1999


Randy Lee

Available at: https://works.bepress.com/randy_lee/23/
REFLECTIONS ON A ROSE IN ITS SIXTH SEASON: A REVIEW OF H. JEFFERSON POWELL'S THE MORAL TRADITION OF AMERICAN CONSTITUTIONALISM

RANDY LEE†

I. INTRODUCTION

When reading H. Jefferson Powell's The Moral Tradition of American Constitutionalism, one might well find herself harkening back to the words of William Shakespeare:

"O, be some other name!
What's in a name? That which we call a rose
By any other word would smell as sweet."1

Powell's book, like Shakespeare's Romeo, is in the end a rose with a thorny label. The book contains both a valuable reference guide to American constitutional history and a thought-provoking discussion of social, political, and spiritual community. Unfortunately, when Powell early on labels the work as "Christian,"2 he frightens away many potential readers and heightens expectations in others that will never be realized. Although Powell's Christian label suggests that the book will hold American constitutional law up to some natural law yardstick and report how the Supreme Court has measured up over the years, Powell has chosen to walk a different path.3 Instead of the natural law approach, Powell provides a wide-ranging, extended discussion of the history of the United States Constitution from its creation through the present.4 Secular as this approach may seem, what

† Professor of Law, Widener University School of Law — Harrisburg Campus. The author would like to thank David Craig Callaghan, Brenda Grimm, Nancy Kippchen and Harry Witte for their research assistance and especially thank Paula Heider and Shannon Whitson for technical assistance. The author would also like to thank Mary Kate Kearney and Samuel Levine for their comments on drafts of this article and Frederick Cabell, Teresa Collett, Mary Ann Glendon, David L. Gregory, Robert Rodes, Thomas Shaffer, and William E. Simon for sharing ideas and encouragement. Finally, he would like to thank his wife Brenda and the rest of his family for their love, patience, and support.

1. WILLIAM SHAKESPEARE, THE TRAGEDY OF ROMEO AND JULIET act II, sc. 2. (Juliet speaking of her love Romeo, who is a member of an enemy family).
4. Powell, supra note 2, at 48-181.
makes it Christian in Powell’s eyes is that through this approach Powell seeks “to provide a truthful description of American constitutionalism.”

Although *Moral Tradition* is not what its name might suggest, it is a valuable resource for contemporary constitutional discourse. Many readers, for example, could benefit from an evaluation of constitutional law such as this one that sought only to be truthful; an evaluation which was stripped of all the personal, social, and political agendas that normally accompany such an endeavor and which sought only to describe its subject honestly. In addition, while Powell does not send down all the answers that he believes a correctly functioning constitutionalism would have yielded, he does provide insight into how a correctly functioning constitutionalism would operate. In this regard, Powell’s evaluation is process rather than result focused, and seeks to show the reader how American constitutionalism would function if its players acted with a healthy balance of confidence in their wisdom and of the humility merited by the recognition of their fallibility. One would think such an infusion of “resoun,” Powell’s term for this balance, would be welcomed as a breath of fresh air into the quite frequently stuffy atmosphere of constitutionalism.

Unfortunately, Powell’s Christian label may not allow a number of readers to meet the work on these terms. Non-Christians may well recoil from the label, as did Mark Tushnet of Georgetown, because they believe that the Christian perspective has nothing to offer someone outside that tradition or because they suspect the work is an attempt to impose Christian law on America at large. Christians, on the other hand, may encounter the work with disappointment, because the book does not “talk about particular moral issues such as abortion, capital punishment, welfare, and things of that nature.” Nor does it seek more generally to “define the meaning of justice.”

Yet, if the reader can transcend the Christian label and meet the work as Powell has written it, rather than as the reader might pre-create it, the reader will find in *Moral Tradition* a rose of force and beauty. As Joseph Vining describes it, *Moral Tradition* “is one of those rare works that leads us to face, at the center of law and legal

5. Id. at 47.
6. Id. at 78.
9. Id. at 30 (Douglas Sturm).
thought, the largest questions about human life and human purpose.”\textsuperscript{10} It is a book that leads one “not to the edge, but to the center, so that the questions become insistent, and whatever we and others say and do in the face of them becomes our response to them.”\textsuperscript{11}

At the heart of \textit{Moral Tradition} is a relentless, no-holds-barred journey decade by decade, trend by trend, case by case through American constitutional law.\textsuperscript{12} It is a journey subsequently accompanied by a response to the leading constitutional theories and theorists of our day.\textsuperscript{13} Jim Chen recognizes in this journey “flashes of brilliance,”\textsuperscript{14} and Mark Tushnet, despite his religious reservations, concedes that the accompaniment has its insights.\textsuperscript{15} Although Powell approaches these segments with honesty and evenhandedness, in the end his conclusions seem as inevitable as they are hard-hitting. As Powell put it six years ago, American constitutionalism is in a state of “decay,” and “the peace of constitutionalism is a false ‘peace;’” the Supreme Court “lurches from decision to decision with no obvious rationale other than the specific substantive preferences of a majority of the justices.” Furthermore, “the epistemological crisis of constitutionalism is rapidly undermining the capacity of constitutionalism to enforce even the orderliness of the coercive society.”\textsuperscript{16} With respect to the work of the constitutional theorists, Powell tells us “that constitutional discourse is in serious theoretical disarray,” and that the most “clear-sighted” of the theorists are those “who have, in part or in whole, given up on Constitutionalism as anything other than talk.”\textsuperscript{17}

The most prominent themes of \textit{Moral Tradition}, then, are not narrowly “religious” but instead concern any American who has an interest in the Constitution under which we live. Powell, however, does not entirely miss the opportunity to provide some particular value for his Christian audience. This value is meant to address the church as “a community where the truth is lived and spoken.”\textsuperscript{18} For the church to be such a community, the story that forms the church must be “a reality-making claim that tells us the truth about the world and our-

\textsuperscript{10} Id. at 15 (Joseph Vining).
\textsuperscript{11} Id.
\textsuperscript{12} Powell, supra note 2, at 48-181.
\textsuperscript{13} Id. at 182-259.
\textsuperscript{14} Chen, 11 Const. Commentary at 603.
\textsuperscript{15} Tushnet, 45 J. Legal Educ. at 305-06. See Chen, 11 Const. Commentary at 606 (stating that “Powell hits his stride in a methodical refutation” of the efforts of traditional scholars).
\textsuperscript{16} Powell, supra note 2, at 10, 264, 277.
\textsuperscript{17} Id. at 12, 271. Professor Vining suggests that many constitutional theorists do not even themselves believe the theories they seek to advance. Conversation, 75 Notre Dame L. Rev. at 23 (Joseph Vining).
\textsuperscript{18} Powell, supra note 2, at 264-65.
selves." Quite simply, for the church and its members to speak and live such a truth, they must have access to it; thus, Powell provides *Moral Tradition* to the Christian community so that they can have, speak, and live the truth about constitutionalism, "the most fundamental mode by which the American republic attempts to channel and mitigate the violence of the state." In Powell's eyes, the challenge of living this truth is to "act appropriately in a world in which constitutionalism is one of the most seductive masks worn by state violence." It is to find a way to "pursue with our fellow human beings — who are not members of our religious community — the common good," and even more, "to try to find a way to express the Christian commitment to action for the common good within the bounds of other Christian commitments."

This article seeks to draw attention to three aspects of Powell's *Moral Tradition*. First, it seeks to respond to Powell's historical treatment of American constitutionalism, which is at the heart of *Moral Tradition*. This response focuses both on Powell's description of alternative visions of judicial review and on the subsequent historical progression Powell advances. Second, this article responds to Powell's notions of community and what is required to sustain a community, a particularly important question for Americans now as many seek increasingly to define the American community in terms of pluralism. Third, the article responds to Powell's labeling of *Moral Tradition* as "Christian" and considers the adequacy of the guidance Powell gives the Christian who feels called to move in the circles of American constitutional law and discussion.

For all this response and discussion, the blush will not here be removed from the rose of *Moral Tradition*. In fact, this reflection on *Moral Tradition* seeks to stress that the need to address the book's largest questions is even more urgent today than it was when *Moral Tradition* was published six years ago. In the intervening years, American constitutionalism has floundered in its most important tests, unable for example to offer credible and authoritative definitions for impeachment terms like "high crimes," "trial," and "guilty;" the American political community of "We the People" has increasingly transcended the label of "pluralistic" to display itself more clearly as polarized; and the American Christian has found herself systemati-

19. *Id.*
20. *Id.* at 264.
21. *Id.* at 47.
cally disinvited and invited to the American political forum and found her views there either embraced, edited, distorted, or rejected exclusively as political convenience required. In this light, the service Professor Powell has done in writing *Moral Traditions* seems undeniable. Thus, this article seeks to return to another passage from Shakespeare and offer *Moral Tradition* to a legion of potential readers with the encouragement, “Here’s drink,” and then turn to Professor Powell and add, “I drink to thee.”

II. POWELL’S HISTORICAL TREATMENT OF AMERICAN CONSTITUTIONALISM

Powell takes the framework he uses in *Moral Tradition* to evaluate American constitutionalism from the work of Alysdair MacIntyre. MacIntyre would maintain that one cannot analyze, critique, nor even understand a political order without studying that order within “[t]he social embodiment of tradition” in which that order is found. For MacIntyre, it is central to any such tradition that it recognize “that the past is never something merely to be discarded, but rather that the present is intelligible only as a commentary upon the past.” This is not to say that the present must always defer to the past. Instead, MacIntyre would maintain that a culture must progress in a continuum of past, present, and future in which the present defers to the past where appropriate, but also in which “the past, if necessary and if possible, is corrected and transcended” by the present. All of this must be done in such a way “that leaves the present open to being in turn corrected and transcended by some yet more adequate future point of view.” Such a notion emphasizes the need for the present participants in a political order to have sufficient humility and wisdom to know when to defer to and when to transcend the past and


25. *SHAKESPEARE*, supra note 1, act IV, sc. 3. (referencing Juliet drinking solution that she hopes will allow her to escape the enmity of this world and be joined with her love, Romeo.).


27. *Id.* at 20 (quoting ALYSDAIR MACINTYRE, *AFTER VIRTUE* 146 (1984)).

28. *Id.*

29. *Id.*
to know how to pass on that wisdom and humility to the future. MacIntyre’s framework, therefore, necessarily requires Powell to seek to understand American constitutionalism in an historical context as Powell so indicates in *Moral Tradition*:

Contemporary American constitutionalism does not exist in an Olympian setting removed from the history of how constitutional institutions and constitutional argument came to this point in history. Only by seeing the constitutional practices of adjudication and theory as embedded in the narrative of the constitutional tradition can we understand and properly critique the claims of current theorists or of the current Court. While Powell’s view has an attractive ring to it, it thrusts him into a head-on collision with the dominant modes of thought in Western culture, which as Powell himself points out, “since the Enlightenment have been a self-conscious attempt to escape from or transcend tradition.” Though Powell does not say so explicitly, one cannot help but wonder, as his case unfolds, if these modes of Western thought have lost the humility necessary to function effectively within the continuum of past, present, and future.

Powell’s historical narrative begins by examining the numerous “intellectual and institutional sources” out of which the Constitution was fashioned. Significant to his ultimate conclusion and consistent with the prevailing views of American constitutionalism, Powell sees these sources as “in tension with or antithetical to one another.” However, while the prevailing views often seek to reduce these sources merely to Federalist and Anti-Federalist camps, Powell probes more deeply to reveal that the forces that shaped the Constitution were actually more numerous and clearly not simply two sides of a single coin. Among these sources Powell includes Enlightenment origins, civic republicanism, Protestantism, and the practical political foreground of the day.

In addition to these sources, Powell shows that three competing views of justice and judging were layered in, each with its own particular level of commitment to being part of an historical tradition.

30. See Conversation, 75 *Notre Dame L. Rev.* at 33 (Randy Lee).
31. *Powell, supra* note 2, at 50.
32. *Id.* at 14.
33. *Id.* at 52.
34. *Id.*
37. *Id.* at 74-86.
The first of these was the view practiced by Lord Mansfield and Sir William Blackstone. This view was marked both by a “freewheeling treatment of earlier case law and common-law learning” and by “the intellectual capitulation to universalizing rationality.” Consequently, the view provided judges with great latitude in deciding private law cases, because it divorced judging from the past and from the surrounding culture. The second view was in fact a reaction to the free-wheeling nature of the first and was marked by an “adherence to precedent that ultimately rigidified into a formalistic doctrine of stare decisis.” Either of these two views would ultimately fail a tradition in which it was used, but each would fail for a different reason. While the first Mansfield-Blackstone view lacked the humility to allow the present to defer to the past when appropriate, the second rigidified notion of stare decisis failed to allow for the wisdom required for the present to correct and transcend the past when necessary.

The third or common law view had, as Powell describes it, characteristics that allowed it to overcome the deficiencies of the first two. This view featured “a capacity to judge reflectively on the basis of the particular features of cases, features which gain significance in virtue of being read against a larger context of common social life and human conversation.” As such, “the common law was self-consciously particularistic and tradition-dependent.” It was something peculiarly the product of the nation in which it lived, learned as much by tradition as by books, and ultimately passed on from age to age.

At the heart of Powell’s common law view is “resoun.” Resoun governed the validity and application of a rule to a particular case. It meant, depending on the context, “that which is reasonable” and “makes sense,” “that which is just, fair, [and] moral,” and “that which is a believable story, [or] an acceptable narrative.” As Powell describes the application of the common law and resoun:

[R]ules were discovered in, debated in terms of, and decided with reference to stories of past situations and decisions. A rule of broad generality might emerge from such stories, but its application in future circumstances was always open to further narrative argument. It was not possible, even in theory, to establish in advance a metarule that would determine the proper application of a rule to all the varied circum-

38. Id. at 81-82.
39. Id. at 81-82.
40. Id. at 81.
41. Id. at 76 (quoting Gerald Postema, Some Roots of Our Notion of Precedent, in Precedent in Law 21 (Laurence Goldstein ed., 1987)).
42. Id. at 74.
43. Id.
44. Id. at 78.
stances of human life. Even a putatively general rule was limited to cases that a lawyer well schooled in the profession’s traditions of argument would agree fell within the resoun of the rule.\footnote{Id.}

When Powell shows us this view at work, we see that it sought out prior authority but weighed that authority both in terms of its author and the locale in which it had previously been applied. It considered whether the position espoused in that authority made sense ethically and rationally. It considered how the rules within its own locale treated similar interests and, in this light, sought internal consistency, and finally it considered if the position of the authority would guide people into productive behavior. Through this, the common law sought to assume its place within the historical continuum of the tradition both by “paying special attention to the views and actions of figures of outstanding legal intellect and integrity” and by embracing “the propriety of critical interaction with earlier arguments and authorities.”\footnote{Id. at 85-86.} Thus, this view sought to overcome the deficiencies of the first two views by harmonizing humility in light of the accomplishments of the past with wisdom newly acquired in the present.

Once Powell’s narrative shows the Constitution formed and adopted, the narrative allows one to see the original forces surrounding the document’s creation fueling a number of ongoing tensions. The battle between the three views of judging is one such tension. A second is related to that: the battle between the three branches of government to decide which should assume leadership on the meaning of the Constitution; or phrased somewhat differently, “the institutional struggle between the courts (with their powerful but essentially un-guided pretensions to moral authority) and elected officials (with their democratic pretensions and their vulnerability to ‘majoritarian’ pressure).”\footnote{Id. at 10-11.} Tensions also ebb and flow between notions of local political community and individual rights and between the notions of local community and the concept of the federal nation-state. Although Powell concedes that the “most common description of constitutionalism” would regard such tensions and the interpretive disagreements they yield as signs of “failure,” “bad faith or apostasy,”\footnote{Id. at 32-33.} Powell sees these tensions as a recognition that traditions necessarily “are the scenes and vehicles of human argument and struggle.”\footnote{Id. at 32.}

While Powell reassures his reader about all the tensions, the ultimate point of his narrative is far from encouraging. For Powell, the
current state of American constitutionalism is one of "epistemological crisis" marked by a Supreme Court caught between conflicting claims "that constitutionalism both is and is not a morality." On the one hand, American constitutionalism clings to the claim of Enlightenment liberalism "that it is autonomous with respect to moral argument and political preference" and works through neutral rationality; yet, on the other hand, American constitutionalism also has come to claim that it does embody "specific moral commitments." For Powell, this desire to have it both ways has left American constitutionalism in a "conceptual and moral quagmire from which it does not appear to have the resources to escape."

