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## Cover Page Footnote

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# CONSTITUTIONAL THEORY AND THE SEARCH FOR THE WORKABLE PREMISE

*Ira C. Lupu**

The decline of the royal families of Europe has been attributed, in part, to the hemophilia caused by their practices of inbreeding. From time to time, I worry about the spread of "intellectual hemophilia," an ailment that accompanies excessive inbreeding of ideas. Constitutional scholars have, of late, talked mainly to each other. We respond to each other's work,[1] criticize each other's books,[2] and arrange symposia[3] structured around our internal agenda.

Many constitutional scholars have been reluctant to tie their sophisticated intellectual insights to the concrete problems and day-to-day issues arising in constitutional adjudication.[4] The reasons for this growing schism are apparent. Frustrated by the drift of, and cleavages within, an increasingly unpredictable and intellectually leaderless Supreme Court, scholars have turned away from doctrine and trends in its development. We have committed our energies in what may well seem a more orderly and polished enterprise — the leap into greater abstraction, purer thought, and interdisciplinary insights. The rewards of this sort of effort can be great. They include intellectual satisfaction and growth, respect from colleagues and students, and a developing sense of community among those scratching away at neighboring garden plots.

For a time, our preoccupation with theory served functions beyond these somewhat personal ones. Our work generated a variety of critical perspectives on the role of judicial review and constitutional law in

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1. *See, e.g.*, Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979); Maltz, *Judicial Competence and Fundamental Rights*, 78 MICH. L. REV. 284 (1980)(responding to Lupu); Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117 (1978); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980)(responding to John Ely).

2. The reviews of John Ely's *Democracy and Distrust* have been legion. *See, e.g.*, Cox, Book Review, 94 HARV. L. REV. 700 (1981); Lupu, Book Review, 15 HARV. C.R.-C.L. L. REV. 779 (1981); O'Fallon, Book Review, 68 CALIF. L. REV. 1070 (1980).

3. In addition to the instant volume, see *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 259-582 (1981); *Judicial Review versus Democracy*, 42 OHIO ST. L.J. 1-434 (1981).

4. Professor Tribe has been, I believe, a notable exception. His treatise is an attempt to articulate precisely this sort of connection. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978).

modern American society. But returns have diminished, and the costs of this journey to the scholar's east are ever-present and increasing. Tied to a set of academic models and rubrics, detached from the law's flow, constitutional scholarship is at risk of irrelevance to its objective concerns and to other bodies of law and legal scholarship. Much as we in the academy may find comfort and willing listeners in one another, the time has come for us to look outside ourselves to the audiences of judges, lawyers, legislators, and the public, all of whom rely on us for the development of an integrated, coherent, and realizable vision of our constitutional order.

Professor Michael Perry's recently published work, *The Constitution, the Courts, and Human Rights*,[5] reveals the deep extent to which the debate in constitutional theory has become snagged in a web of internally defined academic interchange. In what follows, I attempt to show, first, the ways in which Perry's book is the paradigmatic example of the trend with which I am concerned. Thus, in Part I, I summarize the structure and strategy of his argument, and the ways in which his argument is deeply and unproductively intertwined with the academic work of others. Second, I argue in Part II that Michael Perry's general approach to the problem of judicial review is internally contradictory and seriously flawed, and that these contradictions and flaws are predictable from its inbreeding. The method of criticism I employ in Part II is quite ordinary. Indeed, it is the method Professor Perry employs with respect to others, and I undertake the exercise to demonstrate the vulnerability of every constitutional theoretician to a set of enduring critical themes. Finally, in Part III, I sketch briefly what I see as the next task of constitutional law writing — the search for premises with the power and practicality to unite scholar and judge, theoretician and lawyer in what must inevitably be a shared enterprise.

## I.

### *A. The Argument*

The structure of Michael Perry's argument is direct and straightforward. First, he contends that virtually all contemporary products of judicial review in constitutional cases involving individual rights are "noninterpretive"; that is, they do not derive from "any value judgment constitutionalized by the framers."[6] This category, claims Perry, sweeps beyond commonly understood examples of "noninterpretive" review such as *Roe v. Wade*,[7] to include the vast bulk of modern free

5. M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982).
6. *Id.* at 2, 10-11.
7. 410 U.S. 113 (1973).

speech and equal protection doctrine.[8] Thus, Perry argues that *Brown v. Board of Education*[9] is as much a product of noninterpretive review as is *Roe*.[10]

Second, he contends that judicial review contravenes what he calls "the principle of electorally accountable policymaking."[11] Given that Perry views that principle as fundamental to the political-constitutional order, it follows that judicial review is in need of strong justification. He concludes that "interpretive review" — the judicial enforcement of "value judgments constitutionalized by the framers" — is justified by the need to have those textually demonstrable values enforced impartially, so as to best "[complete] the framers' vision of the [written] Constitution as supreme law."[12] For Perry, impartial enforcement of textual values is best guaranteed by assigning that function to the judicial branch. Noninterpretive review cannot be so justified by reference to the document, however, and Perry turns to what he calls a search for functional justification for noninterpretive review.

After what Perry concedes is a wholly inconsequential discussion of the functional justifications (or lack thereof) for noninterpretive review in disputes concerning the allocation of power between nation and states and the allocation among branches of the federal government,[13] he focuses upon his central concern — the question of justification for noninterpretive review in individual rights cases. After reviewing and rejecting a variety of extant attempts, including his own prior work, to justify such review, Perry centers his attention upon the recent work of John Ely.[14] Perry criticizes Ely's *Carolene Products*[15] process-perfecting orientation, on a variety of grounds. Later in the book, Perry advances his own thesis, arguing that the most persuasive justification for noninterpretive judicial review in individual rights cases is that the practice serves as an instrument of reflective inquiry in the search for morally right answers and the quest for moral growth.[16] This function,

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8. M. PERRY, *supra* note 5, at 91-92.
9. 347 U.S. 483 (1954).
10. M. PERRY, *supra* note 5, at 2, 66-75.
11. *Id.* at 9-10.
12. *Id.* at 16.
13. *Id.* at 37-60. This chapter seemed unnecessary. It neither advances nor retards Perry's case in any apparent way, and his argument about judicial review in federalism matters—i.e., the Court should protect the nation against hostile actions by states, but not vice versa—is sound but entirely shopworn. Indeed, this chapter has the flavor of material that Professor Perry includes in his course in constitutional law, and so was determined to include in his book. *See, e.g., id.* at 52 ("Occasionally, my students argue. . . .").
14. J. ELY, DEMOCRACY AND DISTRUST (1980).
15. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).
16. M. PERRY, *supra* note 5, at 97-118.

to which he attributes qualities of "civil religion,"[17] injects the judges into the role of active participants in a "dialogue" with other agencies of government in the quest to better the national character and improve the national soul.

Perry recognizes that his general justification for judicial review leaves unsolved the problem of reconciling the practice with his previously announced "principle of electorally accountable policymaking."[18] His reconciliation strategy is blunt. He argues that the key to reconciliation lies in recognition of a sweeping congressional power to withdraw and control the jurisdiction of federal courts, including the appellate jurisdiction of the Supreme Court.[19] In this way, Perry argues, an ordinary legislative majority can effectively thwart the judicial view of constitutional law on some point, thus vindicating the principle of electorally accountable decisionmaking without "direct" confrontation between legislature and judiciary on the constitutional merits.

A concluding chapter of the book purports to illustrate a situation in which noninterpretive judicial review is functionally justifiable. Entitled "Judicial Protection of 'Marginal' Persons,"[20] this chapter is concerned exclusively with institutional (prisons, hospitals, etc.) reform litigation, and it elaborates the argument in ways that offer insight into its strategic underpinnings. Indeed, Perry's entire work, and the larger process of academic point and counterpoint, can be viewed in strategic terms. I have begun my presentation with Perry's structure of argument, but I am hopeful that the strategic analysis which follows will illuminate my larger themes, and set the stage for the critique presented in Part II.

### *B. The Argument Strategy*

Much of the force of Perry's book derives from its rhetorical precision. The book's argument is carefully designed to keep critics on the defensive, stake out a small piece of new territory for himself, cultivate allies, defeat without embarrassing those adversaries whom he respects, and minimize his own vulnerability. Because the argument strategy is so interwoven with matters of intellectual relationship (either friend or foe), I will treat both as connected devices in the service of Professor Perry's larger objectives.

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17. *Id.* at 91-101. Perry borrows the terminology from Professor Robert Bellah. *See* R. BELLAH, THE BROKEN COVENANT 3 (1975).

18. M. PERRY, *supra* note 5, at 9-10.

19. *Id.* at 128-38.

20. *Id.* at 146-62.

### 1. *The Confinement of the Interpretivist Position*

*Roe v. Wade*[21] clarified, as had no other case since World War II, the Supreme Court's willingness to reach results which no defensible interpretivist position could support. Although rhetorically tied to the meaning of "liberty" in the fourteenth amendment due process clause,[22] and loosely aligned with the penumbral analysis developed in *Griswold v. Connecticut*,[23] *Roe* cut fundamental rights adjudication loose from the constitutional text.[24] The widely perceived inadequacies in the Court's opinion had predictable results. There followed in the constitutional literature a vast array of doctrinal, methodological, and theoretical inquiries into the outcome in *Roe*. More or less detached from the case itself, these scholarly efforts offered a variety of justifications for noninterpretive review — natural law underpinnings of the 1787 Constitution,[25] transplantation of common law method into constitutional adjudication,[26] the search for enduring or traditional unwritten norms,[27] and, from Professor Perry himself, among others, judicial manifestation of consensus morality.[28]

John Ely and others have powerfully criticized these various justifications for noninterpretivism,[29] and Professor Perry has now *adopted* many of Ely's criticisms, including the criticism of Perry's early view.[30] Perry, however, appears to be yet attached to *Roe*, not drawn to Ely's version of participation-oriented review, and hence looking for a new home. In apparent response to this need, Perry argues that "true" interpretivism is incredibly reactionary. He does so by relying in several ways on scholarly works which address the history of the fourteenth amendment. In particular, Perry adopts and endorses Raoul Berger's

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21. 410 U.S. 113 (1973).

22. *Id.* at 153.

23. 381 U.S. 479 (1965).

24. For elaboration of this point, see Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 998-99 (1979).

25. *See* Grey, *Do We Have an Unwritten Constitution*, 27 STAN. L. REV. 703 (1975).

26. *See, e.g.*, Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Michelman, *Constancy to an Ideal Object*, 56 N.Y.U. L. REV. 406 (1981); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

27. *See, e.g.*, Lupu, *supra* note 24.

28. *See, e.g.*, Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976).

29. J. ELY, *supra* note 14, at 43-72. *See also* Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

30. M. PERRY, *supra* note 5, at 93-96.

view of the fourteenth amendment[31] — that it was heavily influenced by Northern racism, that it in no way meant to incorporate the Bill of Rights and apply its provisions to the states, that it cannot responsibly be interpreted to forbid racial segregation in public institutions, and that it protects no rights beyond the sort enumerated in the civil rights statutes of the late 1860's. From Berger's premises, Perry argues that "true" interpretivism is far more miserly in its right-giving potential than the views, thought restrictive, of Judge Bork and Justice Rehnquist. "True" interpretivism, he says, would remove Bill of Rights protections against states, limit the first amendment to a restriction on (federally imposed) prior restraints, and authorize the reimposition of racially segregated schools.

Perry's use of Berger (and, to an analogous but lesser extent, Leonard Levy)[32] is troubling in several respects. First and foremost, it appears that he has proclaimed the "correctness" of Raoul Berger's history and analysis solely to persuade himself and potential allies that interpretivism is reactionary, repressive, and racist. Perry reveals no effort to confirm or deny Berger's view; no original fourteenth amendment historical research appears in text or footnotes. The furthest Perry goes toward conceding the possibility of a contrary view is a few lip-service citations to those who have attacked Berger's reading and analytic use of history.[33] But Berger's interpretations are tremendously controversial and have been widely challenged. Perry endorses them not out of anything resembling a detached, intellectual inquiry into their validity. Rather, he endorses them because they serve extremely well his argument strategy of seeking to convince himself and persuade others that interpretivism is an untenable position in the late twentieth century.

