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MAKING NONINTERPRETIVISM RESPECTABLE: MICHAEL J. PERRY'S CONTRIBUTIONS TO CONSTITUTIONAL THEORY

*Richard B. Saphire**

THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS: AN INQUIRY INTO THE LEGITIMACY OF CONSTITUTIONAL POLICYMAKING BY THE JUDICIARY. By *Michael J. Perry*. New Haven and London: Yale University Press. 1982. Pp. xi, 241. \$24.

On Monday, while we are arguing for a result in court that would be hard to justify in terms of the written Constitution, we say things like: "Oh well, any sophisticated lawyer understands that the text of the Constitution is really not very clear, its history is often extremely ambiguous, and in many areas simply unknown. That being so, why shouldn't the court just do good as we define the good?"

But on Tuesday, after the decision has been made, we find ourselves talking to a different and much larger group, people who are not constitutional theorists and who may be enraged at what the court has done. These tend to be regarded by the constitutional cognoscenti as the great unwashed. To them, we do not mention the ambiguities, the uncertainties that underlie the decision. We certainly don't mention the political basis for the decision. Instead, we say to them, "Why, you are attacking the Constitution." That, of course, is not what the critics are doing.

If noninterpretivism is to be respectable, its scholars must stop talking this way. When they address the public, they should say, frankly, "No, that decision does not come out of the written or historical Constitution. It is based upon a moral choice the judges made, and here is why judges are entitled to make it for you."¹

I

Professor Perry sets out to articulate and justify a theory for "fierce" judicial activism (p. 139). At least since the publication of an article in 1975 by Thomas Grey,² activist theories (whether "fierce" or not) generally have been labeled "noninterpretivist," while theories urging judicial restraint have been labeled "interpretivist." While the precise definitions assigned to

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1. Bork, *The Struggle Over the Role of the Court*, NATL. REV., Sept. 17, 1982, at 1137, 1139 [hereinafter cited as Bork, *Role of the Court*].

2. Grey, *Do We Have a Written Constitution?*, 27 STAN. L. REV. 703 (1975).

these theories have varied somewhat,³ the important distinctions between the two are fairly clear. Professor Grey's account of their distinctive aspects should suffice:

The pure interpretive model should not be confused with *literalism* in constitutional interpretation, particularly with "narrow" or "crabbed" literalism. The interpretive model, at least in the hands of its sophisticated exponents, certainly contemplates that the courts may look through the sometimes opaque text to the purposes behind it in determining constitutional norms. Normative inferences may be drawn from silences and omissions, from structures and relationships, as well as from explicit commands. . . .

What distinguishes the exponent of the pure interpretive model is his insistence that the only norms used in constitutional adjudication must be those inferable from the text — that the Constitution must not be seen as licensing courts to articulate and apply contemporary norms not demonstrably expressed or implied by the framers.⁴

Although the interpretivism-noninterpretivism distinction is not, either in its articulation or theoretical significance, without ambiguity or controversy,⁵ it does seem to capture the essence of a major dispute among constitutional theorists. It is generally conceded that when courts invalidate legislative decisions on the basis of values with at least firm roots in the written Constitution, their decisions are presumptively legitimate.⁶ On the

3. For a sampling of some of the literature employing the interpretivist/noninterpretivist distinction, see Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 OHIO ST. L.J. 3 (1981); Berger, *Government by Judiciary: John Hart Ely's "Invitation"*, 54 IND. L.J. 277 (1979); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981); Ely, *Constitutional Interpretivism: Its Allure And Impossibility*, 53 IND. L.J. 399 (1978); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1 (1981); Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981). See also White, *Reflections on the role of the Supreme Court: the contemporary debate and the "lessons" of history*, 63 JUDICATURE 162 (1979); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) [hereinafter cited as Bork, *Neutral Principles*].

4. Grey, *supra* note 2, at 706 n.9 (emphasis in original).

Professor Perry elaborates the distinction between interpretive and noninterpretive review at pp. 10-11. On the distinction between interpretivism and "literalism," see pp. 32-33.

5. For example, Professor Dworkin has argued:

Any recognizable theory of judicial review is interpretive in the sense that it aims to provide an interpretation of the Constitution as an original, foundational legal document, and also aims to integrate the Constitution into our constitutional and legal practice as a whole. No one proposes judicial review as if on a clean slate.

Dworkin, *supra* note 3, at 472. For further criticism of the interpretivism-noninterpretivism distinction, see Lupu, *Constitutional Theory and the Search for the Workable Premise*, 8 U. DAYTON L. REV. — (forthcoming 1983). This article will be published as part of a symposium marking the publication of Professor Perry's book.

6. The concern for legitimacy is based upon the perceived requirements of democratic political theory and the related concern for judicial discretion. Most theorists accept, as a general proposition, that in our democracy the development and implementation of public policy is entrusted to institutions and individuals who are accountable to the electorate. Indeed, Professor Perry claims that our commitment to electorally accountable policymaking is "axiomatic" (p. 9). But see Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 428-29 (1981); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037, 1058-60 (1980). Since federal judges are not electorally accountable — at least they are thought considerably less accountable than are

other hand, where courts are perceived as acting on the basis of norms whose source cannot fairly be traced to the Constitution, the legitimacy of their power is often regarded as suspect. What divides most theorists and judges is the determination of how clear and direct the constitutional pedigree must be.⁷

Neither interpretivism nor noninterpretivism has been a monolithic philosophy. There are, for example, advocates of narrow and broad interpretivism. Justice Black was considered a narrow interpretivist: in some cases he took the view that the Constitution prohibits only those specific practices which the framers intended to ban.⁸ Others, dissatisfied with the implications of such an approach,⁹ have argued for a "broad interpretivism" pursu-

elected legislators and executives, *see generally* J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 4-59 (1980) — they cannot depend upon periodic mandates from the electorate to justify their authority. Instead, their authority must derive from the Constitution itself which, at least insofar as it provides for individual rights, limits the permissible scope and content of majoritarian policymaking. Where courts cannot plausibly trace the exercise of their power to the Constitution, that power may be considered suspect.

Given these perceptions, the legitimacy of judicial decisions will depend upon the extent to which they can be defended as objective interpretations of the applicable constitutional provisions. Assuming that at least some constitutional restrictions on majoritarian power are ambiguous, the question of whom to trust with ultimate interpretive authority arises. Although it may be argued that ambiguities should always be resolved against the exercise of judicial power, Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 143-52 (1893), that position is problematic. As Professor Perry notes: "[T]he legislature and executive branches of government cannot always be trusted to resolve in an impartial way, or, indeed, even to deliberate about, questions concerning the consistency of their actions with the framers' value judgments . . ." (p. 19); *see also* R. DWORKIN, TAKING RIGHTS SERIOUSLY 140-49 (1977). But where there is serious doubt with respect to the pedigree of a right claimed to have constitutional status, whose judgment should prevail? The answer to this question may depend upon the persuasiveness of the argument that a court's determination is the product of a suitably objective and restrained process of reasoning instead of the product of unbridled interpretive discretion. The legitimacy of a decision will vary inversely with the judicial discretion which led to its determination. *See, e.g.*, Grano, *supra* note 3, at 19. On the issue of judicial discretion, *see generally* Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359 (1975).

