



The Moral Tradition of American Constitutionalism: A Theological Interpretation

H. Jefferson Powell

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Debate over the relationship between morality and the law characterizes the contemporary discussion of American constitutionalism. Many theorists equate constitutionalism with the social morality of the American community; others deny the existence of such a community and identify constitutionalism simply as the positive law of the state. In this thoughtful and innovative book, H. Jefferson Powell presents a theological interpretation of the connection between constitutionalism and morality.

Powell locates the origins of constitutional law in the Enlightenment attempt to control the violence of the state by subjecting power to reason. He then traces constitutionalism's rapid evolution into a tradition of rational inquiry centered in the practice of adjudication and embodied in a community of lawyers and judges. Finally, Powell shows how the tradition's nineteenth-century presuppositions about the autonomy and rationality of constitutional argument have been undermined in the twentieth century, within the constitutional community itself, by the acceptance of a positivist and "democratic" understanding of law. Powell shows how the continued willingness of the courts to resolve moral questions by invoking "the Constitution" has thrown the constitutional tradition into an epistemological crisis. He critiques the work of many major theorists—John Hart Ely, Bruce Ackerman, Frank Michaelman, Rogers Smith, Michael Perry, Mark Tushnet, Robert Bork, Sanford Levinson—who, he claims, persist in attempting to resolve the crisis by redefining constitutionalism as American social morality.

With reference to Alasdair MacIntyre's concepts of moral tradition and social practice and John Howard Yoder's theological account of the state, Powell places his analysis of current constitutionalism within a contemporary Christian theological critique of Western liberalism. With certain exceptions, Powell concludes, there are theological grounds in the United States to prefer decision making by elected officials to decision by constitutional courts. Despite the controversial implications for judicial practice and legal argument, Powell ultimately argues that the liberal tradition of rational inquiry--American constitutionalism--be renounced by the Christian community in favor of the majoritarian political process.

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