### 2. *The Inadequacy of Other Modes of Noninterpretive Review*

Having attempted to cut virtually all of twentieth century constitutional protection of individual rights quite free from textual metes and bounds, Perry then confronts his next strategic goal. In order to open the door for the introduction of his own version of the purpose of noninterpretive review, he endeavors to demonstrate the inadequacy of existing theories in the field.

In the pursuit of this goal, the work of John Ely takes on central significance for Perry. He, in the main, adopts Ely's specific critiques of

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31. *See id.* at 62-63 (citing R. BERGER, GOVERNMENT BY JUDICIARY (1977)).

32. M. PERRY, *supra* note 5, at 64 (citing L. LEVY, LEGACY OF SUPPRESSION (1960)). Unlike Berger, Levy makes no claims that the positive law that has emerged in contemporary constitutional law is wrong or the product of usurpation.

33. M. PERRY, *supra* note 5, at 192 n.23.

looking to tradition, consensus, and "neutral principles," or some combination of the three, as a source of values in a legitimate mode of noninterpretive review.[34] Of course, Ely has offered no critique of his own representation-reinforcing views, and Perry accordingly spends by far the most time and space in the effort to establish the inadequacy of the mode of review defended in Ely's *Democracy and Distrust*. Perry forcefully asserts that Ely's argument "fails,"[35] that it is "seriously incomplete and . . . unsuccessful."[36] In particular, Perry contends that Ely's first premises are flawed — that, contrary to what Perry says are Ely's claims, there are no textual or consensual values which reveal the proper form of representative democracy, or preclude political branches from restricting various forms of expression, or dictate that political actors refrain from action out of prejudice.[37]

Some of these points have real force, and have been pursued elsewhere.[38] The character of Perry's argument about the inadequacy of other theories, however, has the flavor of a Western cowboy shoot-out. Having dismissed, with little serious argument of his own, the work of several others, Perry writes about contemporary constitutional theory as if he and John Ely were struggling for control of it, with a cast of somewhat lesser characters hanging on the fence watching and pitching in an occasional *bon mot*.

This approach to contending with other views in the field is insensitive to the historical evolution of constitutional theory; it fails to recognize, for instance, the powerful connection between the work of John Ely and that of Alexander Bickel.[39] Moreover, Perry's presentation seems the product of an inordinate amount of attention to recent scholarship to the exclusion of the origins of that scholarship and to the raw

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34. *Id.* at 93-96. These arguments from Perry seem nothing more than a shortened version of analogous portions of Chapter 3 of J. ELY, DEMOCRACY AND DISTRUST (1980).

35. M. PERRY, *supra* note 5, at 80.

36. *Id.* at 89.

37. *Id.* at 77-90.

38. *See, e.g.*, Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Grano, *Ely's Theory of Judicial Review: Preserving the Significance of the Political Process*, 42 OHIO ST. L.J. 167 (1981); Parker, *The Past of Constitutional Theory—And its Future*, 42 OHIO ST. L.J. 223 (1981).

39. Ely obviously disagrees with a number of views expressed by Bickel. But Bickel too had frequently expressed a non-exclusive preference for a process-oriented focus to constitutional law. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 25-28 (1962). And, even in disagreement with Bickel, Ely organizes important segments of his work around that of Bickel. *See, e.g.*, J. ELY, *supra* note 14, at 43, 71-72 (footnotes omitted). Perhaps the most interesting question of all is the extent to which both Bickel and Ely have been influenced by the views of the Justices for whom each clerked—Bickel became an advocate of Frankfurterian restraint, and Ely stands as a proponent of Earl Warren's concern for the processes of democracy. But this inquiry is of altogether different character than those which Perry pursues, and Perry cannot be faulted for overlooking the psycho-biographical dimension.

material from which that scholarship emerges. A striking quality of the scholarly work of the past decade is the increasing extent to which the work of the Supreme Court and the attitudes of individual Justices are ignored or, at most, occasionally utilized as an illustration of a particular mode of constitutional decisionmaking. Michael Perry's work is the zenith of a trend in which scholars write to, for, about, or against one another; judicial approaches and outcomes are no more than discrete instances of data to be measured for their soundness against one or another academic theory.

For whatever reasons, Perry's town is too small for everyone but himself. Justices Frankfurter, Black, Douglas, Harlan, and Chief Justice Warren are ignored. Paul Freund and Herbert Wechsler are ancestral and irrelevant. Harry Wellington, once an intellectual ally of Perry, has been overlooked. Laurence Tribe writes "a good historical overview of the career of substantive due process."[40] Defenders of traditional values as a source of adjudicative guidance are romantic and unable to see the world clearly.[41] John Ely, whom Perry sees as the defending champion, is wrong, mistaken, flawed in his assumptions, failed in his enterprise. When the smoke from his gun has cleared, no one is left standing but Michael John Perry.

### *3. The Demonstration of Soundness and Legitimacy of Michael Perry's Functional Justification For Noninterpretive Review*

The function of noninterpretive review in human rights cases, Perry tells us, is not the search for enduring, consensual values, nor an attempt to perfect democratic processes. Rather, it is the function of "moral prophecy," of participation in the dialogue by which moral truth and growth are pursued, and of resolution of disputes about moral truth in a detached, impartial way. The legitimacy of such review, he says, rests on Congress' power to withdraw jurisdiction to exercise it in particular classes of cases. I think Perry's general approach is extremely vulnerable to criticisms he makes of others, and to other criticisms as well, and I will detail those criticisms in the next part of this essay.

For present purposes, I wish only to describe the method employed in this part of the argument and the intellectual derivation of the argument itself. Both the functional justification and the proposed reconciliation with democratic norms are attempts to defend the highest and driest ground. By describing judicial review as an instrument in the process of collective moral growth and self-understanding, and without

40. M. PERRY, *supra* note 5, at 117 n.*.

41. *Id.* at 94 (criticizing Lupu, *supra* note 24).

committing himself to any particular source of values by which moral questions can be answered, Perry seeks the safest possible position. Believe that the judiciary has a moral responsibility in individual rights cases, and you're with him (and he with you); offer a specific method for seeking moral truth — and it's tough to find any without some method — and you're on your own.

Of course, no one who subscribes to the notion that noninterpretive review pursues moral truth can be totally wrong in Professor Perry's world. He does have intellectual allies — once again, scholars and not judges — of a sort, and he courts them from a safe distance. Thus, he cites with some semblance of approval the work of Professors Michelman,[42] Bennett,[43] Richards,[44] and Fiss,[45] and he seems particularly fond of Kenneth Karst's idea of a constitutional "freedom of intimate association."[46] These writers are his allies in holding to the view that constitutional law requires rejection of moral skepticism and some process of search for morally acceptable answers. But when Perry turns to the task of describing how his general schema fits the world of adjudication, he offers nothing more concrete than a suggestion that the work of a multi-member court will tend towards a place where a variety of moral and ethical systems converge.[47] And, in evaluating the work of the Supreme Court over the past century, Perry claims no more than that the Court's output has moved/inched toward "right answers, rather than a stagnant or even regressive morality."[48] This long view, both of the process of constitutional adjudication and of the rate at which it will achieve morally sound results, frees Perry from any need to offer anything resembling a detailed, particularistic evaluation of particular cases or trends in the Court's work. Among other things, his approach enables him to hedge totally on the correctness of the outcome of *Roe v. Wade*.[49]

Perry's search for safe ground is evident in two additional ways, further reinforcing the highly abstract character of his argument. First, he is cautious that the Court must be mindful of "practical limits"[50] on its power to enforce its will, and that it cannot lead the community by too much in the search for moral truth. Unlike the Biblical prophets,

42. M. PERRY, *supra* note 5, at 169 n.24, 210 nn.80-81.
43. *Id.* at 209 n.65.
44. *Id.* at 210 n.81.
45. *Id.* at 206 nn.23-25.
46. *Id.* at 117, 121.
47. *Id.* at 109-10.
48. *Id.* at 113.
49. *Id.* at 144-45.
50. *Id.* at 123.

Perry's court must worry about its "supply of political capital."[51] Second, and more critically, his device for reconciling noninterpretive review with majoritarianism seeks safe historical, rather than safe theoretical, ground. He argues — and for reasons elaborated in Part II below, I think it is an unpersuasive and in some ways quite dangerous argument — that Congress can, by a simple majority, constitutionally withdraw the jurisdiction of the Supreme Court and lower federal courts over any subject matter of noninterpretive review. He also hastens to inform us that Congress almost never does this, which a) in Perry's view is a good thing, and b) tends to reveal "covert" legislative approval of certain human rights results. Thus, in one splendid and seemingly cost-free stroke, Perry claims to have solved what Alexander Bickel called the "counter-majoritarian difficulty."[52]

*4. The Implications of This Form of Noninterpretive Review For An Active Judicial Role In Institutional Reform Litigation*

At this point, the end of his argument, Perry informs us that his version of noninterpretive review is of special value in the evolution of institutional reform litigation. His tone in this chapter is emotionally charged — prisoners and inmates of state mental hospitals are constantly being described by Perry as "degraded and brutalized."[53] The rhetorical appeal of this argument is evident, because it seeks to persuade the reader of the inhumaneness inherent in not subscribing to Perry's view. An acutely distasteful example of this kind of appeal is Perry's charge that a particular critic of institutional reform litigation is "willing to pay the price of delay [in prison reform] with the suffering of others."[54] Perry follows this with a quote from Shaw's *Saint Joan*, in which a chaplain, who has demanded that Joan be burned, recognizes the horror of what he has done. As usual, the tough spots in this argument are simply glossed over. For instance, Perry cites with approval Owen Fiss's suggestion that inmates' "rights" may be developed with an eye toward the practical limits of judicial remedial power.[55] How a judge will know how, where, and when to trade off rights and remedies against the demands of a commitment to moral prophecy, and how a judge will ascertain appropriate standards and duties of care toward inmates is never addressed. It is simple to claim, as Perry in effect does, that jamming six prisoners in a cell for two, feeding them inadequately, and ignoring life-threatening medical

51. *Id.* at 124.
52. A. BICKEL, THE LEAST DANGEROUS BRANCH 16-20 (1962).
53. M. PERRY, *supra* note 5, at 154, 157, 158.
54. *Id.* at 158 n.*.
55. *Id.* at 161.

problems deserves some close judicial attention — it is much more difficult to address, as he does not, the question of rights to therapeutic and rehabilitative treatment for so-called "marginal" persons.[56]

Perry builds his case, then, in large blocks. Great edifices require such blocks, but grand structures are radically incomplete without attention to fine detail. And it is at that level — the hard-headed lawyer's level — that Perry's work falls very short. Theory is important, but it is only a blueprint. It is time to inspect more closely what Professor Perry claims to have built.

## II.

The burden of this essay so far has been to reveal a quality of abstraction, born of inbreeding, in Professor Perry's argument. In the introduction, however, I claimed more than that Perry's argument was a product of excessively academic interchange. Hemophilia as a possible diagnosis implies the likelihood of weakness and decline. Despite his efforts, catalogued in Part I, to keep on maximally safe ground, Michael Perry's argument is deeply vulnerable.

Two of the four themes developed in this section and applied to Perry's work in particular are themes which any constitutional theory must address in some fashion. These are 1) the role of consent in any justification for judicial review, and 2) the theory's allocation of institutional role and assumptions concerning institutional competence. The final two themes addressed here are somewhat more Perry-specific. These include 1) the analytic inadequacy of his version of the interpretive-noninterpretive dichotomy, and 2) the serious difficulties associated with Perry's argument that congressional control over Supreme Court jurisdiction is the key to reconciling the countermajoritarian tension generated by noninterpretive review.