7. In *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973), a major issue separating Justice Powell, writing for the majority, and Justice Marshall, writing in dissent, was whether education was a right protected by the Constitution. In holding that, at least in the circumstances of that case, education did not achieve constitutional status, Justice Powell argued that it was not "explicitly or implicitly guaranteed by the Constitution." 411 U.S. at 33-34. Although Justice Marshall agreed with Powell that "the determination of which interests are fundamental should be firmly rooted in the text of the Constitution," 411 U.S. at 102, he criticized "the majority's labored efforts to demonstrate that fundamental interests, which call for strict scrutiny . . . , encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself." 411 U.S. at 99. Certain rights not specified in the text are entitled to protection, argued Marshall, depending upon how close their nexus to those which are textually explicit. What a court must determine is "the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution." 411 U.S. at 102. One way to analyze the Powell-Marshall dispute is in terms of their differing perceptions of the extent to which education was directly related to constitutionally explicit rights (*e.g.*, freedom of speech) and thus fairly inferable therefrom.

8. *See, e.g.*, *Katz v. United States*, 389 U.S. 347, 364-67 (1967) (Black, J., dissenting). On Justice Black's interpretivism, *see* J. ELY, *DEMOCRACY AND DISTRUST* 2 (1980).

9. Professor Grano has argued that "[i]nterpretivism cannot be narrow in scope because this would defeat the framers' purpose of trying to govern the future through broad, general

ant to which courts could move beyond the specific concerns and practices of the framers and evaluate contemporary practices in terms of their relationship to the general evils with which the framers were concerned.¹⁰ Similarly, noninterpretivists may vary in their analysis of the appropriate sources and methods for deriving constitutional values and in their assessment of the legitimacy of particular decisions. For example, Dean Wellington argues that courts can ascertain and enforce conventional morality but concludes that *Roe v. Wade*¹¹ was wrongly decided,¹² while Professor Perry once defended *Roe* on the basis of its congruence with conventional morality.¹³ And, while many avid noninterpretivists have been reluctant to endorse reasoning from principles derived from natural law, Professor Grey has defended such a methodology.¹⁴

Despite their numerous differences, noninterpretivist scholars generally have been united in one important respect: they have rejected the interpretivists' claim that noninterpretivism would either require or permit courts to ignore the written Constitution and its authoritative effect.¹⁵ Instead, noninterpretive methodologies are defended as either mandated or authorized, either explicitly or implicitly, by the Constitution's text and structure, and the framers' intent.¹⁶ To be sure, many noninterpretivists might con-

proscriptions; interpretivism cannot be narrow precisely because constitutional provisions are rarely narrow or specific in definition." Grano, *supra* note 3, at 64.

10. *Id.* at 64-68. See also J. ELY, *supra* note 8, at 13-14; Monaghan, *supra* note 3, at 363.

11. 410 U.S. 113 (1973) (invalidating a Texas statute prohibiting most abortions).

12. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 243-49 (1973).

13. Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689, 723-34 (1976). While Perry still defends *Roe*, he has now rejected conventional morality as a legitimate source for constitutional values (p. 94).

14. Grey, *supra* note 2, at 714-16. See also Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843 (1978) [hereinafter cited as Grey, *Origins*]. For a useful analysis and comparison of the work of prominent noninterpretivists, see Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981).

15. For such an interpretivist argument, see Grano, *supra* note 3, at 18-30.

16. See, e.g., Grey, *Origins*, *supra* note 14, at 892-93 (claiming that the framers endorsed a natural rights philosophy which became part of the written Constitution and which justifies judicial elaboration of unwritten constitutional norms); D.A.J. RICHARDS, *THE MORAL CRITICISM OF LAW* 50-52 (1972); Richards, *Human Rights as the Unwritten Constitution: The Problem of Change and Stability in Constitutional Interpretation*, 4 U. DAYTON L. REV. 295, 298-303 (1979) (arguing that the framers subscribed to a contractarian theory whose meaning and significance cannot be limited to a narrow conception of individual rights). Cf. J. ELY, *supra* note 8, at 11-41 (arguing that a narrow "clause-bound" interpretivism must be rejected in favor of an approach which permits judges to derive the content of particular constitutional provisions from the general themes of the whole Constitution, such as an approach justified on the basis of the framers' "invitation").

It should be noted that noninterpretivists do not ordinarily claim that either their methodologies or the decisions which they produce flow inexorably from specific and concrete value judgments made by the framers. Indeed, they argue that given the ambiguity of language contained in many important constitutional provisions and the dynamic nature of constitutionalism, such an approach is both impossible and undesirable. What they do claim, however, is that noninterpretivism is not simply a process whereby judges make purely political policy decisions. Instead, they defend noninterpretivism as a legitimate mode of constitutional interpretation.

cede Judge Bork's claim that many of the modern Court's most controversial decisions do "not come out of the written or historical Constitution,"¹⁷ at least if this is taken to mean that those decisions were not mechanically "lifted" from the constitutional text. But they would regard this concession as unremarkable, since, in their view, any coherent constitutional methodology — noninterpretive or otherwise — requires the exercise of some judgment and interpretive discretion on the part of a court. Certainly, most noninterpretivists would reject Bork's suggestion that noninterpretive decisions are based purely and simply upon "a moral choice the judges made,"¹⁸ at least if this is taken to mean — as Judge Bork clearly intended — that those decisions are products of the judges' purely personal and idiosyncratic moral preferences.¹⁹ In fact, as noted above, most noninterpretivists would want to claim that their proposed resolutions for contemporary constitutional problems are informed by, and ultimately justified in terms of, the Constitution itself.

II

Professor Perry, however, is not your ordinary noninterpretivist. He claims that "most constitutional decisions and doctrines of the modern period (concerning human rights issues) . . . cannot fairly be understood as the products of anything but noninterpretive review"²⁰ This claim, by itself, is not remarkable.²¹ However, what I believe separates Perry from his noninterpretive colleagues is his further observation that both the practice and the results of noninterpretive review have "no plausible textual or historical justification" — that there is "no way to avoid the conclusion that noninterpretive review, whether of state or federal action, cannot be justified by reference either to the text or to the intentions of the framers of the Constitution" (p. 24). To support this observation, Perry devotes chapter 3 to an examination of "Interpretivism, Freedom of Expression, and Equal Protection."²² Here, he reiterates his earlier view that Raoul Berger's histori-

17. Bork, *Role of the Court*, *supra* note 1, at 1139.

18. *Id.*

19. For an example of a contemporary noninterpretivist decision in which the Court argued strenuously against the notion that the decision represented only the personal, idiosyncratic moral preference of the justices, see *Moore v. City of East Cleveland*, 431 U.S. 494, 504-06 (1977) (plurality opinion) (holding that the right to privacy protected the extended-family relationship). *Moore* is extensively criticized in Grano, *supra* note 3, at 8-11. For an argument that such judicial discretion rarely characterizes — and indeed need not characterize — the judicial process in hard cases, see R. DWORKIN, *supra* note 6.

20. P. 11 (footnote omitted). Elsewhere, Perry writes that "in very few consequential human rights cases of the modern period can the Court's decisions *even plausibly* be explained as products of interpretive review." P. 130. Although I believe he never comes out and says it, it seems clear that Perry believes there is no such case.

