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The Interpretable Constitution

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THE INTERPRETABLE CONSTITUTION. By *William F. Harris II*. Baltimore: Johns Hopkins University Press. 1993. Pp. xv, 225. \$38.50.

“[W]e must never forget, that it is *a constitution* we are expounding.”¹

Professor William F. Harris II² attempts to give meaning to John Marshall’s well-known phrase in his recent book, *The Interpretable Constitution*. Harris ambitiously attempts to derive a theory of constitutional interpretation from first principles by identifying what is unique about the genre of a constitution in general and about the American Constitution in particular.

The Interpretable Constitution is not a list of “wrong” Supreme Court decisions; nor is it merely a recipe for interpreting the Constitution. In Harris’s own words, “the purpose of the Interpretable Constitution is not to produce categorically correct answers but to substantiate ways of interpreting that do not undermine the nature of the enterprise and whose conscientious use will illuminate the character of its political project” (p. 162 n.28). To that end, Harris develops a complex, multilayered, and language-based view of the constitutional project. In describing that project, Harris claims that

[i]n this crucially self-referential enterprise, a purposefully composed text creates its own normative author. It constructs the popular sovereign it needs to be authoritative, and it nurtures the political life of a People whose citizenship provides it with the only reality it can have or need. . . . This People and these Citizens are not merely the analytical necessities for explaining the validity of the Constitution. Their persistent commitments and practices give the project its three-dimensionality as a meaningful world.³

Harris’s basic premise is that constitutional interpretation must focus on the bond between language and politics that we usually take for granted (p. 84), and, accordingly, his theory is deeply intertwined with language.

Harris posits two distant but parallel political orders. The first is the level of the individual and the Constitution-as-a-document. On this level, an individual, or “natural” person, considers the truth and falsity of propositions by reasoning and communicates those judgments through language. The analogous second order is the realm of the political collectivity and the constitution-as-a-polity — the instan-

1. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

2. Associate Professor of Political Science, University of Pennsylvania.

3. P. xi; cf. JAMES BOYD WHITE, *JUSTICE AS TRANSLATION* 101 (1990) (“Reading is . . . an ethical activity, a way of becoming someone in relation to another I am thus suggesting a way of reading a text as rhetorically constitutive: as an act of expression that reconstitutes its own resources of language and in doing so constitutes a community . . .”).

tiation of the first order document in the political sphere. Here, the artificial person, akin to Hobbes's Leviathan, ponders justice by a process of collective rationality that takes the form of civil law. To explain the relationship between the two levels, Harris constructs a political metaphor of writing, reading, explaining, and revising the Constitution and the constitution — the first- and second-order political "texts."⁴ Each component of the metaphor comprises a separate chapter.

In Chapter One, "Writing the Constitutional Polity," Harris begins with the observation that politics and language are deeply connected, both descriptively and normatively (p. 46). Politics is, and should be, carried out through language. Although that statement may be true of most, if not all, political systems,⁵ word and polity are even more profoundly bound in the specifically American political arrangement, in which a written document serves as the very foundation of the American polity. "To write a Constitution — that is, to write down the political form — is . . . to trade on and . . . to systematize the preexisting concordance of language and politics. This chapter explores Constitution-writing under such a conceptualization" (p. 47; emphasis omitted).

Authoring a Constitution parallels the authoring of other genres. Harris speaks of literary narrative as marking off a "clean, well-lighted place" — to use Ernest Hemingway's metaphor — from the surrounding darkness and chaos,⁶ much as a political narrative establishes an organized sphere from some sort of Hobbesian state of nature. In Genesis, God speaks, and order emerges from the chaos as light separates from darkness.⁷ A group of people write a Constitution, which in turn grants them an identity and defines them as a Constitutional People, a People of the text. The American Constitution becomes a metaphor for the American constitution; the written document stands as a symbol of the reality of the polity.

Harris argues that the "writteness" of the Constitution is fundamental to the document's interpretability (p. 83). Basing the political

4. This Notice follows Harris's style, capitalizing *Constitution* when referring to the first-order political text — the document — and using lower-case *constitution* when referring to the second-order political text — the polity.

