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BOOK REVIEW

THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS. By Michael J. Perry.*

*Reviewed by George E. Garvey***

Michael Perry's book, *The Constitution, the Courts and Human Rights*,[1] is an articulate and provocative defense of "extraconstitutional" judicial decision-making in human rights cases. Professor Perry's strength is his honesty: there is no attempt to support all human rights decisions by reference to the text, history or structure of the Constitution, nor are they justified as directly supportive of the processes of representative democratic government. He is also courageous, speaking the language of religion when his most sympathetic audiences are likely to recoil at the mention of prophecy. That honesty and courage, however, expose a generally unspoken justification for the most extreme forms of judicial activism: the courts speak with greater moral—not just legal—authority than do the representatives of the people.

The book is unlikely to convert non-believers and it may give pause to some believers in an activist judiciary. It is a valuable addition to the literature regarding the propriety and limits of judicial review, however, because it offers a theoretic justification for decisions based on the newly revived substantive due process.

Perry believes there are *right* answers to political moral questions and a just society strives always to find those answers. Morality, he continues, is evolutionary and the United States, as a basically religious nation,[2] is fun-

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1. M. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS (1982).

2. Perry states:

> I want to emphasize, as strenuously as I can, that . . . 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*.

Id. at 97 (footnote omitted).

damentally committed to continual moral growth. The people and their elected representatives, however, tend to be wedded to conventional moral norms and to resist moral evolution.[3] Federal judges, since they are not dependent on the people for tenure, are functionally best able to precipitate growth.

Perry views the role of the judiciary as prophetic: "it is to call the American people—actually the government, the representatives of the people—to provisional judgment."[4] To fulfill this prophetic role in human rights cases, judges may look to their own consciences rather than to those sources that an interpretivist would insist upon, e.g., the constitutional text or the intent of the framers.

To reconcile this judicial role with the national commitment to representative democracy, Perry identifies the courts' role as part of a democratic dialectic. The judiciary articulates a norm and the electorally responsible branches react. The vehicle for reaction is Congress' power over the federal courts' jurisdiction. Congress, Perry suggests, can withdraw jurisdiction over those matters decided by the courts in their noninterpretive capacity. Thus, ultimate power rests in the legislature and the democratic ideal survives.

The Constitution, The Courts, and Human Rights reserves for a later essay the distinction between extra and contraconstitutional decisionmaking.[5] It recognizes, however, that it may be contraconstitutional for the judiciary to assume legislative powers. "[I]t is possible that enforcement, by the federal judiciary against the governments of the fifty states, of value judgments *beyond* those constitutionalized by the framers is itself a contraconstitutional practice—a practice *contrary to* the *federal* character of American government established by the framers . . . ."[6] If, in fact, extraconstitutional policymaking is itself contraconstitutional[7] it would appear to be a threshhold issue that should not be reserved for later development. From both a legal and moral perspective, the prospect of the courts acting in a manner that violates the Constitution raises difficult, if not insurmountable, issues for one attempting a functional justification for judicial activism.

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3. *See id.* at 100-01.
4. *Id* at 99.
5. *Id.* at ix.
6. *Id.*
7. The Constitution so clearly vests "[a]ll legislative powers" in Congress, U.S. CONST. art. I, § 1, that Professor Perry should either establish that the type of judicial policymaking he promotes is not legislative—an extraordinary task—or that the Constitution is not binding on the Court.

Professor Perry reserves one other significant issue for later development. He asserts as a fundamental premise of his work that there *are* correct answers to moral questions but does "not pretend to defend the claim that there are right answers . . . . However, the problem of objectivity in ethics is a fundamental issue that constitutional theory cannot ignore if it hopes to make a genuine intellectual advance."[8] These two issues left for later treatment are not incidental to Professor Perry's theory; they are both vital to the legitimacy of his analysis.

The book also insists upon an exceedingly rigid approach to interpretivism. The Constitution does not seem to embody values; it embodies the value judgments of its framers.[9] The courts may not, consistent with interpretivism, invalidate a law if it appears that the framers of the Constitution or its amendments would not have done so at the time of adoption. I will not suggest a comprehensive interpretivist theory, but Perry's formulation is not the only one that legal tradition or logic will allow.[10]

There is a reason for the narrow formulation. Perry seeks to bring to all noninterpretive review the legitimacy of *Brown v. Board of Education.*[11] Since the framers of the fourteenth amendment did not intend to eliminate segregated schools, Perry argues, *Brown* was a noninterpretive decision.[12] Interpretivists, therefore, should either disavow *Brown* or accept the *constitutional* validity of all noninterpretive human rights cases. *Brown* and *Roe v. Wade*,[13] for example, should be accepted or rejected together as a matter of constitutional theory, although Perry concedes that they need not enjoy the same validity as a matter of policy or judgment. His case, however, is built on a narrow interpretivist model.