The response to this crisis requires: first, an "intelligible explanation of why the resources of the precrisis tradition were inadequate," and then second, "new and conceptually enriched solutions." For Powell, the resources have proven to be inadequate for the two reasons just noted. First, American constitutionalism has sought to be both a moral commitment and not a moral commitment. Second, it has failed to understand its place in a tradition with responsibilities both to a past and to a future. The conceptually enriched solution Powell offers is to require the judiciary to yield to democratic processes in all instances except those in which the democratic processes themselves are threatened. Powell indicates three such instances:

1) Instances that threaten racial, religious, and other minorities as reflected in the famous footnote four of United States v. Carolene Products Co.;

2) Instances that require a process-sensitive protection against suppression of free expression; and

50. Id. at 49-50.
51. Id. at 49.
52. Id. at 6-7. As critical as Powell is of the state of American constitutionalism and as complete as his narrative on that constitutionalism is, he chooses not to factor in the Court's occasional susceptibility to outside political influences. See, e.g., Chemerinsky, supra note 35, at 186 (discussing President Roosevelt's attempt to "pack" the Supreme Court with additional seats and justices sympathetic to New Deal programs); Don E. Fehrenbacher, The Dred Scott Case 308-14 (1978) (discussing President Buchanan's efforts to influence several justices during their deliberations on Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)); Philip Elman, The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946-1960: An Oral History, 100 HARV. L. REV. 817, 828-32, 840-41 (1987) (indicating extensive ex parte communications between the Supreme Court and the Solicitor General's Office during the time that the Justice Department had intervened in Brown v. Board of Education, 347 U.S. 483 (1954)).
53. Powell, supra note 2, at 31-32.
3) Instances that require procedural due process through enforcement of ideals of reliability and regularity.\textsuperscript{55}

Powell obviously has his own sense of the source of the problem and its solution, and the reader of Moral Tradition might well feel ill-used if Powell did not. One advantage of Powell’s attempt to be honest, however, is that the narrative rings with an objectivity and a thoroughness, which allows the reader not only to consider Powell’s sense, but allows the reader alternatively to form his or her own sense.\textsuperscript{56} This makes the narrative particularly valuable for classroom work, because an instructor can use it as a catalyst facilitating any number of critiques or discussions. Powell would downplay the significance of this, claiming that “[a]ny narrative of American constitutionalism is itself an argument about the meaning of American constitutionalism; such arguments are certain to be contestable and contested.”\textsuperscript{57} Yet, while all such narratives may reveal their own agendas sufficiently loudly to make them “contestable,” not all have the clarity and completeness to make such contesting as far-reaching and productive as does Powell’s.

Powell’s narrative can contribute in a classroom setting in four other ways as well. First, the full historical picture it provides allows students to see familiar constitutional law tensions in a new light. For example, students frequently assume that the Supreme Court assumed leadership on the meaning of the Constitution in Marbury v. Madison,\textsuperscript{58} and the other branches have been looking on enviously ever since. Powell’s narrative suggests a more ongoing battle. Certainly the Court asserted itself in Marbury, but after Dred Scott v. Sanford,\textsuperscript{59} one sees the Court’s authority discredited and a dynamic President Lincoln drawing that leadership authority into the Executive Branch. Later, that leadership slips out of the hands of a weakened presidency to be seized by the radical Republican Congress, which can hold it only until that body’s own excesses weaken it and

\textsuperscript{55} Powell, supra note 2, at 290. Powell has also indicated that process issues are much better suited for judicial consideration than are “substantive” issues because lawyers are professionally trained in questions of process whereas justices may have little knowledge when they pontificate on issues like a right to die. Letter from H. Jefferson Powell to Randy Lee (Jan. 28, 1999) (on file with the author). See Powell, supra note 2, at 180 (noting the failure of Supreme Court to defer to political process on factual questions outside the Court’s expertise). Professor Mary Ann Glendon has noted that similarly, law professors are increasingly willing to undertake issues even when they lack the necessary expertise. Mary Ann Glendon, Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society 221 (1994).

\textsuperscript{56} See, e.g., Tushnet, 45 J. Legal Educ. at 305 (commenting on the timing of the crisis).

\textsuperscript{57} Powell, supra note 2, at 51.

\textsuperscript{58} 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{59} 60 U.S. (19 How.) 393 (1857).
allow the Supreme Court to reassert control. The battle hardly ends there, but instead has continued through the Roosevelt years and even to today.

Second, by including a wide range of sources contributing to the formation of the Constitution, Powell’s narrative gives students not only a more accurate view of the past, but also of the present. Rather than seeing America’s political landscape for the complex and amorphous mass that it is and always has been, Americans cling to a view of that landscape as simply bipolar: Federalists and Anti-Federalists; Federalists and Republicans; Democrats and Whigs; Democrats and Republicans. Powell demonstrates clearly that we did not evolve from bipolar political philosophies, but from multiple bodies of belief that are overlapping. Jefferson, for example, is viewed as the most outstanding of the proponents of Enlightenment liberalism, and yet Powell shows that Jefferson also advanced positions consistent with civic republicanism. Meanwhile, both civic republicanism and liberalism reflected a Protestant influence, even as liberalism maintained “that intellectual and institutional forms of medieval Christendom were not adequate to ensure a just and peaceful social order — or, indeed, any sort of order at all.” As our history progressed, the tradition retained this complexity and overlap. Both Lincoln and the secessionists, for example, traced their roots to Jefferson, and Lincoln himself reflected the influences of both Jefferson

60. Powell, supra note 2, at 126-28.
61. The battles between the Court and Congress over the Religious Freedom Restoration Act serves as but one current example. See, e.g., City of Boerne v. Flores, 521 U.S. 507 (1997) (holding that the Freedom Restoration Act exceeded Congress’ Section 5 enforcement powers). It must be noted that Congress has not viewed Flores as the final word on this issue. See, e.g., 144 Cong. Rec. S5791 (daily ed. June 9, 1998) (statement of Sen. Hatch) (declaring that in response to Flores, Congressmen who valued religious liberty had rebuilt their coalition and crafted new legislation to guarantee that government will be “cognizant of and solicitous of the freedom of each American to serve his or her concept of God”).
62. For an entertaining presentation of Federalist and Anti-Federalist forces during the adoption of the Constitution, see Videotape: Empire of Reason (Direct Cinema Ltd. 1989).
63. Conversation, 72 Notre Dame L. Rev. at 36 (Harold J. Berman); Powell, supra note 2, at 62.
64. Powell, supra note 2, at 68.
65. Id. at 71. The nature and extent of the Protestant influence can help law students understand more richly their heritage of popular sovereignty. The Pilgrim community, for example, took popular sovereignty so seriously that it decided by customary majority vote that the community and its resources would take the radical step of leaving Holland for the New World, and upon arriving in America, its members bound themselves by a Mayflower Compact, whose talk of “general good,” “submission” and obedience, contrasts well with the rights talk of the Declaration of Independence. James Daugherty, The Landing of the Pilgrims 25-27, 54-55 (1950).
66. Daugherty, supra note 65, at 53.
67. Powell, supra note 2, at 122 & n.254.
and the competing Federalists, along with a host of other influences, including Protestantism. 68

Today one could say that the Democrat and Republican labels over our political players are as much a veil over reality as are the liberal and conservative veils placed over our judges. While the two parties may represent the only two current avenues to political power, they hardly represent two consistent threads of political thought. A more accurate view would be that America is a political marketplace filled with a multitude of diverse parties — some would call them factions 69 — joined only by necessity, convenience, and historical inertia. Upon closer inspection, Republicans appear an odd assortment, including, but not limited to: industrialists, conservative Christians, second amendment advocates, and private education administrators. The Democratic Party also combines odd assortments with equal incomprehensibility, including: socialists, African-Americans, gay rights proponents, environmentalists, labor unions, and abortion advocates. While party officials claim philosophies broad enough to make room for all Americans, party members seem bound to their party often by nothing more than the desire to further a single issue and often by less. Ironically, political success for a party seems both to expose and unravel the structure. The success of the Republican Party during the mid-1990's, coupled with the tension that concurrently came to dominate that party's ranks, 70 is but the most recent example of that phenomenon. However, it is a phenomenon that should come as no surprise, because it is only when a party is in a position to accomplish something tangible that the party's inconsistencies and lack of focus have tangible effects.

Such bipolar labeling of judges is equally misleading. Justice Hugo Black, for example, was a Roosevelt appointed New Deal Democrat, but on a Warren Court which moved to allow less room for democratic processes to operate, Black could have been labeled conservative. 71 Such would have been an oversimplification. As a United States senator, Black held a political vision that was liberal in

68. Id. at 122-26.

69. James Madison, The Federalist No. 51 358-59 (Benjamin Fletcher Wright ed., 1966) (declaring that "the society itself will be broken into so many parts, interests and classes of citizens").

70. Michael J. Gerson, A Righteous Indignation: James Dobson — Psychologist, Radio Host, Family-Values Crusader — Is Set to Topple the Political Establishment, U.S. News & World Rep., May 4, 1998, at 20 ("Dobson, long on loyal radio listeners and short on patience, was threatening, in effect, to bring down the GOP unless it made conservative social issues, including abortion, a higher legislative priority.").

its time. However, that vision had to play out in the context of Black's commitment to popular sovereignty. Being on the Warren Court, that placed him at odds with more "liberal" colleagues. Thus, Black becomes but one example of our desire to shove a multitude of well-rounded judges into but two square holes.

Quite often it is easier to see a reality first in another generation rather than to try to see that reality first in one's own. Because of this, Powell makes it easier for students to recognize the breadth of the present day political landscape by presenting students with a broader vision of our political landscape in all the earlier periods of American constitutionalism.

The third way in which Powell's narrative can serve in the classroom setting is to fill a void created by the explosion of constitutional law course content since the 1960's. During this time, constitutional law has broadened even within the narrow parameters of the traditional required constitutional law course. For example, Congressional power under the Commerce Clause now has both private and public scope, and substantive due process has expanded beyond the tension between economic and abortion liberties to include seemingly essential current topics like gay rights and a right to die. Not only have the breadth of these areas expanded, but the tests within the areas have grown more complex, and thus, require even more class time.

As black-letter demands increase, less time is left to understand the nature of constitutional argument, to see constitutionalism within an historical context, and to reflect on the peculiar role in society that constitutional language creates for lawyers. Furthermore, Powell points out that historically one has developed good legal reason only "by reading and hearing good arguments by lawyers and judges with the virtues of insight, discrimination, judgment, integrity and so on." As the present volume of constitutional language expands, it crowds out the opportunity to remain in touch with these "virtues" as they have been demonstrated in the past. Certainly they are to be found in the present as well, but time frequently helps us separate the grain from the chaff more effectively than we can do so with current events. Powell's narrative cannot replace careful study of each historically significant or particularly well-reasoned opinion, but it is a welcomed alternative in a less-than-perfect world.

73. POWELL, supra note 2, at 78.
74. This explosion of constitutional law material has also contributed to the further crowding out of lower court opinions from the study of constitutional law. The interplay between Supreme Court directives, or even Supreme Court silence, and lower court responses is an often overlooked but critical part of understanding constitutional law as it impacts people's lives.
Fourth and finally, Powell’s narrative provides law students, and lawyers for that matter, with information that is at the heart of being a lawyer. John Sexton recently called lawyers “the conscience” of the legal system, and Marie Failinger has referred to the common law as the “liturgy” of lawyers. As striking as these words are, the two speakers did not choose them lightly. In all society, only the lawyer is trained to strip away the subtleties, the ambiguities, the complexities, and the niceties of the language of our social order to see it as it is, for better or for worse.

More than any other body of law, constitutional law confronts the lawyer with his role in society. Whether the lawyer practices in constitutional law or not, the truth of what is done in the name of constitutional law is accessible to the lawyer. While her countrymen may deny knowing that reality, the lawyer cannot.

Lawyers read Dred Scott v. Sandford and Brown v. Board of Education, Lochner v. New York and Roe v. Wade, Korematsu v. United States, Wisconsin v. Yoder and Buck v. Bell, not because they provide the current substantive law tests in their areas, but because they define who we are as lawyers. We are, as Powell calls out repeatedly in Moral Tradition, part of a tradition; a tradition with immense power. When we read the cases mentioned here, we can see how that power can and should be used, and how it has been but should never be used again. We see why there are opportunities for the doers and makers of law to be wise, and why there is a need for them to be humble.

Powell’s narrative gives us access to our tradition, and it does so in a way that allows for reflection and invites further study. He does refrain, as the criticism goes, from explaining why the law is not

---


76. Conversation, 72 Notre Dame L. Rev. at 32 (Marie A. Failinger).

77. 60 U.S. (19 How.) 393 (1857) (denying African-Americans the right to sue in federal court).

78. 347 U.S. 483 (1954) (overturning the concept of “separate but equal” in education).

79. 198 U.S. 45 (1905) (upholding a right to contract that preempted state labor and health regulations).

80. 410 U.S. 113 (1973) (creating the right for women to choose whether to have an abortion).

81. 323 U.S. 214 (1944) (upholding the power of the military to place Japanese in internment camps during World War II).

82. 406 U.S. 205 (1972) (prohibiting states from imprisoning religious families for choosing to educate their children at home).

83. 274 U.S. 200 (1927) (allowing a state to sterilize women who were developmentally delayed).
Godly, and yet the truth of how mortal our law is stills rings out from Powell’s work. As part of this tradition, we all would be well-served to listen to that ringing and recognize “for whom the bell tolls.”

III. POWELL’S MESSAGE TO THE PLURALISTIC COMMUNITY

Thirty years ago, Americans still clung to the image of the “Great Melting Pot.” The goal, if perhaps not the reality, was unmistakable: people from all cultures coming to the pot and being melted into one common American broth. We were to seek assimilation and to stress our similarities.

Today, we speak not of the Great Melting Pot, but of multiculturalism. In many corners, the pluralistic society is not merely a reality of the 1990’s, but a goal of them. Rather than seeking to expand our common ground, today the message is to revel in our differences. The broth is to be savored not for its consistency, but for its diversity.

By acknowledging this change in orientation, we must confront one of the greatest challenges for American culture today: Can a people, community, or tradition be bound by differences alone? The presence of different peoples is nothing new to America; in fact, the whole mystique of Ellis Island and the Statue of Liberty testify to that dynamic as a key part of American lore. Now, however, we no longer envision these people assimilating into the American experience, but anticipate instead that the American experience will broaden out to accommodate these peoples on their own terms.

Perhaps the Great Melting Pot was never more than a myth or unfulfilled promise. Certainly some would say that, historically in America, groups like peoples of color and peoples with disabilities...
have been in the soup but have never quite made it into the broth. Yet, even if in the past our similarities were not quite enough to overcome all our differences, the question still remains whether today an appreciation of our differences is enough to overcome a lack of similarities.

In *Moral Tradition*, Powell quotes MacIntyre to express how difficult moral discourse has become in a land de-emphasizing the need for some shared framework of thought and commitment:

> The most striking feature of contemporary moral utterance is that so much of it is used to express disagreements, and the most striking feature of the debates in which these disagreements are expressed is their interminable character. I do not mean by this just that such debates go on and on and on — although they do — but also that they apparently can find no terminus. There seems to be no rational way of securing moral agreement in our society.90

Powell attributes this inability to secure such moral agreement in large measure to our lack of a “shared cultural vision or societal ethos.”91

This is not to say that either Powell or MacIntyre see disagreement within a community as necessarily bad, or any shared vision or framework of thought and commitment within the community as rigid. Quite the contrary. Powell says in one of the most striking passages of *Moral Tradition* that “[w]hat unites participants in a MacIntyrean tradition is as much the problems they think important as the answers they think correct.”92 In this light, Powell maintains that in fact “[c]onflict and the interpretive disagreement over the meaning of the tradition's texts and practices constitute the ongoing life of the tradition.”93 Inevitably, participants in a tradition will discover that they are interpreting their shared vision differently or that their “existing ways of thinking are incoherent or unable to resolve new questions.”94 When this happens, the participants reform these
old beliefs or reject them entirely, and new shared beliefs emerge.95 Thus, both Powell and MacIntyre agree that disagreement can be healthy and we can be bound by it. This is true, however, only if the disagreement occurs in the context of a community with enough in common to allow disagreements to be resolved. That level of commonality, then, becomes a minimum level for a community to survive.

Yet another point indicates even more basically that differences alone cannot join a people. A people must first share some answers they think correct before then can share problems they think important. For example, until Americans agreed that racial integration was desired within our national community, we could not even begin to disagree on what was constitutionally required to achieve such integration. Shared questions necessarily can only arise out of shared beliefs and commitments.