5. See, e.g., THOMAS HOBBS, *LEVIATHAN* 100 (C.B. Macpherson ed., Penguin Books 1968) (1651) ("[Without Speech, there would have been] neither Common-wealth, nor Society, nor Contract, nor Peace . . ."); JOHN LOCKE, *The Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* § 77, at 318-19 (Peter Laslett ed., student ed., Cambridge Univ. Press 1988) (1690) ("God . . . put [man] under strong Obligations of Necessity, Convenience, and Inclination to drive him into Society, as well as fitted him with Understanding and Language to continue and enjoy it.").

6. P. 49 & n.5 (citing ERNEST HEMINGWAY, *A Clean, Well-Lighted Place*, in *THE VIKING PORTABLE HEMINGWAY* 531 (1944)); see also EARL ROVIT & GERRY BONNER, *ERNEST HEMINGWAY* 98 (rev. ed. 1986) ("The clean, well-lighted place is the structure that man imposes on the chaos to wrest order and temporal regularity out of meaningless flux of sensations.").

7. *Genesis* 1:1-4.

order on a written document presupposes a set of constitutional readers who not only form a political whole but also act individually. "To erect a constitutional order with public writing is to ground it not only in political collectivity but also in individual intelligence" (p. 85).

In Chapter Two, "Reading the Constitutional Polity," Harris explains the importance of being able to "read" the second-order political "text" (p. 102). He expands on his claim that the first-order written document serves as a metaphor for the second-order constitution of the polity. Furthermore, he argues that establishing connections between a "first order of the individual as a natural, aggregatable being and a second order of the public as artificial orderliness and wholeness" (p. 95) is crucial to the ongoing vitality of the enterprise. The two constitutional attributes of Authority and Legibility serve as the necessary mediating vectors (pp. 95-96), in the same way that physicists speak of vector bosons mediating the fundamental forces of the universe among subatomic particles. Harris likens this mutually conforming process to establishing a Rawlsian "reflective equilibrium," where one arrives at a sense of justice through a process in which our personal overarching general principles and our specific everyday judgments are mutually adjusted and revised to achieve a durable consonance or match."⁸

Harris labels the first vector Authority, by which he refers to the "transformation of private will into public decision that can then act in reverse against the particularities that make it up" (p. 95). Authority mediates the generality of one order with the specificity of the other. The second mediating vector is Legibility, referring to the readability of the second-order political "text" (pp. 95-96). The second-order rationality of the civil law must ultimately be comprehensible by the individual. Harris states that "the second-order rationality of political process must re-enter the first-order logic of mental discourse" (p. 88; emphasis omitted). Furthermore, the two vectors are not independent but reciprocal, partly because the intelligibility of the second-order processes legitimates political authority.⁹

Having established that the American constitutional enterprise, unique in its presumption of the bindingness of words, maintains its coherency through the vectors of Authority and Legibility, Harris turns to the task of outlining an interpretive methodology in Chapter Three, "Explaining the Constitutional Polity" (pp. 114-63). He begins with a rare bit of criticism. Harris surveys several pairs of labels that commentators frequently apply to various styles of interpretation — strict versus liberal, active versus restrained — and rejects them as unhelpful at best (pp. 124-31).

8. P. 107 n.20 (citing JOHN RAWLS, *A THEORY OF JUSTICE* 20, 21, 46 (1971)).

9. P. 96 (referring, as an example, to Hart's "rule of recognition" in H.L.A. HART, *THE CONCEPT OF LAW* 92-107 (1961)).

Then, in what comprises the centerpiece of his book, Harris constructs the analytic framework of an interpretive strategy. The basis of his model is the perpendicular mapping of two dichotomies: positivism versus structuralism and immanence versus transcendence.¹⁰ Harris thus divides the interpretive possibilities into four quadrants. The first is immanent positivism, which corresponds to a reliance on the plain meaning of freestanding words and clauses. The second, immanent structuralism, focuses on the structure and internal coherence of the document. Third, the transcendent positivist approach looks to the spirit of the words, an analysis anchored in the document but projecting out of it. Finally comes transcendent structuralism, corresponding to a consideration of the logic or structure of the polity rather than the document.

