⁵ Justice Brennan's confirmation hearings, and President Roosevelt's rejection of the legislative veto). The link drawn between cases traditionally regarded as raising separation of powers issues, and those usually treated as matters of federal jurisdiction, is especially illuminating. Structuralism and the federal system, however, are presented in a rather traditional way;²⁶ the authors trace a steadily increasing recognition of national power from *McCulloch v. Maryland*,²⁷ through *Crandall v. Nevada*,²⁸ to the post-Civil War reconsiderations in *The Slaughter-House Cases*,²⁹ *National League of Cities v. Usery*,³⁰ and *Garcia v. San Antonio Metropolitan Transit Authority*.³¹

The purposive modes of interpretation that subserve democracy are the subject of chapters eleven and twelve. The authors provide in chapter eleven a fairly extensive set of Supreme Court cases to present the theme of protecting political speech; the role of political participation is illustrated in chapter twelve by selected decisions from the reapportionment, association, and campaign regulation cases. The authors then deal with equal protection in chapters thirteen and fourteen, providing the standard array of race cases and most of the usual nonrace equal protection decisions.

The treatment of fundamental rights adjudication as a "mode" of interpretation is fresh and imaginative. The introductory text of chapter fifteen outlines the history of the constitutional protection of property

21. 299 U.S. 304 (1936).

22. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

23. 50 U.S.C. §§ 1541-1548 (1982).

24. 462 U.S. 919 (1983).

25. *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804).

26. The authors' usual sensitivity to the complexities of constitutional history is inadequately employed in chapter 10, which would have benefited by reproducing materials of a nonnationalistic flavor, such as *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33-34 (1812) (denying existence of federal common law of crimes on structural grounds); and *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 138 (1837) (holding state police power "complete, unqualified and exclusive"). As noted above, the book does provide the student (in an earlier chapter) with the seminal presentation of states' rights constitutionalism, the Kentucky Resolutions of 1798.

27. 17 U.S. (4 Wheat.) 316 (1819).

28. 73 U.S. (6 Wall.) 35 (1868).

29. 83 U.S. (16 Wall.) 36 (1873).

30. 426 U.S. 833 (1976).

31. 469 U.S. 528 (1985).

and the materials that follow present the views of Locke, Madison, Marshall, Taney, the *Lochner* Court, and the Roosevelt appointees, and culminate with the Court's remarkable decision in *Hawaii Housing Authority v. Midkiff*.³² The substantive constitutional value of property is followed, logically but innovatively, by the substantive constitutional value of religious freedom. The selection of materials is orthodox,³³ their placement and editorial treatment are not. The third part of the book's treatment of fundamental rights analysis, chapter seventeen, addresses the highly controversial issue of substantive privacy rights. The cases are arranged thematically, and the editorial materials successfully link the chapter to issues arising earlier in the book.

The final chapter deals with the role of the Constitution in borderline situations, when the nation's needs or fears seem to call for governmental action that extends beyond the ordinary constitutional limits. To stimulate contemplation and debate, the authors present materials on the crises of Jefferson's administration, the Civil War, World War II, and the extralegal behavior of the Nixon administration.

American Constitutional Interpretation is characterized by sophisticated and innovative uses of intelligently edited original materials. The editorial text and apparatus provide useful background information and conceptual tools; the authors also challenge the student by a judicious selection of questions. Each essay and chapter is accompanied by a brief, useful bibliography.

II. AMERICAN CONSTITUTIONAL INTERPRETATION AS A TEACHING BOOK

American legal education today is often said to be in a state of crisis. American lawyers, of course, have been worrying about the professional and political adequacy of legal education since the birth of the Republic. Nevertheless, the contemporary concern may be especially warranted: legal education in the late twentieth century law school, especially in the crucial first year, remains based on a method devised by late nineteenth century law professors. Given the almost universal repudiation of Langdellian legal science, it is rather odd that the heirs of legal realism, indeed even the disciples of critical legal studies, continue to follow the case-orientation and employ the doctrinal organization that Langdell and

32. 467 U.S. 229 (1984). Without dissent, the *Midkiff* court upheld an exercise of state eminent domain power that in effect simply transferred, with compensation, plots of real property from one person to another. Cf. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (seriatim opinion of Chase, J., denying constitutionality of such governmental action).