Professor Perry also minimizes the lessons of history. Activists are consistently met with a "what about *Dred Scott*[14] and *Lochner*?"[15] argument.

> Of course, it would be both foolish and dangerous to ignore the relevant lessons of the past . . . . [However, our] evaluation of noninterpretive review in human rights cases must be contextual, which is to say that it must proceed principally by reference to how such review has worked, can work, and is likely to work in

8. M. PERRY, *supra* note 1 at x.

9. *Id.* at 16, 70-72.

10. *See* H. READ, J. MACDONALD, J. FORDHAM & W. PIERCE, MATERIALS ON LEGISLATION 752-98 (4th ed. 1982).

11. 347 U.S. 483 (1954).

12. M. PERRY, *supra* note 1, at 66-67.

13. 410 U.S. 113 (1973).

14. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

15. Lochner v. New York, 198 U.S. 45 (1905).

the modern period . . . .[16]

The mistakes of the past are not particularly significant since modern courts have made arguably sound value judgments.

Reliance on contemporary experience is risky, even for those who find the modern courts' judgments sound. If *Roe* and *Brown* stand on the same constitutional footing so also do *Dred Scott* and *Lochner*. It would follow that those decisions were not constitutionally infirm; rather, they represented bad judgment. This formulation, however, provides no structural or institutional restraints on future abuse. Restraint, and wisdom, must be found within the judges while history cautions that the judiciary will not be restrained.

I find the most problematic aspect of *The Constitution, The Courts, and Human Rights* to be its assumption that courts are somehow skilled in moral analysis. It is not self-evident to me that either legal education or the judicial selection processes are likely to produce men and women with superior moral judgment. If courts are in the business of making fundamental moral decisions free of the Constitution's text, structure and history, as well as the traditions of the people, I would suggest the need for radical changes in the legal educational processes.[17]

Professor Perry's justification for substantive due process demonstrates the depth of the problem.

> My own view is that noninterpretive review in most substantive due process cases, specifically those in which the judiciary has sought to establish freedom of intimate association as a human right, consists, in the main, of right answers to the questions the courts have addressed—answers approaching or perhaps even reaching an emergent point of convergence among a variety of systematic moral theories. (This is not necessarily to say that the judiciary has given answers to which there is a "consensus" among the American people. The moral sensibilities of the pluralistic American polity typically lag behind, and are more fragmented than, the developing insights of moral philosophy and theology. A point of convergence among a variety of systematic moral theories, even if one exists or is emergent, does not necessarily consist of an answer as to which there is a present consensus among the people.)[18]

16. M. PERRY, *supra* note 1, at 116-17.

17. There seems to be little systematic exposure of law students to moral analysis. Professional responsibility courses focus on the relationship between attorneys and clients; matters such as the proper treatment of funds held in trust. They do not train lawyers to make moral judgments for society.

18. M. PERRY, *supra* note 1, at 118.

Clearly he views the courts as searchers for the "developing insights of moral philosophy and theology." Yet, I see little to suggest that judges are by background skilled in the disciplines of systematic moral philosophy or theology and nothing in the processes of adjudication is likely to bring forth this needed expertise. Furthermore, judicial decisions seldom indicate that the courts have attempted a comprehensive moral analysis.

There are also, I believe, structural barriers to comprehensive moral analysis by the judiciary. A decision based on a judge's conclusion that a particular Roman Catholic, Protestant or other moral view is superior to that of competing philosophies would likely shock the nation. The "wall of separation" would be viewed as breached in a most egregious manner. It should be no less shocking, however, for the courts to refuse to consider the moral teachings of religious traditions when making moral value judgments. The constitutionalization of a secular moral philosophy, to the exclusion of traditional religious moral views, would be tantamount to establishing a secular federal religion.

Experience also suggests to me that the judiciary is not an appropriate vehicle for moral decisionmaking. History has shown the Court to be morally suspect: it fostered slavery [19] and later racial separation,[20] and constitutionalized the right of employers to exploit children in the workplace.[21] Perry suggests that we must judge the Court by its contemporary decisions. Although the judgment may not be as harsh, the contemporary judiciary has not consistently demonstrated sound moral leadership.