21. Many theorists have either argued or conceded this point. See, e.g., Grey, *supra* note 2, at 10-14.

22. Chapter 1 is devoted to a general examination of the "problem of legitimacy" in constitutional theory. Chapter 2, entitled "Noninterpretive Review, Federalism, and the Separation of Powers," deals with the question of whether noninterpretive review can be justified with respect to federalism and separation-of-powers issues. Perry concludes that noninterpretive review in such cases cannot be justified in terms of the constitutional text or history. He does admit that there is a functional justification for judicial review in dormant commerce clause

cal analysis of the framers' intent with respect to the fourteenth amendment is essentially correct.²³ The framers *did not* intend "to make applicable to the states the first amendment or any other provision of the Bill of Rights" (p. 61), nor did they intend "for the amendment to have any effect on segregated public schooling or on segregation generally."²⁴ Thus, in the cases that noninterpretivists are most concerned with defending — for example, *Brown v. Board of Education*,²⁵ *Roe v. Wade*,²⁶ and the numerous cases applying the first amendment to the states — the Court was not enforcing the framers' value judgments. Indeed, it was not enforcing "the Constitution" at all.²⁷ Instead, the Court, as its interpretive critics have warned us all along, has been engaged in policymaking, not constitutional "interpretation." And what might seem even worse, it has been formulating and enforcing value judgments of its own. This, Perry admits, is presump-

cases — even though that review cannot be justified by the constitutional text and framers' intent — but concludes that these cases do not involve noninterpretive review at all since the Court is acting in an essentially legislative capacity. Pp. 38-40. With respect to separation-of-powers cases, functional considerations also justify noninterpretive review, but unlike review in human rights cases, the Court merely implements the "policy choice of one electorally accountable branch." P. 59. Thus, in such cases, judicial review is not countermajoritarian and does not raise legitimacy-related concerns. Examination of these areas leads Perry to conclude that "no consideration presented by either federalism or separation-of-powers issues undermines the interpretivist claim that all noninterpretive review . . . is illegitimate." P. 60.

23. Perry, Book Review, 78 COLUM. L. REV. 685 (1978) (reviewing R. BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977)). Perry continues to be one of the few prominent constitutional scholars who endorses Berger's historical (although not theoretical) conclusions concerning the meaning of the fourteenth amendment. For the latest installment in the battle against Berger, see Dimond, *Strict Construction and Judicial Review of Racial Discrimination Under the Equal Protection Clause: Meeting Raoul Berger on Interpretivist Grounds*, 80 MICH. L. REV. 462 (1982). In a forthcoming article, I have evaluated and criticized the phenomenon of "out-Bergering Berger." See Saphire, *Judicial Review in the Name of the Constitution*, 8 U. DAYTON L. REV. — (forthcoming 1983).

24. Pp. 66-67 (footnote omitted). Although Perry has argued that the equal protection clause does yield a principle of racial equality which is incompatible with most forms of racial (including school) segregation, he rejects the claim that such a principle was constitutionalized by the framers. *Id.* See generally Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023 (1979) [hereinafter cited as *Modern Equal Protection*].

In addition to his conclusion regarding the original understanding of the equal protection clause, Perry argues that, with respect to the privileges-or-immunities clause, the framers "meant only to protect, against state action discriminating on the basis of race, a narrow category of 'fundamental' rights . . ." P. 23. He thus rejects John Ely's conclusion that that clause "was a delegation to future constitutional decision-makers [that is, the judiciary] to protect certain rights that the [Constitution] neither lists, at least not exhaustively, nor even in any specific way gives directions for finding." *Id.*, quoting J. ELY, *supra* note 8, at 28.

25. 347 U.S. 483 (1954).

26. 410 U.S. 113 (1973).

27. Perry spends considerable time pointing out and criticizing important inconsistencies in the positions of prominent interpretivists such as Judge Bork and Justice Rehnquist. Although he contends that "interpretivism is *not* an impossible position to maintain," p. 23 (footnote omitted), he claims that these theorists have not been able or prepared to apply it in a principled fashion. He claims that neither Bork's endorsement of *Brown v. Board of Education* nor Rehnquist's willingness to apply the first amendment to the states can be justified in terms of value judgments constitutionalized by the framers. Pp. 64-69. For elaboration of Bork's and Rehnquist's constitutional philosophies, see Bork, *Neutral Principles*, *supra* note 3; Rehnquist, *The Notion of a Living Constitution*, 54 TEXAS L. REV. 693 (1976).

tively antidemocratic and therefore illegitimate. It can be defended, if at all,²⁸ only upon the establishment of a special justification.

In chapter 4, entitled "Noninterpretive Review in Human Rights Cases: A Functional Justification,"²⁹ Perry elaborates the special justification for noninterpretive review. That justification is functional: it is based on the notion that noninterpretive review serves "a crucial governmental function, perhaps even an indispensable one, that no other practice can realistically be expected to serve . . ." (p. 92). The importance of that function, and the Court's competence to perform it, is based upon Perry's understanding of our political-moral order. That understanding, in turn, is based upon the following propositions: (1) that we, as a polity, have been and remain committed to the notion of moral evolution (p. 99); (2) that "we seem to be open to the possibility that there are right answers to political-moral problems," and that even if we are not, we *should* be open to that possibility³⁰ (p. 102); and (3) that, at least comparatively, the Court is suited to help us keep faith with our commitment to moral evolution and our search for right answers to political-moral problems in a way which our electorally accountable institutions are not (pp. 100-02). Thus, while "[t]he Constitution established by the framers does not ordain a perfectly just political order" (p. 88), as a polity we are committed to an ongoing moral reevaluation and growth which (we hope) will allow us to achieve such perfection. Perry believes that without an activist Court, we would be unable to fulfill this commitment.

But if courts are to play an important, indeed a necessary, role in helping us keep faith with these commitments, how shall they do so? Other noninterpretivists have claimed that if the Court is to act legitimately, it must be guided by sources which exist outside the judge herself. Indeed, if anything has an axiomatic status in constitutional law, it is the notion that judges cannot decide cases — or at least admit they are deciding cases — by resorting to their own values.³¹ Few have been bold enough to defend such

28. Perry's entire theory is based upon the assumption that our polity is deeply committed to electorally accountable policymaking and that noninterpretive review presumptively violates that commitment. He notes, however, that "[i]f I were unable to defend constitutional policymaking by the judiciary as consistent with the principle of electorally accountable policymaking, then, given my commitment to constitutional policymaking by the judiciary, I would have to question the axiomatic character of the principle of electorally accountable policymaking." P. 10 n.*.

29. Chapter 4 was previously published, in substantial part, as the lead article in a symposium on constitutional theory. See Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278 (1981).

30. Perry rejects the "moral skepticism" of interpretivists such as Judge Bork, a rejection which he regards as a necessary but insufficient prerequisite to a defense of noninterpretive review and a rejection of interpretive review. He proceeds under the "assumption that there might be right answers" to political-moral problems, p. 107, an assumption which he does not defend in his book, but which he hopes to defend in his future work. P. x.