### *A. The Sirens of Consent*

Constitutional theorists have felt compelled to account for a single, deceptively complex, theme. That theme is, simply put, that the legitimacy of governmental power ultimately rests on the consent of the governed. Of course, this does not mean unanimous consent; if it did, nothing would get done. Nor, even in its simple majority setting, does this mean continuous referenda on public issues; this seems an excessively cumbersome way to govern. Constitutional democracy has historically — one might say definitionally — involved delegation of power from

56. Youndberg v. Romeo, 102 S. Ct. 2452 (1982)(due process requires state to provide retarded institutional inmates with safe conditions, freedom from unnecessary physical restraint, and rehabilitation necessary to preserve such safety and freedom.) *Cf.* Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981).

the many to the few. Moreover, that delegation has built into it subtle checks and balances designed to prevent majority tyranny, and to minimize the risk of quick upheavals in law and policy made in response to popular passions.[57] Nevertheless, it follows powerfully from entrenched notions of equal citizenship and equal respect for each citizen that when individuals coalesce into a majority and formally act, they presumptively are entitled to have their way. Majority rule is the way consent is expressed, and we have consented to be ruled by majorities. At the same level of presumption, judicial reversal of legislatively enacted choices seems to run afoul of the notion of government by consent, unless consent to the process of judicial review, the values it advances, or both, can be demonstrated.[58]

A wonderful assortment of intellectual devices has been assembled in response to this problem. Interpretivists, echoing Hamilton in the Federalist Papers,[59] argue that consent requirements are satisfied in the exercise of judicial review on grounds of enforcement of values which "the people" have enshrined in the constitutional text.[60] Harry Wellington argues that constitutional adjudication must rest on premises found in conventional morality, that morality then serving as evidence of consent.[61] Alexander Bickel became increasingly enmeshed in the issue of reconciling judicial review with the requirement of consent.[62] Paul Brest thinks the idea of consent elusive and not terribly helpful, and yet spends pages chasing it.[63] Owen Fiss claims that consent goes to the entire system of government, not particular institutions within it.[64] John Ely argues, somewhat more subtly than most, that the constitution as a whole requires a striving toward open democratic processes (i.e., toward a more perfect expression of consent), and that consequently there is and should be consent to judicial policing of those

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57. For a thoughtful and well-documented elaboration of this point, see Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 488-92 (1982).

58. In a way, this paragraph simply expresses what Paul Brest and others have described as the unresolvable contradictions of liberal democracy. *See* Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1096-1109 (1981).

59. THE FEDERALIST NO. 78 (A. Hamilton).

60. *See, e.g.*, Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

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

62. *See* A. BICKEL, THE MORALITY OF CONSENT (1975).

63. Brest, *supra* note 58, at 1101-02; Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204, 224-26 (1980).

64. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 38 (1979).

processes.[65] I have argued that courts can and should enforce nontextual values "behind which [in past and present] the society and its legal system have unmistakably thrown their weight,"[66] i.e., that requirements of consent are satisfied in the enforcement of such values.

Professor Perry tries to escape the sirens of consent, but their lure proves far too strong. That he seeks to escape is evident from two positions which he asserts unequivocally. First, he tells us that he has abandoned his early embrace with moral consensus theory because he is now convinced that "there are no consensual values sufficiently determinate to be of help to the Court [in resolving particular human rights conflicts], and the values that do enjoy significant support are, in our pluralist culture, fragmented and point in many different directions."[67] Later on in his argument, after contending strenuously that morally correct answers to political-moral questions can be found, and that it is the task of noninterpretive review to seek such answers, Perry claims that "answers to human rights questions are right (or not) independently of what a majority of Americans happen to believe, either in the short-term or in the long-term."[68]

One would think, in light of this sort of general repudiation of the usefulness of consensual values in constitutional adjudication, that the balance of the argument would remain free of references to these "fragmented" and irrelevant values. The extent to which the contrary is true is startling. Perry tells us that "a basic, irreducible feature of the American people's understanding of themselves . . . [i]s religious."[69] This religious conception involves a sense of being " 'chosen' in the biblical sense of that word; that is, charged with a special responsibility, *an obligation*, among the nations of the world . . . to carry out God's will on earth."[70] This sense, claims Perry, is one that "[t]he American people — not each and every one of them, to be sure, but certainly the great bulk of those who have been responsible for establishing, developing, and maintaining the principal institutional constituents of the American political community — have understood"[71] and shared. Thus, according to Perry, there is consensus, at least among the elite, on a sense of American responsibility to act as the "chosen" people should.

Why fragmentation has not destroyed this consensus is never made

65. J. ELY, *supra* note 14, at 102, 105-34.
66. Lupu, *supra* note 24, at 1040.
67. M. PERRY, *supra* note 5, at 94 (footnote omitted).
68. *Id.* at 111.
69. *Id.* at 97.
70. *Id.* (footnote omitted).
71. *Id.*

clear. If it has ever existed, one is surely entitled to wonder how and whether this miraculous sense of unity of purpose survived the war in Vietnam. Nor is there a shred of evidence offered — Perry is constantly demanding evidence from those of contrary views[72] — that American elites have ever truly held these sorts of views. Even if American political leaders frequently use this sort of rhetoric, it is perfectly plausible to contend that such rhetoric is an effective way to manipulate religion-opiated masses, rather than an honest expression of belief.

If Perry is aware of this problem, he does not so disclose. Rather, he presents a series of claims about what the "American people" expect of themselves, and what these same people believe about a whole variety of matters. Thus, he tells us that the American people "value, even as they resist, prophecy,"[73] that we see our nation as "standing under transcendent judgment,"[74] that we are committed, though not with full consciousness of it, to "the notion of moral evolution,"[75] and that "we know that we are fallible"[76] and "frail."[77]

The sort of argument that Perry tries to develop from consensus here is in some ways distinct from his earlier acceptance of consensual values as a basis for decisional norms.[78] His present argument seems to be one of content to a *process* of moral evolution and growth, rather than to particular moral outcomes. But in that regard, his argument is strikingly vulnerable to the objection which he aims at Dean Ely. If there is no consensus as to the nature and form of democratic processes, and no consensus as to the appropriateness of judges rather than elected officials being the guardians of democratic processes, how and why is the case stronger for consensus about a) the value of moral growth, or b) the processes of moral growth, including that of judicial power to pronounce on political-moral questions, subject to being overturned on the merits of those questions only by an extraordinary majority? Perry's repeated use of the third person plural pronoun, and heavy citation to the work of Robert Bellah[79] on civil religion in America, simply cannot carry the burden of his argument against his own form of criticism.

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72. *Id.* at 108. "The fatal problem with [the claim that the Constitution incorporates contractarian philosophy] is that it utterly lacks persuasive evidentiary support." *Id.*

73. *Id.* at 98.

74. *Id.*

75. *Id.* at 99.

76. *Id.*

77. *Id.*

78. Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976); Perry, *Substantive Due Process Revisited: Reflections On (and Beyond) Recent Cases*, 71 NW. U.L. REV. 417 (1976).

79. M. PERRY, *supra* note 5, at 206-07 nn.28-38.

The lure of the sirens is yet stronger, however. After criticizing moral skepticism as a defensible constitutional or intellectual position, Perry suggests that morally right answers "frequently represent . . . a point at which a *variety* of philosophical and religious systems of moral thought and belief converge."[80] How convenient! Having proclaimed several pages earlier that consensus morality cannot be found or does not exist because of value "fragmentation," Perry now claims that the fragments may often be reconstructed into — lo and behold — a consensus about "the right answer," even without consensus about the system of reasoning and set of premises from which the answer emerges. Ultimately, Perry concedes that all this means is that each judge will rely on the moral system he or she finds authoritative, and that because judges are "creatures of the larger, pluralistic moral culture,"[81] they are not likely to act idiosyncratically. Thus, his general picture of judicial behavior reverberates with his concern for consent mechanisms — judges are "among us," their morality will represent ours, or important fragments of ours.

His argument thereafter continues to make highly debatable claims about "us." In evaluating the Court's work, for instance, Perry asserts that "few members of the American polity . . . upon surveying the broad features of the Court's workproduct and judging with the benefits of hindsight and reflection, would today take issue with much of what the Court has done in the name of either freedom of expression or equal protection."[82] In particular, he says, "[c]ertainly not many would take issue with what is most consequential — the Court's . . . disestablishment of [legally maintained] racial segregation."[83] It requires the rosiest or most disingenuous distortion to make such an assertion in the face of the turbulence of school desegregation efforts since 1954. Perry's claim here is an empirical one, and it is both counterintuitive and totally unsubstantiated.

The creeping claims of consent and consensus continue. In his last chapter on institutional reform litigation, Perry asserts that "[s]urely very few persons would dispute the moral claim . . . that the basic respect owing to any human being is grievously violated by the depraved and brutal conditions under which many prisoners and inmates of mental institutions are required to live."[84] "That claim," he says, "is simply not controversial."[85] I hope he is right about this, but no evi-

80. *Id.* at 109.
81. *Id.* at 116.
82. *Id.* at 117.
83. *Id.*
84. *Id.* at 149.
85. *Id.* "[M]ost persons would doubtless agree that the persistence of such [brutal] condi-

dence beyond his own assertion appears to support the claim. Fifteen years ago, I was equally convinced that no one could fail to see the horrendous immorality of the United States involvement in Vietnam; unfortunately, however, not everyone did.

The belief that many others think as we do is always alluring, but neither the claim nor the demand that they do will make it so. Professor Perry falls prey to these sirens, both at the level of process ("we" believe in judicially-inspired moral evolution) and outcomes ("we" accept desegregation as a legal and moral good). That he is so lured is less a condemnation of his work than a reflection on the overpowering force of the democratic ideal, of the difficulty of resisting the power of the majority's beliefs and wishes. Professor Perry may think that in moving on from his earlier work he has buried the problem of consent; if he looks more closely, however, he will see that it reaches out from its grave and forever threatens the search for "right" answers by its concern for broadly acceptable ones.

### *B. Questions of Institutional Role and Competence*

Questions of allocations of institutional role have concerned legal scholars, constitutional and otherwise, for many years. Henry Hart and others of the so-called "legal process" school focused enormous amounts of scholarly energy on these questions,[86] and Alexander Bickel devoted a scholarly career to explication and analysis of such problems.[87]

In the recent efforts at constitutional theory-building, these questions have taken on renewed significance. John Ely's work,[88] in particular, focuses substantially on these questions. He argues, *inter alia*, that courts' lack of electoral accountability and general detachment from the popular will make them inappropriate instruments for measuring the "people's values," and undercut any claim of their authority to impose noninterpretive values outside the scope of reinforcing representative democracy. He argues further that legislators' self-interest in ensuring their own continuation in power make them comparatively less trustworthy than courts in "facilitating processes of political change."[89]

Perry is critical of Ely's argument in this respect, but his mode of

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tions bespeaks a callous, shocking, shameful disregard for the basic dignity of human beings." *Id.* at 153.

86. *See, e.g.*, H. HART & A. SACKS, THE LEGAL PROCESS: PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958); Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

87. A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); A. BICKEL, THE MORALITY OF CONSENT (1975); A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970).

88. J. ELY, *supra* note 14.

89. *Id.* at 101-34.

criticism and his own assertions about institutional role and competence both involve uncritical and highly dubious assumptions. Perry attacks Ely's argument about legislative superiority in matters involving choice among nonparticipational values (e.g., reproductive autonomy vs. fetal survival) because, according to Perry, such disputes cannot be legislatively resolved "in an impartial, politically disinterested fashion."[90]

But Ely never argued that such disputes should be resolved in that fashion, and Perry's claim is entirely question-begging on basic questions of institutional role. A comparison of Ely and Perry on these questions illuminates the views of each and the differences in political theory which separate them.

For Ely, if it is the "people's values" by which disputes over nonparticipational values are ultimately to be resolved, then it follows as a matter of simple reasoning from institutional design that the job is a legislative one. Not only are legislators chosen by the self-same people whose values are being implemented; they are vulnerable to the prospect of subsequent electoral defeat if they "get it wrong." For Perry, on the other hand, such disputes are to be resolved in an "impartial, politically disinterested fashion,"[91] free of "established moral conventions"[92] (which, claims Perry, tend to control legislative decisions, in light of the desire to remain in power), and in a way which responds to an imperative of moral evolution.

