

## BOOK REVIEWS

### HISTORY AND MORALS IN CONSTITUTIONAL ADJUDICATION

THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS. By Michael J. Perry.<sup>1</sup> New Haven, Connecticut: Yale University Press. 1982. Pp. xi, 241. \$24.00.

*Reviewed by Harry H. Wellington<sup>2</sup>*

Michael Perry believes that, in assessing the legitimacy of judicial review, one must distinguish sharply between its "interpretive" and "noninterpretive" aspects. Perry finds no difficulty in claiming legitimacy for interpretive review (pp. 11-19); noninterpretive review is another matter. Why noninterpretive review — which he sees in every important constitutional adjudication of human rights questions (p. 19) — is suspect, and how its legitimacy can be established, constitute the heart of Perry's concise essay on the theory of American constitutional law.

Judicial review, a longstanding and significant feature of American government, occurs when a court, in a "case or controversy," passes upon the constitutionality of governmental action. Judicial review manifests itself most dramatically when the Supreme Court declares unconstitutional a statute passed by Congress and signed into law by the President.

According to Perry:

The Supreme Court engages in *interpretive* [judicial] review when it ascertains the constitutionality of a given policy choice by reference to one of the value judgments of which the Constitution consists . . . . The [judicial] effort is to ascertain, as accurately as available historical materials will permit, the character of a value judgment the framers constitutionalized at some point in the past . . . . The Court engages in *noninterpretive* review when it makes the determination of constitutionality by reference to a value judgment other than one constitutionalized by the framers. (Pp. 10-11).

Perry is explicit about a limit he imposes on the notion of noninterpretive review. He uses the term when addressing "the legitimacy of constitutional policymaking (by the judiciary) that goes *beyond* the value judgments established by the framers of the written Constitution" (p. ix). He is "not concerned with the distinct issue of the legitimacy of constitutional policymaking that goes *against* the framers' value judgments" (p. ix). This latter review Perry calls "contracon-

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stitutional" (p. ix). Establishing the legitimacy of contraconstitutional review might not be possible; surely the effort would have to be heroic. Some academic lawyers — even some who, like Perry, favor searching judicial review of human rights questions — have, in their work, made a distinction similar to the interpretive/noninterpretive distinction posited by Perry.<sup>3</sup> He uses the distinction very differently, however, and for him it is sharper. He seems much surer of where to draw the line and is almost stridently insistent upon drawing it.

Unless there is an obligation to make this sharp distinction between forms of constitutional adjudication, I do not understand why a proponent of judicial review would make it. It cuts across the grain of our professional training, for it vastly increases the already difficult task of justifying judicial review. Perry plainly believes that there is an obligation to make the distinction — that it is "fundamental" to constitutional theory (p. 10). Beneath this belief lies a particular conception of adjudication. I shall try to imagine what it might be and to argue that it, in turn, rests upon a flawed understanding both of the proper uses of history in adjudication and of the interrelationship of governmental institutions.

If the conception I criticize does not underlie Perry's work, I confess to be bewildered, for I cannot imagine any other conception that would drive a theorist to believe that he must distinguish between interpretive and noninterpretive review. In Perry's case the distinction not only makes the problem of justifying judicial review much harder, but also seems, quite understandably, to push Perry into positions that are inconsistent with his ultimate resolution of that problem.

## I.

Let us get at conceptions of adjudication by supposing that the Constitution is a statute. This means that the Constitution, and judicial decisions under it, can be amended by Congress. To be sure, statutory and constitutional adjudication are not the same. But thinking first about the former helps one to understand the latter.

When dealing with legislation that is meant to govern vast areas of life over long periods of time, why would one hold a conception of statutory interpretation that demanded a distinction between interpretive and noninterpretive adjudication?<sup>4</sup> The explanation is based on

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<sup>3</sup> See, e.g., Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U.L.Q. 695 (objecting to noninterpretive judicial review); Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975); Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981); cf. J. ELY, *DEMOCRACY AND DISTRUST* (1980) (leery of, but ultimately favoring, searching judicial review).