This bond between shared agreements and disagreements harkens us back to Powell's common law notion of resoun96 and the corresponding effort to balance wisdom and humility. A union of people hopes that the answers they share reflect a common wisdom that their community has gained over time. Meanwhile, the union accepts in humility that their disagreements, the questions that bind them, stem from their individual fallibilities and their consequent need to continue their mutual search for wisdom.97 Powell would add to this

95. Id.
96. See supra notes 44-46 and accompanying text.
97. Chief Justice Warren Burger provides the following memory of Justice Hugo Black as an example of humility in constitutional discourse:

One one occasion, Hugo Black and I talked for several hours on a point that could move him to great eloquence. He could see that I was not fully persuaded, and, as we separated, that wonderful warm smile flooded his countenance, his eyes sparkled and he said something like this:

"Do you know something? You might be right about that, so stick to your guns. I don't think you are right, but it might turn out that you are."

This was not a pose or a gesture. It came directly from the well-springs of his nature. It was an Alabama populist's 20th century version of Voltaire's famous dictum. He was a confident man, sure of his own powers and convictions, but there was a quality of humility that could be seen in a very short time after coming under his spell.


Thomas Berg points out that this humility can have religious origins. As Berg notes, "People who know they are limited yet forgiven have a resource to see beyond their own perspectives to understand and be forgiving even of their opponents." Thomas C. Berg, Church-State Relations and the Social Ethics of Reinhold Niebuhr, 1567, 1606 (1995).

Robert Lipkin discusses "tolerance" in a way that gives us a different insight into humility. Lipkin advocates for tolerance on at least two levels. First, he points out that "[y]our views represent an alternative perspective, a different conception of how to solve problems of a certain kind. I might even learn something by considering them though without endorsing them or believing them to be true." Robert Justin Lipkin, Liberalism
mix that this mutual search for wisdom will only succeed if the members of the union, or tradition, respect both the process in which the search takes place and the other participants in the search. In this light, he sees the crisis in American constitutionalism as twofold: not only do those involved in the tradition no longer share enough to be bound by common answers, but they also no longer respect either the process or its other participants enough to be bound by common questions.

One might seek to respond to such a crisis in several ways. One could perceive Powell’s call to return more to democratic values as a response designed to recreate the process of constitutionalism in a form more likely to be respected. One can also sense in Moral Tradition that Powell sees a need for the players of constitutionalism to be more worthy of respect. In addition, one can sense in the book a need for a greater degree of awareness within our tradition of a shared wisdom than the degree allowed for in modern liberalism. All of this helps the reader to understand American constitutionalism’s current predicament and makes sense within MacIntyre’s framework, but one might also feel that the portrait Powell has painted within the MacIntyrean framework demands resolution beyond that framework. If critics of the Melting Pot are right to dismiss it as myth, and critics of our current venture in pluralism are right to dismiss it as a structure without foundation, then perhaps the answer to the lifeblood of community is not to be found simply within the continuum between wisdom and humility.

Robert Frost’s poem Mending Wall invites our reflection on this point. In the poem, Frost and another New England farmer meet each spring to repair the stone wall that separates their properties. The neighbor insists on his father’s view that “Good fences make good
neighbors,”104 while Frost senses that “something there is that doesn’t love a wall.”105 In Plaut v. Spendthrift Farm, Inc.,106 Justice Antonin Scalia saw in the neighbor the view of American constitutionalism that, with respect at least to branches of government, the best safeguard of harmony is a high, clear wall,107 while Justice Breyer saw in Frost the view that the absence of walls can allow government to work better.108 Certainly, these views are there to be seen and are consistent with discussing community in terms of how much we need to share to live together or whether a good wall by itself can address our differences.109 Alternatively, one could see in the poem, as Powell might, the neighbor seeking humbly to cling to his father’s beliefs of the past,110 while Frost seeks to draw his neighbor to a new wisdom.111

One might, however, transcend those views and see in the poem that Frost and his neighbor are really bound by Frost’s willingness to serve his neighbor. Frost knows his neighbor wants the wall; Frost knows it needs mending, and so Frost helps the neighbor in his task. In addition, although Frost would like to evangelize his neighbor with words and ideas, he refrains from doing so. Instead he lets his kindness, his cooperativeness, and his neighborliness speak for itself, hoping ultimately that Frost’s compassion will allow the neighbor to see for himself that there is “[s]omething that doesn’t love a wall.”112

In this light the poem’s message echoes the life and words of Mother Teresa of Calcutta. As Mother Teresa asserted, it was works of love that bound together the diverse faiths and cultures that partic-

---

104. Frost, supra note 103, at 34.
105. Id. at 33.
107. Plaut, 514 U.S. at 240.
108. Id. at 245.
110. Frost, supra note 103, at 34. According to Frost:
   He moves in darkness it seems to me,
   Not of woods only and the shade of trees.
   He will not go behind his father’s sayings...

Id.
111. Frost, supra note 103, at 34. Frost further states:
   Spring is the mischief in me, and I wonder
   If I could put on a notion in his head:
   “Why do they make good neighbors?”

Id.
112. Frost, supra note 103, at 34. Additionally Frost stated:
   Something there is that doesn’t love a wall,
   That wants it down. I could say “Elves” to him,
   But it’s not elves exactly, and I’d rather
   He said it for himself.

Id.
ipated in her world, and it was only the rhetoric of kindness that could say what needed to be said:

- Our work among the Hindus proclaims that
  - God loves them
  - God has created them
  - they are my brothers and sisters.

Naturally I would like to give them the joy of what I believe
  - but that I cannot do;
  - only God can.

Faith is a gift of God
  - but God does not force himself.

Christians, Muslims, Hindus, believers and nonbelievers have the opportunity with us to do works of love

have the opportunity with us to share the joy of loving and come to realize God's presence.

- Hindus become better Hindus.
- Catholics become better Catholics.
- Muslims become better Muslims.\(^{113}\)

In fact, Mother Teresa succeeded so completely in building and binding community in this way that we forget, now fifty years since she began, that she was at first not welcomed in her work, and that many sought to have her removed from their community and some even to stone her.\(^ {114}\) But Mother Teresa's work, through her love, could not be resisted, and she died as one of India's greatest treasures.\(^ {115}\)

In a sense, Mother Teresa was a living parable of Christ; she was the story of the Good Samaritan.\(^ {116}\) Just as it was a dreaded Samaritan who cared for the Jew whose own people had passed him by,\(^ {117}\) Mother Teresa, a European Catholic, cared for India's Hindus and Muslims when even their own people were afraid to touch them.\(^ {118}\)

\(^{113}\) MOTHER TERESA, WORDS TO LOVE BY 35 (1983).

\(^{114}\) DESMOND DOIG, MOTHER TERESA: HER PEOPLE AND HER WORK 87 (1976) ("I have given my word that I would push this lady out and I will keep it. But, before I do, you must get your mothers and sisters to do the work she is doing. Only then will I exercise my authority."); ROBERT SERROU, TERESA OF CALCUTTA 48 (1980).

\(^{115}\) Emily Mitchell, Jan McGirk & Nina Biddle, SAINT OF THE STREETS: CALCUTTA'S MOTHER TERESA MADE OF HER LIFE A GIFT TO THE WORLD; A STEEL WILL Drove HER MISSION OF MERCY, PEOPLE, Sept. 22, 1997, at 158 (noting that the Indian government granted Mother Teresa a state funeral, and closed all government offices and flew flags at half-staff in her honor).


\(^{118}\) Michael Gomes, who invited Mother Teresa and the first Missionaries of Charity into his home to live, recalls this story:

One day, Mother saw a crowd on the pavement outside the Kali temple and in their midst was a man dying in a pool of mess. No one would touch him as he had cholera. Mother herself picked him up and took him to the Home where she nursed him and cared for him. Eventually he died, but he had a happy
She was in the world to answer for us who our neighbors are; they are those to whom we would respond with love.\footnote{Luke 10:29.} Thus, we need to look no further than Mother Teresa to learn how to build and define community.\footnote{Randy Lee, \textit{The Immutability of Faith and the Necessity of Action}, 66 \textit{Fordham L. Rev.} 1455, 1464-67 (1998). For a Christian view of community based on shared beliefs, see \textit{Amos} 3:3 ("Do two walk together unless they have agreed?").}

This answer to the puzzle of cultural pluralism does not escape Powell. Instead, he is drawn to it by his Christian roots. Powell relies on Augustine for the notion that because the "central impulse in human nature" is "the unquenchable desire for God and his truth," that desire must also be the basis of a "community of interests."\footnote{POWELL, \textit{supra} note 2, at 283. Consistent with Augustine’s observation that the unquenchable desire for God is central to human nature is the Jewish concept of \textit{ruah}, "the part of us deep down that makes us who we are and cries out to God for connection and relationship with Him." \textit{Michael T. Mannion, Abortion and Healing: A Cry To Be Whole} 47 (1986).} And what is the unquenchable desire for God and his truth but to love God with all one’s heart, and with all one’s soul, and with all one’s strength,\footnote{Deuteronomy 6:5.} and to love one another as He has loved us?\footnote{John 15:12.}

In the end, when Powell feels drawn as a Christian to be more than the honest commentator, he responds by instructing the Christians among his audience to resist the temptation to temper their honesty with ideology or politics. He warns against looking for God in some variation of Caesar or Constantine or even against expecting from Caesar or Constantine what only God can deliver.\footnote{POWELL, \textit{supra} note 2, at 260-92.} Yet, Powell also recognizes that so long as the Christian in America sojourns\footnote{RICH MULLINS, \textit{Land of My Sojourn, or A Liturgy, A Legacy and A Ragamuffin Band} (Reunion Records 1993) ("Nobody tells you when you get born here how much you’ll come to love it and how you’ll never belong here so I’ll call you my country, but I’m lonely for Illy Irorre and I wish that I could take you there with me."). In a subsequent work, Powell describes this \textit{sojourn} as a “Babylonian captivity to which American Christians have willingly submitted our thought and practice.” H. Jefferson Powell, The Earthly Peace of the Liberal Republic 1 (1997) (unpublished manuscript on file with author).} in this land, he is part of the American community. He is called to be neighbor to the community just as the Samaritan was called to be neighbor to the Jew.\footnote{1 Peter 2:17 ("Give honor to all, love the community, fear God, honor the king.").}
he describes a people as "a multitude of rational beings united by a 
common agreement on the objects of their love." In the end, how­
ever, one realizes that this view is consistent with where Powell would 
wish to take us in Moral Tradition. If, as Powell maintains, Augus­
tine is correct in that within humans rests an unquenchable desire for 
God and His truth, then ultimately the love through which a commu­
nity would be best united by a common agreement is a love of God and 
His call for us to acts of love. Mutual love of wealth, power, self-actu­
alization or any other worldly "vanity or chasing after the wind" cannot bind people, because none of us can ever get enough of those 
things, and in the end we all realize that the more of them one of us 
gets, the less there will be for the rest of us. Thus, a love of those 
things ultimately must divide us. On the other hand, if God is the 
object of that common love, then all of us can be satisfied in abun­
dance. As Christ showed while on Earth when he fed the multitudes 
with a few loaves and fishes, He can fill many with very little and still 
have "baskets" left over.

Whatever it is that will bind non-Christians together in the new 
America, whether it be some function of our similarities or some re­
spoonse to our differences, Christians, it seems, are called to be bound 
by their love of their neighbor. The question then, for Christians, is 
how they live that call as it presents itself in the midst of American 
constitutionalism. In the next section, we will consider the guidance 
Powell provides in this regard.

IV. SPEAKING TRUTH TO POWER

A. A WARNING AND A CALL

Powell's advice to Christians who come in contact with American 
constitutionalism is both a warning not to be deceived and a call to 
evangelization: "the Christian lawyer, school board member, voter, or 
victim must not be deceived by the false claims of American constit­
utionalism to 'establish justice,' but he or she need not reject out of 
hand one means that exists in this society by which the Christian can 
speak truth to power." We may turn our attention first to the 
warning and subsequently address the call. For Powell, the false

127. Powell, supra note 125, at 7 (quoting AUGUSTINE, CITY OF GOD 826 (Henry Bat­
tenson trans., Penguin Classics 1984)).
128. Ecclesiastes 2:11.
129. If Powell is right that what we thirst for is God, then trying to quench that 
thirst with anything else is like drinking salt water: It will only make us thirstier. 
(forthcoming 1999) (manuscript at 16-17, on file with author).
131. Powell, supra note 2, at 11.
claims of American constitutionalism, about which he warns, are re-
lected in the moral rhetoric American rulers use to insist that their
rule seeks "justice" and "equality," and that their rule is "morally
legitimate and socially beneficent. This rhetoric equates constitu-
tionalism with theological ethics and implies that what we do as a
nation, we do in imitation of God with God's endorsement.

One might well illustrate Powell's point about the deceptiveness
of this rhetoric with the paradox of the Ten Commandments' presence
being unconstitutional in the Alabama courtroom of Judge Roy
Moore while they have hung, apparently constitutionally, in other
courtrooms for centuries. Judge Moore's hanging of the Ten Com-
mandments and opening each session with prayer creates a constitu-
tional problem, because Judge Moore explicitly believes that the God
he prays to and the law that his God has handed down should impact
the way he performs his obligations to the government. Conversely,
invocations, priestly robes, and sacred scripture on the walls are not so much constitutional when, as the Supreme Court indicates,
they are traditional or somehow secular; more to the point, we treat

132. Id. at 7-8. See The 25th Anniversary of Roe v. Wade: The Test of Time: Hear-
ings Before the Senate Subcommittee on the Constitution, Federalism, and Property
Rights, WL 8991162 (Jan. 21, 1998) (testimony of Gerard V. Bradley) (declaring that the
Supreme Court can pass acts of raw power for legitimate acts because of its "success at
presenting itself as a principled, apolitical arbiter of our most contentious issues").

133. POWELL, supra note 2, at 270. Powell's warning echoes the words of Thomas à
Kempis, who wrote "Put all your trust in God. Let him be both your fear and your
love.... You have here no lasting city. For wherever you find yourself, you will always
be a pilgrim from another city. Until you are united intimately with Christ, you will
never find your true rest." Laraine Bennet, The Psalms: Reflections of God and Man,
NAZARETH, LENT, 8, 10 (1997).

134. POWELL, supra note 2, at 11.


in part, dissenting in part) (acknowledging and explaining the presence of Moses and
the Ten Commandments in the courtroom of the Supreme Court).

137. Judge Moore's position is not unique. For example, during Justice William
Brennan's Supreme Court confirmation hearings, speeches of Justice Brennan's were
introduced indicating views consistent with Judge Moore's:

None questions now the portentous fact, starkly revealed by daily events
that the fundamental difference between our government and that of our en-
emy [the Soviet Union] is that we Americans accept and he rejects, the concept
that man-made government must ever be subject and obedient to the laws of
God.... [A]ll branches of government in America have followed a course of
official conduct which openly accepts the existence of God as the Creator and
Ruler of the Universe.

Every official of Government, State or Federal, presidents, governors,
judges, officeholders at all levels, before assuming their duties of office, take an
oath that is a recognition of God's authority and an undertaking by the official
to accomplish the transaction to which it refers as required by His laws.

Brennan, supra note 85, at 9.

138. Allegheny, 492 U.S. at 652-55 (Stevens, J., concurring in part, dissenting in
part). For a thorough discussion of the legal background of this issue, see FREDERICK
these things as constitutional when the message they send is that God endorses us, rather than that we endorse God. We can say, "In God we trust," because we mean, "God trusts us." Quite strikingly, we are much more likely to invite a clergy member to the White House for pictures or call for a national day of prayer after we have decided to blow up an enemy rather than before.139

Such a relationship between church and state is neither anything new nor anything uniquely American. Powell stresses that "American law never was Christian in the requisite sense,"140 but instead has been "a narrow professional oligarchy that exploited its political power to protect its own socioeconomic interests."141 Thus, Powell notes that


139. A Proclamation for National Days of Thanksgiving April 5-7, 1991 by the President of the United States of America (giving thanks for God being "our help and shield" in the Gulf War). Consider also James Bennet, Again, Clinton Creates His Own Political Aura, N.Y. Times, Jan. 27, 1999, at A14 (contrasting President Clinton's proclamations to the Pope that the Pope has never let America "forget our responsibilities" and that the Pope would see "an America working harder to... be: an example of justice and civic virtues, freedom fulfilled and goodness at home and abroad," with the Pope's attempts to stress his "profound policy differences" with the President and to call for yet "a higher moral vision" which alone "can motivate the choice for life"); Maureen Dowd, The Apostle of Hype, N.Y. Times, Jan. 27, 1999, at A27 (responding to President Clinton's statement that he was "a walking apostle of hope" by maintaining that the President "uses religiosity tactically to get beyond his troubles with carnality and mendacity, quoting the Bible, praying with Jesse Jackson and bringing a team of ministers into the White House to work on his soul"). See also James Bennet, Tearful Clinton Tells Group of Clerics, "I Have Sinned," N.Y. Times, Sept. 12, 1998, at A10 (commenting, on the day the Starr Report was released, "In the company of clerics and to refrains of Scripture, the President spent a solemn morning in public with his wife, Hillary") (emphasis added); Laurie Goodstein, Clinton Selects Clerics to Give Him Guidance, N.Y. Times, Sept. 15, 1998, at 1 (noting the President's public disclosure that the President chose two or three ministers "to serve as a team of personal spiritual advisors" two days before the Starr Report was delivered to Congress, but noting the ministers "were defensive about the possible appearance that Mr. Clinton had selected them as part of political damage control.").