31. For examples of the verbal gymnastics judges have employed to convince others (or themselves?) that they have not engaged in such a process, see *Adamson v. Palko*, 332 U.S. 46, 59-68 (1947) (Frankfurter, J., concurring); *Griswold v. Connecticut*, 381 U.S. 479, 486-87 (1965) (Goldberg, J., concurring); *Moore v. City of East Cleveland*, 431 U.S. 494, 499-506 (1977) (plurality opinion); 431 U.S. at 541-49 (White, J., dissenting). For prominent scholarly discussions of this point, see B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 98-141 (1921); Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of*

judicial reasoning, and those that have defended it only as a matter of last resort.³² In what is certain to be the most controversial aspect of his theory, Professor Perry argues — boldly and with conviction (indeed, this is an area where his argumentation is especially passionate) — that the Court, in performing its dialectical and persuasive functions of helping us seek right answers to our political-moral problems and forging a new moral order, must subject conventional morality to critical evaluation. In this process,

the justice, like the legislator, will inevitably conclude that some particular political-moral principles (perhaps even a particular political-moral system) are better than others. Inevitably each justice will deal with human rights problems in terms of the particular political-moral criteria that are, in that justice's view, authoritative. I do not see how it could possibly be otherwise.³³

In cases where the Constitution is silent, or expresses no judgment to the contrary,³⁴ the Court must evaluate the "constitutionality" (it almost seems awkward to say it) of a policy generated by the electorally accountable political process by subjecting it to a "moral critique." That critique results in a judgment by a majority of the Court — a judgment based upon the Court's determination of the right answer to the human rights issue before it. In this process, "the ultimate source of decisional norms is the judge's own values (albeit, values ideally arrived at through, and tested in the crucible of, a very deliberate search for right answers)" (p. 123). Although Perry concedes that "it is a radical thing to say, and hence a thing not often said, that the source of judgment is the judge's own values," he "cannot see any way to avoid concluding that, in the exercise of noninterpretive review . . . the determinative norms derive — again, not in an unself-critical way — from the judge's own moral vision" (p. 123).

This, then, is Perry's conception of the functional justification for noninterpretive review. He recognizes, however, that when judges engage in such a function — one which he considers prophetic — they will often interpose what is unabashedly their own moral vision against the best that the political processes have had to offer. Even though our society may be

Justice, 121 U. PA. L. REV. 962, 1004-10 (1973); R. DWORKIN, *supra* note 6, at 123-30; J. ELY, *supra* note 8, at 44-48.

32. See, e.g., Greenawalt, *Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991, 1047-53 (1977) [hereinafter cited as Greenawalt, *Judicial Decision*]; Greenawalt, *Speech and Crime*, 1980 AM. B. FOUNDATION RES. J. 645, 736-37.

33. P. 111 (footnote omitted).

34. Perry's theory is concerned with justifying noninterpretive review where the value judgment that the Court seeks to apply was not constitutionalized by the framers. In such cases, the Court would be acting extraconstitutionally. He explicitly excludes from the theory's concern cases in which the court acts contraconstitutionally — that is, where the decision would create "a result contrary to a state of affairs that is constitutionally required." P. 74. In the preface to the book, he refers to contraconstitutional policymaking as a basic issue which he will address in a later essay. P. ix. Elsewhere, Perry has written that to say that a decision was contraconstitutional would "certainly be to condemn it." *Modern Equal Protection*, *supra* note 24, at 1032-33 n.47. Dean Sandalow has suggested that, under certain conditions, a decision which went against a specific value judgment of the framers might be defended as legitimate, Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1060-68 (1981), a position with which I agree. See Saphire, *supra* note 23, at ____.

committed to moral growth and evolution, Perry is acutely aware and equally confident of our commitment to electorally accountable policymaking. Rejecting the efficacy of other forms of political control, Perry, following Charles Black before him,³⁵ resolves this tension by recognizing plenary power in Congress to check the federal courts' noninterpretive decision-making by controlling their jurisdiction (pp. 128-37). Such power is "a proper vehicle for electorally accountable policymakers to control the value judgments, not of past framers, but of electorally unaccountable judges" (p. 123 n.†). Perry makes this "concession" to Congress reluctantly — although given his recognition that the people and the Court are partners in the process of moral evolution, the reason for his reluctance is unclear — because he does not "see how anyone who is interested in justifying noninterpretive review, and who takes seriously the principles of electorally accountable policymaking, can avoid making that concession" (p. 137).

III

Professor Perry's theory is as intricate and complex as it is provocative. By conceding that judges have not decided most contemporary human rights cases on the basis of the written or historical Constitution, but that, instead, they have acted on the basis of their own moral vision, he has perhaps answered Robert Bork's plea that noninterpretivism be made respectable.³⁶ But while respectability may be a virtue, it remains to be seen whether Perry has done noninterpretivism any favors. Space does not permit evaluation of all of the important aspects of Perry's theory. Consequently, I will focus on two major and related matters: his argument that our society is committed to moral evolution and his claim that judges should decide human rights cases on the basis of their own values.

Professor Perry's understanding and vision of American society seems to be based on his assessment of our history and his personal faith. It does seem to me that, as a matter of historical observation, we have as a nation had a conception of ourselves which at least approximates and makes plausible Perry's conception of our "religious self-understanding."³⁷ At the time of the framing, there were many who believed that "Americans, like the Israelites of old, were God's chosen people."³⁸ And this notion of America's special role in the world — a role defined in large part by a sense of our moral decency and enlightenment, if not our moral superiority — persists to this day.³⁹ As Charles Miller has noted, the belief in the Ameri-

35. C. BLACK, *DECISION ACCORDING TO LAW* 36-43, 76-79 (1981); Black, *The Presidency and Congress*, 32 WASH. & LEE L. REV. 841, 845-49 (1973). See also Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections on the Law and the Logistics of Direct Review*, 34 WASH. & LEE L. REV. 1043 (1977).

36. Bork, *The Role of the Court*, *supra* note 1, at 1139.

37. For Perry's conception of our collective, religious self-understanding, see pp. 97-98.

38. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 115 (1969). I cannot resist noting that Wood cites, as an example of persons publicly endorsing this conception of America, Perry, Sermon, May 11, 1775. *Id.* at 115 n.58.

39. See, e.g., Commencement Address at the University of Notre Dame, delivered by President Jimmy Carter, May 22, 1977, reprinted in *HUMAN RIGHTS AND AMERICAN FOREIGN POLICY* 302 (D. Kommers & G. Loescher eds. 1979).

can mission has had both theological and secular-political foundations.⁴⁰ But like much theology and politics, this missionary zeal has had its less seemly side. Abroad, we have, on occasion, been known to engage in actions whose morality is (and was) suspect.⁴¹ And at home — well, we may have made some progress in both absolute and relative terms in our treatment of minorities and the disadvantaged, but our record is certainly equivocal. Moreover, the social and economic policies currently in place suggest to me — and, I would imagine, to Perry — significant doubt with respect to either the substance or the strength of our nation's moral commitments.

But perhaps this is Perry's point. Perhaps it is in times like these that we need the moral leadership of the Court. Perhaps the Court, "an institution that resolves moral problems not simply by looking backward to the sediment of old moralities, but ahead to emergent principles" (p. 111), can indeed help us forge a new moral order — or at least recapture elements of our past moral enlightenment. The prospect is intriguing, but somewhat problematic.