From a moral perspective, *Brown* is perhaps the most compelling decision in the history of the Court. *Roe*, however, may be the Court's worst. I cannot demonstrate that the delegation of the decision to have an abortion to the woman is wrong;[22] but I have yet to see a compelling moral or legal argument that the decision by the state to preserve the fetus is wrong. The important point is that *Roe* presented one of the most profoundly important moral issues ever to reach the Court, (*if* a fetus is a human being, the Court precipitated a moral catastrophe) and it did not deal with it as a moral issue. Professor Perry's thesis is based on his belief that there are right moral answers and that the courts will strive to find them. *Roe*, however, represents a dramatic effort to avoid a moral evaluation (apparently splitting the difference between two strongly held views) while reaching a conclusion with profound moral implications. The Court freed us from a

19. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

20. Plessy v. Ferguson, 163 U.S. 537 (1896).

21. *See* Hammer v. Dagenhart, 247 U.S. 251 (1918).

22. I am mindful that *Roe* actually delegated the abortion decision to physicians, at least during the first trimester.

conventional, anti-abortion norm but never explained why a society with liberal abortion policies is a better society. It used the coercive powers of a sovereign; not the persuasive force of prophecy.

This does not suggest that the Court should have reached a conclusion about the morality of abortion. It rightly sensed that the issue would have plunged it into a morass without the tools to climb out. One dramatic claim to moral legitimacy in an abortion decision, for example, raises as many moral questions as it resolves. Justice Marshall, dissenting in *Beal v. Doe*[23] stated "I am appalled at the ethical bankruptcy of those who preach a 'right to life' that means, under present social policies, a bare existence in utter misery for so many poor women and their children."[24] The rhetoric is moving, but it leaves serious moral issues unresolved. Is non-existence preferable to poverty, particularly poverty in the United States? Is Justice Marshall embracing a materialistic moral philosophy, i.e., life lacking in material benefits is worthless? How can a political body claiming moral superiority not react aggressively to end "social policies [that result in] a bare existence in utter misery?" Is a morality that celebrates all life ethically bankrupt?

I am not suggesting answers to these questions, but a body seeking to assume a prophetic role must answer, or at least ask them. If the judiciary is to serve as a moral leader, I believe it is essential that its reasoning and motivation be articulated. Liberal abortion policies, for example, may be the result of altruism,[25] utilitarianism,[26] or even racism.[27] The underlying motivation will determine over time if we are a moral nation, or one steeped in immorality.

The need for explicit, systematic analysis, and fully articulated goals, can perhaps best be seen in recent cases involving the rights of handicapped infants.[28] Treatment may be withheld, and a child allowed to die, because (1) the treatment would only prolong the child's suffering; (2) the child would survive but not enjoy all of the faculties of "normal" persons; (3) the child would survive and impose substantial burdens on its family; or (4) the child would survive as a ward of the state. Rhetorical incantations about the "quality of life," "privacy" or "parental autonomy" cannot

23. 432 U.S. 438 (1977).

24. *Id.* at 456-57 (Marshall, J., dissenting).

25. *See, e.g.*, *id.*

26. *See, e.g.*, Harris v. McRae, 448 U.S. 297, 355-56 (1980) (Stevens, J., dissenting); Commission to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1980).

27. Justice Blackmun, for example, noted in *Roe* that "population growth, pollution, and racial overtones tend to complicate and not to simplify the problem." 410 U.S. at 116.

28. *See, e.g.*, United States v. University Hosp., No. 83-6343 (2d Cir. Feb. 23, 1984).

blink away the complexity of the moral issues. A society that does not require the needless prolongation of the process of death may have a claim to moral legitimacy. One that permits the termination of a life capable of loving and being loved because it would burden others should have no pretensions about being a moral "light to all the nations."[29]

There are other examples of recent judicial developments that may be legally sound, but difficult to justify on moral grounds. Upholding the right of Nazis to demonstrate in a community with a large number of death camp survivors may have been solid first amendment jurisprudence.[30] It arguably fails to move this nation to a higher moral level than a society that will not tolerate any propagation or demonstration of racial hatred. An application of the exclusionary rule that places a demonstrably violent person back into society is not without moral implications. Even the courts' persistently deferential posture when reviewing state economic regulations in *Williamson v. Lee Optical Co.*,[31] may not be morally justified. In a society committed to a market economy—one which places a stigma on those needing economic assistance—laws that limit access to the market in order to benefit a powerful competing economic group raise serious moral concerns.

Even those areas identified by Professor Perry as in need of judicial leadership have not frequently invoked desired responses.