One might also compare Matthew 6:5 (Christ's admonition against people praying "on street corners so that others may see them"), with Julia Malone, Clinton's Supporters Seem Quiet as House Vote Nears, Harrisburg Patriot-News, Dec. 17, 1998, at A8 (referring to Reverend Jesse Jackson calling for a prayer vigil outside the United States Capitol on the date the impeachment was originally scheduled to begin in hopes "of our presence will have made a statement"). Note, however, that there need not be a conflict between the two positions. The vigil may, in fact, have been designed to be visible to invite all to pray together and to make such community prayer accessible as opposed to prayer having been made visible to send a message to Congress rather than to God. In Matthew, Christ stresses that we use prayer to talk to God and not to people.

140. Powell, supra note 2, at 276.

141. Id. at 275. In his film, Mr. Smith Goes to Washington (Columbia Pictures 1939), Frank Capra paints a similar picture of America when Senator Smith, the film's hero, observes in a moment of dejection: "A lot of fancy words around this town, some of them carved in stone. I guess the Taylors and Paines put them up there so suckers like
“the social Darwinism of the Lochner era was as natural a development of the constitutional tradition as it was repugnant to the Christian commitment to the weak and outcast.”142 Japan in the sixteenth century had a similar relationship with Christianity. The faith was allowed to flourish when it facilitated the reigning power’s desires to challenge the influence of Buddhist monks or to expand foreign trade, but when the reigning power felt that increasing numbers of converts could expedite a foreign invasion, persecutions of the faith began.143 Consistent with such examples, Aldous Huxley notes that governments generally like to frame their actions themselves and subsequently conform God to their actions.144

Powell’s warning against being deceived is not to be misconstrued. He is not saying that any American leader, such as Lincoln,145 who has ever led the nation while calling for God’s blessings is either a fool or a hypocrite, nor is he saying that Christians cannot read them.” Senator Smith, however, ultimately is able not only to speak truth to power but to get power to listen.

142. Powell, supra note 2, at 276.
143. Patricia Mitchell, A Samurai’s Noble Death, Word Among Us, Apr. 1997, at 50. In 1596, twenty-four Christian leaders in Japan were ordered crucified in the hope that “a public, gruesome blood bath would put an end to this religion of the West.” Id. at 52. The crucifixions, however, only strengthened the faith in Japan. Id.
144. Aldous Huxley, Politics and Religion, in Collected Essays 268, 278 (1964) [hereinafter Politics and Religion]. In another particularly enlightened essay, Huxley would add that such behavior may well result from the state’s desire to deceive and the people’s desire to be deceived. As Huxley puts it, “In a fictitious world of symbols and personified abstractions, rulers find that they can rule more effectively, and the ruled, that they can gratify instincts which the conventions of good manners and the imperatives of morality demand that they should repress.” Aldous Huxley, Words and Behavior, in Collected Essays 245, 255 (1964) [hereinafter Words and Behavior].
145. Many of Lincoln’s speeches acknowledged America’s need for God’s support. In his second inaugural address, for example, President Lincoln used God and Christian imagery to refocus the nation:

With malice toward none; with charity for all; with firmness in the right, as God gives us to see the right, let us strive on to finish the work we are in; to bind up the nation’s wounds; to care for him who shall have borne the battle, and for his widow, and his orphan - to do all which may achieve and cherish a just, and a lasting peace, among ourselves, and with all nations.

Sterling North, Abe Lincoln: Log Cabin To White House 176 (1956). Similarly, at Gettysburg Lincoln stressed that America must remain a nation “under God.” Abraham Lincoln, Gettysburg Address, in Mark A. Beliles & Stephen K. McDowell, America’s Providential History 241 (1989). Two months before the Battle of Gettysburg, Lincoln, convinced that the Union’s failures in the Civil War were attributable to the nation’s sins, called for a national Day of Humiliation, Fasting, and Prayer to acknowledge that “we have forgotten God[,] [w]e have forgotten the gracious hand which preserved us in peace, and multiplied and enriched and strengthened us,” and “to humble ourselves before the offended Power, and confess our national sins, and to pray for clemency and forgiveness.” Id. at 237.

In less public actions, Lincoln was no less willing to inject God into his official activities. When asked by one of his generals if he had been anxious about how the Battle of Gettysburg would go, Lincoln replied that after he had prayed about the matter, “a sweet comfort crept into [his] soul that God almighty had taken the whole business into
participate in government or must find every action of the state inherently evil. Powell says, in fact, that “Christians have no stake in denying the goodness of Caesar’s acts when the latter are, in Christian terms, good.” Additionally, as we shall see, Powell gives guidance for Christians on how to respond to the state. Powell does want it understood, however, that:

Christian theology and American constitutionalism are competing traditions. By offering as its goal and justification the achievement of social peace and community — in the actual language of the Constitution “domestic tranquility” and “a more perfect Union” — constitutionalism implicitly claims for the American constitutional order a justice and “ordered unity in plurality, a genuine res publica” that Christianity recognizes only in community constituted by God.

The danger that Powell sees in the two competing traditions sharing images, language, justifications, and goals is that so much God-talk, so to speak, will blind Christians “to the increasing irrationality and violence of the constitutional ‘order.’” Christians cannot come to the political table wearing glasses that make Caesar look like God so that Caesar’s every action appears to be what Jesus would do; instead, “Christian analyses of political structures and forms of thought must be shaped fundamentally by ‘New Testament realism about the nature of governmental power.’”

Having dealt with Powell’s warning, we may now turn to his call. Powell maintains that to speak truth to power, the Christian

his own hands.” Id. at 239. When word of Lee’s surrender reached Lincoln, he led his whole cabinet down to their knees to pray. Id. at 242.

For all of this, Lincoln described his spirituality perhaps oddly, but more likely profoundly:

When I left Springfield I asked the people to pray for me. I was not a Christian. When I buried my son, the severest trial of my life, I was not a Christian. But when I went to Gettysburg and saw the graves of thousands of our soldiers, I then and there consecrated myself to Christ. Yes, I do love Jesus.

Id. at 241.

146. POWELL, supra note 2, at 265.
147. See infra notes 148-61 and accompanying text.
148. POWELL, supra note 2, at 46.
149. Id. at 11.
150. Id. at 265. In fact, Powell would no doubt suggest that the recent feelings of political isolation among Christians are more a function of Christians beginning to take off these Caesar glasses rather than of any fundamental change in American government. See supra note 140 and accompanying text.
151. Although Powell does not claim explicitly that the movement of American constitutionalism from pursuing internal goods like ideals and creativity to pursuing external goods like “prestige, status and money” is yet another false claim to Christians, one could argue that it is. POWELL, supra note 2, at 34-36. The shift, in fact, calls to mind the warning of God to the prophet Samuel when he went to the house of Jesse and eventually chose David as Israel’s next king. Samuel was tempted to evaluate according to the external, but God guided him to see as God sees rather than as men see and to
must first seek to redesign the structure of American constitutionalism along the democratic lines discussed earlier. Voices as diverse as Christian songwriter Rich Mullins and social commentator Aldous Huxley have questioned the degree to which Christians can put their confidence in democratic structures, and Powell is not insensitive to their concerns. Powell responds to such concerns, however, by pointing out that “[o]ne need not romanticize the openness of American legislatures to Christian and other deviant voices to question the wisdom of narrowing drastically the range of persons able to make policy.” Powell suggests that the orientation and indoctrination of judges make them even more unlikely to generate Christian responses to problems than would be the democratic process. In addition, Powell’s case for democracy turns not so much on the solutions he expects it to yield, but on the damage he sees it minimizing. Powell advocates for democracy, because he hopes that “by strengthening the voices of disagreement and dissent that can challenge the exercise of domination,” democracy can “reduce the sphere in which the coercive power of the democratic process holds sway.”

Powell also endorses democracy over more centralized decision-making, because it “provides a language of criticism and means for evaluate not according to lofty appearances but according to what is inside a person. 1 Samuel 16:7. As the legal profession chooses to consider wealth, power, and prestige more important than honesty, justice, and competence, it yields to that which tempted Samuel and sees as men see but not as God sees. See Glendon, supra note 55, at 14-39; Timothy Floyd, The Practice of Law as a Vocation or Calling, 66 Fordham L. Rev. 1405, 1416-23 (1998).

152. See supra notes 54-55 and accompanying text.


I think the big problem is that as Christians we forgot that our identity is wrapped up in Christ, and for a long time we bought into the illusion that the will of the masses would be more generous and more benevolent than the will of one dictator. But democracy isn’t necessarily bad politics; it’s just bad math.

A thousand corrupt minds are just as evil as one corrupt mind.

154. Politics and Religion, supra note 144, at 279 (“The quality of moral behavior varies in inverse ratio to the number of human beings involved.”).

155. Powell, supra note 2, at 289.

156. Id. at 288-89.

157. Id. at 287 (emphasis omitted). As Powell describes his ultimate end, “a Christian modeling of dialogical community may lead to a situation where faith communities, and ... other voluntary associations and household structures [may] pursue their own ends without any more central management, by the demos or anyone else, than the peace of the total community demands.” Id. at 286-87 (quoting John Howard Yoder, Priestly Kingdom 167 (1984)). Further, see Conversation, 72 Notre Dame L. Rev. at 57 (Randy Lee), stating:

I believe that one result of the seduction to which Jeff [Powell] refers is that we look to the government as this third party we have to mobilize to heal the world. I wonder if instead we should be asking ourselves how we neutralize the government so that the Body of Christ is in a position where it can go and use its resources to heal the world of its wounds.
making evident the provisional and revisable nature of the political order." He withdraws that endorsement when the democratic order itself would threaten either that language or that means to use the language: (1) in instances where the majority threatens groups to whom it has been traditionally unwilling to listen; (2) where the majority might cut off the use of the language of criticism itself; or (3) with Powell's procedural due process concerns, where the majority might cut off any forum in which one could use the language to defend oneself. Thus, Powell arrives at democratic decisionmaking as the more desirable approach for Christians, not because democracy will facilitate America embracing Christian law, but because democracy may both limit the extent to which America intrudes into Christian communities with non-Christian law and also allow for Powell's primary goal, that Christians have the opportunity to speak truth to power.

Powell presents four reasons why the Christian should seek to speak truth to a power she may not trust or may consider irreparably damaged. First, Powell points out that in America all important moral questions ultimately become first political and then legal questions. Thus, if Christians want to influence the American moral identity, they must participate in political and legal debate. Second, Christians should seek to speak to constitutional authority in America to try to reduce state violence. As Powell puts it, "constitutionalism is the most fundamental mode by which the American republic attempts to channel and mitigate the violence of the state and (since the state attempts to enforce a monopoly on violence by violence) the society." Thus, if curbing violence is a priority, one must seek to address constitutional authority. Third, Powell similarly stresses that this violence is not limited to America's borders, and therefore, those Christians who find themselves in America are uniquely situated, or called, to understand and respond "appropriately to the moral culture of the most powerful modern nation-state." Finally, the Christian community must speak to state power to try to rein in a secular government so committed to expanding into so many areas of life that it

158. Powell, supra note 2, at 282.
159. Id. at 290-93.
The decline of moral consensus and of social institutions, such as the family and church, places more pressure on the law to serve as an instrument of conflict resolution and social control. And as the Supreme Court increasingly exercises its special decisional procedures for policymaking, especially in areas of strong moral dilemmas, the courts become the arena of political controversy.

Id.
161. Powell, supra note 2, at 264.
162. Id. at 7.
threatens “to push religion to the margins.” Powell warns that “[i]f families, religious communities, and other social structures mediating between the individual and the nation-state are to have space in which ‘to pursue their own ends without any more central management’ than necessary, the hostility of the contemporary Court toward such structures must be curbed.”

Even if one accepts Powell’s view that in theory Christians should seek to speak truth to power in America, one might still insist that in practical terms, any Christian participation is futile. In fact, Powell’s appeal comes in the midst of a growing multitude of voices that insist in America, “the powers that be appear increasingly unconcerned with our concern.” Christian input into political discussion here has been termed “a backward and divisive force standing in the way of society’s progress toward mutual understanding and tolerance,” and “simply too absolutist to be a useful participant in public debate in a pluralistic democracy.” Such attempts to alienate Christian voices in political discourse feel particularly chilly coming as they do from a political community that guarantees Larry Flynt the right to contribute to political discourse the supposedly humorous falsehood that Jerry Falwell had sexual intercourse with his mother in an outhouse. Father James Burtchaell suggests that the time has come for Christians in America to recognize that they are no longer at home in the American political community, but are no more than “awkward and wary immigrants” here.

---

163. Berg, 73 N.C. L. Rev. at 1628.
164. Powell, supra note 2, at 292.
166. Berg, 73 N.C. L. Rev. at 1567 (describing views articulated by forces favoring a secularized government). See Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 914 (1992) (Steven, J., concurring in part, dissenting in part) (responding to a state interest in protecting fetal life by saying, “it is clear that, in order to be legitimate, the state’s interest must be secular; consistent with the First Amendment the State may not promote a theological or sectarian interest.”); but see Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring) (“Condemnation of [homosexual sodomy] is firmly rooted in Judeo-Christian moral and ethical standards.”).
168. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988) (“[T]he sort of expression involved in this case does not seem to us to be governed by any exception to the general First Amendment principles stated above.”). More recently, Mr. Flynt has been contributing the sex lives of Congressmen to public discourse, a contribution welcomed by nearly half the American public. Howard Kurtz, Hooray for Larry Flynt?, Wash. Post, Jan. 25, 1999, at C1.
169. Conversation, 72 Notre Dame L. Rev. at 72 (James T. Burtchaell).
Of course, not everyone believes that political discourse in America has closed itself to Christian participants, and even many who believe it has still call Christians to heed Powell's call to speak truth to power. William E. Simon, for example, emphatically demands that defeatism not be given into:

History tells us that when social and intellectual dissolution has reached a certain stage, it becomes difficult if not impossible to reverse. In my more pessimistic moments, I fear that this may be the case with the United States.

On the other hand, our most deeply cherished values and the lessons of our heritage tell us that such historical defeatism is mistaken. It is our moral determination and our vision that define the scope of what we can accomplish; we are not determinists whose course of action is dictated by some unalterable force or by the implacable pressure of events. We are a free people, with the power to decide our destiny. We can correct the evils that afflict us if we have the intelligence to see what must be done and the courage to take the necessary action.

Along these lines, although not speaking necessarily to a Christian audience, Geoffrey Hazard has offered the encouraging reminder that "we have witnessed situations where exemplary conduct by a single individual has brought about change in community ethos. All tales of heroism carry this message." In that light, "perhaps we must stand fast a little — even at the risk of being heroes."

Peter Kreeft would also demand that Christians not give in to defeat, but not so much because victory is inevitable as because faith in the ultimate victory is part of our calling:

If we believe that the thing we are fighting to preserve, namely, the knowledge of the natural law in the heart of man, is indestructible and guaranteed eventual victory, we will fight joyfully and effectively and confidently. But if we believe that it is fragile, we will be driven by fear, anxiety, and

---


171. William E. Simon, A Time for Action 135 (1980). For a discussion of Mr. Simon's views on the precise interaction between faith, state, and private initiative, see Lay Commission on Catholic Social Teaching and the U.S. Economy, Toward the Future: Catholic Social Thought and the U.S. Economy (William E. Simon, Chairman, 1984). For a recent view of Mr. Simon's personal attempts for his faith to impact American society, both on a grand scale and on a one-to-one basis, see Grant Williams, Giving Away a Personal Treasury: William Simon Works to Insure that His Fortune Is Disposed of His Way, Chronicle of Philanthropy, June 18, 1998, at 1.


pessimism, and our spiritual warfare will be less powerful, less joyful, and probably less saintly. So let us create our vici-
tory by believing in it.