33. This section does, however, contain an excerpt from a statement by Roman Catholic Bishops in response to the renewal of military draft registration (pp. 1062-65).

company rendered canonical.³⁴

As a teaching tool, this book deserves the highest marks for its largely successful escape from prerealist pedagogy. Murphy, Fleming, and Harris avoid overemphasizing Supreme Court opinions. In particular, they avoid the tendency to overemphasize *Marbury* and the issue of judicial review,³⁵ a tendency that often leaves the student with the impression that constitutional discourse is something that the Justices do and the rest of us observe. Instead, the book presents to its reader ample evidence that the Court does not enjoy exclusive jurisdiction over constitutional interpretation. By leading students to reflect on the process and means of constitutional interpretation, the book encourages readers actively to engage in it, and not simply to react to the Court's pronouncements.

The focus on interpretation should enable readers more easily to avoid another unintended consequence of traditional teaching materials: the sense that "constitutional law" is not so much a single subject as a catch-all label for a set of discrete and largely unrelated doctrines—federalism, equal protection, freedom of speech, the ban on an establishment of religion, the commerce power, and so on.³⁶ In doing so, the authors make a powerful if largely implicit argument on behalf of a particular vision of constitutional discourse, a vision that is the subject of my final section.³⁷ But *American Constitutional Interpretation* is not a partisan or polemical book; the fairness with which the authors present divergent constitutional theories makes the book usable by teachers of widely differing viewpoints.

American Constitutional Interpretation is a significant contribution to the teaching and study of the United States Constitution. But it may also be something else—one of the first signs that a truly post-Langdellian legal education is emerging. Ever since the coming of age of legal realism, the professoriat has fitfully recognized a need to expand and deepen what we offer our students, and to escape the reductionism that

34. See, e.g., H. FINK & M. TUSHNET, *FEDERAL JURISDICTION: POLICY AND PRACTICE* (1984).

35. Brest and Levinson also avoid the standard treatment of this aspect of constitutional law. See P. BREST & S. LEVINSON, *supra* note 7, at 172-98 (introducing federalism through provocative case study of the early controversy over a national bank).

36. The single most significant pedagogical problem that the book may present, for law school teachers, concerns the commerce clause, in both its positive, power-granting, and negative, state-restricting, aspects. Inclusion of a few teaching tools for this purpose—for example, cases such as *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Wickard v. Filburn*, 317 U.S. 111 (1942), and a selection from the Senate Committee hearings on the 1964 Civil Rights Act—would enhance the book's usability in the law school classroom. In a second edition, I hope the authors will consider addressing this concern.

37. See *infra* notes 40-54 and accompanying text.

regards, for example, contracts as well-taught when the students have been exposed to a selection of edited appellate court opinions organized in accordance with a doctrinal system unknown to the makers of contracts and of limited relevance to the lawyers who advise them. Much has been said about the need to equip aspiring lawyers with the insights of sociology, history, psychology, economics, and the other social sciences. In more recent years, this call has been joined by the superficially conflicting demand that law teachers devote more energy to equipping their students to be better practitioners.

The reformers' sermons have not been wholly successful. It is true that the casebook—in Dean Langdell's day a compendium of cases entirely devoid of editorial or extrajudicial comment—is now justifiably entitled "Cases and Materials on . . ." or some variant thereof. But even though appellate opinions are hardly a good sample of "law" from the social scientist's perspective, and despite the fact that few practicing lawyers are regularly involved in evoking or producing them, reading cases remains the central focus of the law school course and the student's perception of the law. Most law teachers will be familiar with the resulting difficulty one encounters in persuading second- and third-year students to treat materials other than appellate opinions with equal seriousness.

The thrust toward greater professionalization is in danger of entering an analogous educational cul-de-sac. Even though most law schools now have clinical programs, those programs and the teachers who administer them are often seen as separate from the main educational program of the law school.³⁸ The effort to professionalize legal education, like the struggle to "intellectualize" it, may be compartmentalized and thereby neutralized in the not-too-distant future.

This bleak future is not inevitable, however, and we need not accept the widespread assumption that greater professionalism and enhanced scholarly rigor are contradictory. *American Constitutional Interpretation*, I suggest, shows that this assumption is unwarranted. The concern of Murphy, Fleming, and Harris is with precisely what practicing lawyers do all the time: interpret (make sense of) and explicate (present arguments about the meaning of) legally significant documents. The student's attention is directed toward the acquisition of these professional skills of argument and documentary construction rather than to the mastery of academic theories about Supreme Court decisions. In doing so, Murphy, Fleming, and Harris have bridged the gap between academia's call for intellectual enrichment and the call by bench and bar for more