Belief and even faith in an American religious self-understanding⁴² does not, in itself, provide much of a structure for discerning the moral values which might guide human rights adjudication. While it is one thing to agree with Perry that our polity is committed to moral evolution — indeed, I believe that the Constitution embodies and expresses that commitment⁴³ — it is quite another to discern the direction of that evolution and the moral values it promises to yield. Like Perry, I am not a moral philosopher. Many of my moral conceptions are largely intuitive. But Perry's theory presents a number of issues which a judge must confront. For example, Perry speaks of the need "to bring our collective (political) practice into ever closer harmony with our evolving, deepening moral understanding" (p. 99). The search for right answers to fundamental political-moral problems must be undertaken in the context of our commitment to ongoing moral growth. But what does Perry mean by "moral growth" and "moral evolution"? Do growth and evolution suggest an inexorable process leading toward greater mutual understanding and love? Do they suggest a commitment to more perfect realization of human equality or of substantive or procedural justice? Perry's argument that noninterpretive review is necessary to lead us to "a more mature political morality" (p. 113) can be read to suggest the notion that we are irrevocably committed to a moral awakening

40. C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY 171-72* (1969).

41. For an interesting account of the more questionable aspects of America's missionary zeal, see W. WILLIAMS, *EMPIRE AS A WAY OF LIFE* (1980).

42. Perry's evocation of religious metaphors unquestionably will serve as a lightning rod to those for whom notions of the justices as divinely inspired prophets have long been anathema. This will no doubt be true notwithstanding his attempt to forestall such criticism:

I want to emphasize, as strenuously as I can, that in the following discussion I use the word *religious* in its etymological sense, to refer to a binding vision — a vision that serves as a source of unalienated self-understanding, of "meaning" in the sense of existential orientation or rootedness. *I do not use the word in any sectarian, theistic, or otherwise metaphysical sense.*

P. 97 (emphasis in original) (footnote omitted). See also pp. 99-100.

43. See Saphire, *The Search for Legitimacy in Constitutional Theory: What Price Purity?*, 42 OHIO ST. L.J. 335, 352-56 (1981).

in which we seek to move inexorably toward fruition of liberal ideals.⁴⁴ Thus, he refers to *Dred Scott* and *Lochner* as examples of occasions in which "noninterpretive review has served, and can again, as an impediment to moral growth" (p. 125).

It is, of course, possible to view the notions of moral evolution and growth as embracing the possibility that we can and may (should?) be moving away from the ideals of the liberal left. Perry seems to concede as much with his reluctance "to assume that a single moral system will ever have an exclusive claim on the mind of man" or that there is a "single authoritative moral system" (p. 109).⁴⁵ Moreover, he admits that courts following his theory may — at least in terms of process — act legitimately when they sustain "morally suspect governmental action" (p. 116). But how is the judge to know when the government action in question must be considered "morally suspect"? According to Perry, in most, if not all, contemporary human rights cases, the Constitution provides no guide. Assuming that it does make sense to believe, as Perry does, that we can know what is morally right, can the judge also know at what point on the moral evolutionary scale our society now rests, or even the direction in which moral evolution is now moving? If the judge cannot identify with certainty our current moral conventions, and if she cannot determine with confidence the direction in which our morality is evolving, her undertaking of the prophetic function Perry envisions could well result in the determination of our public morality instead of the facilitation of its (more natural) growth. Indeed, Perry is critical of a method of noninterpretivism according to which the judge "predicts progress" (pp. 114-15). He claims that his conception of noninterpretive review is not concerned (or at least not preoccupied) with whether the judge decides human rights cases in a way which "tomorrow's majority might come to credit as progress" (p. 115). Perry's point is not that noninterpretive review answers human rights questions in a way which turns out to be correct (e.g., in a way which would comport with answers that society would ultimately give to those questions without noninterpretive review), but that noninterpretive review helps us in our commitment to aspire to give right answers to our political-moral problems. Perhaps the difference between a judicial process which predicts progress and deter-

44. In the last chapter, Perry's adamant support for judicial validation of the claims of the institutionalized suggests that his conception of moral growth and evolution differs considerably from that of, say, the Moral Majority. See pp. 147-62.

45. Perry also notes that "it is possible that noninterpretive review will *retard* rather than advance the polity's political morality." P. 115 (emphasis added). The notion of retarding moral evolution might be taken in two ways. First, it might mean that the Court could decide a case on the basis of substantive moral values which are simply incompatible with those which society, given its current state of moral evolution, would or should endorse. Second, it could mean that the Court's decision is simply so out of line with prevailing moral conceptions that it would tend to unsettle society's efforts to engage in a coherent and deliberate process of moral introspection. If Perry uses "retard" in the former sense, he might be taken to accept the existence of a single, correct answer to political-moral problems which can (must?) be derived from a single, authoritative moral system — a position which he explicitly seeks to avoid. (If he cannot avoid this position, his theory is especially vulnerable to claims of elitism.) On the other hand, if a "retarding" noninterpretive decision is one which merely derails the *process* by which society subjects public policy to moral criticism, Perry could consistently maintain the argument that morally correct answers are not preordained.

mines our public morality and one which (merely) helps fulfill our commitment to (provisionally) right moral answers is less ambiguous than I perceive it to be. But a judge who is uncertain of the difference, and who is reluctant to impose upon society her personal moral conceptions, may be reluctant to accept the role Perry would give her.

In this regard, it is important to examine how Perry's judge is instructed to proceed. If the judge is instructed to decide human rights cases purely on the basis of her own personal, subjective, idiosyncratic moral convictions, even those persons otherwise sympathetic to Perry's purposes (like myself) will be reluctant to endorse his theory. Although Perry claims that Congress has plenary control over noninterpretive review, few persons are likely to be persuaded that such control can or will impose meaningful restraints on a practice whose antidemocratic characteristics Perry emphatically concedes. However, notwithstanding Perry's assertion that the judge must derive the norms that are to be applied to evaluate government action from her own values (or her own moral vision), I do not read him to claim that the judge should rely upon her purely idiosyncratic moral conceptions. Indeed, Perry argues that the right answer which the judge seeks lies at (or somewhere near) a point where "a *variety* of philosophical and religious systems of moral thought and belief converge" (p. 109 (emphasis in original)). If the judge's function in noninterpretive review is to identify the area(s) where contemporary and perhaps competing moral theories intersect — a point where the right moral answer either resides or from which its location can readily be discerned — then the discretion which a judge can exercise must be understood in a limited sense. Like Dworkin's Hercules, Perry's judge can only employ her own judgment as to what morality requires to the extent that such a judgment is inevitable: the process of judging, at some point, requires one to exercise judgment.⁴⁶ On this interpretation, Perry's judge can be contrasted with Dworkin's Herbert:⁴⁷ she cannot act, like Herbert, on the basis of her own, idiosyncratic moral convictions to supplement or modify a decision which "objective" moral theory requires. At least where she can discern the difference between her own moral preferences and those emanating from the point at which extant systems of moral thought converge, she must decide according to the latter.⁴⁸

As I said before, I am not a philosopher. But if my comparison of

46. R. DWORKIN, *supra* note 6, at 124.

47. *Id.* at 125-26.