* * *

Our times may be terrible, even apocalyptic, but that is 
our normal situation according to Scripture: deadly peril, 
spiritual warfare, wrestling with principalities and powers in 
high places on earth and low places in Hell. Welcome back to 
East of Eden, Adam. Now perhaps you will believe again that 
the One who alone can save your society is the One who alone 
can save your soul.174

Professor Mary Ann Glendon also stresses the need to speak truth 
to power, but Glendon’s arguments suggest that the need to do so may 
rest less in what Christians may gain by doing so and more in how 
much they may lose if they do not speak. Glendon states that 
“[w]hether meant to be or not, law is now regarded by many Amer-
icans as the principal carrier of those few moral understandings that 
are widely shared by our diverse citizenry. In these circumstances, 
legal silences can acquire unintended meanings.”175 Glendon, of 
course, welcomes the advantages in shaping American morality that 
can be gained by winning the legal battles when she notes that “pre-
cisely because our society is so legislative, the chances are reasonably 
good that a new and forceful legal statement . . . could reinforce and 
value the deeds of those who already practice the ethic involved, while 
encouraging the broader development of similar behavior and atti-
dutes.”176 But what should be more striking here for Christians is 
what is reinforced by the absence of a forceful legal statement, or 
worse yet silence in the sphere of legal debate. If there are no voices 
in the legal arena advocating for a certain way of behaving, people in 
America will lose sight of the need to behave in that way. Research

176. Glendon, supra note 175, at 87-88. Professor Anthony Fejfar explains the dy-
namic this way:

Conventional moralistic foundational consciousness is present in a person 
whose consciousness is centered in adherence to, or belief in, authority. The 
strength of such consciousness is the capacity to believe in the information or 
leadership provided by other persons. The weakness of conventional moralistic 
consciousness, however, is the inability to employ abstract analytic under-
standing, creative intuitive imagination, and interactive judgment, to appropri-
ately critique beliefs, or the authorities and institutional structures which 
promulgate such beliefs. This is especially true in a person who, at the very 
core of his or her foundational consciousness, has a neurotic need to believe in 
“authority,” as such.

Anthony J. Fejfar, A Road Less Traveled: Critical Realist Foundational Consciousness 
has in fact borne this out.\textsuperscript{177} If Christian ideas and ideals, therefore, are not pressed into American legal debate, they will disappear from American moral consciousness. Thus, one could well feel that even if a Christian could not envision an ultimate legal victory, she might still engage in the legal debate as a way to keep jarring the nation's moral conscience.\textsuperscript{178}

Perhaps in the end, though, the best reason for the Christian in America to seek to speak truth to power, no matter how futile that may appear, is that it is consistent with what God has called Christians to do. In Romans, Paul instructs: "Let every person be subordinate to the higher authorities, for there is no authority except from God, and those that exist have been established by God."\textsuperscript{179} To be subordinate in America, to be the good citizen, is to participate in the political process. From the nation's inception, the state has told the nation's citizenry that their involvement is essential to the success of the American political enterprise.\textsuperscript{180} At the very least, to be involved in that enterprise is to communicate with it, to tell the state whether it is doing the work it claims to do.\textsuperscript{181} Thus, God has instructed Christians to obey the state, and the state in America has asked Christians to speak the truth to power. For the Christian, the required response should be obvious.

Yet, this is not simply a matter of obedience. It is more importantly an extension of God's mercy. Those whom God would call to speak truth to power in America are called as the prophet Jonah was called in the days of Ninevah,\textsuperscript{182} not only to cry out of impending danger,\textsuperscript{183} but to remind the world that God is "gracious and merciful . . . slow to anger, rich in clemency, loathe to punish."\textsuperscript{184}

Those to whom God has entrusted authority, even earthly authority, must "guard what has been entrusted" to them.\textsuperscript{185} In the end, much will be expected of those to whom such authority has been

\textsuperscript{177} Glendon, supra note 175, at 88.

\textsuperscript{178} Glendon acknowledges that the law does not always dictate morality, and sometimes law must wait on morality. Id. at 85.

\textsuperscript{179} Romans 13:1. Cf. 1 Corinthians 2:6 (New American trans.) (referencing where Paul acknowledges that "the rulers of this age" are "men headed for destruction").


\textsuperscript{181} Conversation, 72 Notre Dame L. Rev. at 58 (Douglas Sturm).

\textsuperscript{182} Jonah was a reluctant prophet who initially resisted carrying God's message to Ninevah, a city of wicked foreigners. In the end, however, Jonah relented, and his warning to the city of Ninevah led to repentance and God's sparing the city. Jonah 1-3.

\textsuperscript{183} Jonah 3:4.

\textsuperscript{184} Id. at 4:2.

\textsuperscript{185} 1 Timothy 6:20.
given. But God will send them truth to guide them. This merciful God would no more leave America without a voice of truth than He would have left Ninevah without Jonah, Pharaoh without Joseph, King Ahasuerus of Persia without Esther, or King Nebuchadnezzar of Babylon without Daniel.

To be called by God to speak truth to power is to be called by God to be an instrument of mercy. It is to be called by God to help a brother or sister in power to hear one day, from God: "Well done, good and faithful servant." It is no wiser nor more loving for Christians to resist this calling today than it was for Jonah to try to do so in the time of Ninevah.

Ironically, while Jonah resisted God's calling because he knew the people of Ninevah would listen and repent and God would not destroy them, today Christians resist for fear no one will listen. Such fear, however, should not be a Christian concern. Christ sends the Christian out to carry His truth. His mercy and love draw the Christian to respond. If power listens, there is cause to celebrate. If not, one must shake the dust from her sandals, and move on. Ultimately, God's justice will address the result. The result is not our con-

---

187. **Genesis** 41 (referncing where Joseph interprets Pharaoh's dream and guides Egypt in preparation to seven years of famine).
188. **Esther** 7:1-8 (referncing where Queen Esther saves the king from facilitating a wrongful extermination of her fellow Jews).
189. **Daniel** 2:24-49 (referring to where Daniel interprets the dream of King Nebuchadnezzar of Babylon and becomes the greatest among his advisors). Daniel also was an honored advisor for the Babylonian Kings Beshazzar and Darius. *Id.* at 5-6.
190. **Matthew** 25:21, 23.
191. **Jonah** 1-2.
192. *Id.* at 4:1-2. Jonah's resistance might also be contrasted with Abraham's willingness to attempt to negotiate with God for the preservation of all the residents of wicked Sodom for the sake of even ten righteous residents. *See Genesis* 18:16-33. *See also* 1 *Samuel* 12:23 (saying to a stiff-necked people, "As for me, far be it from me to sin against the Lord by ceasing to pray for you and to teach you the good and right way.").
193. In this light, today's Christians may resemble the discouraged Elijah, who fled to a cave on Mount Horeb because he believed himself the last faithful man in an Israel that had forsaken God. 1 *Kings* 19:1-14. The Lord reassured Elijah that as isolated as he might feel, seven-thousand men in Israel had refused to kneel to or kiss Baal. *Id.* at 19:18.
194. **Luke** 15:32 ("[N]ow we must celebrate and rejoice because your brother was dead and has come to life again; he was lost and has been found.").
195. **Matthew** 10:14; **Luke** 9:5. One should not understand from this, however, that the Christian is quick to abandon the would-be listener and move on. Father Slavko Barbaric tells us, "Whoever loves, honors freedom. The moment we accept freedom, however, love may begin to suffer and be crucified. Love burns with a desire to enrich another person. However, if the other person does not respond, then this desire does not cease but rather waits, offering itself and suffering." Fr. Slavko Barbaric, *in The School of Love* 82 (Sarcevic family trans., 1993). *See Acts* 19:8-12 (Paul presenting the truth in Ephesus).
As Andrew McThenia puts it, the project is not to make the world right; it is "somehow to learn how to tell the truth to Caesar and also go back into our faith communities and get the strength to tell the truth."197

Not everyone, of course, shares in this calling. Saint Thérèse of Lisieux lived her Carmelite calling consciously avoiding the slightest piece of information of the outside world.198 Further, one might even argue that C.S. Lewis, perhaps the twentieth century's greatest Christian communicator, also was not so called. Though he did sometimes write on politics, Lewis was obviously bored during political conversations and only came to life when the topic turned away from matters of state to literature, philosophy, or religion.199 Yet, even the apolitical person may have moments when he is called to speak truth to the political process. Padre Pio, the twentieth century Italian stigmatist set to be beatified this spring, "was not a political man, but he voted regularly and frequently expressed strong opinions about events and personalities."200 Thomas Merton sought in a Kentucky monastery (called Gethsemani) the life of a trappist monk, a life in which "the pseudo-novelty of the modern" could be stripped away and the joy of life in His light could be revealed.201 But Merton did not see this as a "fleeing from modern problems," but as a means of "transcending them, discerning them, in going beyond them, and completely rising above them."202 In fact, from his life of sacred silence, Merton wrote for the world his own history of the American myth, the myth that

196. Mother Teresa, The Blessings of Love 81 (1996) ("We deliberately renounce all desires to see the fruit of our labor, doing all we can as best we can, leaving the rest in the hands of God."). See Conversation, 72 Notre Dame L. Rev. at 56 (Edward McGlynn Gaffney, Jr.) ("We are simply called to be faithful and to leave the results to God.").

197. Conversation, 72 Notre Dame L. Rev. at 46-47 (Andrew W. McThenia, Jr.).

198. Sr. Genevieve of the Holy Face, My Sister Saint Thérèse 99 (1997). In this regard, one day when Saint Thérèse's sister Celine, Sr. Geneviève, was expressing concern about,

religious communities who were submitting to unjust laws against the Church promulgated by the anti-Catholic secular power, Saint Thérèse told her,

We should not be concerned about such matters at all. It is true that I would be of your opinion and act perhaps in the same way had I any responsibility in the matter. But I have no obligation whatsoever.

Moreover, our only duty is to become united to God.

Despite her detachment from the political, Saint Thérèse remained sensitive to the needs of others, encouraging her sister to relieve those who surround them "of their burdens and send them away free!"

Id. at 125.

199. Chad Walsh, Afterword to C.S. Lewis, A Grief Observed 93, 98 (Bantam Books 1980).


202. Merton, supra note 201, at 51.
"America is the earthly paradise," warning that whatever truth may have rested in its inception, "[t]he beautiful story we are telling ourselves is no longer much more than an ordinary lie." 203

There is room, then, to claim that it can be appropriate and perhaps even necessary for a Christian to seek to respond to Powell's call to speak truth to power. Yet, the practice of actually doing so can appear quite intimidating. Thus, in the next section our attention turns to dealing with the pitfalls to be anticipated as one seeks to speak truth to power.

B. THE DANGERS OF RESPONDING

Even as Paul was instructing the early churches "to be subordinate to the higher authorities," 204 he was reminding them that it was Christ who was seated at the right hand of God "far above every principality, authority, power, and dominion." 205 Peter similarly conditioned his direction that Christians "[b]e subject to every human institution for the Lord's sake," 206 with his urging that Christians, "as aliens and sojourners . . . keep away from worldly desires that wage war against the soul." 207 If those worldly desires came dressed in full battle armor with a great banner declaring their evil intent, Peter's urging would be easier to heed. Unfortunately temptation often comes disguised as virtue, 208 and therefore, as one sets out nobly to speak truth to power, she runs the risk of falling, almost unknowingly, into a host of subtle enemies — among them: compromise, arrogance, violence and idolatry.

Compromise may appear to be an odd enemy for a Christian. Christians are, after all, encouraged not to insist on their own way. 209 Yet, as Christians interact with America's forums of power, they may find themselves compromising that which Peter and Paul both wanted them to protect. Powell describes these forums of power in America as "places where bargaining between individuals, each with their own preferences, is conducted," and not as places where we struggle to find

204. See supra note 179 and accompanying text.
206. 1 Peter 2:13.
207. Id. at 2:11. Peter also responded to the Sanhedrin when they ordered him not to spread the Gospel, "Whether it is right in the sight of God for us to obey you rather than God, you be the judges. It is impossible for us not to speak about what we have seen and heard." Acts 4:18-20.
208. C.S. Lewis, The Last Battle 28-40 (Scholastic Books 1995) (discussing the plot to bring evil to overcome good in Narnia comes under the cover of a false Aslan, the source of goodness and virtue).
209. 1 Corinthians 13:5.
truth in rival conceptions of the human good. The successful player in such forums is one willing to compromise, to give a little to get a little. The player who seeks to get a particular result exclusively, because truth or justice requires it, will feel, for the most part, left out of the game. Thus, as Donald Kommers points out, to succeed in matters of politics, the Christian must be “pragmatic,” but still resolve matters “with no more value compromise than we Christians can live with.” Can there be, however, compromises in truth and justice with which the Christian can live?

While Christians struggle with how much compromise they can live with in such forums, the pressure in America to compromise more only increases. America’s political forums now seem intent on drifting toward a dynamic of consensus through compromise. The concept of consensus itself, of course, is not a bad thing for Christians. In fact, a consensus based on the mutual attainment of truth would appear to be the goal of a Christian seeking to speak truth to power. Yet, that is not the nature of the consensus building to which America is drifting. In consensus through compromise, consensus is achieved not when truth is universally accepted, but when the most resistant player in the process finally agrees she has been satisfied. In this scenario, that player can force everyone else in the game to compromise their values and interests in exchange for their being able to escape a discussion that otherwise would be endless. This dynamic is neither new nor unique. It has been around as long as spoiled children have whined until their friends were forced to adopt the chosen game of the spoiled playmate, and as long as decisions at meetings have turned on which side was intent on talking the longest and which side needed to leave the soonest.

In the midst of such pressure to compromise for reasons other than principle, it is not surprising that Stanley Hauerwas observed that “we live in a time of progressive dechristianization in which the

210. POWELL, supra note 2, at 40 (citations omitted).
211. Conversation, 72 NOTRE DAME L. REV. at 35 (Donald P. Kommers).
212. Gerson, supra note 70, at 24 (“I guess it irritates me when people who know what is right put self-preservation and power ahead of moral principle... It's never wrong to do what's right. And you stand for what's right whether it is strategic or not.”).
213. This dynamic can be seen in the obsession with bipartisanship in the recent Congressional consideration of impeachment. In the Senate, bipartisan decisionmaking became a goal in and of itself at the expense of the goal of making substantively good decisions. At one point the Senate agreed to ignore their differences rather than address them just so they could reach a largely vacuous “bipartisan agreement.” Helen DeWar & Peter Baker, Senate Votes Rules for President’s Trial; Proceedings to Begin Next Week; Decision on Witnesses Deferred, WASH. POST, Jan. 9, 1999, at A1.

For a discussion of the problems with seeking to find answers in a single principled morality when one lives in a pluralistic society, see Julius Cohen, Critiquing the Legal Order in the Name of “Critical Morality,” 16 CARDOZO L. REV. 1599, 1622-23 (1995).
temptation of the church is to accommodate to the prevailing culture rather than shape it.”214 Yet, the Christian seeking to speak truth to power need not succumb to that temptation to alter her message to accommodate the world. All she must remember is that the ethics of a Christian in politics differ from those of ordinary politicians, because the Christian aspires to sanctity rather than to success.215 Even in the time of the great prophets of old, like Samuel,216 Elijah,217 and Jeremiah,218 those that carried truth to power found that power would not listen to truth and that other wisemen around them were more than willing to compromise truth to gain power. Yet, these great prophets could not change their message, because it was sanctity and not success, which these prophets sought. Ultimately it is this aspiration to sanctity that must save us from the dangers of unprincipled compromise as well.

Arrogance also stands prepared to overcome one who would speak truth to power, and this is of particular concern in light of Powell’s discussion of the value of humility in community.219 Professor Robert Rodes of Notre Dame noted that there are at least two reasons for us to approach our desire to speak truth to power with a sense of humility. Both of these stem from the possibility that our truth may be less than the Truth. First, Rodes notes that truth can be a tricky concept, and we may not have as great a grasp on it as we may initially think.220 Second, Rodes notes that even where truth is readily accessible, our own interests and perspectives may distort our view of it.221 Thus, as Christians set out to speak truth to power, they cannot

---

215. Politics and Religion, supra note 144, at 271. A colleague suggested here the need to distinguish between the sincere holiness associated with sanctity and the hypocritical concept of sanctimonious.
216. 1 Samuel 12-15.
217. 1 Kings 17-19.
218. See, e.g., Jeremiah 27-29 (referencing where Jeremiah must compete for the attention of the Children of Israel with false prophets offering sweet messages).
219. See supra notes 96-99 and accompanying text.
220. Robert E. Rodes, Jr., Toward a Spirituality of Social Justice (manuscript at 1, on file with author) (“Having resolved, often painfully, to do right by our neighbor, we inevitably discover how little we understand what right consists of under the circumstances and how to do it.”). See also Homeless Man: The Restless Heart of Rich Mullins (Word Entertainment 1998) (“I think if we were given the Scriptures, it was not so that we could prove we were right about everything. If we were given the Scriptures, it was to humble us into realizing that God is right, and the rest of us are just guessing.”); Bolt, supra note 173, at 66 (“The currents and eddies of right and wrong, which you find such plain sailing, I can’t navigate.”).
221. Rodes, supra note 220, at 2 (“There is always a rationalization in place for continuing our privileges, for leaving intact the institutions that make us comfortable and others poor.”).
charge into the fray convinced they can fix the world, but they instead must approach the task by recognizing that "there are answers that we don't have yet." Furthermore, and reminiscent of Powell's call to be bound by questions, Christians must also recognize "that we are not in the process simply because we believe that we are right, but we are in the process because we believe the questions being discussed" are ones we are called to help answer.