38. One would think that academic lawyers even more than other people would recognize that separate seldom means equal.

“practical” instruction. The book employs sophisticated tools from political science, hermeneutics, and history in order to develop the intellectual and forensic abilities of its readers. The result is a coursebook more professional *and* more intellectual than the ordinary.³⁹

III. THE VISION OF THE BOOK: CONSTITUTIONAL OBJECTIVISM

In the history of American constitutional thought, the 1970's and 1980's will go down as the Era of the Big Theory. Academics, judges, and even an attorney general have proposed and debated grand visions of how constitutional interpreters should go about their task. But despite the great differences among the theorists, most of them have shared a crucial presupposition: that the Constitution itself does not have “a meaning independent of what anyone in particular might want it to mean.”⁴⁰ This presupposition is seldom acknowledged, and few of the theorists would follow it to its logical, nihilistic conclusion, but the presupposition is nonetheless there. The role of constitutional theory therefore becomes one of filling in the awkward conceptual gap created by the disappearance of an objective Constitution.

Expressed differently, theory must provide the interpreter something to interpret, because the putative object, the Constitution, cannot do so. Thus, for example, we are sometimes told that the real “constitution” or fundamental political principle of the United States is representative democracy. The theorist's job, therefore, is to reconcile judicial review with this fundamental principle either by insisting on extreme judicial deference to majoritarian decisionmaking,⁴¹ or by limiting the courts to policing the political process.⁴² Or we are exhorted to follow a jurisprudence of original intent⁴³ whereby the interpreter's role is not to construe the Constitution, but to obey a speculative reconstruction of political principles the framers wanted enforced but perversely or incom-

39. In this exciting combination, the book parallels the recent professional responsibility coursebook by Professor Thomas Shaffer. T. SHAFER, *AMERICAN LEGAL ETHICS: TEXT, READINGS, AND DISCUSSION TOPICS* (1985). Professor Shaffer's work forces both instructor and student to deal with the ongoing ethical tradition of Western culture at the same time that it directly addresses the concerns of practicing American lawyers.

40. S. BARBER, *ON WHAT THE CONSTITUTION MEANS* 13 (1984). Professor Barber's excellent book is a defense of the claim that the Constitution *does* have an independent or objective meaning, and is the most extended theoretical exposition to date of what I call in this review “constitutional objectivism.”

41. See, e.g., R. BORK, *TRADITION AND MORALITY IN CONSTITUTIONAL LAW* 7-8 (1984); Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971).

42. See J. ELY, *DEMOCRACY AND DISTRUST* 73-75 (1980).

43. See Address by Attorney General Meese, *American Bar Association* 4, 11 (July 17, 1985) (available in U.S. Dep't of Justice, *Current Documents 1985*, Fiche No. 116).

petently failed to put into the text itself.⁴⁴ Or we are told that the real “constitution” is the system of human rights required by some extraconstitutional political theory.⁴⁵ Perhaps the most common viewpoint of all is that “the Constitution” is what the Supreme Court says it is.⁴⁶

In their book, Murphy, Fleming, and Harris have presented a powerful, if largely implicit, case for “constitutional objectivism”⁴⁷—the view that constitutional interpretation does have its own particular proper object. Thus, when we argue about a constitutional issue, we can find meaning separate from the predilections of the interpreter.

Murphy, Fleming, and Harris, of course, are not propounding some sort of naive faith in a mythical plain meaning. The meaning of the constitutional document is often opaque, and interpretations can be debatable or even wrong. Even more fundamentally, the authors do not insist that “the Constitution” is simply equivalent to the text of the document. The extent and contents of the object of constitutional interpretation are acknowledged to be questions for the interpreter.

Constitutional objectivism is not, then, a new version of Justice Hugo Black’s literalism.⁴⁸ The objectivist can recognize the open-ended nature of the document, and the connection between the document and the polity it creates and describes. But constitutional objectivism, in contrast to most modern theories, approaches the “text” to be interpreted—document plus polity—as itself the primary source of the interpreter’s methodology. What is fundamentally wrong with contemporary theories, whether majoritarianism, egalitarianism, intentionalism, or the various rights theories, is their insistence on according fundamental authority to *a priori* and extratextual premises. The result may be politically or philosophically admirable, but it is not constitutional interpretation as the objectivist understands that enterprise. Interpretation of a fundamental and normative text is necessarily *a posteriori*—determined methodologically by the text and the structure of the institutions it creates. Professor Sotirios Barber’s recent study suggests the possibility of a constitutional hermeneutic that obeys this objectivist canon.⁴⁹ Murphy,

44. In his book on contemporary right-wing constitutional thought, Professor Stephen Macedo powerfully critiques the contradictions within the majoritarianism-plus-original-intent theory propounded by Meese, Bork, and others. See S. MACEDO, *supra* note 4, at 21.