<sup>4</sup> "Contrastatutory" adjudication must be distinguished from other kinds of statutory adjudication. See G. CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 23-26 (1982)

two broad and interrelated sets of ideas. The first comprises beliefs about the certainty of language and the methods of discovering its meaning. The second is made up of beliefs about the allocation of institutional responsibilities between legislatures and courts.

An observer insisting on the interpretive/noninterpretive distinction, who wished to argue that interpretive statutory adjudication should be the norm, would have to be optimistic about a draftsman's ability to capture complicated ideas in words with a good deal of precision. He would have to be optimistic as well about the existence of a definitive historical record to resolve linguistic ambiguity. This optimism would have to persist even though the observer knew full well the realities of the legislative process, including the uses of intentional ambiguity and the purposeful manipulation of what becomes legislative history. Moreover, the optimism would have to continue even though the observer recognized, wherever he looked, that the meaning of a text never remains fixed, that indeed at any time texts are rich with meanings, and that competing accounts of the past are attributable to fresh perspectives as well as new information.

The observer who differentiates between interpretivism and non-interpretivism must be not only optimistic about the clear presentation of complex ideas, but also apt to embrace a strong version of the standard distinction between legislation and adjudication: law is *made* by duly elected representatives and *applied* by courts. According to such an observer, the difference between making and applying the law is, at its center, a sharp one. And when it is blurred, the courts should — although I cannot imagine how they could — keep clear of any action that constitutes an assumption by judges of the legislative prerogative.

Contrariwise, the observer (like me) who finds it unnecessary to adopt the interpretive/noninterpretive categories in statutory adjudication is likely to see the drafting and enactment of a complex statute as a process radically different from the writing of a document by a single author. Whatever such an observer believes about understanding single-author texts, he is impressed by the facts that a statute is the product of negotiation, that negotiation of complex issues usually leaves major problems unresolved, and that language on which people of divergent views can agree often must be — to put it euphemistically — “open textured.”

Moreover, although this observer, in his quest for the meaning of a single-author text, may wonder about the usefulness of attempting to inquire into the author's intention, he doubts that it is even coherent to talk about the intention of legislators as a class. And if, for guidance, he decides to search for legislative intent, he does so know-

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(analyzing this reviewer's theory of the nullification of statutes as inconsistent with “legal topography”). As with “contraconstitutional” adjudication, line-drawing may be difficult.

ing that this perhaps incoherent thing he seeks will almost surely not reveal itself in the history of a statute's enactment with sufficient clarity to become the authoritative source of the statute's meaning. Of course, he also knows that the statute, not legislative intent or history, is what legislators enact.

Nor does this observer accept the sharp distinction between making and applying law, between legislature and court. Although he concedes that each institution has discrete functions, he sees the two engaged in a common enterprise of governing the future wisely. And because of the adumbrated difficulties inherent in enacting statutes to control outcomes within the particularist perspectives of concrete cases, he sees lawmaking as an inevitable and desirable function of adjudication.

The problem for this observer, therefore, is not how to legitimize judicial lawmaking, but how to make law properly. This he sees as the major issue of statutory adjudication. It translates into the following question: what are the sources of law available to a court in the great cooperative lawmaking enterprise it shares with the legislature?

## II.

I shall return to this question in its constitutional setting. But first I want to make it clear that, as far as I can tell, Perry does not see any need to employ an interpretive/noninterpretive distinction in statutory adjudication. In a textual footnote, he writes:

[The] concededly legitimate policymaking functions [exercised by the judiciary in nonconstitutional cases] are undertaken [in] the judiciary[']s role as delegate of the legislature; whatever policy choices the judiciary makes in nonconstitutional cases are subject to revision by the ordinary processes of electorally accountable policymaking. In that sense, nonconstitutional policymaking by the judiciary is electorally accountable, even if the judges themselves are not. (P. 28 n.\*).