Certainly, there are times when one must speak with the boldness of certainty, confident in his wisdom, but one must be able to distinguish those times from the ones where a level of humility is warranted. If the Christian fails to do so, she risks not only imposing on the world false guidance, but also imposing on the world the face of arrogance disguised as Christ, a great disservice to Him who loves us. Such a face has been known to frighten away many from God.

In its most extreme form, such arrogance may display itself as violence. Powell maintains "most early modern Christians (both Roman Catholics and 'magisterial' Reformers) committed a fundamental intratheological error by accepting the legitimacy of employing violence in behalf of Christian truth." Frustrated by an inability to find the words necessary to convince all in the public forum of the rightness of their truth, Christians through the ages have been known to turn to power and violence to make their point. Yet, such violence has proven itself to be no more than a temporary means of ending debate. Rather than peace, the long-term result of such violence has been to leave non-Christians wary of Christians and of how they go about giving life to their ideas. Powell is sympathetic to this uneasiness and stresses the need for Christians to address this uneasiness with compassion for our neighbors:

Non-Christians are right to fear Christian social power. They are absolutely right. Christian social power has been used again and again in history in evil ways. The starting point

222. Tom Shaffer, The Jurisprudence of John Howard Yoder (manuscript at 5, 11, on file with author).
223. Schaffer, supra note 222, at 19.
224. See supra notes 92-94 and accompanying text.
225. Conversation, 72 Notre Dame L. Rev. at 33 (Randy Lee).
226. MARIA VALTORA, 2 THE POEM OF THE MAN-GOD: THE SECOND YEAR OF PUBLIC LIFE 765 (Nicandro Picozzi trans., 1987) ("Through the veil of tears they may see the face of God deformed, and His countenance full of revengeful arrogance. No. Do not be scandalized! It is only a hallucination brought about by the fever of grief. Assist them so that their temperature may abate.").
227. POWELL, supra note 2, at 41 n.111. Tom Shaffer notes that the jurisprudence of John Howard Yoder was one which refused to differentiate on moral grounds violence in the cause of freedom and violence for other purpose. Shaffer, supra note 222, at 7.
228. POWELL, supra note 2, at 41 n.111.
229. Conversation, 72 Notre Dame L. Rev. at 54 (Mark Tushnet).
for Christian truthfulness and Christian social witness is to recognize that and to be aware of it, and to let that fact shape our action. . . . We have to deal with the rightful fears and concerns of non-Christians, the non-Christians who are our brothers and sisters and members of the political communities in which God has placed us.\textsuperscript{230}

The Christian in the political process also runs the risk of idolatry, succumbing to the temptation to forget that “our reward is in the vision of a higher justice than the powers of this world administer,”\textsuperscript{231} and thus coming to believe that if one worships at the altar of American constitutionalism, she will be able to usher into the world the peace that only God will deliver. As Powell notes,\textsuperscript{232} the language of American constitutionalism today speaks to Christians of justice with the same seductive force as did the call of the Sirens of old to Odysseus.\textsuperscript{233} As Professor Teresa Collett stated, however, ultimately “[t]he best the state can give us is only the pale substitute of political coercion and right conduct.”\textsuperscript{234} Huxley echoes this point, going so far as to suggest that nations generally are more likely to be dealing in the opposite of justice than in the ideal of justice.\textsuperscript{235}

This temptation to put our trust in the nations and not in God threatens not only our own salvation,\textsuperscript{236} but it also threatens to blind us to the true state of our brothers and sisters, and to leave them in our eyes faceless and depersonalized. It is all too easy for one to work zealously to press the state to solve the problems of its people and then, having gained a response, come to believe, as Mr. Scrooge did, that we no longer have to be concerned for the poor because the state now has its “prisons . . . Union workhouses . . . Treadmill . . . and Poor Law.”\textsuperscript{237} Today, along not so different lines, we insist that the econ-

\begin{flushleft}

\textsuperscript{230} Id. at 66 (H. Jefferson Powell).

\textsuperscript{231} Rodes, supra note 220, at 10.

\textsuperscript{232} See supra notes 131-42 and accompanying text.

\textsuperscript{233} HOMER, THE ODYSSEY 180-84 (E.V. Rieu & D.C.H. Rieu trans., Penguin Books 1991). The Sirens were sea creatures who with their clear voices and sweet words lured seamen to their doom. Their song would bewitch the sailors even as the Sirens sat “there in a meadow piled high with the mouldering skeletons of men, whose withered skin still [hung] upon their bones.” Id. at 180. To Odysseus, the Sirens promised that they “know whatever happens on this fruitful earth” and that “no one who has listened has not been delighted and gone on his way a wiser man.” Id. at 184.

\textsuperscript{234} Conversation, 72 NOTRE DAME L. REV. at 58 (Teresa Stanton Collett).

\textsuperscript{235} Politics and Religion, supra note 144, at 277:

\begin{Quotation}
The history of many nations follows an undulatory course. In the trough of the wave we find more or less complete anarchy; but the crest is not more or less complete Utopia, but only, at best, a tolerably humane, partially free and fairly just society that invariably carries within itself the seeds of its own decadence. Large-scale organizations are capable, it would seem, of going down a good deal further than they can go up.
\end{Quotation}

\textsuperscript{236} Jeremiah 10.

\end{flushleft}
omy of the state has never been, nor could it ever be better; yet, as we trumpet this "solution," we are completely oblivious to the reality that the plight of the poor in our community has only gotten worse.238

In this world, one must never let the search for justice end.239 In so searching, however, one must remember that even as one appeals to power with truth, at best the justice to be found at the hands of the state cannot replace that which we may give one another.240 As Powell puts it: "I think one of the dangers of the reductionism that tempts us today is that it moves us to levels of high theory, moves us away from the importance, and indeed, for Christians, the utter transcendent importance, of the particular and the individual."241 In this light, Powell's call to democracy in American constitutionalism242 should appeal to the Christian, but not because democracy promises to help Christians bring the power of the state to yield easy, one-size-fits-all Christian answers to all the world's needs. Rather, democracy should appeal to Christians because it makes them accountable for appealing to and changing a large number of individual hearts. Democracy can succeed for Christians when they evangelize, when they seek to change the world not through force, but by touching the hearts and lives of their neighbors. Christ walked that way, touching people as individuals one at a time,243 and are Christians not called to walk in His image?244

As the Christian goes to speak truth in America, she must be prepared to meet calls to compromise with sanctity, calls to arrogance with humility, calls to violence with compassion, and calls to idolatry with truth. As she stands firm against powers and tactics of all natures,245 she must, as Paul says, be "girded in truth, clothed in righteousness" and prepared to walk in "the gospel of peace."246 She must hold "faith as a shield"247 and seek the protection "of the helmet of salvation and the sword of the Spirit, which is the word of God."248


240. Conversation, 72 NOTRE DAME L. REV. at 58 (Teresa Stanton Collett).

241. Id. at 64 (H. Jefferson Powell).

242. See supra notes 54-55 and accompanying text.


244. John 15:12.

245. Ephesians 6:11-12.

246. Id. at 6:14-15.

247. Id. at 6:16.

248. Id. at 6:17.
And she must remember the words of C.S. Lewis, who advised fellow Christians that this world most certainly does not contain the place that we look for all our lives, but we can still love it because sometimes it can be made to look a little like that place.249

C. THE LANGUAGE OF TRUTH — THE LANGUAGE OF POWER

Although Powell calls the Christian to speak truth to power, Powell concedes that seeking to use the language of American constitutionalism as “the instrument of our critical and constructive communication with our rulers” is fraught with at least two fundamental problems.250 First, when Christians communicate in the language of constitutionalism, they begin to lose the perspective necessary to “remain faithful to their own social vision.”251 Second, those Christians willing to take that risk may be confounded in their attempt to communicate to their rulers in their rulers’ language of constitutionalism, because even these rulers seem unsure what that language really is.252

Others have also noted the danger when Christians do not remain faithful to their social vision.253 The reality of that danger is not to be taken lightly. Yet, even God is not above speaking to each in his own language if the occasion requires. The miracle at the birth of the Church testifies to this, when filled with the Holy Spirit, Christ’s followers spoke so that all people could understand them, each in his own language.254 If power is to comprehend truth, power must hear truth in a language it can understand. Thus, the danger must be appreciated, but it cannot be allowed to overcome the necessity of speaking in a way that allows one’s audience to hear.

Tom Shaffer struggles with this in concrete terms when he considers whether an advocate should argue to a judge in terms most likely to persuade the judge, or in terms most likely to communicate the ar-

249. LEWIS, supra note 208, at 196.
250. POWELL, supra note 2, at 277 (quoting JOHN HOWARD YODER, PRIESTLY KINGDOM 158 (1984)).
251. Id.
252. Id.
253. Conversation, 72 NOTRE DAME L. REV. at 73 (Father James T. Burtchaell) (“Catholics weren’t paying any attention to the Bishops because the Bishops had been trying so long to preach to the Oval Office that they stopped preaching to the Catholics, on grounds that perhaps only Catholics could understand.”); id. at 59 (Kenneth Craycraft) (“There is always that danger of forgetting one language in the process of using another.”).
254. Acts 2:7-8 (“They were astounded, and in amazement they asked, ‘Are not all these people who are speaking Galileans? Then how does each of us hear them in his own native language?’”).
arguments most deeply felt by the lawyer. For Shaffer, the necessity of leading the judge to the right result makes the choice obvious, but he still finds the approach "disingenuous."256

Shaffer may be too harsh in his evaluation of his choice. When speaking to protect someone from hurting herself or others, the ultimate goal is that the hurt is to be avoided. That is the message that must be communicated, and the nature of the message must be framed to facilitate that communication. When a parent seeks to keep a three-year-old from playing in the street or jumping alone into a pool, the parent often explains this demand not in terms of the dangers with which the street or the pool threaten the child, but in terms of the parent's authority or potential punishment for the child. There is nothing underhanded in this. These are the arguments the child can understand. As the child's ability to understand her world increases, the parent will be able to explain things to the child in images more consistent with those which the parent finds most compelling.257

This is not to say that judges are children. Rather, it is to say that power in America may not be ready to comprehend truth in the images in which Christians consider truth most vividly and essentially communicated. That should not prevent power in America from hearing truth. Christians would be arrogant rather than merciful if they allowed power to blindly inflict or sustain injuries simply because power could not comprehend these consequences through Christian images. If it is possible to speak some notion of truth to power in a language power can comprehend, then the Christian should attempt to do so. If the attempt is fruitful, over time power will be better able to understand truth in a fuller form.258

The second problem Powell raises, that power in America may not have settled on a language of constitutionalism in which it can be communicated to, may be more troublesome for the problem it masks than for the problem it is. Whatever ambiguity there is in the language of constitutionalism, Powell acknowledges: (1) that the language is always about "the appeal to force as ultimate authority,"259 and (2) that

---

255. Conversation, 72 Notre Dame L. Rev. at 48 (Thomas L. Shaffer speaking with Robert E. Rodes, Jr.).
256. Id.
257. See Anthony J. Fejfar, An Analysis of the Term "Reification" as Used in Peter Gabel's "Reification in Legal Reasoning," 25 CAP. L. REV. 579, 596 (1996) (discussing how over time our ability to understand meaning can grow).
258. Philippians 1:9-10 (desiring "that your love may increase ever more and more in knowledge and every kind of perception to discern what is of value"); C.S. LEWIS, THE VOYAGE OF THE DAWN TREADER 247 (1995) ("This was the very reason why you were brought to Narnia, that by knowing me here for a little, you may know me better there.").
259. Powell, supra note 2, at 267-68.
behind all the arguments and reasoning of American constitutionalism lies violence. Mary Ann Glendon adds that at the heart of the language of American law “is an unexpressed premise that we roam at large in a land of strangers, where we presumptively have no obligations toward others except to avoid the active infliction of harm.” Thus, even if the precise form of the language of American constitutionalism cannot be identified, we know the language seeks to define its world within concepts of force, authority, violence, isolation, autonomy, and rights. Even more significant to Christians, Glendon maintains that this language distinguishes itself by what it leaves unsaid. Where does this language seek to articulate pardon, healing, deliverance, love, compassion, and renewal, which are concepts central to the way Christians believe God orders His universe? Certainly, as Powell notes, this language of American constitutionalism speaks of justice, as does the Christian language, but when American constitutionalism so speaks, it refers to retribution and condemnation and ignores the additional elements of Christian justice: mercy, graciousness, kindness, redemption, and forgiveness.

One might argue that the Christian concepts identified here are not foreign to American constitutionalism, and that the recent discus-

260. Id.
261. GLENDON, supra note 175, at 77.
262. Id. at 76.
263. Psalm 103:3-5 (declaring that God “pardons all your sins, heals all your ills, delivers your life from the pit, surrounds you with love and compassion, fills your days with good things; your youth is renewed like the eagle’s”); Jeremiah 31:3-4 (“With age-old love I have loved you; so I have kept my mercy toward you. Again I will restore you, and you shall be rebuilt.”).
264. See supra notes 131-32 and accompanying text.
265. Mother Teresa has admonished Christians to avoid condemnation even in their personal lives:

None of us has the right to condemn anyone. Even though we see some people doing something bad, we don’t know why they are doing it. Jesus invites us not to pass judgment. Maybe we are the ones who have helped make them what they are. We need to realize that they are our brothers and sisters. That leper, that drunkard, and that sick person is our brother because he too has been created for a greater love. This is something that we should never forget. Jesus Christ identifies himself with them and says, ‘Whatever you did to the least of my brethren, you did it to me.’ That leper, that alcoholic, and that beggar is my brother. Perhaps it is because we haven’t given them our understanding and love that they find themselves on the streets without love and care.

MOTHER TERESA, ONE HEART FULL OF LOVE 130 (1984). See Matthew 7:1-5 (referencing Jesus on not judging and on focusing one’s attention on removing the plank in her own eye before trying to remove the speck of sawdust in her brother’s).
266. Psalm 103:8-10 (“Merciful and gracious is the Lord, slow to anger, abounding in kindness. God does not always rebuke, nurses no lasting anger, has not dealt with us as our sins merit, nor required us as our deeds deserve.”).
268. MOTHER TERESA, supra note 265, at 113.
sion of the concept of forgiveness in American political discourse proves this. That discussion, however, does not undermine, but instead illustrates, the point made here for two reasons. First, to many the concept of forgiveness seemed out of place when the discussion imposed it into a constitutional system where contrition sometimes tempers, but never replaces, retribution. Secondly, even the nature of this political concept of forgiveness differed from its Christian counterpart.\(^\text{269}\) As William J. Bennett observed, "we must reject the increasingly popular argument that biblical forgiveness requires us simply to 'forgive and forget.' Forgiveness is a sacred concept in Christian doctrine; it should never be allowed to become a pretext to excuse moral wrong."\(^\text{270}\) The critical word in Bennett's observation is "simply," because it reminds us that far from being simple, the Christian concept of forgiveness is passionately and profoundly deep.

There is undoubtedly a dimension in Christian forgiveness of "forgive and forget."\(^\text{271}\) Not only has God promised to forget our offenses,\(^\text{272}\) but He has promised to restore our crimson souls to white as snow.\(^\text{273}\) When Christ was confronted with the adulterous woman, He redeemed her and sent her off to sin no more without exacting the stoning the law would have allowed.\(^\text{274}\) He instructed His followers to forgive similarly, exalting them to judge others with the same degree of mercy with which they would hope their Heavenly Father would judge them.\(^\text{275}\) Mother Teresa also stressed this dimension of forgiveness, in which we must recognize our own need for forgiveness, when she said "we must be aware of our need to be forgiven[,] for being the cause of such suffering, for which we need forgiveness. Only then will we be able to forgive others."\(^\text{276}\)

This, however, is not the whole story. King David's *Miserere* in Psalm 51 reflects another dimension to forgiveness so complex that


\(^{271}\) Bennett, *supra* note 270, at 10-11.

\(^{272}\) *Isaiah*, 43:25 ("It is I, I, who wipe out, for my own sake, your offenses; your sins I remember no more.").

\(^{273}\) *Id.* at 1:18 ("Though your sins be like scarlet, they may become white as snow; though they be crimson red, they may become white as wool.").

\(^{274}\) *John* 8:3-11.

\(^{275}\) *Matthew* 7:1-2 ("Stop judging, that you may not be judged. For as you judge, so will you be judged, and the measure with which you measure will be measured out to you.").