When speaking within these modes, according to Harris, constitutional interpreters do not abuse their power. Harris does not claim that only certain modes are legitimate, nor even that the interpretive styles are mutually exclusive. On the contrary,

“[e]ach of the four partial styles . . . has great usefulness and persuasiveness; each should be considered in a given case to see what the resulting argumentative strategy would be In a simple sense, the more interpretive modes that support the decision, the more solid the decision would be presumed to be In their method of interpretation, the greatest decisions would orchestrate all four partial styles and — in the course of this kind of comprehensive interpretation — clarify the tense juncture of liberalism and democracy which, as substantive political models oriented alternatively to individual- and collective-oriented rights, underlie the American constitutional enterprise. [p. 162; footnotes omitted]

Harris then offers an intriguing analysis of well-known judicial opinions and scholarly constitutional writing in terms of his model.

For an example of Harris's point that a single opinion can encompass all four interpretive modes, and for specific examples of each of the four, consider *McCulloch v. Maryland*.¹¹ Marshall makes a statement indicative of the immanent positivist when he questions the wisdom of adopting a construction that hinders congressional action “unless the words imperiously require it If, indeed, such be the mandate of the constitution, we have only to obey”¹² Although he does not actually rely on the plain meaning of an isolated phrase to decide the case, Marshall concedes that that mode of interpretation is a powerful one. But in construing the Necessary and Proper Clause, he claims that the question of whether the Constitution has delegated a particular power to the federal or the state government depends “on

10. Harris offers a rich, complex, and engaging graphic representation of the Interpretable Constitution at p. 146.

11. 17 U.S. (4 Wheat.) 316 (1819). See p. 162 & n.29.

12. *McCulloch*, 17 U.S. (4 Wheat.) at 408.

a fair construction of the whole instrument,"¹³ a paradigmatic immanent structuralist claim.

Marshall also relies heavily on a transcendent positivist approach in deriving his doctrine of implied powers. If the Constitution were textually complete, he reasons, it "would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. . . . Its nature, therefore, requires, that only its great outlines should be marked" ¹⁴ In other words, some powers that are not explicit in the text of the Constitution, such as the power to establish a national bank, should be treated *as if* they were specifically enumerated. Finally, Marshall employs a transcendent structuralist approach when he considers whether the states or the people are the true sovereigns. He concludes that "[t]he government of the Union . . . is, emphatically, and truly, a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit."¹⁵ In this passage, Marshall looks beyond the borders of the document to the second-order political text.

In Chapter Four, "Revising the Constitutional Polity," Harris considers the process of amending the Constitution (pp. 164-208). He argues that the three attributes discussed so far — "first, that a . . . political life can be created by the deliberative imagination whose effects are authoritatively reflected in writing; second, that it can be modeled in a text whose design can be grasped by human understanding; and third, that this very nature requires its interpretation by . . . its authentic citizens" (p. 164) — implicate the existence of a fourth attribute: the possibility of revision. Being able to amend the text reinforces its boundedness, because to recognize that the document *could* say something different than it does is to recognize that authority lies within the boundaries of the document (p. 165). Furthermore, the document's amendability illuminates its bindingness as well because the constitutional authors had the capacity to write differently, suggesting other constitutional worlds (pp. 165-66). "The constitutional order can be considered ratifiable only in the context of a capacity to envision (and to endorse) a fundamentally different alternative" (p. 166). That ours is one of many imaginable Constitutions legitimates its claim of authority. Thus, both the boundedness and bindingness of the document rest on its amenability to revision.

Now, having attempted to summarize some of *The Interpretable Constitution*, I should point out that it is an extremely difficult book to paraphrase. Perhaps the inability to be summarized is a mark of good

13. *McCulloch*, 17 U.S. (4 Wheat.) at 406.

14. *McCulloch*, 17 U.S. (4 Wheat.) at 407. Note that in this passage Marshall explicitly recognizes the importance of the legibility of the constitutional enterprise.

