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### Robert Tsai, *Eloquence and Reason: Creating a First Amendment Culture* BOOK REVIEW

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Despite these shortcomings, *From Words to Worlds* is an excellent introduction to constitutional design. Each chapter is self-contained and can be read in isolation, which works well for teaching purposes. The book also summarizes concisely the key scholarly works relevant to the topics he discusses. Breslin starts and ends his book by asserting that written constitutions are worthy of attention (pp. 13, 183). Given their salience in the last few decades, this is a point on which all can agree.

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*Eloquence & Reason: Creating a First Amendment Culture*. By Robert Tsai. New Haven, CT: Yale University Press, 2008. Pp. xiii+198. \$45.00 cloth.

Reviewed by Zanita E. Fenton, University of Miami School of Law

*Eloquence & Reason* explores the relationship between the First Amendment and democracy. Robert Tsai illuminates how constitutional norms become culturally inscribed, over time, in the fabric of ordinary life and how perceptions of complex legal concepts by legal actors, as well as by ordinary people, are developed. The book spends most of its time discussing the use of metaphor and rhetoric in demonstrating how constitutionally relevant concepts become part of the popular lexicon, fomenting the subject ideals into normative understandings.

The significance of *Eloquence & Reason* lies in its identification of adjudication as a means of facilitating social understanding and democratic norms. Connecting the use of metaphor to common understandings of the Constitution and political uses of rhetoric based in such metaphors firmly indicates that the Supreme Court is a political actor and has a cultural role in influencing the democratic form. The book ultimately suggests that courts generate politics, just like the other branches of government. It posits that the Court necessarily engages with the relevant social and political context, demystifying the Court's removed status. The idea that the Court is a political actor, alone, is contrary to conventional ideals and teaching concerning the role of the Court within democracy, as independent from politics.

Tsai describes and discusses such well-known and descriptive metaphors as the "marketplace of ideas" (pp. 60–8) and "shouting fire in the crowded theater" (pp. 74–5) to demonstrate how these concepts have become ingrained in the collective cultural psyche. In tandem with other relevant metaphors, these have contributed to the popular legitimacy of constitutional principles through a common language of rights. The upshot of the book is that legal rhetoric has a substantial role in building and confirming social and political community.

The book goes beyond the relationship between metaphor and popular understandings of constitutional law in also connecting political rhetoric and its influence on the meanings of those metaphors. The book in several places notes that political actors, especially the President, use rhetoric to influence popular understandings of legal concepts. Tsai's most explicit example is the transformation in the meaning of the "wall" metaphor, originated by Thomas Jefferson to describe the theoretical separation of church and state (p. 93), by President Ronald Reagan's use of the same metaphor to suggest that this separation was a "wall oppression" (p. 101). This connects the metaphor not just to popular culture, but also to its political uses in transforming that very culture.

Identification of the use of the term *culture war* by Supreme Court Justice Antonin Scalia in *Romer v. Evans* (1996), and again in *Lawrence v. Texas* (2003; p. 26), demonstrates one extreme use of metaphor and rhetoric: "Scalia's rendition of politics-as-war is simply more provocative than most [metaphors that make populist appeals]" (p. 27). Tsai acknowledges that this "gestalt treats sexual minorities as potential victims of the political process but as full participants" (p. 27). Tsai then indicates that the metaphor was intended to support a policy of "non-intervention" by the Court and explains how the metaphor serves this purpose.

Tsai does not, however, take the opportunity presented with this example or any other presented in the book to explore the drawbacks of the use of metaphor or how the created community only has the appearance of commonality and inclusion. Justice Scalia uses the "culture wars" to establish a conflict between the political liberal elite and the "common man," but he does not serve the judicial purpose of addressing individualized harms or generalized acknowledgment of rights under the Constitution.

The book does not grapple with why the "marketplace of ideas" metaphor is problematic in its underlying assumption of equality when in fact there are wide variations in political capital that mirror social disadvantage in society. That is, the marketplace is severely flawed. These variations in social and political capital are at the heart of what is missing from the book. It does not address the impact or relevance of "low-value speech" to the formation of community. It does not address sexual or pornographic speech, discriminatory speech, hateful speech targeting social and political minorities, or the migration over time of popular sensibilities away from basic civilities. It also does not deal with forms of resistance to cultural homogenization or approved forms of cultural ostracization.

Institutionally and historically, it is socially embedded power relations upon which the politics of successful rhetoric relies. Even as one acknowledges that common language creates social

and political community, one must also deal with its ability to exclude. Artful rhetoric lulls the population into a false sense of security and reality, masking the underlying power relations. That Tsai barely touches on this dynamic gives his theories the luster of naïveté or subterfuge. In fact, Tsai's approach is one consistent with that of the Supreme Court in its rhetorical approach. The Court's use of metaphor and "sound bite" masks real conflict by reasonable minds in interpretation, doctrinal outcomes, and real-life consequences. Of course, this does support the contention that the Court has a political role.

In the book's own eloquent fashion, Tsai makes law's evolution seem coherent. Metaphor may allow readers to imagine the world in a coherent fashion—but is it? Tsai mirrors in his book that which the Court does routinely and in which it has a real investment: to create the appearance of coherence in the face of its own inconsistencies. The transformation of First Amendment doctrine from *Minersville School District v. Gobitis* (1940), where the Court sanctioned local school requirements of schoolchildren to salute the flag, to *West Virginia State Board of Education v. Barnette* (1943), a total reversal in only three years, with the Court finding that such requirements violate the First Amendment, is the most stark in this regard.

Tsai really attempts to tie Presidential rhetoric to the Court's shift in position in *Barnette* above other accepted explanations. "Interpretation of the events rejects a strict internal account of the switch. . . . It also rejects a purely extrinsic account" (p. 114). He gives the most credit for the shift to President Franklin D. Roosevelt's "Four Freedoms" address (p. 119), making rhetoric the unifying factor of change. Here, the point is overstated in the pursuit of a consistent theory of rhetoric and the formation of democratic norms.

This book contributes significantly to ongoing conversations concerning constitutional interpretation, as well as to those surrounding democratic theory and understanding the impact of linguistic transformations on the greater culture. As such, this book has genuine relevance to the fields of constitutional law, constitutional politics, linguistic anthropology, and any humanistic study of rhetoric and persuasion. Notwithstanding the criticisms in this review, *Eloquence & Reason* is a worthy read.

#### Cases Cited

- Lawrence v. Texas*, 539 U.S. 558 (2003).  
*Minersville School District v. Gobitis*, 310 U.S. 586 (1940).  
*Romer v. Evans*, 517 U.S. 620 (1996).  
*West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).