\(^{276}\) *Mother Teresa, supra* note 265, at 113.
only God can sort it out.\textsuperscript{277} It is a total yielding of the human heart to God, a yielding which reflects "utter desolation, terror, . . . deep sorrow, exultation, joy and peace — in the most concrete terms."\textsuperscript{278} Yet, these words refuse to be confined "on the natural human plane."\textsuperscript{279} David acknowledged that God will reject all attempts at supplication, save one, and cried out: "My sacrifice, God, is a broken spirit; God, You will not spurn a broken, humbled heart."\textsuperscript{280} David is not merely expressing remorse nor seeking to bargain with God in the sense of "I'll be good if you'll let me off." More profoundly, he approaches without reservation and without defense into the mercy of God and seeks to subject himself entirely to the will of God,\textsuperscript{281} whatever God's will may be.\textsuperscript{282} Such a response is essential to the Christian concept of forgiveness.\textsuperscript{283} Yet, it is a response which can only be understood and evaluated by God and can only be perfected and effectuated through His mercy. Such a concept of forgiveness is something that Christians may seek to emulate imperfectly in their lives, but it is nothing like any concept ever pursued within American constitutionalism. Thus, to the extent that the languages of Christianity and American constitutionalism do share the word "forgiveness," they do so only in the illusory way in which tort and English law share the word "causation;" the words may look deceptively the same, but the underlying concepts are quite different.\textsuperscript{284}

\textsuperscript{277} Bennet, supra note 142, at 8.
\textsuperscript{278} Id.
\textsuperscript{279} Id.
\textsuperscript{280} Psalm 51:18-19.
\textsuperscript{281} Id. at 51:14.
\textsuperscript{282} In the case of David, that will was to take from David the life of the child born of his adultery with Bathsheba but then to bless him with another son through her, Solomon whom the Lord loved. 2 Samuel 12:13-25.
\textsuperscript{283} Contrast Psalm 51 with Isaiah 65:1, 5-7:
\begin{quote}
I was ready to respond to those who asked me not, to be found by those who sought me not.
I said: Here I am! Here I am!
To a nation that did not call upon my name. . . .

These things enkindle my wrath, fire that burns all the day.
Lo, before me it stands written,
I will not be quiet until I have paid in full
Your crimes and the crimes of your father as well,
says the Lord.
\end{quote}
\textsuperscript{284} For a discussion of the varying views of the meaning of the word "causation" even within negligence, see Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928).
The problem presented by the differences in languages goes beyond how the Christian communicates truth to power in America and cuts to the heart of whether truth can be spoken to power in America. Can a world defined, as is the world of power, in excluding so many Christian concepts still be capable of comprehending truth? As Professor Anthony J. Fejfar has stressed, the words and labels we use in common "in many ways both simultaneously limit and make possible what we can consciously know" and what we can consciously ignore.285 Thus, where the world of power lacks the language to receive and know Christian truth, it may be inevitable that the world of power will ignore that truth.

In this light, we must note that in the world of power, violence is used to protect rights,286 while in Christ's world, love is used to pursue peace.287 In the world of power, authority is respected because of force, while in Christ's world, He who "founded the earth"288 assures us that He is "meek and humble of heart."289 In the world of power, autonomy is pursued in the face of isolation, while in Christ's world, one is called to embrace an ever-expanding circle of neighbors.290

In Christ's world, the dogs have no right to sit at the table with the children; yet, they do so and are nourished as brothers and sisters.291 In Christ's world, the adulterous woman could be condemned, but she is not; rather, she is redeemed and instructed to start fresh

285. Fejfar, supra note 257, at 590. See Words and Behavior, supra note 153, at 245 ("We are purposeful because we can describe our feelings in rememberable words upon which all human experiences are strung.").

286. MOTHER TERESA, supra note 265, at 13 ("Pray that you and I don't employ bombs and cannons to conquer the world. Let us use love and compassion to win the world, to bring the world the gospel of Christ."). See Rich Mullins, How to Grow Up Big and Strong, on A Liturgy, A Legacy, & A Ragamuffin Band (Reunion Records 1993):

Strong man take no prisoner
favor no plea
he leave no gold in teeth of enemy
he fit and dominant
he rise above
he not have the word
that mean love.


287. MOTHER TERESA, supra note 265, at 113 ("We all need to become more aware that if we are going to love truly, if we really want peace and love to go together, (we can't separate them) we must forgive.").

288. Job 38:4 ("Where were you when I founded the earth? Tell me, if you have understanding."). See Genesis 1-2.

289. Matthew 11:28-31 ("Come to me, all of you who labor and are burdened, and I will give you rest. Take my yoke upon you and learn from me, for I am meek and humble of heart; and you will find rest for yourselves. For my yoke is easy, and my burden light.").


291. Matthew 15:21-28. See also Lewis, supra note 208, at 189 ("And this is the marvel of marvels, that he called me Beloved, me who am but as a dog.").
and sin no more.\footnote{John 8:1-11.} Such results are defining in Christ's world. Therefore, the Christian cannot escape asking whether such results can be duplicated in the world of power.

The deficiencies in the language of power are reflected in the inability of the state to resolve the abortion controversy in America. For example, the words of the plurality in \textit{Planned Parenthood of Southeastern Pennsylvania v. Casey},\footnote{505 U.S. 833 (1992).} a plurality many believe was appointed in large part to overturn\footnote{Twenty-five Years Later, the Debate Rages on: Roe v. Wade Decision Changed the Face of American Politics Forever, \textit{State J.-Register}, Jan. 18, 1998, at 3, \textit{available in} 1998 WI 55563206 [hereinafter Debate]. The inability of American constitutionalism extends beyond the judicial branch. Political discourse on the issue, for example, has grown increasingly ambiguous in the twenty-six years since \textit{Roe v. Wade}, 410 U.S. 113 (1973). For example, what began as a debate between pro-abortion and anti-abortion positions, evolved to one between pro-choice and pro-life positions, and has now become one between choose-choice and choose-life positions.} \textit{Roe v. Wade},\footnote{410 U.S. 113 (1973).} are more accurate than many Christians may want to realize: Women have relied on the Court's moral judgment about abortion. This reliance must factor into the way in which Christians try to speak truth about that law.\footnote{Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 861 (1992) (noting a "degree of personal reluctance" with their resolution of the case).}

Many Christians who oppose abortion believe that among the people injured by abortion "are those women who have had abortions and who state that the operation has left them grieving for their lost infant and has caused them anxiety, depression, and guilt" — feelings that for some of these women "may not be triggered until years after the event."\footnote{135 CONG. REC. E908 (daily ed. Mar. 21, 1989) (Report of Dr. C. Everett Koop, Surgeon General). Dr. Koop has explained this view more fully: This school of thought views abortion as a stressful experience that overwhelms the coping abilities of some women. As previously noted, this condition has been characterized as postabortion syndrome. The symptoms include (1) exposure to the violence of intentionally destroying one's unborn child; (2) uncontrolled and involuntary negative reexperiencing of the abortion death; (3) attempts to avoid or deny abortion pain or grief, which can result in reduced responsiveness toward one's environment; and (4) experiencing associated symptoms including sleep disorders, depression, secondary substance abuse, intense hostility, and guilt about surviving. The course of this disorder may be acute (30 days or less), or chronic (6 months or longer), or may be delayed, occurring 5-10 years or more after the operation. \textit{Id.} at E908. Not all professionals accept this view, and some women alternatively indicate "that the health and psychological effects [of abortion] have been beneficial." \textit{Id.} Dr. Koop has indicated that all available scientific studies supporting either view are flawed, and "[h]ence it is neither reasonable nor advisable to rely on prevailing opinions, based on flawed studies, to conclude whether or not psychological risks are associated with abortion." \textit{Id.} In \textit{H.L. v. Matheson}, 450 U.S. 398, 411 (1981), the Supreme Court acknowledged the reality of this condition, saying "the medical, emotional, and psychological consequences of an abortion are serious and can be lasting."} Clinicians who hold this view believe that these women...
need help both with grieving and with forgiveness. 298 Since 1973, well over thirty-five million abortions have been performed in the United States. 299 Each year an additional 1.5 million women decide to have an abortion. 300 One must recognize that if even the smallest percentage of these women suffer from the depression described here, the suffering of such women constitutes a large part of the abortion problem in America.

The world of power, however, is incapable of resolving the abortion problem in any way that will not further injure these women. American constitutionalism told these women over twenty-five years ago that they had a right to make a choice. 301 American constitutionalism has regularly reaffirmed that right ever since. 302 No voice, having done that, can simply turn around and declare that such a right never existed and that what these women have done is really to have "killed their children." 303 Unless, however, the language in which the voice speaks is capable of communicating compassion, forgiveness, re-

Mother Teresa affirmed the condition to the Indian government when she sought to establish a home to shelter women who had been raped and impregnated by foreign soldiers as an alternative to a government program of abortion for the women. To gain support for her shelter, Mother Teresa argued to the government that their program would expose the women to a lifetime of despair:

[W]hat you are trying to force them to commit is a transgression that they will remember for the rest of their lives. . . . They will never forget that they were mothers who killed their own children.

Thanks be to God! The government accepted our proposal. The women were told that each child who was to be aborted should be taken to the house of Mother Teresa.

MOTHER TERESA, supra note 265, at 33.

298. Koop, supra note 297, at E908. These professionals believe that men can also be impacted by the abortion decision and require similar help. Id.

299. Debate, supra note 294, at 1.

300. Koop, supra note 297, at E906.


The Supreme Court, of course, is certainly not the only source of this affirmance in American society. As post-abortion counselor Michael Mannion points out, when a woman decided to seek an abortion in America, "[v]ery possibly the people she trusted the most in the world, parents, friends and even clergymen/women, were the very ones who strongly urged and advised her to have an abortion." MANNION, supra note 121, at 36. "If ten friends told the woman to have the abortion, perhaps, it was only one faint voice that said, 'Don't.'" Id. at 49. Thus, Mannion maintains that women in America must make the decision whether to abort in "a societal pressure cooker." Id.

303. Jane of Arizona, Abortion Pain, in Letters to the Editor, MEDUGORJE MAG., Spring 1992, at 6:

I think it's possible to fight against abortion without hurting those women who've had abortions. I don't think calling such women "murderers" is a step toward understanding and reconciliation. Abortion is tragic, but fight with prayer and fasting instead of angry indignation. As a woman who had an abor-
demption, healing, and renewal. Robbed of the law’s approval, many women will need to hear messages of love, gentleness, and hope, but American constitutionalism is incapable of communicating any of those messages. Thus, when Christians, who accept this view and believe that women are really victims of abortion, turn to the state as the principle answer to abortion in America, they may well be calling to an answer more likely to harm than to help.

Robert Bork recently “told a right to life audience [that] the only weapon against abortion now available is morality,” and that “[h]e held out no hope of stopping abortion in the near future through legal action.” He may well have been right, but not simply because the legal system has refused to respond to the appeals of pro-life citizens. More likely he would be right because until our culture can communicate compassion, forgiveness, healing, deliverance, and redemption in a meaningful way, it can never bring true peace to the abortion controversy.

Post-abortion counselor John J. Dillon describes the situation in this way: [E]ven if the laws allowing abortion were changed tomorrow, there would still be many problems. We would be inundated with tremendous numbers of women seeking healing and therapy from thousands of counselors, therapists, psychologists and psychiatrists who saw nothing wrong with abortion in the first place. These women would be seeking wholeness through professionals and counselors who don’t really understand, let alone believe in, the reality and dimensions of the brokenness. Dillon, supra note 304, at 13. Ministries of this kind seek “to be a vessel of God’s reconciling love, to say to those who are broken, I’m going to be there with you, as a friend. You can be safe here, . . . to offer safety and support for people so they can go through the process of change.” Id. at 17. Ultimately, they seek “to lead the woman to see her status and self-definition in terms of her daughtership to the one Father, rather than in any action or mistake she’s made,” and to “respond to her cry to be whole.” Mannon, supra note 121, at 10, 44. As they seek to do this, these ministries recognize that the center of the woman’s life is not the abortion experience but her own feelings of not being understood, her feelings of rejection, manipulation, exploitation, and worthlessness.” Id. at 14, 43. They understand that “[c]ondemnation of an action without compassion for the person involved accomplishes little.” Dillon, supra note 304, at 17. Additionally, ministries such as Birthright and Morningstar provide support systems and services to women before they have had an abortion so these women feel able instead to continue their pregnancies. Id. at 19.

Yet another example of these efforts is the movement within the Catholic Church to canonize Dorothy Day, the leader of the Catholic Worker movement whose life in Christ was simply and essentially to “feed the hungry, house the needy, [and] care for the sick,” in a community she created in hospitality houses, urban soup kitchens, rural settings and picket lines. Robert Coles, Dorothy Day: A Radical Devotion 138, 159 (1987); see David L. Gregory, Dorothy Day’s Lessons for the Transformation of Work, 14 Hof.
These points should not be read to say that a Christian should not speak truth to power about abortion or any other issue, nor should they be read to undermine those who seek legal solutions to social problems. The point here is that when the Christian seeks to speak truth to power, she needs to understand that such witness by itself cannot make this a perfect world. Certainly such witness can serve to make the world a little more honest and a little more gentle. It may touch the heart of someone in power to facilitate his or her salvation. It may be a way for God to work in the heart of the person whom God has called to witness. Any of these would be reason enough to speak truth to power. But the faith of the Christian community can never rest in the state to save the world, nor can that community ever believe that because it witnesses to power, it need not do its own acts of mercy in the community at large.

The state can give out alms to the poor, but only Christ elevates the poor to blessedness. Only Christ calls us to be so much of one body with the poor that we truly do know their suffering and their joy as our own and live accordingly. The state also can free the slaves within its borders, but the people of that state will forever bear the weight of the chains of that slavery until they can, as Paul instructed Philemon, embrace their former slaves, "no longer as a slave but more than a slave, a brother, beloved especially to me, but even more so to

---

straa laB. L.J. 57 (1996). In addressing the issue of Ms. Day's abortion before her conversion to Christ, Cardinal John O'Connor noted that Ms. Day's abortion may have been the beginning of her conversion and that she "should be considered for canonization because she had an abortion, not in spite of it." Dorothy Day's Abortion Not Impediment to Sainthood, Cath. Witness, Oct. 23, 1996, at 12. As Cardinal O'Connor pointed out, Ms. Day's canonization would "speak to a great number of women and others and remind them that God is very merciful." Id.


308. Robert Serrou, Teresa of Calcutta 73 (1980). Even the nature of poverty may be a subject of disagreement between the state and the Body of Christ. As Mother Teresa pointed out,

The greatest poverty in the world is not the want of food but the want of love. 
You have the poverty of people who are dissatisfied with what they have, who do not know how to suffer, who give in to despair. The poverty of the heart is often more difficult to relieve and to defeat.

Mother Teresa, The Joy In Loving 323 (Jaya Chaliha & Edward Le Joly eds., 1997).

309. 1 Corinthians 12:25-26. Professor Rodes has articulated this:

This, to my mind, is more than a will to do him justice, more than a will to meet his necessities as best we can. It is a will to enter into his sufferings and make them our own. It is a will to appropriate the passion of our neighbor as a Christian is called to appropriate the Passion of Christ.

Rodes, supra note 220, at 3.

310. U.S. Const. amend. XIII.
you as a man and in the Lord."311 In the end, the state may succeed now and then at halting the bleeding in this world, but only Christ can heal the wounds.

The problem of language presented here is not insurmountable, but it does require that Christians come to grips with the truth and limitations of American constitutionalism. In that light, I believe that in the eyes of God I have no more rights than did Job, who was stripped of everything without notice312 and then told that it was not his role to question God.313 I agree with Thomas More:314 I accept and am thankful for the present benefits of the earthly rights I have, even if I do not put my faith in their long term ability to protect me nor to bring peace nor justice to the world.315 Furthermore, I do not believe that when I appeal to power in the name of truth, I speak to an abstraction in hopes of saving civilization. I believe that in those instances, I speak to a person in the hope of helping real, individual persons, and in the hope of facilitating my own redemption as well as the redemption of that person to whom I speak.316 Believing in this way helps to insure that the process of Christian communication with power remains honest about what it is and what it can never be.

What is left is to determine what form this communication must take. Christians can divide that determination into three areas: who we must be to communicate effectively; to whom we must communicate; and how we must communicate. Dorothy Day provided a haunting response to the first of these questions when she said: "To be a

311. Philemon 15. See generally James Tunstead Burtchaell, Philemon's Problem (1999) (arguing that the Church's mission today is to offer insight that God can have no attitude but favor).

312. Job 1:13-2:8 (referencing when Job's servants and children are killed, his livestock is stolen, and severe boils form from his toes to the crown of his head).