The gap between Ely and Perry about the assignment of roles and the allocation of public decisions has its analogue in the debate in political theory about the proper role of elected representatives. Whether such representatives are to reflect as faithfully as possible the views of their constituents, or to exercise moral leadership on difficult questions in the face of contrary constituent views is a frequently confronted and never resolved question. Indeed, the democratic system seems to flourish in the tension this question generates. The ideal of government by consent is served by the former response, presumably the more frequently followed because of the reelection desire of most elected officials, and the function of moral challenge and leadership which a society requires to avoid stagnation is promoted by the presumably more occasional efforts by elected officials to hold on principle to an unpopular view in hopes that constituents will "see the light."

Ely and Perry both attempt to accommodate this tension in indirect ways. Ely assumes that the popular will should prevail in the resolution of disputes over nonparticipational, nonconstitutional values, and

90. M. PERRY, *supra* note 5, at 120.
91. *Id.*
92. *Id.* at 111.

so concludes that legislatures should resolve them free of authoritative judicial intervention, though he in no way would limit legislative consideration of moral schemes or other sources of guidance in the creation of a virtuous society. Perry assumes that controversial political-moral questions should be answered in a more detached, less reflexive way, and so concludes that judges are better suited for them, though he recognizes that judges will be influenced to some extent by their own biases and by the public response to judicial outcomes. Thus, both Ely and Perry recognize the potential conflict between moral reason and unchecked will in the resolution of disputes concerning distributive justice, and recognize further that both the legislative and judicial branch will draw on elements of both reason and will, and presume the predominance of will over reason in the legislative process. Ely believes that the idea of democracy requires decisionmaking by the predominance of will, and believes further that so-called "fundamental values" adjudication inevitably rests on judicial will rather than any constitutionally defensible process of reason. Perry holds contrary views on both grounds; his concept of the democratic society in search of virtue requires the predominance of moral reason over will, and he believes that reliance on the judicial process generates the better likelihood that moral reason will prevail.[93]

The division between Perry's concept of institutional role and function and that of John Ely has deep roots in the American political psyche. The tension between their views is played out in American law in a host of ways, including issues concerning the scope of judicial review of administrative decisions[94] and the interplay between judicial development of the common law and judicial interpretation of statutes touching upon common law fields.[95] These matters, too, place reasoned elaboration of legal or moral principles in potential conflict with the resolution of disputes through mechanisms of clashing centers of power

93. There are those who doubt that this tenet of liberal constitutionalism — that moral and legal reason can exist as a constraining force against the exercise of will and preference — has any coherence or historical validity. *See, e.g.*, Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

94. Arguments for deferential judicial review of administrative decisions will consequentially, and at times designedly, lead to increased play for political power struggles and a reduced role for judicial articulation and enforcement of statutory norms. *See generally* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975). Ely's view of the role of power and interest in the resolution of disputes about government policy would presumably place him in the camp of greater rather than lesser judicial deference to administrative decisions, while the opposite positions might be more consistent with Perry's general assumptions about power allocation and role. Of course, the nonconstitutional context of this problem might substantially influence both or either of them.

95. *See* G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982). *See also* Traynor, *Statutes Revolving in Common Law Orbits*, 17 CATH. U. L. REV. 410 (1968).

and interest. More fundamentally, neither text nor history nor consistent constitutional practice generates any controlling principle by which to resolve the larger debate to which these questions belong. Inescapably, these questions implicate basic choices in political theory.

What may help to clarify the choice, however, is a closer look at the institutional and behavioral implications of Perry's allocation of roles. First, Perry's view allocates responsibility for morally sensitive decisions primarily to the judicial branch. James Bradley Thayer astutely recognized this quality of active judicial review a century ago[96] and expressed concern that judicial review might dwarf or deaden the capacity of political branches and the people generally to make decisions on principle.[97] Indeed, a central premise of allocating decisions involving matters of high principle to the judicial branch is distrust of the outcomes produced by representatives of a populace momentarily and brutishly aroused. Yet the self-fulfilling quality of this allocation deserves recognition; to the extent decisions regarding politically controversial matters can be avoided, political actors seeking to remain in power will be inclined to so avoid them, leaving such matters to unelected judges for resolution. Perry's claim that judicial review is a critical part of the process of national dialogue on matters of principle has been voiced by others,[98] and certainly is a plausible one, but the tendency in modern political life has been far more monologuish than Perry's ideal suggests. Thus, the allocation for which Perry contends, might reduce the likelihood of controversial issues involving moral principle being debated in legislative forums, or being fully and fairly considered in electoral campaigns.[99] This, in turn, might lead to increasing realization of Thayer's expressed worry — a community deadened in its own moral sense, increasingly dependent on its judges rather than itself for moral sensitivity. This scenario seems truly subversive in the long run of Perry's hope for a society fully and awarely committed to self-understanding and moral progress.[100]

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96. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

97. *Id.* at 155-56.

98. *See, e.g.*, Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

99. Legislative cowardice about publicly facing highly charged issues in campaigns may occasionally have the pro-democratic consequences of increased use of ballot referendum questions, rather than the anti-democratic one of increased reliance on judicial review.

100. Paul Brest seems in this regard to be braver in his faith in the human spirit than is Michael Perry:

> Finally, the truly courageous—or the most foolhardy—among us might go the next step and, grasping what we understand of our situation, work toward a genuine reconstitution of society—perhaps one in which the concept of freedom includes citizen participation in the community's public discourse and responsibility to shape its values and structure.

Viewed from a more individualistic behavioral perspective, Perry's concept of noninterpretive judicial review in individual rights cases might generate some pressures of highly questionable value on judges who subscribe to it. A "Perry judge" would recognize that her job was one of leadership in society's moral evolution. She would know that it was both permissible and, indeed, expected of her, that she consult her own system of moral beliefs and her own method of moral reasoning in performing this task. Yet she would know that she was expected to resolve complex and controversial disputes in a detached, politically disinterested way, and that judicial review would likely serve its purpose only if her views and those of her judicial colleagues were representative of the larger culture and were likely to converge at a point of acceptability within that culture.

These orders are not merely tall; they are potentially conflicting in fundamental and irreconcilable ways. What is the judge to do if her sense of her own moral beliefs is that they are in no way detached or politically disinterested, but rather are the product of intensely felt political ideology and commitments developed in her pre-judicial days? Her choices are to detach from her own views and attempt to apply moral premises not her own, or to remain with her own and violate the injunction against operating on moral reflex. More probably than not, she will struggle unsuccessfully and perhaps self-deceptively to do the former, and wind up neither detached nor fully conscious of the moral premises upon which she is operating. Alternatively, she might sense that her views are highly idiosyncratic. Should she attempt to shift in uncomfortable directions in an attempt to exercise moral leadership somewhat more restrained than her natural inclinations, or hold steadfastly to her own position in the hope that the collective product of a multimember tribunal[101] will tend toward the convergence Perry suggests will appear? Either choice seems reasonable under Perry's view, but either one will affect the actual convergence point that is reached. Perhaps an invisible hand will prove sufficient here; some judges will *be* in the center of the culture's moral aspirations, others at the fringe but drifting inward as a result of perceptions about the role. Still, something about the individual and collective distortion possibilities inherent in Perry's scheme suggest that both his descriptive and predictive claims for its success are oversimplified or exaggerated.

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Brest, *supra* note 58, at 1109 (footnote omitted).

101. The Supreme Court's recent inability to muster a majority view in a variety of important cases has frustrated Court-watchers and provoked intriguing and critical commentary. *See* Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982); Maltz, *The Concept of the Doctrine of the Court in Constitutional Law*, 16 GA. L. REV. 357 (1982). To the extent this phenomenon continues, it undercuts the convergence argument advanced by Perry.

Any theory of the judicial task will of course generate some behavioral pressure on judges. Those inclined to follow Ely will have to resist the steady pressure to recast nonparticipational claims in participational terms,[102] or vice versa, as a way of responding to felt instincts and hunches that produce outcomes inconsistent with the theory. And judges inclined to follow purely interpretivist modes, or noninterpretivist approaches rooted in traditional and/or contemporary values will face similar pressures to reformulate and temptations to manipulate.[103] But all these pressures and temptations are more severe as a theory becomes more open-ended and value-detached, and Perry's approach is thus maximally vulnerable to problems of intellectual manipulation and pure result-orientation.

Perry's version of the Court's role is also maximally vulnerable to the charge of elitism of the worst sort. Perry admits to his elitist bias when he limits his claim of "collective American self-understanding" of the "chosen" quality of our system to the architects and leaders of the political system.[104] He reinforces that bias when he qualifies his argument for "candor" in judicial opinions by suggesting that "political representatives . . . lawyers, journalists, and any educated citizen who takes half a minute to look"[105] already understand what the Supreme Court is doing, and that it tends not to matter whether the people at large so understand. More directly, his argument that the Court's role is one of moral prophecy and leadership simply ignores the sociology of judicial appointment. So long as the bulk of judicial appointments are affluent, well-educated, and upper middle-class, the moral prophecy such appointees generate will be systematically skewed in the direction of those biases and ideologies most common in that group. That risk, too, is common to all constitutional theories, but the totally untethered quality of Perry's view once again elevates this kind of risk to the highest possible level. One need not be committed to a Marxist view of social organization to fear that Perry's expected role of moral reason may turn out to be no more than dominance of the most powerful class.[106] Yet, this risk seems to be one Perry courts, rather than avoids.

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102. *See* Cox, Book Review, 94 HARV. L. REV. 700 (1981) (arguing that abortion claims could be framed in participational terms, and so resolved in accord with the result in *Roe v. Wade*).

103. *See* Lupu, *supra* note 24, at 1070-71.

104. M. PERRY, *supra* note 5, at 97.

105. *Id.* at 141.

106. Of course, if one is so committed, that fear will no doubt surface in response to Perry's view. *See* Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979). And Perry's Epiloguish evasion of the question of judicial protection of constitutional rights to economic subsistence is good confirmation of that fear. M. PERRY, *supra* note 5, at 164. Ely was surely right on this one—mention food or

One wonders how and why he is willing to place so much faith in the Court; at times, the argument is a peculiar cross between "Father Knows Best" and the divine right of kings.[107]

Finally, Perry's allocation of role to the Court carries with it some special costs in cases where the Court upholds controversial legislation. The legitimating force of such pronouncements of course has rhetorical and political, as well as precedential, force over what may be a substantial period of time.[108] The symbolic force of the legitimation is much stronger under Perry's theory than under a variety of others. The process-perfecting judge who votes to uphold a statute is saying no more than the political mechanism which produced it is trustworthy, not that the statute is good or just. A statute-validating vote from a judge who will depart from interpretive review only when a law runs afoul of deeply embedded national values is simply a statement that our collective social and legal tradition, virtuous or not, does not stand in the way of some particular innovation. But what of pronouncements by the Court which have been assigned the institutional role of leader of our moral evolution? When a Court placed in that role puts the force of its morally prophetic stance behind its judgments, the society may struggle for a substantial period of time against the force of that prophecy. *Plessy v. Ferguson*[109] is perhaps the clearest example of the costs of constitutional legitimation of an unjust social order.

Perhaps Professor Perry is fully sensitive to the price a Court of his persuasion would have us pay. Such sensitivity is not disclosed in his work, however. Moreover, his brief discussion of the Court's modern substantive due process work suggests he is not so aware. In his commentary on the extent to which emerging doctrine in this area generally supports a "freedom of intimate association,"[110] not bound by traditional values, he concludes that judicial efforts in this area "will

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housing, and "most fundamental-rights theorists start edging toward the door." J. ELY, *supra* note 14, at 59.

107. In purporting to "evaluate" the Court's work, Perry concedes that the institution is fallible. But he asserts, in the most conclusory and unelaborated fashion, that what he calls noninterpretive review "has functioned, on balance, as an instrument of deepening moral insight and of moral growth." M. PERRY, *supra* note 5, at 118. This proposition is surely not proven by the simple assertion of it. Nor is it proven, as Perry also claims, by absence of controversy over some portions of the Court's work. Popular approval, if it exists, may mean no more than the Court's morality is as shallow and reflexive as that of the public at large.