48. After several readings of Perry's book, I cannot say with confidence whether he would agree with this interpretation. In fact, despite his bold assertion that judges derive the moral values they are to enforce from within themselves, I find his treatment of the matter fraught with either ambiguity or ambivalence. Contrast, for example, his claim that judges derive the determinative norms from their own moral vision (p. 123) with his later discussion of the relationship between the presidential appointments power and popular control over noninterpretive review:

Moreover, the appointments power can serve to prevent the appointment to the Court of individuals who are so idiosyncratic or exotic in their own moral values and sensibilities as to be hopelessly (and dangerously) out of touch with the larger moral culture, which must function to some (indeterminate) extent as a constraint on the outer reaches of judicial innovation.

P. 143 (footnote omitted).

Perry's judge and Dworkin's Hercules is at least plausible, the fact that Perry's judge does not really act or decide independently (or from a point outside) of the legal system will not do much to assuage his critics. If the literature reacting to Dworkin can be taken as a guide,⁴⁹ the notion that there is a meaningful distinction between strong or absolute and weak forms of discretion is not a popular one. Moreover, Dworkin at least believes that when a judge engages in moral reasoning, her task is to determine the rights that the system *already* has expressed its willingness to embrace; that is, in constitutional cases, Dworkin's judge at least purports to be interpreting the Constitution. Perry's judge, however, is doing something quite different. She actively engages in the *creation* of law, without even the pretense of purporting that the "law" antedated her decision.⁵⁰

These observations lead to what I view as one of the most troubling implications of Perry's theory. As previously suggested, Perry makes noninterpretivism respectable by conceding that the Court, when undertaking noninterpretive review, engages in a nonconstitutional lawmaking function. There can be no doubt that the Court's ability to facilitate effective and meaningful moral evaluation of public policy — indeed, ultimately, its ability to perform its noninterpretive function at all — depends crucially on its institutional prestige. Even when it engages in interpretive review, the Court often has been reminded of its limited political capital and cautioned that its forays into the political process must be tempered by discipline and moderation.⁵¹ Professor Perry, however, would have the Court intervene in the political processes with a confident ferocity for the purpose of enforcing its "own moral vision" of human rights. The question arises whether the fierce activism Perry espouses will have the effect of seriously depleting the Court's political capital and undermining ultimately its ability to undertake effectively its functions of both noninterpretive and interpretive review.

In considering this question, it is important to note the extent to which — at least in academic mythology — the Court and the Constitution have been equated. Professor Bickel once wrote that "[w]ith us the symbol of nationhood, of continuity, of unity and common purpose, is, of course, the Constitution, without particular reference to what exactly it means in this or that application."⁵² He went on to note that "it has in large part been left to the Supreme Court to concretize the symbol of the Constitution."⁵³ Charles

49. The voluminous literature directed toward Dworkin's thesis is overwhelmingly critical. For prominent examples, see *Jurisprudence Symposium*, 11 GA. L. REV. 969, 969-1199 (1977); Leedes, *The Supreme Court Mess*, 57 TEXAS L. REV. 1361, 1379-92 (1979); Reynolds, *Dworkin as Quixote*, 123 U. PA. L. REV. 574 (1975); Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473 (1977). For more sympathetic reactions, see Denvir, *Professor Dworkin and an Activist Theory of Constitutional Adjudication*, 45 ALB. L. REV. 13 (1980); Fried, *The Laws of Change: The Cunning of Reason in Moral and Legal History*, 9 J. LEGAL STUD. 335 (1980).

50. At most, Perry's judge seeks and enforces "background rights" — those which "provide a justification for political decisions . . . in the abstract." R. DWORKIN, *supra* note 6, at 93.

51. See, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); J. CHOPER, *supra* note 6, at 129-70. For an argument suggesting that too much moderation can also undermine the Court's political capital, see M. SHAPIRO, *FREEDOM OF SPEECH: THE SUPREME COURT AND JUDICIAL REVIEW* 39 (1966).

52. A. BICKEL, *supra* note 51, at 31.

53. *Id.*

Miller observed that the Court has become "the living manifestation of the constitutional symbol."⁵⁴ He quoted with approval Paul Freund's observation that "[w]e accept the Court as a symbol in the measure that, while performing its appointed tasks, it manages at the same time to articulate and rationalize the aspirations reflected in the Constitution."⁵⁵ And Max Lerner concluded that "[t]he Supreme Court as symbol goes hand in hand with the Constitution as symbol."⁵⁶ He went on to suggest that "we transfer our sense of the definitive and timeless character of the Constitution to the judges who expound it."⁵⁷ As described by these commentators, the Court's relationship to the Constitution is, in an important sense, parasitic. The Court traditionally has claimed its authority from the Constitution itself, drawing from the Constitution both its entitlement to exercise political power and its institutional prestige. Before Perry, many commentators who considered judicial review in prophetic terms did so not primarily on the basis of the Court's institutional characteristics or the justices' personal qualities, but rather on the basis of the commentators' conception of the Constitution itself. It was the Constitution which was perceived as either embodying or suggesting values alleged to have religious (or religious-like) significance.⁵⁸ To the extent that belief in the Constitution's religious significance has diminished, the Court's claim to prophetic status has been undercut. That is, absent the Court's (or the commentator's) ability to link persuasively the product generated by its "prophecy" to the constitutional document, perceptions of the legitimacy of its power and its institutional prestige have been *pro tanto* undermined.

It seems to me that the Court's relationship to, and dependence upon, the Constitution is much deeper than Perry's theory admits and that there is a real danger that his theory will threaten seriously to jeopardize that relationship. Perry repeatedly rejects the suggestion that noninterpretive review — and thus (virtually) all of the Court's modern decisions pertaining to individual rights — has even the remotest connection to values constitutionalized by the framers. Instead, all of these decisions embody the Court's own moral vision. Indeed, Perry believes that there is no justification for the Court not to be candid about this fact (p. 140). Let me suggest, however, a reason that unrestrained candor⁵⁹ may be ill-advised. Once the

54. C. MILLER, *supra* note 40, at 185.

55. *Id.*, quoting P. FREUND, *THE SUPREME COURT OF THE UNITED STATES* 89 (1961).

56. Lerner, *Constitution and Court as Symbols*, 46 *YALE L.J.* 1290, 1293 (1937).

57. *Id.* at 1312.

58. *Cf.* A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 14 (1970) ("At the turn of the century, leaders of opinion consecrated the Constitution, and deified the judges who were the Constitution's supposed impersonal voices.").

59. Perry's commitment to judicial candor with respect to the courts' policymaking function should be examined in the context of his rejection of even prudentially based limits on that function. In rejecting the notion that judges should, in institutional-reform litigation, "exercise caution in defining the underlying right [that their] remedial orders are designed to vindicate," p. 161, he concludes that "[t]he judiciary must not forsake its prophetic function simply because its ability to secure compliance is sometimes weak . . ." P. 162 (footnote omitted). Thus, even where there may be substantial reason for judges to doubt that their conception of human rights will make an immediate difference — that is, where public resistance and opposition to the court's function is the strongest — they are instructed to declare the existence of rights which, in candor, derive from within themselves.