15. *McCulloch*, 17 U.S. (4 Wheat.) at 404-05.

literature. The literature that can offer its reader a personal education, that can move its reader to a new ethical perspective at the end of the work, defies paraphrasing. But apart from the general richness of the work, there are two specific reasons Harris is difficult to summarize. The first is that he rejects the notion that one can convey a complex idea in straightforward language such that the reader will fully understand it simply by reading it once.¹⁶ "The level of language must be adapted to the level of theory. . . . I believe it is an illusion or a form of reverse academic snobism to insist that abstract ideas can be coined in uncomplicated prose structure" (p. 36). True to his word, Harris's language reflects the complexity and sophistication of his theoretical project. He chooses each word with great care.¹⁷ So I have no doubt that he would object to much of my discussion of his book, thinking it to be quite imprecise.

Second, *The Interpretable Constitution* is difficult to paraphrase in the same way that a poem is. How would a reader of a poem respond to one who demanded, "Tell me what the poem was about"? Would one simply relate the "theme" of the poem? Something along the lines of, "'The Road Not Taken' deals with the concept of missed opportunities . . ."? Or would one try to be more detailed and describe the poem's imagery, its meter and rhyme, its alliteration? No. One cannot parse a poem, analyze its separate parts individually, and still remain true to the genre of a poem. Perhaps one can speak that way about a law review article or a historical biography, but not about a poem ("Or a Constitution!" I imagine Harris adding).

For that reason I have quoted *The Interpretable Constitution* liberally, hoping to convey a sense of the work through the language Harris employs. Like a poet, Harris says as much in the *way* he writes as by *what* he writes.¹⁸ He also requires his readers to involve themselves with the text in much the same way as a reader of poetry.

16. See GEORGE ORWELL, *Politics and the English Language*, in *SHOOTING AN ELEPHANT AND OTHER ESSAYS* 84 (1950), for one proponent of such a view.

17. For example, consider Harris's point that the American constitutional presumption that words can create and order a political world is "preposterous." P. 1. Harris uses *preposterous* both in its common sense of being illogical and in its more literal sense of being inverted in time — a Constitution coming before a government. The words *astounding*, *surprising*, or *counterintuitive* simply would not have done.

18. J.T. Boulton once praised Edmund Burke's writing by saying: [W]hat Burke "has to say is not a matter just of 'content' or narrow paraphrasable meaning, but is transfused by the whole texture of his writing as it constitutes an experience for the reader." . . . [H]is exposition — the play of imaginative insights as well as the statement of logical argument — itself becomes "proof" in this special sense that it communicates, and affirms while communicating, the rich complexity of a philosophy of life; it does not merely demonstrate the truth of a set of propositions.

JAMES T. BOULTON, *THE LANGUAGE OF POLITICS IN THE AGE OF WILKES AND BURKE* 97-98 (1963) (quoting JOHN HOLLOWAY, *THE VICTORIAN SAGE* 10-11 (1953)). Harris's book is similarly "transfused by the whole texture of his writing" and consequently thwarts attempts at paraphrasing.

To carry on a theoretical discourse, I believe it is best for a reader to have to work actively with a text to reach an understanding and criticism of it, rather than for the writer to presume to make a simple transfer of a thing from his or her head to someone else's head. A theoretical book may more appropriately approximate a carefully framed seminar than a lecture.¹⁹

In light of the poetic nature of the book, I have tried not to belittle the work by presuming to be able to summarize it all; I have instead tried to give a sense of Harris's general approach and to go into slightly more detail with respect to his model of the Interpretable Constitution.

The book is refreshingly affirmative in its approach. Its project is to outline an interpretive methodology that supports the relationship between document and polity — between Constitution and constitution — that the American constitutional project envisions. He does not write because he believes the Supreme Court has “got it wrong” (p. 33). Nor does he criticize justices or scholars for relying too heavily on a particular mode of interpretation such as “original intent” or ignoring “the plain meaning of the text.” In fact, he is extraordinarily accommodating, delighting in the widely different approaches of concurring and dissenting justices. Although Harris discusses a variety of views of “thoughtful constitutional citizens” (p. 28), he does so to illuminate a particular point, not to criticize their specific theories or interpretive styles. Harris has a different perspective, not on a higher or lower level, but one that encompasses, yet reinterprets and relocates, a variety of views on constitutional interpretation.