313. Job 38:3 ("Gird up your loins now like a man; I will question you, and you tell me the answers."). See generally Job 38-41 (stating that God is beyond the comprehension of this world and that it is not for men to challenge Him).

314. Bolt, supra note 173, at 66:

This country's planted thick with laws from coast to coast - man's laws, not God's - and if you cut them down - and you're just the man to do it - d'you really think you could stand upright in the winds that would blow then? (Quietly)

Yes, I'd give the Devil benefit of law, for my own safety's sake.

See id. at 126 (discussing when More sought to save himself through complexities in the law).

315. John Howard Yoder described the role of rights in the Christian community in this way: "If we were a Christian community in the desert, we would still ask whose business is it to do what, but the notion of a right would not be foundational to the community." Interview with John Howard Yoder, Professor at Notre Dame University, in South Bend, Ind. (Mar. 22, 1996).

316. According to Bob Rodes, "I see an urgent need, therefore, to pass beyond a moral aspiration to social justice into a spiritual aspiration to be liberated through Christ. The question arises then, how we are to manifest that aspiration in our lives as we await its consummation in God's good time. Rodes, supra note 220, at 3.
witness does not consist in engaging in propaganda or even in stirring people up, but in being a living mystery; it means to live in such a way that one's life would not make sense if God did not exist."

Aldous Huxley has described what such a life must look like. For Huxley, the saint to whom power will listen is one who "is impressive, not only for what he is, but also for what he does and says. His actions and all his dealings with the world are marked by disinterestedness and serenity, invariable truthfulness and a total absence of fear." This aura is both "fruits of the doctrine he preaches," and "gives him a certain strange kind of uncoercive but none the less compelling authority over his fellow men." His mission, Huxley tells us, "is always marginal, is always started on the smallest scale." Upon reflection, one might see in this description, as Huxley would suggest, Christ, upon whom Christians should model themselves "[w]henever [they] undertake any action." Not coincidentally, one might also see Mother Teresa, who in an unexplainable way went from solitary nun in the streets of Calcutta to one of the most influential women in the world, without ever altering the smallness of herself. Mother Teresa was such a living mystery and did seem to command an uncoercive and yet compelling authority over her fellow man. This is reflected in the following exchange between Mother Teresa and a government official:

The Minister of the Imperial Court in Addis Ababa asked me a few searching questions:

"What do you want from the Government?"

Nothing. I have come only to offer my Sisters to work among the poor suffering people.

"What will your Sisters do?"

We give wholehearted free service to the poorest of the poor.

"What qualifications do they have?"

We try to bring tender love and compassion to the unwanted, to the unloved.

"Do you preach to the people trying to convert them?"

---

317. Coles, supra note 306, at 160 (referring to Ms. Day quoting Cardinal Suhard, Archbishop of Paris). Two friends of the late Rich Mullins articulate this idea in different terms. Franciscan Father Simon of Saint Michael's Church in Arizona says that we need to have and live a vision such that we can be poets not in what we write but in what we live. Scottish pastor and band leader Sammy Horner meanwhile says that the Christian light should burn so brightly in our lives that people say, "I don't know what he's having, but I'll have a pint of that." Homeless Man, supra note 220.


319. Id.

320. Id. at 283.

321. Id. at 273.
Our works of love reveal to the suffering poor the love of God for them.\textsuperscript{322}

Brennan Manning next can help us to understand to whom we must communicate. In doing so, Manning would warn the Christian to avoid the temptation to become Caiaphas, a man for whom “[r]eligion has left the realm of the person,” and for whom “sacredness has become institutions, structures, and abstractions.”\textsuperscript{323} Manning tells us that Caiaphas:

is dedicated to the people, so individual flesh and blood men are expendable. Caiaphas is dedicated to the nation. But the nation does not bleed like Jesus. Caiaphas is dedicated to the temple — impersonal brick and mortar. Caiaphas became impersonal himself, no longer a warm human being but a robot, as fixed and rigid as his unchanging world.\textsuperscript{324}

Manning here confronts the Christian with the need to remember that he is called to speak, deal with, and save persons rather than abstractions. Thus, the Christian in America is called to speak truth not to power nor to America, but to Americans. Once again, Christ provides us with a model. One could argue that Christ had little success in communicating with power in Israel, if He even tried,\textsuperscript{325} but Christ’s life undeniably transformed powerful people of His day. Among others, the wealthy Martha ceased to be one who merely busied herself and became one who served her Lord.\textsuperscript{326} Through Christ, pagan military commanders came to see the authority of God.\textsuperscript{327} Even the religious leaders of Christ’s time, Nicodemus and Joseph of Arimathea, were transformed from men who sought truth only in secrecy or

\textsuperscript{322} MOTHER TERESA, supra note 265, at 322. For further examples of exchanges between Mother Teresa and government officials that were curious, mysterious and perhaps miraculous, see MOTHER TERESA (Petrie Productions 1986) (including unexpected land grants and war-time cease fires).

\textsuperscript{323} BRENNAN MANNING, THE RAGAMUFFIN GOSPEL 139 (1990).

\textsuperscript{324} Id.

\textsuperscript{325} In a parable in Luke, the raising of a man named Lazarus from the dead is referred to by a wealthy sinner as the sign to which anyone would respond. Luke 16:19-31. Christ later raised a man named Lazarus not only from the dead but from the sealed tomb. John 11:1-44. Yet, rather than catalyze the conversion of the Sanhedrin, the raising of Lazarus catalyzed that body’s commitment to the crucifixion of Christ, John 11:53, just as Christ indicated in the parable. Luke 16:31. Thus, one might argue Christ’s mercy gave to the powers of His day the miracle even they maintained could not be denied although He knew they would, in fact, deny it.

\textsuperscript{326} Compare Luke 10:38-42 (addressing Martha busying herself with serving while Jesus is trying to speak), with John 12:2 (referencing when Martha truly serves after Jesus has returned her brother Lazarus to her from the tomb).

\textsuperscript{327} Luke 23:47 (addressing the centurion who witnessed Christ’s crucifixion glorifying God and acknowledging Christ as “righteous beyond doubt”); Matthew 8:5-13 (referencing a centurion displaying faith in Christ beyond that of anyone in Israel, and Christ healing the centurion’s servant); see also Luke 7:1-10.
under the dark of night\textsuperscript{328} to men of courage who would show their loyalty to the love of Christ even if it meant confronting a world gone mad with hate.\textsuperscript{329} Thus, just as Christ's witness never left "the realm of the person," the witness of Christians in America must remain in that realm as well.

Third and finally, we may return to Powell's own words to respond to how one communicates truth to power. Powell addresses this, but not in terms of what truths to share. Powell more humbly would only tell the Christian what questions to address. For Powell, the first question that must always capture the Christian imagination is this: "How do I love God and neighbor?"\textsuperscript{330} Thus, in speaking truth to power, Powell does not give in to the agenda, to the questions, of the secular state, just as Christ did not give in to that agenda in His time.

When Jesus was presented with what power believed to be the pressing questions of the day, Jesus's answers fell into two categories. First, when He was asked about taxes and authority, Jesus's answers were quick and cutting and showed that the questions of the day did not merit the extent of discussion to which power believed them to be entitled.\textsuperscript{331} Second, when Jesus was asked about the law itself, invariably He answered: "Could you not love more,"\textsuperscript{332} thereby guiding those who pursued His answers to the question that really mattered. In fact, of all the questions power ever asked Jesus, the only one that seemed to capture His imagination was "who is my neighbor;" who is it that I am to love?\textsuperscript{333}

In the end, the questions of this world may have very little to do with speaking truth to power. Those questions that the Christian would ask herself about the powers of this world are more likely to fuel self-righteousness, bitterness, judgmentalism, and inaction than

\begin{itemize}
\item \textsuperscript{328} John 19:38 (acknowledging Joseph of Arimathea as "secretly" a disciple of Christ); id. at 19:39 (acknowledging Nicodemus as one who came to Christ at night).
\item \textsuperscript{329} John 19:38-42 (discussing Joseph of Arimathea and Nicodemus seeking Christ's crucified body from Pilate, preparing it for burial, and placing it in a tomb).
\item \textsuperscript{330} Powell, supra note 125, at 10-11.
\item \textsuperscript{331} See, e.g., Matthew 17:24-27 (addressing the issue of the temple tax); id. at 21:23-27 (addressing questions on the authority of Jesus related to the source of the baptism of John); id. at 22:15-22 (addressing the payment of taxes to Caesar).
\item \textsuperscript{332} See, e.g., Matthew 15:1-9 (referencing Jesus, in response to question about breaking tradition, calling for greater love for parents); id. at 19:3-9 (referencing Jesus, in response to question about legal divorce, calling for greater love in marriage); id. at 22:34-40 (addressing Jesus answering that the greatest commandments are to love); Mark 2:18-22 (stating that Jesus, in response to question about fasting, calls for seeing the world in a new way); Luke 6:1-11 (stating that Jesus, in response to questions about observance of the Sabbath, answers with a healing, an act of compassion).
\item \textsuperscript{333} Luke 10:29-37.
\end{itemize}
they are to catalyze a better sense of how to love.\textsuperscript{334} And those questions that power, itself, would ask come out of a language so far removed from love that they allow the Christian to do little more than introduce truth at its most elementary levels.\textsuperscript{335} Given these limitations, could it be that in \textit{Moral Tradition}, Powell provides the Christian with only the paradoxical calling to try to teach power to love and to try to do so not so much by what we say but by how we live?

Professor Jim Chen offers us these words to confirm and to clarify this dilemma:

At its extreme [Powell's] 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." From this perspective, Christian lawyering consists simply of seeking justice, loving mercy, and walking humbly with God.\textsuperscript{336}

Just as Christian lawyering consists "simply" of seeking justice, loving mercy, and walking humbly with God, Chen might add that similarly a rose consists simply of petals and a stem. But by the grace of the Master we know the rose as the most beautiful of all the blossoms. In \textit{Moral Tradition}, Powell does not offer Christians the hope that they can create in America the New Jerusalem, nor does he suggest that Christians can impose order on chaos, have all the answers, or get anyone to listen to the few answers Christians can communicate to power. But Powell does invite Christians to be a light in a world in need of light,\textsuperscript{337} and salt in a world in need of flavor,\textsuperscript{338} simply by seeking justice, loving mercy, and walking humbly with God. Simple as that may be, by the grace of the Master, that too will blossom.

V. CONCLUSION

In \textit{The Moral Tradition of American Constitutionalism}, H. Jefferson Powell has provided much needed direction in three areas at a critical time in American history. As America struggles with its political and social identity in the age of pluralism, Powell has shown us the reality of American constitutionalism, the essence of social com-

\textsuperscript{334} \textit{John} 8:3-11 (stating that the \textit{holy} and \textit{enlightened} of that time sought to determine how to deal with the \textit{sinfulness} in their world, only to have Jesus instruct them that only the one among them without sin should cast the first stone).

\textsuperscript{335} See supra notes 259-311 and accompanying text.


\textsuperscript{337} \textit{Matthew} 5:13.

\textsuperscript{338} \textit{Id.} at 5:14-16.
munity, and the necessity and nature of communicating truth to power.

To show us the reality of American constitutionalism, Powell has provided an honest and uncluttered view of the Constitution's history. This view allows one to see the continuing battle among the branches of government for control of the Constitution and to see the multiplicity of influences and ideologies that continually contribute to our understanding of that document. While Powell concludes from this view that the judiciary's role in American constitutionalism should be to confine itself to protecting the integrity of the democratic process and to operating in areas, particularly those of process, where the judiciary actually has a particular expertise, Powell's readers are left with the freedom and the information necessary to form their own conclusions.

In his examination of community, Powell demonstrates that walls and rights are not enough to sustain a people. At the very least, Powell suggests, there must be shared questions that the members of the community all consider important and answerable within the community, and such shared questions necessarily must arise from some body of shared wisdom and humility. Even as Powell holds open such shared questions as possibly sufficient, however, one can sense that Powell himself would advocate that the essence of community lies in the call to “love thy neighbor.”

Finally, Powell expresses the necessity and nature of the calling to speak truth to power. It is here Powell draws most vividly on his own Christianity. Here Powell warns the Christian not to be deceived by the language of constitutionalism, which frequently appears strikingly like the language of Christianity, but which cannot comprehend the concepts of love and redemption essential to Christian truth. Powell also calls the Christian to seek to transcend this language barrier and speak truth to the powers of American constitutionalism. He advocates for us to do this not in words, but by seeking justice, loving mercy, and walking humbly with God.

Christ once looked down upon Jerusalem and lamented: “[H]ow many times I yearned to gather your children together, as a hen gather-

339. See supra notes 26-84 and accompanying text.
340. See supra notes 85-130 accompanying text.
341. Luke 10:27. Minister Josh McDowell has observed that in binding the pluralistic community, “[t]he opposite of intolerance is not tolerance but love.” Josh McDowell, Tolerating the Intolerable, in FOCUS ON THE FAMILY (1998). That observation follows from Michael D. O’Brien’s recognition that “Truth and Love were made to work together, were not at war with each other — an insight that had long fallen into disuse.” MICHAEL D. O’BRIEN, FATHER ELIJAH 56 (1996).
342. See supra notes 131-337 and accompanying text.
ers her young under wings, but you were unwilling!"343 Increasingly, one hears a similar lament in America. Voices express what former Secretary of the Treasury William E. Simon observed nearly twenty years ago: (1) America is in "a spiritual as well as an intellectual crisis;" (2) "[w]e are drifting in confusion, refusing to make the hard decisions that must be made, ignoring the signs of danger that proliferate around us;" and (3) "we have lost the compass bearings of religious faith and patriotic affirmation."344 And yet, many of those voices today add that despite the depth of this crisis, like the Jerusalem of Christ's lament, American constitutionalism would never listen to a Christian voice; our attempts to speak truth to power here are inevitably futile.345

If such attempts must be confined to spoken words, then no doubt they will be futile. As Michael Mannion has reminded us, however, "God never calls His community to a task without gifting it with the charisms needed to accomplish it."346 Thus, to the extent that God has called Christians in America to be his hands and carry His truth to power here,347 He has also provided us with the means to do so; He has given us lives which can speak living words of love.

As Lincoln instructed Christians of his time:

If you would win a man to your cause, first convince him that you are his sincere friend. Therein is a drop of honey that catches his heart, which, say what he will, is the great high road to his reason, and which, once gained, you will find but little trouble in convincing his judgment of the justice of your cause, if indeed that cause really be a just one. On the contrary, assume to dictate to his judgment, or to command his action, or to mark him as one to be shunned and despised, and he will retreat within himself, close all the avenues to his

344. Simon, supra note 171, at 13:
   The Bible tell us that "where there is no vision, the people perish." . . .
   There is no vision in Washington today. There is instead the aimless move­ment of vast machinery, a scramble for votes and cushy jobs, an endless parade of subsidy-seekers, tin cup in hand, in search of handouts. We are drifiting in confusion, refusing to make the hard decisions that must be made, ignoring the signs of danger that proliferate around us.
   No one has ever accused me of being excessively pious, but I have quoted the Bible in this context with deliberate intent. I believe the disorders of our times are, in several senses, the product of a spiritual as well as an intellectual crisis. The troubles we experience are the result of a contagion that affects the whole of our society — political leaders, intellectuals, businessmen, average workaday citizens. We are without direction, ultimately, because we have lost the compass bearings of religious faith and patriotic affirmation.
345. See supra notes 165-69 and accompanying text.
346. MANNION, supra note 121, at 53.
347. JOHN MICHAEL TALBOT, St. Theresa's Prayer, on HEART OF THE SHEPARD (Spar­row Corp. 1987) ("Yours are the hands with which He blesses all the world.")
head and his heart. . . . Such is man, and so must he be understood by those who would lead him, even to his own best interest.348

"Such is man" today as well. If Christian truth is to impact those in power in America, then Christians must dismiss any notions of easy answers, quick fixes, and head trips. "Head trips don't change people," Mannion tells us, "Hearts change people. One way or another, when people's hearts are opened, their heads will follow."349 Christians must strip off "our own self-righteousness, our own judgmentalism, our own hang-ups,"350 and accept that God did not call us to be a "Justice of the peace. This right belongs to God alone. But [our] vocation is to be an Angel of Peace."351 In this light, we can expect that in our quest to bring truth to power, Christians must try to "[j]udge little, heal much, [and] understand more fully."352 To the extent Professor Powell has made this task to appear a little clearer and a little more essential to Christians, he has done a great service to people of all faiths and persuasions.

349. MANNION, supra note 121, at 51.
350. Id. at 53.
351. SISTER GENEVIEVE OF THE HOLY FACE, supra note 198, at 137 (quoting Saint Thérèse).
352. MANNION, supra note 121, at 15.