108. For a discussion of the problem of legitimation in the context of advocacy of "passive virtues," i.e., techniques for avoiding decisions on the merits, see A. BICKEL, *supra* note 39, at 111-99.

109. 163 U.S. 537 (1896).

110. M. PERRY, *supra* note 5, at 117 (citing Karst, *The Freedom of Intimate Association*, 80 YALE L.J. 624 (1980)).

not long be the occasion of widespread controversy."[111] The Supreme Court's summary affirmance of a district court's validation of Virginia's sodomy statute[112] is glossed over by Perry as a "but see" citation[113] in an accompanying footnote. Is it not evident to him that the Court's easy willingness to validate the ban on homosexual conduct between consenting adults constitutes a stamp of approval against which homosexual rights proponents must contend?

Put more generally, the nature of the dialogue between the Court and the electorally accountable branches may be influenced by perception of institutional roles. The interpretivist would focus that dialogue on the meaning of the written Constitution. My own views would encompass that focus, and go beyond it to include attention to "deeply embedded values" of individual liberty. The process-perfecter would tailor the interaction among branches so as to heighten attention to questions of fair representation and the openness of political processes. Professor Perry would transform that dialogue into a theological debate, a struggle over the last and best word on moral truth and morally correct answers. Allocating primary power in those sorts of debates to unaccountable institutions tends to preclude compromise, aggravate political divisiveness, and produce angry and disgruntled losers. When multiplied, dialogues with consequences of that sort tend toward the dissolution of the political community.

### C. *The Interpretive-Noninterpretive Distinction*

Academics seem to thrive on dichotomies, and this one is a classic.[114] The distinction between interpretive and noninterpretive review is of immense importance to Perry, on a number of linked grounds. First, as I pointed out in Part I, he has an extremely narrow view of the scope of interpretive review. The great bulk of modern constitutional law is the product, according to Perry, of noninterpretive review. This has two significant consequences. First, noninterpretive review is in need of its own, independent justification; Perry is thus arguing that most of post-1937 constitutional law can only be justified by his functional argument that the Court is a necessary agent of moral evolution. If this functional argument fails, Perry would presumably be compelled to conclude that the bulk of the post-1937 constitutional universe disap-

111. M. PERRY, *supra* note 5, at 118.

112. Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), *aff'g mem.*, 403 F. Supp. 1199 (E.D. Va. 1975).

113. M. PERRY, *supra* note 5, at 213 n.120.

114. Use of this particular terminology to distinguish between the positive and natural lawyers may be traced to Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). *See* J. ELY, *supra* note 14.

pears into a black hole. Second, he argues that noninterpretive review can only be reconciled with democratic norms by recognizing a sweeping congressional power to control and withdraw federal court jurisdiction. Perry would limit a power of this magnitude, however, to matters of noninterpretive review. Thus, the scope of the jurisdiction-limiting power is a direct function of the scope of the noninterpretive review category.

Perry's dichotomous vision of constitutional law is one which in general outline I share — that is, I agree that some case outcomes can only be classified as exercises in noninterpretive review, and that some instances of such review can be justified. He and I part company, however, on what kinds of matters fall outside the legitimate scope of interpretivism. As I hope to show in what follows, his version is extraordinarily and indefensibly narrow. To adopt it would be to destabilize and delegitimize large bodies of otherwise stable and legitimate constitutional doctrine.

Perry's version of interpretivism rests on an explicitly disclosed theory of interpretation. Its initial premise is that each constitutional provision embodies a "value judgment"; the interpreter's duty is to discover and articulate that value judgment, no more and no less, and apply it to matters within its legitimate and intended scope. Up to that point, Perry's interpretivism is wholly conventional and, to my mind, quite sound. It is his implicit next step, however, in which his approach seems to collapse. The "value judgment" to be discerned may be hinted at by the constitutional text, Perry suggests, but the sweeping language of the text must be limited in its capacity to serve as a value repository by reference to the more *specific practices* in the minds of the framers and ratifiers at the time of enactment.[115]

In the most extreme example of this, Perry argues that "*at most* [the framers of the Bill of Rights] intended [the first amendment] to prohibit any system of prior restraint and to modify the common law of seditious libel by making truth a defense and by permitting the case to be tried to a jury."[116] Adherence to an originalist approach[117] of this sort would make of the Constitution *precisely* what Chief Justice Marshall said in *McCulloch v. Maryland*[118] it was *not* to be if it were to endure — that is, a detailed code of particulars, incapable of growth and resistant to adaptation. However accurate Perry may be that the

115. M. PERRY, *supra* note 5, at 70-75.

116. *Id.* at 63-64 (footnotes omitted).

117. By "originalist," I mean to incorporate Paul Brest's notion of fidelity to historically determined "intent of the framers." Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

118. 17 U.S. (4 Wheat.) 316 (1819).

first amendment's enacters were concerned about the particular practices he mentioned, it is of critical significance that the language chosen for the amendment is not merely a specific prohibition on both prior restraints and certain doctrines pertaining to seditious libel.[119] If legal enactments are to be understood as purposive,[120] which Perry seems to concede, interpreters must proceed from consideration of particular practices outlawed, through and including the language chosen to do so, in a more general attempt to assign purpose to provisions at hand.[121] Thus, the assignment of purpose to the free speech and press clauses must surely take into account the specific practices Perry mentions — any such assignment which would not lead to prohibitions on those particular acts with which the enacters were immediately concerned would be presumptively wrong. But an assignment which substituted those prohibitions in particular for a more generalized sense of the amendment's aim would be equally wrong.[122] And given the comparative difficulty of constitutional over statutory change, the rigidities of a narrow "historical practice only" limitation would be deeply threatening to the *McCulloch* idea of evolving constitutionalism.[123]

The illustrations of this defect in Perry's view of interpretation could easily be multiplied. The fifth amendment's privilege against self-incrimination, for example, was designed to outlaw extraction of confessions by torture and the process of seeking compulsory testimony from an accused, who might then be forced into the "cruel trilemma" of convicting himself by his own words, possible perjury charges for lying, or contempt charges for choosing to remain silent.[124] Yet absent an assignment of a value or purpose to the choice to prohibit such practices, the privilege could be understood as outlawing precisely these practices and no more.[125] On this narrow view, the more recent concern

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119. *See* J. ELY, *supra* note 14, at 16; Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353, 377 (1981).

120. *See* Monaghan, *supra* note 119, at 374 n.129.

121. For an extremely sophisticated development of the issues attending the assignment of purposes to constitutional provisions, see Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

122. *Id.* at 488-93.

123. Perry argues that the *McCulloch* argument for growth and flexibility must be limited in its scope to the power-granting provisions of the Constitution. M. PERRY, *supra* note 5, at 33-35. But Perry's argument confuses the requirement of growth with the question of which branch of government can be trusted to oversee the process of growth. For a persuasive response to Perry, one which accurately sees the question as one of constitutional substance, see Michelman, *Constancy to an Ideal Object*, 56 N.Y.U. L. REV. 406, 408-09 (1981).

124. *See generally* Arenella, *Schmerber and the Privilege Against Self-Incrimination: A Reappraisal*, 20 AM. CRIM. L. REV. 31, 36 (1982).

125. *Id.* at 36-40.

with compelled lie detector tests,[126] judicial comment on an accused's failure to testify,[127] pressure on government employees to give testimony against themselves or lose their jobs,[128] and the permissibility of custodial interrogation[129] would all be quite simply and easily perceived as lying wholly outside the scope of the privilege.

Perry is willing to concede that an amendment can be responsibly and correctly interpreted to include a modern day "counterpart" or "analogue" to a historical practice which has been outlawed. He insists, however, that practices which the enacters expressed an intention not to prohibit — for example, he argues, racial segregation in schools — can never be viewed as a prohibited modern counterpart of an outlawed historical practice.[130]

Perry's argument on this point is simply inconsistent with the idea of the rule of law. Legal enactments embody goals, purposes, and value judgments; they do not simply reflect, although they may be influenced by, lawmakers' perceptions of the social facts that exist in the world at the time of the enactment, unless those perceptions are explicitly disclosed and expressed as a portion of the governing norm. It is the nature of the judicial task, in constitutional cases or otherwise, to give continuing life to those enactments through a process of reflection and elaboration of the purposes and values expressed thereby. The 1954 decision in *Brown*, forbidding mandatory racial separation in schools, was a decision of precisely this character; it furthered a nineteenth century enactment's goal of equal citizenship without regard to race, by recognizing the necessity of public education to full opportunity and full realization of equal citizenship.[131] The growth of the federal commerce power in light of the evolution of the national economy, and the judicial understanding thereof,[132] reveals in a different context the constitutional necessity of separating the enactors' empirical views from their legal purposes.

A hypothetical example of a problem in the interpretation of statutes may be even more useful to illustrate the point. Suppose the federal laws respecting the status of resident aliens include a provision, enacted in 1920, which makes it a deportable offense for any such alien

126. *Id.* at 43-44 (commenting on Justice Brennan's opinion in Schmerber v. California, 384 U.S. 757, 764 (1966).

127. *See, e.g.*, Griffin v. California, 380 U.S. 609 (1965).

128. *See, e.g.*, Spevack v. Klein, 385 U.S. 511 (1967).

129. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

130. M. PERRY, *supra* note 5, at 71-75.

131. *See* Dworkin, *supra* note 121, at 488-93.

132. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942) (upholding wheat acreage quota, imposed under federal authority, without regard to actual disposition of the crop, on grounds that disposition of wheat may affect the national market).

to be involved in the transportation of women or girls in interstate commerce for purposes of prostitution or other immoral objectives. Suppose a 1983 deportation proceeding against a male resident alien for traveling interstate and sharing sleeping quarters with an adult female companion for wholly noncommercial purposes. Suppose further two alternative versions of legislative history; 1) at the time of enactment, it was generally considered immoral for, under any circumstances, an unmarried adult male to spend the night with an unmarried adult female, and 2) at the time of enactment, such behavior was generally viewed as morally acceptable. If, in either case the society's morality has reversed itself at the time of interpretation, how should the interpreter respond?

The answers to me seem quite plain. The hypothetical statute embodies the judgment that transit for purposes of commercialized sex is to be conclusively deemed immoral, but that the morality of other purposes is to be answered by reference to the standards of the interpreter's time. The statute is a delegation to the interpreter of discretion to make that judgment. Thus, unless the accumulated gloss on the statute would render it unfair surprise to do so, the interpreter in both cases should ignore morality at enactment time, no matter how explicitly expressed in legislative history or other sources. To conclude otherwise would be to freeze the capacity of statutory law to be an instrument of the very moral growth which Perry champions. This of course means in case 2) — behavior once viewed as moral, hence nondeportable, and now viewed otherwise — that a practice known to the enacting agency and not outlawed by that agency's specific intention has become an outlawed practice by a change in public morality.

This view of the law's capacity for growth — more precisely, to absorb or adapt to organic social changes, whether they be moral, cultural, technological, or otherwise — is essential if the concept of fair warning is to be given ongoing meaning. More basically, this view is necessary if law is to be the force of noncalcified cohesion which a society requires for balance between stability and change. In Perry's view, growth capacity 1) is limited by an exceedingly narrow notion of analogy, 2) is not inspired by any coherent sense of purpose, and 3) is limited further by an asserted but undefended and indefensible limitation on applying textually expressed values to situations which once seemed not to implicate those values but now do so implicate them. Perry's approach to interpretation seems to elevate the products of cognitive dissonance, shortsightedness, and disingenuousness above this concern for growth capacity. Why any legal system would choose to do so, however, remains a mystery. And given the exceedingly cumbersome process of constitutional amendment, Perry's view of constitutional interpretation treats the basic law as the most rigid and unyielding of all the

law's forms.