"[E]lectorally accountable policymaking" seems for Perry to be the factor that makes the interpretive/noninterpretive distinction important for constitutional theory. He believes that "[w]e in the United States are philosophically committed to the political principle that governmental policymaking . . . ought to be subject to control by persons accountable to the electorate" (p. 9).

Does the fact that there is more accountability to voters in statutory than in constitutional adjudication affect the case against the necessity for an interpretive/noninterpretive distinction in the latter setting? All of the arguments I have made against the usefulness of the distinction retain whatever force they may have when the shift is made from

statutory to constitutional adjudication.<sup>5</sup> Of course, between the Constitution and the Court stands the legislature. And, to speak Perry's language, one might suggest that the Constitution delegates noninterpretive questions exclusively to an electorally accountable policy-making body, and that it does so because giving such power to a nonelectorally accountable body is simply too dangerous. But that suggestion presupposes the utility of the distinction between the two types of judicial review and hence begs the question. If one avoids begging the question, one finds that the posited delegation to elected decisionmakers calls into question all judicial review, which after all is countermajoritarian (that is, weak on accountability to voters) and therefore requires justification.

### III.

I came away from reading *The Constitution, the Courts, and Human Rights* believing that Perry's preoccupation with the distinction between interpretive and noninterpretive review did indeed make it harder for him to deal with constitutional adjudication in human rights cases. The problem is that the contrast between the two modes of review he has imagined is so stark. In the interpretive mode, judges are on firm ground in applying the "value judgments" of the framers. If it is not an easy task, at least it is a familiar one, and when that task is over the judge must have a wonderful sense of serenity: he has been true to those great men who conceived us in liberty.

When the judge is in the noninterpretive mode, however, he is at sea. Where is he "to locate a source of values . . . that can serve as a reservoir of decisional norms for human rights cases" (p. 97)? Perry, in advising the Court, first uses "biblical imagery" (p. 98) and then indicates that, although the metaphors may sound strange, the vision endures:

The American people still see themselves as a nation standing under transcendent judgment: They understand . . . that morality is not arbitrary, that justice cannot be reduced to the sum of the preferences of the collectivity. They persist in seeing themselves as a beacon to the world, an American Israel, *especially in regard to human rights* ("with liberty and justice for all"). And they still value, even as they resist, prophecy — although now it might be called, for example, "moral leadership."

The significance of this religious American self-understanding for our purposes is that it supplies the critical context in which the func-

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<sup>5</sup> Indeed, because the making or amending of the Constitution requires, respectively, adoption or ratification by the nation as a whole, the usefulness of intention as a tool for resolving ambiguity is diminished. See J. ELY, *supra* note 3, at 16-18.

tion of noninterpretive review in human rights cases is finally clarified. Such judicial review represents the institutionalization of prophecy. The function of noninterpretive review in human rights cases is prophetic; it is to call the American people — actually the government, the representatives of the people — to provisional judgment. (Pp. 98–99) (footnotes omitted).

But although such judicial review serves a prophetic function, prophecy itself is not, I believe, meant to be the “reservoir of decisional norms” (pp. 122–23) — nor, surprisingly, is it the justification for such review (p. 99). Perry’s account here turns on the “essential claim” that “[n]oninterpretive review in human rights cases has enabled us to maintain a tolerable accommodation between, first, our democratic commitment and, second, the possibility that there may indeed be right answers — *discoverable* right answers — to fundamental political-moral problems” (p. 102).

I take it to be Perry’s view that, if there are “*discoverable* right answers,” they will reveal themselves more easily to judges than to legislators (pp. 100–01), that these right answers constitute “a reservoir of decisional norms for human rights cases” (p. 97), and that, accordingly, the Court is to try to make the discovery and to call the representatives of the people to “provisional judgment” (p. 98).

Two questions come to mind. First, how is this discovery to be made? Perry tells us: “The ultimate source of decisional norms is the judge’s own values (albeit, values ideally arrived at through, and tested in the crucible of, a very deliberate search for right answers)” (p. 123). What if “the judge’s own values” are idiosyncratic? Perry’s answer: “Surely there are *practical* limits to what a judge should say is constitutionally required or forbidden, his own values notwithstanding” (p. 123).