Court confesses that its primary function is one of policymaking, its relationship to the Constitution will cease to be an important source of legitimation. (Indeed, candor should require the Court to concede publicly that, to the extent its contemporary human rights decisions had been justified in constitutional terms, most of its modern work-product was fraudulently advertised!) The Court will then be exposed for what it really is — an agency of government (and an unaccountable one at that) whose principal responsibility is nothing more or less than to engage in a process of moral reflection and to impose the results of that process against the moral conventions embodied in electorally accountable policymaking. Now it may be that the public will be willing to forgive and forget; it may even be that the public has come to see the moral soundness of all of the Court's modern noninterpretive decisions and will overlook the Court's past hypocrisy or, better yet, bestow upon the Court its deepest gratitude. But given the controversy that still rages with respect to the Court's modern decisions in such areas as racial segregation (and in particular those decisions governing desegregation remedies), school prayers, abortion and personal privacy, I wonder whether the Court's current stock of institutional capital could long survive. To be sure, Perry argues that the public can and even should respond to the Court's *mea culpa* by regulating its jurisdiction. This control may, he suggests, serve as an outlet valve for public hostility. But he also recognizes that legislative inertia, as well as other factors, may prevent a significant expression of public disapproval.⁶⁰ In any event, I am less sanguine than Perry with respect to the Court's ability to withstand the political buffeting his theory invites.⁶¹

There is a final point that warrants mention. If the Court is as dependent upon the authority of the Constitution as I have suggested, a candid confession of the policymaking nature of noninterpretive review may not only undermine its ability to protect human rights in noninterpretive contexts, but may also adversely affect its ability to perform an interpretive function. Although Perry argues that the distinction between interpretive and noninterpretive review is clear — at least with respect to modern human rights decisions (p. 130) — many readers (including myself) may be less confident of this proposition.⁶² Once the Court comes out of the closet and announces that virtually all of its contemporary human-rights output is noninterpretive, can we afford to be confident that the public will (continue to) believe the Court's (or the commentators') claim that at least some decisions are or have been interpretive? If the public is less sanguine than Perry

60. Perry admits that "Congress' jurisdiction-limiting power is not a source of perfect control over noninterpretive review" but believes that it is "deeply unrealistic to insist on perfect control." P. 138.

61. Although Perry concedes that there may be significant impediments to the exercise of congressional power, he denies that they can be understood properly as rendering that power ineffective. Pp. 134-35.

62. See, e.g., Levinson, *The Turn Toward Functionalism in Constitutional Theory: Some Preliminary Observations*, 8 U. DAYTON L. REV. __, __ (forthcoming) ("I do not share Perry's optimism that clear criteria exist for this demarcation (assuming that one accepts the possibility of interpretivism in the first place, about which I am skeptical)."); Levinson, *Law as Literature*, 60 TEXAS L. REV. 373 (1982); see also Sedler, *The Legitimacy Debate in Constitutional Adjudication: An Assessment and a Different Perspective*, __ OHIO ST. L.J. __ (forthcoming).

about the Court's entitlement or ability to engage in moral prophecy, will its hostility diminish the effectiveness of the Court's power in interpretive situations?⁶³

There is, of course, no way to predict confidently the answers to such questions. We live in a political culture which has presumed that the Court's function in human rights cases is to interpret the Constitution. Indeed, the Court continues to reaffirm its own endorsement of this presumption. To be sure, some interpretivist theorists and nationally syndicated columnists claim that the Court has routinely ignored the Constitution. I would guess, however, that most reasonably well-informed members of the American public would not be so sure. Moreover, while we no doubt are committed to electorally accountable policymaking, my own view is that both the nature of that commitment and the line which separates nonconstitutional policymaking from constitutional interpretation are more obscure than Perry believes. No doubt there are grounds for legitimate doubt with respect to the constitutional pedigree of many constitutional decisions, but that may be better understood as reflecting the inherent complexities of constitutional interpretation rather than the intentional flouting of the Constitution by noninterpretivist judges and theorists.⁶⁴ Perry, however, claims confidently that the Court has been going well beyond the range of legitimate interpretation and that the public has all along been up to its real game. With equal confidence, he claims that while we have understood the Court's hypocrisy, we have also understood that the "dogmatism" of interpretivism is fundamentally irreconcilable with our deep commitment to a morally reflective and enlightened political order. But what if Perry's confidence on these matters is misplaced? It may be that the Court could withstand the disapprobation Perry's theory may invite — it may even be that the moral quality of both the process and substance of public policymaking would be better served with a candid but impotent Court than one which is more circumspect concerning the proper limits of constitutional interpretation and less bold in admitting its uncertainties — but Perry has left me with serious doubts.⁶⁵

IV

Although Professor Perry's book may make noninterpretivism respectable, it makes a much more important contribution to constitutional theory. Those of us who believe that the Court can and should play an active role

63. For a more extensive elaboration of this problem and an examination of its significance for Dean Choper's approach to constitutional theory, see Saphire, Book Review, 6 U. DAYTON L. REV. 359, 374-79 (1981) (reviewing J. CHOPER, *supra* note 6).

64. See Sandalow, *supra* note 34, at 1060-68.

65. Since I still believe that much (if not all) of the Court's modern decisions protecting individual rights plausibly can be understood and defended as constitutional interpretation, I reject the notion that the Court must or should announce otherwise. However, even if I were to accept Perry's conclusion that the Court has been engaged in pure policymaking, I would still be cautious in suggesting that it should (at least precipitously) be candid in announcing otherwise. Although there is much to recommend candor, see Forrester, *Are We Ready for Truth in Judging?*, 63 A.B.A. J. 1212 (1977) — and Perry makes some thoughtful arguments on its behalf, pp. 140-43 — it is not necessarily the exclusive, nor always the most important, political or moral value.

in the elaboration and protection of human rights may disagree with Perry's conclusion that those rights cannot fairly be interpreted from the Constitution. But, whether the Court looks for its moral values inside the Constitution or elsewhere, it must — and we who evaluate it must — begin to reflect more deeply about the content those values do and should possess.⁶⁶ Even if one concludes that Perry has conceded more to democratic theory than was necessary, his powerful articulation and defense of the Court's obligation to confront the morality of public policy is compelling. But if the Court is to participate actively in our moral life — whether the object of that participation is the facilitation of moral evolution, moral growth or moral awakening — it must begin to take moral philosophy seriously. Perry is, I believe, correct in his conclusion that this is a responsibility that the Court cannot avoid. Nor is there persuasive reason to believe that it should. As Professor Richards has argued, there is nothing inherent in the method of moral philosophy which would make it unsuitable or unmanageable for judges.⁶⁷

There are, of course, some unsettling effects associated with a judicial process which takes seriously and without embarrassment its responsibility to accept moral reasoning as an essential ingredient of constitutional interpretation. For moral reasoning to be most efficacious, it must be undertaken in a conscious, critical and reflective way. Although there may be no compelling reason to believe that judges are not capable of such self-conscious reflection,⁶⁸ traditional processes of judicial selection have placed little importance on a candidate's formal training in philosophy or prowess for philosophical reflection. Thus, Dean Ely's admonition against accepting the notion that judges *qua* individuals are somehow more accomplished at moral philosophy than others has some merit.⁶⁹ But that may be, in part, because judges (and those who select them) have seldom confronted in a self-conscious way the indispensability of moral discourse in constitutional interpretation.⁷⁰ Moreover, the point seems not to be whether judges are or can be better philosophers than (say) legislators. If and when moral

66. I have developed this theme more extensively elsewhere. See Saphire, *supra* note 43, at 345-72.

67. Richards, *Moral Philosophy and the Search for Fundamental Values in Constitutional Law*, 42 OHIO ST. L.J. 319, 323-30 (1981). See also Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 668-69.