Perry compensates for this flaw by arguing that judges can do on their own, i.e., noninterpretively, precisely what his theory of interpretation would forbid them to do interpretively. This position, it seems to me, is Perry's attempt to avoid taking any real side in the positivist-natural law debate; he can join with Berger on the narrowness of the positive law, and with Brest and others on the expansiveness of noninterpretive modes of adjudication. But the costs of this ambivalence are severe. First, and significantly, adoption and disclosure of this view (both of which Perry recommends)[133] would destabilize and delegitimize enormous bodies of modern constitutional law. In ripping loose from the text all constitutional doctrine that cannot meet Perry's constraints on interpretivism, a court would be purposely sabotaging the idea of continuity in constitutional law. It is hard to overestimate the symbolic force of this sort of rupture. Constitutional law, as the Justices conventionally elaborate it, must continuously be responsive to what has gone before, either by the following of, the reasoned distinction from, or the justifiable overruling of precedent. Although the case law may seem to, in this process, replace the text as the more immediate source of authoritative norms,[134] the text generally remains as a boundary beyond which value selection cannot responsibly proceed.[135] This process of evolution in constitutional law — from text to authoritative, yet bounded, decisional gloss on the text — carries the legitimacy of time, repetiton, professional respect, popular understanding, and continued testing in the adversary process. All these qualities enhance, though of course they do not perfect or insure, the legitimacy and public acceptability of constitutional law.

Professor Perry's narrow view of interpretivism and expansive view of the permissible scope of noninterpretivism abandons this critical connection with the past in favor of a mystical and unperceivable tie to the future. If morality is timeless and universal, then this rejection of yesterday in tomorrow's favor may be of no moment. But Perry himself argues otherwise, in stressing the nexus between constitutional adjudication and existing belief systems within the culture. Moral prophecy is wonderful when it works, but our century, like all others, has seen its share of demagogues and butchers posing as moral prophets. For the

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133. M. PERRY, *supra* note 5, at 140.

134. *See* Brest, *supra* note 26, at 224-29; Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981).

135. Sandalow, *supra* note 134, at 1060 (quoting Karl Llewellyn for the proposition that the limit of interpretation is what "words can be made to bear"). I have suggested a narrowly defined field of value selection in which the text may be transcended. *See* Lupu, *supra* note 24, at 1039-50.

Court to announce its judgment as moral prophecy would quite appropriately invite all the resistance that potentially false prophecy should receive. So long as what the Court decides can and must be responsibly defended as an elaboration in principle of some form of preexisting authority, why should the legitimacy and power of prior approval and application of evolving principle be jettisoned in favor of the possibilities of rejection normally attendant on assuming the prophetic stance?

Several additional and more concrete difficulties attend Perry's confinement of the scope of interpretivism. First, it would render virtually meaningless the power of Congress to enforce and implement constitutional guarantees by virtue of its power in section five of the fourteenth amendment or, for that matter, section two of the thirteenth amendment. If Perry is correct that very little modern constitutional protection of individual rights against states rests on the fourteenth amendment, then Congress lacks power to enforce such rights either remedially or by way of substantive enhancement.

Perry's response to this problem is weak and disingenuous. He suggests that the scope of congressional power to enforce and enlarge individual rights is simply a matter of "federalism,"[136] and that, therefore, the argument that Congress lacks such power is "dated"[137] and irrelevant. This cannot suffice as a response, either in theory or as an expression of the current state of the law. In regard to the latter point, Perry virtually ignores the 1976 decision in *National League of Cities v. Usery*,[138] in which the Court held state sovereignty to be a barrier to a congressional effort, pursuant to the commerce power, to regulate wages and hours of state and local employees. Although it is apparent that the Court has pulled back from the farther reaches of that holding,[139] it has never indicated any willingness to scrap it altogether. The Court has on several occasions held that legislation based on the power to enforce provisions which themselves restrict state sovereignty is free from the *Usery* limitation.[140] Perry's view, however, stands free of those provisions, and hence cannot claim their sovereignty-overriding force.

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136. M. PERRY, *supra* note 5, at 132 n.*.

137. *Id.*

138. 426 U.S. 833 (1976).

139. *See* Federal Energy Regulatory Comm'n v. Mississippi, 102 S. Ct. 2126, *reh'g denied*, 103 S. Ct. 15 (1982).

140. *See* Rome v. United States, 446 U.S. 156, *reh'g denied*, 447 U.S. 916 (1980). *See also* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

> When Congress acts pursuant to § 5 [of the fourteenth amendment], not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional amendment whose other sections by their own terms embody limitations on state authority.

*Id.* at 456.

Thus, Perry unjustifiably ignores a recent and significant judicial pronouncement which suggests the possibility of judicially enforceable limits on congressional actions regulating states as states. Indeed, Perry ignores the entire constitutional history of judicial oscillation on matters of the scope of national power in the federal system, on commerce matters and otherwise. This tendency perhaps enhances his theory's prescriptive force ("this is how it should be"), but at a severe cost of descriptive inadequacy.

Judicial enforceability aside, Perry blithely overlooks a constitutional fundamental. Congress is not a body of general legislative power. It has no power other than that granted in, or fairly inferable from, the power-granting provisions of the Constitution. But Perry's noninterpretivism removes most modern constitutional protection of the individual from the written Constitution, and hence eliminates all congressional power to enforce such protections. On his theory of the source of rights and in his own words, any such exercise of power would be contraconstitutional.[141]

Finally, Perry's view of the expansive quality and range of noninterpretive review is coincidental with the scope of congressional power to withdraw the jurisdiction of the federal courts in constitutional cases. Perry argues explicitly that the scope of that withdrawal power may be limited in various ways when Congress acts against the products of interpretive review, but is unlimited when the congressional target is the product of noninterpretive review.[142]

This distinction is utterly unworkable. It would force the Court to decide in any case whether the congressional target was an interpretive or noninterpretive outcome; if, but only if, the target was the former, the Court would proceed to consider the permissibility of the jurisdictional withdrawal. This responsibility would force upon the Court an untenable choice between honest appraisal of which brand of review was the target and protection of its own institutional commitment to the targeted doctrine or rule. Second, even if the Court could wholly detach its decisionmaking from the pressures of that conflict, the distinction is incapable of principled application. It could never be said with sufficient assurance or precision at what point in the elaboration of a constitutional provision the noninterpretive had "taken over" from

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141. His argument that the recognition of human rights as a concern in international covenants somehow validates congressional power over matters of human rights is bizarre. *See* M. PERRY, *supra* note 5, at 132. The Congress of the United States does not derive its power from the process or substance of international relations.

142. *Id.* at 130, 133. Perry does not argue for any particular limitation in regard to matters of interpretive review. He concedes such limits may exist for those matters, while denying the acceptability of such limits in matters of noninterpretive review.

the interpretive.[143] This is so for the same reason sketched above in the general criticism of this distinction; a provision couched in general terms is not merely a prohibition on some particular practice which inspired that provision. Rather, it is an attempt to constitutionalize some concern of which the historical practice is the nearest-in-time and therefore most compelling example. Elaboration of that concern in the process of adjudication proliferates its applicability, and balances the force of the concern against competing forces in particular conflicts. Perry's view introduces a radical discontinuity in the constitutional cosmos; at some inestimable point, constitutional doctrine departs from the text and takes off into the hyperspace of moral prophecy. At that same point, congressional power to control jurisdiction becomes an absolute. But the precise location of this warp cannot be charted. Congress will have every incentive to move that point closer and closer to historical practice only, the Court in self-protection will prefer a much more expansive view of interpretive review, and no sound structure or principle has been offered by Perry to mediate the conflict.

### *D. The Inadequacy of the Jurisdictional Control Argument*

Even if Perry could persuasively parse constitutional development into interpretive and noninterpretive components, the effort would be in service of a wholly unworkable scheme for reconciling judicial review and electoral accountability. Perry's assumptions and arguments about congressional control over jurisdiction overlook a series of fundamental postulates of the constitutional order.[144]

Perry argues that congressional withdrawal of federal jurisdiction over a subject matter of noninterpretive review is a method to "control," "upset," and "overrule"[145] the judicial process. This position is open to at least three significant objections. First, so long as the basic assumption of the Madisonian Compromise in article III—that is, that state courts of general jurisdiction continue to exist[146]—remains satisfied, I cannot see how the jurisdiction withdrawal will necessarily lead

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143. A similar difficulty attends Professor Monaghan's effort to construct a framework for what he calls "constitutional common law." *See* Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). Professor Monaghan, in contrast to Professor Perry, perceived that his effort contained just such a difficulty, and attempted to address it as best he could. *Id.* at 30-34.

144. An enormous and sophisticated scholarly commentary on this subject already exists. *See generally* Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 20 n.7 (1981).

145. M. PERRY, *supra* note 5, at 132 (footnotes omitted).

146. *See* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953).

to the control or overruling which Perry claims for it. Thus, it may be wholly ineffectual as a control method. Second, once one admits to the legitimacy of motive-centered constitutional inquiry, the kind of jurisdictional withdrawal Perry describes will rarely satisfy the requirement of permissible purpose. Finally, even if the withdrawal "works" to produce some sort of "overruling" and the withdrawal is not invalidated, the consequences of the device for the legal system as a whole are severely dislocational.

My critique will be clarified, I think, by an illustration. Imagine a federal statute which prohibited the distribution in interstate commerce of any book or magazine that made reference in word or picture to the act of sexual intercourse, and which withdrew from the federal courts the power to review the statute for consistency with the first amendment. If, in response to a threatened prosecution under the statute, a book distributor sought federal declaratory and injunctive relief solely on first amendment grounds, Perry would presumably have all federal courts unwilling to entertain the suit. The grounds of the suit's dismissal would be simple, under Perry's theory. Modern obscenity doctrine is wholly noninterpretive,[147] so Congress has total withdrawal power over suits making claims under that doctrine.[148]

Perry's argument, however, goes much further. If our disappointed book distributor stays in business, convinced of the unconstitutionality of the statute, and is prosecuted in the federal district court, Perry would have the court be the forum for the prosecution and simultaneously recognize the preclusion of constitutional review.[149] Thus, in Perry's world, federal courts, up to and including the Supreme Court, could be made the instruments of a deprivation of physical liberty without a defendant being afforded the opportunity to test the legitimacy of the statute under which the deprivation occurs.

Later steps in Perry's theory purport to account for the role which state courts might play in response to withdrawal of federal judicial power. What if our book distributor, realizing that his suit for affirmative relief in federal court will be dismissed and that his constitutional defenses against federal prosecution will be ignored, decides to bring a suit in state court for affirmative relief against federal enforcement of

147. That is, under Perry's version of what is noninterpretive. *See* M. PERRY, *supra* note 5, at 64. Perry maintains that "very little if any modern constitutional doctrine regarding freedom of expression—for example, the protection extended . . . pornographic expression—could be defended as the product of interpretive review." *Id.* (footnote omitted).

148. *Id.* at 133.

149. *Id.* at 136. "[I]n my view the supremacy clause does not prevent Congress from authorizing a federal court to hear a case while at the same time denying to the court the power to enforce a norm not constitutionalized by the framers." *Id.* at n.*.

the statute? Since the statute seems quite clearly defective under federal obscenity precedents,[150] why should the state court not simply enter the requested judgment and relief?

Perry suggests several reasons and scenarios under which it might not. First, he relies on the Lincolnian distinction between law of the case and the law of the land[151] to argue that state courts would not be bound to follow obscenity precedents. That is, he claims that each judicial decision is limitable in theory to nothing more than a resolution of the dispute between the parties to it, and therefore does not necessarily generate an authoritative rule for resolution of identical disputes in inferior courts.[152] On this view of the character of judicial decisions, state courts would be free to make their own independent judgment about the application of the first amendment to this hypothetical federal statute. Such an independent judgment presumably might lead to a state court judgment, unreviewable by the Supreme Court, that the federal statute does not offend "constitutional" principles regarding free speech.

Finally, Perry argues that a state court lacks authority to bind a branch of the national government to a decision based on federal constitutional law, absent reviewability by the Supreme Court.[153] Thus, according to Perry, a state court might give the relief requested by our book distributor, but the United States Justice Department and its agents would be totally free to ignore the state court's commands. If this is so, all of our hypothetical plaintiff's options are empty; his state court suit might fail on its merits, or might succeed and be justifiably ignored by federal prosecutorial officials.