45. See, e.g., J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 73-75 (1980).

46. See Powell, *supra* note 1, at 1136-38 (describing Professor Tribe’s work as tending toward this position).

47. I dislike the phrase, but the other obvious candidate, “constitutional realism,” seems likely to invoke erroneous connotations of legal realism.

48. See H. BLACK, *A CONSTITUTIONAL FAITH* 7-12 (1969).

49. See S. BARBER, *supra* note 40.

Fleining, and Harris provide the raw materials, and the conceptual tools, for constructing a similar interpretive approach.

Constitutional objectivism, unlike result-oriented approaches, recognizes the legitimacy of interpretive pluralism. If we really are addressing an object separate from our own preferences, we inevitably will disagree at times on the most appropriate interpretation. What objectivism avoids is the conversion of constitutional discourse into another form of partisan political dispute. When the autonomy of the Constitution is effectively recognized, the interpreter's results no longer conform to our customary ideological categories.⁵⁰ The vision of Murphy, Fleining, and Harris transcends and cuts across the debates between Justice Brennan and Chief Justice Rehnquist, Professor Monaghan and Professor Perry.⁵¹

The Constitution, both the historical document and its polity, is designed to include among "We the People" persons of significantly different political viewpoints. In contrast to the reductionistic approaches of some modern theorists, whose ultimate goal often seems to be to eliminate constitutional choice and dispute,⁵² the Constitution creates a bounded but nevertheless somewhat indeterminate sphere of discourse. Within this sphere, interpreters can conduct meaningful debate because they share a common allegiance to the bounds of the sphere and to the forms of discussion found within it. Rather than predetermining substantive results, as do the theories of the right, constitutional objectivism questions whether any given position can be justified, by appropriate and historically accepted methods, from text and polity. Rather than deny limits to the interpreter's choice among forms of argument, as do the theories of the left, constitutional objectivism questions whether any given method can be justified, in the light of appropriate and historically accepted positions, from text and polity. Objectivism recaptures the fundamental insight that constitutional interpretation is something we all can and ought to do, and which can cut against the particular results we would prefer to reach.

Constitutional objectivism is widespread in American society as a whole; most judges, lawyers, legislators, and citizens probably assume

50. See *id.* at 90-101 (criticizing certain judicial interpretations of federal power as pretextual and illegitimate); S. MACEDO, *supra* note 4, at 30-31 (arguing for judicial activism in both civil rights area and economic liberties area).

51. Any recent volume of the United States Reports will illustrate the ongoing debate between Justices Brennan and Chief Justice Rehnquist. For the academic debate over whether "originalism" is the most appropriate interpretive approach, compare Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981) (yes) with Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional "Interpretation,"* 58 S. CAL. L. REV. 551 (1985) (no).

52. Professor Tribe recently published a sustained and powerful critique of this flight from controversy. L. TRIBE, *CONSTITUTIONAL CHOICES* 9-20 (1985).

that the Constitution has independent meaning.⁵³ But I suspect that the opposite may be true in the law faculty lounge and, most unfortunately, in the law school classroom. The denial of meaning to an objective Constitution is ultimately destructive of constitutional discourse, which becomes nothing more than "Civil War carried on by other means."⁵⁴ If "the Constitution" means nothing more than whatever a legislative majority or five Supreme Court Justices prefer, then the American experiment in a constitutional polity that combines democracy and limited government has failed. *American Constitutional Interpretation* is a sustained rejection of that despairing conclusion. In their book, Murphy, Fleming, and Harris have offered the Constitution and the Republic a splendid bicentennial anniversary present.

53. Other recent works produced by members of the emerging school of constitutional objectivism include S. BARBER, *supra* note 40; S. MACEDO, *supra* note 4; Harris, *Bonding Word and Polity: The Logie of American Constitutionalism*, 76 AM. POL. SCI. REV. 34 (1982); Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703 (1980); Murphy, *Constitutional Interpretation: The Art of the Historian, Magician, or Statesman?*, 87 YALE L.J. 1752 (1978); Powell, *supra* note 1; and Powell, *Parchment Matters: A Meditation on the Constitution as Text*, 71 IOWA L. REV. 1427 (1986). These writers illustrate the intrinsic pluralism of an objectivist view of the Constitution; although their specific positions often differ, they fundamentally agree on what Murphy, Fleming, and Harris label an interpretive "approach."

54. A. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 253 (2d ed. 1984).