68. Although there is considerable doubt concerning the extent that legal education has either encouraged or developed the capacity of lawyers to engage in critical moral reasoning, this may in part be attributable to an assumption that moral and legal reasoning are mutually exclusive (or at least not necessarily related) processes. A major contribution of the constitutional scholarship of, for example, Professors Perry, Dworkin, Greenawalt, and Michelman, has been its role in stimulating a reexamination of this assumption. For provocative discussions of the role of moral reasoning in legal education, see Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 YALE L.J. 955 (1981); Richards, *Moral Theory, The Developmental Psychology of Ethical Autonomy and Professionalism*, 31 J. LEGAL EDUC. 359 (1981).

69. J. ELY, *supra* note 8, at 56-60.

70. For an eloquent discussion of the dilemmas confronting a judge who believes in the propriety of subjecting public policy to moral critique but who is uncertain of his authority to decide cases on the basis of conclusions drawn from that critique, see Michelman, *supra* note 31, at 1005-07.

reasoning is accepted as an essential component of constitutional interpretation, judges necessarily will begin to take seriously their responsibility to familiarize themselves with moral theories and to develop the necessary expertise. Moreover, despite protestations to the contrary,⁷¹ it seems to me that Professor Perry is correct in his belief that the judicial process often may offer the only real opportunity for sustained moral reflection on important political-moral issues.

Finally, to say that judges should engage in self-conscious moral evaluation is not to conclude that they must always interpose their moral conceptions against the current popular will. I must confess that, in my first reading of Perry's book, I was somewhat discomforted by the relative ease with which, in the last chapter, he applies his theory to justify judicial efforts to vindicate the claims of mental patients, prisoners and other "marginal persons."⁷² In a democracy, perhaps a court exercising presumptively illegitimate power would want to move more cautiously, even knowing that it is not subject to popular control. But Perry concedes that a court adopting his theory may very well "hand down many decisions sustaining morally suspect governmental action" (p. 116). And if he and his theory are to be taken seriously, he (and we) must be prepared to accept decisions we don't like, or mobilize the political processes to prevent the (federal) courts from continuing their abuses.⁷³ This may not be an unreasonable price to pay for a public policy that is morally principled.

Perry's book also presents a challenge to the Court's academic critics. Consider, in this regard, Cardozo's observation with respect to judicial use of the "method of philosophy":

The judge who moulds the law by the method of philosophy may be satisfying an intellectual craving for symmetry of form and substance. But he is doing something more. He is keeping the law true in its response to a deep-seated and imperious sentiment. Only experts perhaps may be able to gauge the quality of his work and appraise its significance. But their judgment, the judgment of the lawyer class, will spread to others, and tinge

71. See, e.g., J. ELY, *supra* note 8, at 56-60.

72. That is not to say that I disagree with his conclusions concerning the merits of recent institutional reform litigation successfully challenging the outrageous and inhumane conditions existing, traditionally and in the present, in many of our public institutions. I do not. See Saphire, *The Civilly-Committed Public Mental Patient and the Right to Aftercare*, 4 FLA. ST. U. L. REV. 232 (1976). But my commitment to the legitimate scope of electorally accountable policymaking is less dogmatic than Perry's. Moreover, I believe that much of what Perry deems judicial policymaking can be understood and defended as constitutional interpretation. See Saphire, *supra* note 23.

Indeed, in reading the last chapter, entitled "Judicial Protection of 'Marginal' Persons," one may recall Kent Greenawalt's observation concerning Dworkin's rights thesis:

Dworkin's thesis is a means for shielding activist judges from the charges of usurpation. When linked with his denigration of welfare arguments and his approval of rights arguments, it forms a perfect apologia for the work of a court like the Warren Court that gives extensive protection to unpopular claims of individual rights.

Greenawalt, *Judicial Decision*, *supra* note 32, at 1036. The difference, of course, is that Perry concedes the usurpation issue up front and concedes Congress' power to harness the Court. But Perry himself is most doubtful as to Congress' willingness to exercise that power — and indeed of the propriety (as opposed to legality) of such an exercise of that power.

73. In the alternative, each of us "has the option of becoming, with Bork, a defender of interpretivism instead" (p. 119).

the common consciousness and the common faith.⁷⁴

As Cardozo noted — and as Judge Bork has recently agreed⁷⁵ — the immediate and perhaps principal burden of criticizing and influencing the Court will fall on the academic “experts.” It will be up to us not only to evaluate the Court’s moral vision, but to guide it as well. Clearly, that will be a heavy burden. And if the interpretivists’ observations are correct with respect to the doubtful credentials most law professors have as moral philosophers⁷⁶ — as they surely must be — it will not be an easy burden to bear. If, however, noninterpretivists wish to maintain a constructive role in the development of morally sound constitutional doctrine — if we are to participate with Michael Perry in facilitating a genuine intellectual advance in constitutional theory — we must become less preoccupied with the legitimacy of noninterpretive review and join with Perry in exploring the profound issues of morality that his theory evokes.

V

As I hope this essay has made clear, I believe that Professor Perry’s book makes an extraordinarily important contribution to the literature of constitutional theory. Among contemporary efforts to develop a functional justification for an active judicial role in the protection of individual rights,⁷⁷ Perry’s is, in my judgment, the most powerful and compelling. A staunch defender of judicial activism, Perry has taken on the traditional objections to activism and has accepted the personally unappealing consequences which he believes a principled theory requires. While Perry may enhance the cause of noninterpretivist theory by making it respectable, he has done much more. Through his unusual ability to combine passion and reason, he has helped clarify the directions in which those of us concerned with enhancing the morality of our constitutional order must move.

The Constitution, the Courts, and Human Rights will, I believe, come to be regarded as one of the most respected and influential works in constitutional law of our generation. Robert Nozick’s recent observation concerning the literature of philosophy captures poignantly my reaction to Perry’s work and provides, it seems to me, a fitting way to close:

I find I usually read works of philosophy with all defenses up, with a view to finding out where the author has gone wrong. Occasionally, after a short amount of reading, I find myself switched to a different mode; I become open to what the author has to teach. No doubt the voice of the author plays a role, perhaps also his not being coercive. An additional factor affects my stance. Sometimes a writer will begin with a thought similar to one I have had and been pleased with, except that his is more

74. B. CARDOZO, *supra* note 31, at 35.

75. Bork, *Role of the Court*, *supra* note 1, at 1138-39.

76. See, e.g., Posner, Book Review, 1981 AM. B. FOUNDATION RES. J. 231 (reviewing B. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (1980)); Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1127-29 (1981).

77. See, e.g., J. CHOPER, *supra* note 6; R. NEELY, *HOW COURTS GOVERN AMERICA* (1981). For a listing and analysis of functional approaches to constitutional theory, see Perry, *The Abortion Funding Cases: A Comment on the Supreme Court’s Role in American Government*, 66 GEO. L.J. 1191, 1201-06 (1978).

profound or subtle. Or after reading the first few sentences I may have thoughts or objections which the author then will go on to state or meet more acutely. Here, clearly, is someone from whom I can learn.⁷⁸

Clearly, Michael Perry is someone from whom we all can learn.

78. R. NOZICK, *PHILOSOPHICAL EXPLANATIONS* 6 (1981).