The assumptions underlying Professor Perry's analysis are both dubious and dangerous. First, as I have argued above, the interpretive-noninterpretive distinction is not susceptible of principled application;[154] thus, it is by no means so clear as he suggests that this jurisdiction withdrawal is targeted at noninterpretive review and therefore immune from judicial scrutiny. If the Court concludes that its obscenity doctrine is the product of interpretive review, Perry would presumably concede that both the jurisdictional withdrawal and the substance of

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150. Under Miller v. California, 413 U.S. 15 (1973), words or pictures which describe sexual acts would constitute protected expression unless the work, taken as a whole, in which they were located, exceeded articulated standards of prurience, offensiveness, and lack of value beyond its power to arouse.

151. See comments of Abraham Lincoln on obedience to the *Dred Scott* decision in its particulars, and resistance to it as a "rule," *quoted in* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 28 (10th ed. 1980).

152. M. PERRY, *supra* note 5, at 130-31.

153. *Id.* at 131-32.

154. *See supra* text accompanying notes 116-48.

the restriction on distribution of sexually-oriented literature should be invalidated.

Second, Perry would permit a federal court to be an instrument of prosecution and conviction under this statute, despite the preclusion of the review of the statute's constitutionality. The article III implications of this for an independent federal judiciary, and the deeper implications for a theory of rights protected against momentary majorities, are extremely troubling. Suppose Congress mandated death sentences for non-white defendants in certain categories of criminal cases and precluded judicial review of the constitutionality of this racially discriminatory action. The absence of any textually demonstrable equal protection restriction[155] on the federal government would presumably lead Perry to conclude that the precluded review was noninterpretive, and that the federal courts should therefore quietly succumb and proceed as directed. This would make the court the slavish agent of Congress in any such action, and place the judicial imprimatur upon it by the act of adjudication without resistance to the offending provision. The image of the "hands-tied" judge imposing a race-determined death sentence is more than grisly; it brutally assaults our constitutional tradition respecting the role and independence of courts.[156]

Third, Perry's arguments about the role of state courts in a regime of withdrawn federal review power cannot withstand close analysis. The claim that once Supreme Court review has been withdrawn, prior decisional law no longer generates norms for dispute resolution binding on state courts is a pure confusion of force with reason and responsibility. In a system which includes Supreme Court review of state court decisions on federal constitutional questions, state courts endeavor to follow Supreme Court precedents because, as *Martin v. Hunter's Lessee*[157] long ago made plain, the related ideals of supremacy and uniformity of federal law require it. Those ideals are no less significant nor less embedded in the constitutional structure, itself a source of authoritative legal principle, because Congress has withdrawn federal court jurisdiction. Indeed, state courts would arguably have *additional* responsibility to act in vindication of federal constitutional rights if the Supreme Court had been removed as guardian of those rights.[158] In Perry's

155. I assume that even Perry or Raoul Berger would agree that a state law counterpart to this hypothetical federal statute would violate the equal protection clause of the fourteenth amendment, since a prohibition on race-differentiated punishments was among the 1866 Civil Rights Act provisions. *See* The Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (current version at 42 U.S.C. §§ 1981, 1982 (1976)). Berger argues that the fourteenth amendment was designed to constitutionalize these statutory rights. R. BERGER, GOVERNMENT BY JUDICIARY (1977).

156. *See* Hart, *supra* note 146, at 1379-83.

157. 14 U.S. (1 Wheat.) 304 (1816).

158. *See* Hart, *supra* note 146, at 1401.

world, state courts seem to be motivated only by fear of reversal; absent that fear, they are free to ignore Supreme Court pronouncements. Perry somehow fails to see that the supremacy clause binds state court judges to duties somewhat higher than avoidance of reversal risks.

The nature of these duties, and the ways in which Perry would have state courts contravene or overlook them, deserves some attention. First, Perry's vision of a state court free to ignore Supreme Court pronouncements on a particular subject matter once review has been precluded ignores the multiplicity and hierarchy of American courts. The Supreme Court's obscenity decisions have been cited and followed in the federal circuit courts,[159] federal district courts,[160] and state courts[161] from those of last to first resort on such matters. The law that emerges thereby is not simply a series of isolated pronouncements of victors and vanquished in a marble courthouse in the District of Columbia or elsewhere; rather, it becomes part and parcel of a system of principles binding in and acted upon in all courts. For state courts to ignore the entire corpus of American obscenity law, as a response to an act of congressional jurisdiction control, would simply be lawless.

Still closer to the legitimation of lawlessness, in more extreme fashion, however, is Perry's claim that state courts lack authority to bind national officials in cases falling under the jurisdiction withdrawal. It is critical to note that he is not arguing, on the basis of *Tarble's Case*,[162] that state courts are without power to adjudicate matters in which coercive relief against federal officials is sought. Rather, Perry is claiming that government officials are free to ignore the judgment on the merits of a court with jurisdiction to hear and decide a case. But if government officials are not bound to follow judicial edicts of this sort, on what basis would parties opposing the federal government, in state or federal court, be so bound? One of the underpinnings of judicial authority is the presumption of enforceability of judicial orders. Perry would limit that presumption to a unilateral rather than a mutual one, thereby encouraging resistance to judicial authority on both sides or undermining legitimacy of state court authority when those courts attempt moral prophecy in the name of the federal constitution.

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159. *See, e.g.*, Red Bluff Drive-In, Inc. v. Vance, 648 F.2d 1020 (5th Cir. 1981), *cert. denied sub nom.*, Theatres West, Inc. v. Holmes, 455 U.S. 913 (1982); United States v. Palladino, 490 F.2d 499 (1st Cir. 1974).

160. *See, e.g.*, Wild Cinemas of Little Rock, Inc. v. Bentley, 499 F. Supp. 655 (E.D. Ark. 1980); United States v. Various Articles of Obscene Merchandise, 480 F. Supp. 264 (S.D.N.Y. 1979); Hamar Theatres, Inc. v. Cryan, 365 F. Supp. 1312 (D.N.J. 1973).

161. *See, e.g.*, City of Duluth v. Sarette, 283 N.W.2d 533 (Minn. 1979); City of Tacoma v. Mushkin, 12 Wash. App. 56, 527 P.2d 1393 (1974).

162. 80 U.S. (13 Wall.) 397 (1871). For more elaborate discussion of this point, see Sager, *supra* note 144, at 80-84.

Perry's deep premise that the state courts are not to be respected as full and responsible participants in the constitutional scheme is revealed in additional ways. For instance, he dismisses Professor Sager's recent argument about the need for uniformity in the interpretation of federal law[163] by asserting that the problem of nonuniformity will not arise if the jurisdiction withdrawal is limited to challenges to state laws. But the uniformity question cannot be so lightly glossed over, and Perry misses Sager's point entirely. Sager had argued that Congress is *unlikely* (not unable) to withdraw jurisdiction over cases involving federal statutes and programs because the resulting nonuniformity in interpretation would threaten the congressional goals of the program itself.[164] Nonuniformity of federal constitutional interpretation as applied to state laws, however, generates an entirely *different* set of costs.

Absent the opportunity for federal review, what should a state court do, for instance, if a public school institutes a voluntary prayer session for its pupils during school hours,[165] and a first and fourteenth amendment challenge is commenced? The systemic problems associated with nonuniformity of federal rights, constitutional or statutory, are hardly the score of a new theme in our law.[166] Even in the limited example given—one which does not involve the state in direct coercion of individuals or deprivation of their physical liberty—the costs of nonuniformity are obvious. They include the undermining of a sense of shared national experience, the erosion of public confidence in the idea of federal constitutional rights, the corrosive pressures on state courts to move with the popular tide rather than remain bound by authoritative national precedent, and, in terms of Perry's vision of the judicial function, a state court role in moral leadership of the type that might

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163. Sager, *supra* note 144, at 40. *See* M. PERRY, *supra* note 5, at 136-37 n.*.

164. Sager, *supra* note 144, at 39-40.

165. Such a program clearly runs afoul of the Court's existing establishment clause holdings. *See, e.g.*, Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

166. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816), contains Justice Story's famous words on the point:

> [A congressional grant of appellate jurisdiction to the Supreme Court over state court decisions on federal questions might be motivated by] the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution. Judges of equal learning and integrity, in different states, might differently interpret a statute, or a treaty of the United States, or even the constitution itself. . . . [In such circumstances] the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states. The public mischiefs that would attend such a state of things would be truly deplorable. . . .

*Id.* at 347-48.

have been exercised at the Tower of Babel.

Perhaps the most critical defect in Perry's view is one that transcends the distinction between review of federal law and state law, and cuts to the heart of the system's allocation of judicial power and responsibility. Perry writes as if a state court, free of reversal risk in the federal court system, would be wholly liberated by a withdrawal of federal jurisdiction from the obligation to respect prior judgments of the Supreme Court, other federal courts, courts of other states, and courts within its own state. But precisely the reverse is the only posture consistent with the supremacy clause, by virtue of which "the [j]udges in every [s]tate" are reminded that the "Constitution, . . . [l]aws, . . . and [t]reaties" of the United States are supreme.[167] Perry seems to be arguing that Supreme Court decisions of the noninterpretive variety no longer qualify as part of the "laws" of the United States once jurisdiction has been withdrawn. That can be so only if such decisions were never part of the "laws" of the United States to which state court judges must look for guidance, or are stripped of their quality as "laws" by the act of jurisdictional limitation. If the former is true, state court judges are now constitutionally free to ignore Supreme Court precedents on virtually any subject; that is an assumption which our system has flatly rejected. Indeed, the grant in article III of federal judicial power over "[c]ases, . . . arising under [the] Constitution, the [l]aws of the United States, and [t]reaties"[168] surely seems to be coterminous with the enumeration of sources of "supreme law" in article VI. If decisional products of noninterpretive review are not "law" for supremacy clause purposes, they cannot be "law" for purposes of permitting an article III court to hear disputes arising out of the interpretation of those decisional products. If that were so, much of Perry's enterprise would collapse, because only state courts would remain with jurisdiction to engage in noninterpretive review under the federal constitution. Moreover, Congress would never need to withdraw jurisdiction; the Constitution would not permit such jurisdiction in the first place. Federal question decisions which article III permits the federal courts to render must therefore be presumed to be binding on state courts by virtue of the supremacy clause.[169]

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167. U.S. CONST. art. VI, cl.2.

168. *Id.* art. III, § 2, cl. 1.

169. *Cf.* Cooper v. Aaron, 358 U.S. 1 (1958). The Court stated:

> [T]he interpretation of the Fourteenth Amendment enunciated by this Court in *Brown* is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States 'any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' Every state . . . judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, 'to support this Constitution.'

*Id.* at 18-19.

If, on the more likely other hand, Perry's view is that the "law" of Supreme Court opinions is made into "no law"—i.e., erased, even if not reversed—by the jurisdiction limitation, he has once again introduced the possibility of radical discontinuity into the American legal system. An essential quality of the Anglo-American ideal of the rule of law inheres in its complex premise that there will always be law to apply, that every case can be decided by careful sorting, reconciling, and reasoning from the principles that have previously governed analogous matters.[170] The concept of erasure—a rip in the seamless web—is destabilizing, anarchical, and wholly alien to the structure of this system. Although designed to accommodate gaps and interstices, our legal order is without instruments to respond in a sensibly or orderly way to sudden gaping holes. Indeed, the only instrument available seems to be judicial whim, in its most subjective, unconstrained form. Perry's argument about the position of state courts in a regime of withdrawn federal review is thus inconsistent with the pursuit of objective, dispassionate justice implicit in the ideal of the rule of law.

Perry hints that he recognizes the dangers of his argument that Congress has such broad control over jurisdiction in constitutional cases, but suggests that the real danger is slight. That is, the real weight of his argument here is that Congress has always been empowered to limit jurisdiction, has rarely done so, and need not be feared in the future.[171] "Relax," a Perry paraphrase might run, "Congress has rarely done this and won't start now; perhaps its members covertly agree with the great bulk of the Court's work. The democracy, acting through Congress, could stop the Court, and hasn't, so it must approve of the Court's product and is likely to continue to so approve."