> In twentieth-century America, there have been several such issues: for example, distributive justice and the role of government, freedom of political dissent, racism and sexism, the death penalty, human sexuality. Our electorally accountable policymaking institutions are not well suited to deal with such issues in a way that is faithful to the notion of moral evolution or, therefore, to our religious understanding of ourselves. Those institutions, when finally they confront such issues at all, tend simply to rely on established moral conventions and to refuse to see in such issues occasions for moral reevaluation and possible moral growth. That is not invariably the case, but sometimes, not infrequently, it is.[32]

In the area of distributive justice the courts have often either impaired

29. Bellah, *Civil Religion in America* 96 Daedalus 18 (1967), *quoted in* M. PERRY, *supra* note 1, at 98.

30. Village of Skokie v. National Socialist Party, 69 Ill. 2d 605, 373 N.E.2d 21 (1978); *see* Rockwell v. Morris, 12 A.D.2d 272, 211 N.Y.S.2d 25, *aff'd*, 20 N.Y.2d 721, 176 N.E.2d 836, 219 N.Y.S.2d 268, *cert. denied*, 368 U.S. 913 (1961).

31. 348 U.S. 483 (1955).

32. M. PERRY, *supra* note 1, at 100.

progress,[33] or refused to act.[34] The battles against racism and sexism have been effectively waged in the legislature,[35] although the Court seems to have functioned as a catalyst in *Brown*. The death penalty survives[36] and the Supreme Court has not been particularly progressive when dealing with human sexuality.[37] Only in the area of political dissent has the judiciary staked out a fairly unique protective role.

Chapter two of Perry's book attacks the judiciary's role as guardian of the principles of federalism. The states, Perry believes, can take care of themselves; federal legislators are elected by state constituencies and it is, therefore, not functionally necessary for the courts to intervene on behalf of the states.[38]

Federalism should not be so readily dismissed. It is not an abstract formality; federalism is *functional*.[39] It accommodates diversity among the several states. Federalism, rather than judicial activism, may best foster a primary goal Perry seeks to achieve, a moral heterodoxy. Each state may impose an orthodoxy, some demanding greater conformance to majoritarian norms than others, but there is room for fifty orthodoxies. And each individual enjoys a constitutional right to travel to and enjoy the benefits of whatever state best comports with that person's concept of a just society.[40]

Perry's formulation, on the other hand, results in a judicially imposed federal orthodoxy. The value judgments of the federal judiciary are imposed on all states and extramajoritarian processes are required to escape the judicial mandate. It may be, as Perry believes, that the states are able to protect themselves against the actions of Congress. It is extraordinarily difficult, however, for the states to protect themselves against the constitutional rulings of the federal courts.

If Professor Perry was dogmatic, *The Constitution, The Courts, and Human Rights* could be dismissed as idiosyncratic. He is not, however,

33. *See, e.g.*, Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935); Carter v. Carter Coal Co., 298 U.S. 238 (1936).

34. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471 (1970)

35. *See* H. HOROWITZ & K. KARST, LAW, LAWYERS AND SOCIAL CHANGE 352 (1969).

36. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976).

37. *See* Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROBS. 83 (Summer 1980).

38. M. PERRY, *supra* note 1, at 43-44.

39. J. BURNS & J. PELTASON, GOVERNMENT BY THE PEOPLE, THE DYNAMICS OF AMERICAN NATIONAL GOVERNMENT 87-89 (3d ed. 1957); *see* de Tocqueville, *On Democracy in America*, in 1 THE PEOPLE SHALL JUDGE 522-24 (Phoenix ed. 1976); ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, URBAN AMERICA AND THE FEDERAL SYSTEM 105 (1969).

40. Shapiro v. Thompson, 394 U.S. 618 (1969).

and the book offers *a* theory of judicial policymaking in human rights cases. It is valuable because it subjects to scrutiny and discussion a premise that generally remains unstated; the judiciary can best bring about moral growth because it is less responsible to the public. Those strongly committed to aggressive judicial activism should recognize that justification must lie in a theory akin to Professor Perry's.

Since the concept of an enlightened judiciary, or perhaps more correctly a less enlightened electorate, is intrinsically aristocratic, the proponent of a theory that would establish the concept as part of our constitutional order has a heavy burden of persuasion. There are, in my judgment, too many missing pieces to Professor Perry's theory to satisfy this burden. Subtheories essential to the validity of his model are reserved for later development or simply left undeveloped. Before accepting a model of judicial review based on the judiciary's functional ability to provide moral leadership, I would want to be convinced that (1) this form of judicial policymaking does not itself violate the Constitution; (2) there is some cognizable, workable model of ethical objectivity; and (3) the judiciary is by training, selection or processes best able to make moral judgments. Until these issues have been adequately addressed, I would opt for moral growth through experimentation and example among the states. Like Perry, I am suspicious of a politically imposed moral orthodoxy; unlike Professor Perry, however, I believe a salutary heterodoxy—one that permits moral reevaluation and growth—can best be fostered by a judicial commitment to federalism and to policymaking by the electorally accountable branches of government.