Harris occasionally disappoints the reader by declining to expand on an evocative point. For example, he briefly discusses the values of human dignity and democracy inherent in the Constitution (pp. 97-99). These two attributes are implicit in the Constitution because the writtleness of the document requires both intelligence and collectivity on the part of its constitutional citizens. Harris claims that these metaconstitutional values should therefore inform the project of interpreting the Constitution and are “as close as we need to get to natural law in American constitutional interpretation” (p. 98). He quickly

19. P. 37. Professor James B. White makes a similar statement about reading poetry:

The meaning of a poem is not its paraphrase, but the experience of reading it — not just reading it once, but reading it to learn it, to master it, reading with imaginative engagement and readiness to learn . . . Of course the poem may not have a simple statement at all . . . But some summary can always be made, and you should see that there is always something beyond this summary, beyond the message, in the good poem, and . . . that it is this which gives the poem value. One has not a sense of solution but the reverse, and this works as an invitation.

JAMES B. WHITE, *THE LEGAL IMAGINATION* 764-65 (1973). Cf. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 454 (1793) (Wilson, J.) (“For, in an instrument well drawn, as in a poem well composed, silence is sometimes most expressive.”) (speaking of the Constitution). For a discussion of how *The Interpretable Constitution* serves as an “invitation,” see *infra* note 20 and accompanying text.

moves on, however, leaving the reader to mull over alone the idea of dignity and democracy forming a pseudo-natural law.

Some will be disappointed that there is little in the way of specific conclusions in *The Interpretable Constitution*. One certainly will not find a statement of the "correct" interpretation of the Constitution on a particular substantive question such as the right to an abortion or how to read the Second Amendment. But that should not be viewed as a shortcoming of the book. Rather, it reflects the modesty of this first stab at the lofty and ambitious goal of developing a theory of constitutional interpretation from first principles. Harris's book has an air of humility about it, in that his goal is not to persuade others of the validity of his claims but to spark a dialogue along certain lines. He claims merely to begin the dialogue.²⁰ Harris sees the book to be the first iteration of a new way of talking about the practice of constitutional interpretation, so perhaps it is unfair to expect a comprehensive statement of the theory, let alone the result of applying it to specific cases.

How then should one judge Harris's offering? Charles Taylor suggests that a theory "can shape or alter our way of carrying out [practices] by offering an interpretation of the constitutive norms."²¹ "What makes a theory right," Taylor goes on to say, "is that it brings practice out in the clear; that its adoption makes possible what is in some sense a more effective practice."²² Harris himself reminds us that to theorize means "to see" (p. ix). It would be premature to ask whether Harris's theory will make the practice of interpreting the Constitution more effective, but one might ask how adopting his theory would change the practice.

One effect might be to moderate the polarization of much of the current debate over constitutional interpretation. Harris's model of an Interpretable Constitution can support a variety of interpretive styles — requires them, in fact. But more importantly, the Interpretable Constitution presupposes, and thus creates, a citizenry that is intelligent and responsible.

[T]he constitutional People frames its own political nature in a text, for the survival of its identity, and then looks to that documented image of itself — to recur to its original plan for public life — to determine who they authentically are, or aspire to be, even beyond their current state of constitutional realization and the imaginings of their founders. [p. xi]

The text is therefore not some ultimate source of authority, issuing commands to its subjects. Rather, it demands a set of engaged readers

20. In fact, Harris has already planned his next contribution to the dialogue he has begun: a second book to be entitled *The Imaginable Constitution*.

21. CHARLES TAYLOR, *Social Theory as Practice*, in 2 PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS 91, 99 (1985).

22. *Id.* at 104.

who, with both “deliberation and imagination” (p. 41), explain the Constitution so as to harmonize the document with the political text. To do this well, its readers must have a thorough understanding of the political collectivity and its institutions, a deep involvement with the document, and a willingness to listen to the voices of other constitutional readers. Such are the people that *The Interpretable Constitution* would have us be.

— *Steven C. Coberly*