This view is disturbing for several reasons. First, it ignores the force of existing constitutional doubt about jurisdiction removals. If the Court were suddenly to announce that it adhered to Perry's position, some of the objections to such removals, now voiced in terms of constitutional principle, would disappear. The objections might reappear in defense of the merits of the targeted doctrine, but that is clearly a more politically dangerous position to take. Thus, jurisdiction removals might become far more likely in a world in which their constitutionality was unquestioned.

Second, Perry's view effectively abandons the requirement that all legislation be motivated by a constitutionally permissible purpose.[172] In

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170. For a sophisticated presentation of this view, see R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

171. M. PERRY, *supra* note 5, at 134-35. *See id.* at 128-29 (footnote omitted)(quoting C. BLACK, DECISION ACCORDING TO LAW 37-39 (1981)).

172. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev., 429 U.S. 252

the hypothetical obscenity statute discussed above, the challenged legislation, including and especially the jurisdiction withdrawal, is designed to prohibit the exercise of rights which the Supreme Court has been willing to protect, and to deprive those who seek to exercise such rights of any judicial forum for their vindication.[173] Such substantive and remedial repression cannot plausibly be argued to be in pursuit of a constitutionally valid goal.[174] Put the other way, the statute's purpose can be viewed as legitimate only if we are prepared to give Congress, when it acts to limit jurisdiction in matters Perry would deem noninterpretive, the final word on the legitimacy of its own purposes.

Perry's willingness to concede to Congress the power to undo federal constitutional rights by legislation with simple majority support is thus at war with a most basic assumption of American constitutionalism. Individual rights against government would need no special judicial protection if the processes of majoritarianism could be systematically trusted to respect the interests of unpopular minorities, be they racial, religious, or political. Neither the Bill of Rights nor the post-Civil War amendments would have been necessary if those processes had historically been reliable. That, unfortunately, is not our constitutional or political history.

Michael Perry would not grant Congress plenary power to withdraw jurisdiction over matters of interpretive review, because such a power would threaten the enforcement of the framers' "value judgments."[175] But if having the Court play the role of moral prophet is a "compelling functional justification" for noninterpretive review, how can he defend handing over to Congress a sword by which portions of the prophecy can be sliced off the *corpus* of federal constitutional law? The rights generated by noninterpretive review are, in Perry's scheme, second-class rights, because of their vulnerability to congressional power.[176] Yet virtually all of the real matters of significant modern controversy, Perry argues, are matters which trigger the process of

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(1977).

173. For the analysis demonstrating the absence of a judicial forum under Perry's view, see *supra* text accompanying notes 147-61.

174. For a more elaborate analysis of permissible motivation, and the analytic consequences of imposing the requirement, in the context of jurisdiction withdrawals, see Sager, *supra* note 144, at 74-80.

175. M. PERRY, *supra* note 5, at 133 (footnote omitted). Early in the book, Perry argues that "completing the framers' vision of the Constitution as supreme law" constitutes a "compelling functional justification" for judicial review in interpretive matters. *Id.* at 16, 22 (footnote omitted).

176. *Cf.* Schrock & Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1158-71 (1978) (criticizing on similar grounds Professor Monaghan's idea of a legislatively reversible constitutional common law).

noninterpretive review. In all modern disputes involving minority rights, therefore, Perry has placed the final say in the hands of a national legislative majority rather than in a life-tenured, politically insulated judiciary. History suggests the dangers of such a course. The amendment process can of course lead to a loss of pre-existing rights, but that process was made difficult precisely to protect against such losses at the hands of a momentarily enflamed legislative majority.

Perry argues for an expansive and fierce judicial activism, and, in what might be seen as an intellectual analogue to the physical laws of action producing equal and opposite reaction, a correspondingly broad power of congressional control of judicial review and its consequences. In claiming this breadth of judicial and legislative power, Perry says that the American polity is committed to basic principles of "ongoing moral reevaluation"[177] and "electorally accountable policymaking,"[178] principles which can be in opposition. When they are so opposed, concludes Perry, "the American polity is committed, in effect, to a paradox."[179] Simultaneous and deep attachment to powerfully contradictory principles is not a sign of commitment. It is rather the sign of confused and conflicted *unwillingness to make a commitment*, and to pay its price. If Perry is right, we are in more trouble than I would otherwise have thought.

## III.

Each attempt at an adequate and field-covering constitutional theory faces three major tasks in the construction and elaboration of premises. First and foremost, the theory must trace itself back into some set of acceptable premises. For some, such premises are circumscribed by the text;[180] for others these premises are to be found, *inter alia*, in natural law,[181] "deeply embedded values,"[182] evolving moral consensus,[183] or overarching textually-generated norms of process and participation.[184] In some theories, various extra-textual sources are in supplement to the text;[185] in others, such sources guide the proper con-

177. M. PERRY, *supra* note 5, at 138.

178. *Id.*

179. *Id.*

180. *See, e.g.*, Bork, *supra* note 60; Monaghan, *supra* note 119.

181. *See, e.g.*, Dworkin, *"Natural" Law Revisited*, 34 U. FLA. L. REV. 165 (1982).

182. *See* Lupu, *supra* note 24, at 1040.

183. *See, e.g.*, Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973). *See also* J. ELY, *supra* note 14, at 216 nn.94-96.

184. *See* J. ELY, *supra* note 14.

185. *See* Lupu, *supra* note 24, at 1039-50, 1070-77.

struction of the text.[186] A great deal of the scholarship in constitutional law over the past decade has been in search of first premises, and most of it has been enormously stimulating and valuable. Indeed, Michael Perry's book is simply the most recent elaborate effort of this kind.

Second, a constitutional theorist must move beyond his root premises to a set of intermediate premises. These sorts of premises, often ignored in the constitutional literature, represent the connective tissue between a theory's most basic building-block assumptions and its adjudicative standards, doctrines, and rules on the other. John Ely's analysis of the ways in which prejudice-distorted legislation may produce breaches of the duty of representation in the common good[187] is a useful example of the sort of premise-building I describe. Intermediate premises deserve a good deal more attention than they have generally received, for two reasons. First, they serve to clarify, and make concrete the original premises from whence they spring. Second, they tend to be the generative source for the third phase of theoretical elaboration — that of construction of the premises upon which adjudication ultimately will rest. Intermediate premises, moreover, may have both process and substantive dimensions. It will be critical, for instance, in the creation of a doctrine of presumptively forbidden classification, to articulate openly the problems of judicial competence attendant upon the various formulations of that doctrine.[188]

Third, and of course at a level of specificity and detail higher than the first two phases, a theory's original and intermediate premises must be woven into a more textured body of doctrines, standards, and constitutional rules from which constitutional decisions can be made and defended. This frequently is a slippery and dangerous portion of theory-building, because choices within it may seem arbitrary, and results logically required by it may appear undesirable. At a different point of worry, this stage of theory-building may reveal the radical indeterminacy — hence the practical uselessness — of the entire enterprise.[189] The risk of foundering on one or another of these shores is enough to deter many writers from ever offering any particular set of adjudicative premises.

The evolution from original and intermediate premises to adjudicative ones is critical in several respects. First, it will help to measure the adequacy of a particular theory — if it generates no adjudicative

186. This is particularly true of J. ELY, *supra* note 14.

187. *Id.* at 135-70.

188. *See* Lupu, *Choosing Heroes Carefully* (Book Review), 15 HARV. C.R.-C.L. L. REV. 779, 788-91 (1980)(commenting on Professor Ely's formulation).

189. *Cf.* Ely, *Democracy and the Right to be Different*, 56 N.Y.U. L. REV. 397 (1981) (defending his theory against attacks that it is indeterminate).

premises, or is totally indeterminate in that generative effort, that will be powerful evidence of a theory's emptiness. If, on the other hand, it generates conflicting premises, its contradictions will have been revealed. Alternatively, if a theory generates a series of related, overlapping, yet not wholly coincidental adjudicative premises, that theory's basic coherence and remaining normative choices will be disclosed. More fundamentally, adjudicative premises are necessary if constitutional theory is to do what such enterprises generally are designed to do—i.e., guide the solution of unforeseen legal problems in consistent, principled and just ways.

Complicating the task of construction of adjudicative premises yet further are all the constraints imposed by the basic features of our ongoing legal system — *stare decisis*,[190] the relationship between constitutional law and other bodies of law, the need for creative continuity in any field of law, the problems of decisionmaking on a multi-member court,[191] and more. No constitutional theory can remain internally pure and yet retain its overall power and effectiveness in the face of these constraints.

Michael Perry's attempt at constitutional theory-building, as it is presented in *The Constitution, the Courts, and Human Rights*, is insufficient when judged by the quality of adjudicative premises it generates, for it generates none with any power and specificity sufficient to guide the decisionmaker. The notion of moral prophecy contains nothing resembling a guide for a court trying to measure its performance, its convergence with the larger culture, or its success or failure as a prophet. The distinction between interpretive and noninterpretive review is, as has been shown above, insufficient to guide a court in all but the most extreme cases. And it is that very distinction which Perry offers, to my mind with equal insufficiency, for guidance on questions of the scope of congressional power to control federal jurisdiction.

It is significant, and in many ways more telling than any of my criticisms, that Perry's few efforts to "apply" his theory are either totally superficial or devoid of all substantive content. He promises to address the issue in the *Abortion Cases*,[192] but when he finally does, he offers only a few banalities about the inadequacy of the opinions in those cases and the possibility that judges perhaps should defer in cases involving "a fundamental political-moral problem of unusual complex-

190. *See, e.g.*, Monaghan, *Taking Supreme Court Opinions Seriously*, 39 MD. L. REV. 1 (1979).

191. *See* Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982); Maltz, *The Concept of the Doctrine of the Court in Constitutional Law*, 16 GA. L. REV. 357 (1982).

192. Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973). *See* M. PERRY, *supra* note 5, at 118.

ity."[193] Ultimately, he makes no attempt to criticize or defend the outcome of the *Abortion Cases*; he escapes behind the screen of (in his view) plenary congressional power to withdraw jurisdiction from the federal courts to hear challenges to state abortion laws.[194] This sort of adjudicative premise is a blunderbuss, and, as I have argued in Part II, D., is likely to miss the intended target while damaging several unintended ones.

Moreover, Perry in his final chapter on "Judicial Protection of 'Marginal' Persons" fares no better by the criterion of adequacy of adjudicative premises. He offers no principled guidance on how to decide which groups constitute "marginal" persons — why felony convicts but not the most recent group slashed from AFDC or the food stamp program? Nor does he suggest any standards by which to decide how much protection should be given institutional inmates. Enjoining physical beatings and requiring life-and-limb saving medical care does not seem to require complexity of judgment, but how is the judge to decide how many psychiatric visits per week the Constitution requires?

Professor Perry's work does not operate well at this level of the particular, either because he has avoided that level of analysis or is indifferent to it. Either way, nothing in his work unites scholar and judge. Nothing that he writes draws on the developing *corpus* of constitutional law as a source of data from which to construct integrative approaches and pragmatically useful adjudicative tools and approaches.

The trend exemplified by Professor Perry's work is not, I think, one for us to follow. Trained in this system and forever incapable of being completely detached from it, constitutional scholars and lawyers might well turn their energies toward constructive criticism, toward a set of adjudicative premises by which the Court's work and grander theory can at least be partially meshed. Expectations of a role for theory any broader than that of general guidance toward a set of adjudicative premises are both unreasonable and ultimately alienating; simultaneously, expectations of the process and substance of constitutional adjudication any narrower than that of rigorous, intellectual, good faith struggle towards a coherent constitutionalism within a virtuous society are equally alienating and self-defeating. Perhaps no individual's work can survive this prescription of reduced expectations for the grand and heightened expectations for the particular. Yet if I have accurately de-

193. M. PERRY, *supra* note 5, at 144.

194. *Id.* at 145. He also offers survey data of popular support for the idea of no state intervention in the abortion decision, *id.*, but this point is surely irrelevant to his claim about the independence of morally correct answers from the popular will. Or is it? *See supra* text accompanying notes 57-88.

scribed our common dilemma, perhaps every individual's work can contribute to its solution.