Second, why is the judgment “provisional”? Perry’s answer:

The relationship between noninterpretive review and electorally accountable policymaking is dialectical. The electorally accountable political processes generate a policy choice . . . . In exercising noninterpretive review, the Court evaluates that choice on political-moral grounds, in the end either accepting or rejecting it. If the Court rejects a given policy choice, the political process must respond, whether by embracing the Court’s decision, by tolerating it, or, if the decision is not accepted, or accepted fully, by moderating or even by undoing it. (P. 112) (footnote omitted).

And what is the method for “moderating” or “undoing” the Court’s decision? What safeguards the principle of electoral accountability in this dialectical relationship? Perry rejects a number of standard suggestions (pp. 126–28), including “the possibility of amending the Constitution” (p. 127). What he embraces is “the legislative power of Congress (and the President, who may sign or veto legislation passed

by Congress) to define, and therefore to limit, the appellate jurisdiction of the Supreme Court and the original and appellate jurisdiction of the lower federal courts" (p. 128).

#### IV.

In further examining the section of Perry's book that I have just attempted to explicate, I shall, in this Part and the next, limit my comments to two internal difficulties that I hope are not fatal to his worthy, if misguided, enterprise. I certainly do not mean, by limiting my observations in this way, to endorse what I have not attacked. Indeed, in the final Part of this Review I shall outline a position on judicial review that either directly or by implication takes issue with much of what Perry says.

Consider the following elements in Perry's conception of morality and constitutional adjudication: there may be discoverable right answers "to political-moral problems" (p. 102). Noninterpretive judicial review in human rights cases is legitimate because courts are institutionally better equipped to search for and discover such answers. Moreover:

The basic function of that practice is to deal with those political issues that are fundamental moral problems in a way that is faithful to the notion of moral evolution (and therefore, to our collective religious self-understanding) — not simply by invoking established moral conventions [which is what legislatures are apt to do (pp. 100–01)] but by seizing such issues as opportunities for moral reevaluation and possible moral growth. (P. 101).

Of course, "the ultimate source of decisional norms is the judge's own values," but as noted above, Perry believes that "there are *practical* limits to what a judge should say is constitutionally required or forbidden, his own values notwithstanding" (p. 123).

When the constitutional question is inescapably before the Court, however — when there exist no other grounds on which to decide the case and no principled way of declining to decide it — how can the judge who is certain he has found the right answer possibly suppress it in favor of the wrong answer simply because the right answer is startling?<sup>6</sup>

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<sup>6</sup> Practical considerations are important in constitutional adjudication, as Alex Bickel has shown us. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 111–98 (1962). But Bickel's "passive virtues" are methods for postponing constitutional decision. On the whole, they relate to the timing of a decision on the merits. Perry's practical limits are very different: they relate to the content of a decision on the merits.

Part of Perry's justification for his practical limits is that "the development of constitutional doctrine should proceed somewhat cautiously and incrementally if the dialectical relationship between noninterpretive review and the processes of electorally accountable policymaking is to

Notice that the issue would evaporate if Perry gave up his belief that judges are to search for right answers to moral questions — practical considerations could then limit judicial innovation — or if he abandoned his view that “the ultimate source of norms is the judge’s own values.” But both of these positions are critical to Perry’s notion of morality in constitutional adjudication.<sup>7</sup>

Perhaps Perry could give up his admonition that judges should moderate belief in the right by attention to the practical. That concession, however, would put an even greater burden on the jurisdictional trump that Perry has dealt Congress. Unfortunately, as it is, that card is a joker in Perry’s constitutional theory.<sup>8</sup>

## V.

The power of Congress over the jurisdiction of the Supreme Court is, for Perry, a functional necessity: without it, the “political principle that governmental policymaking . . . ought to be subject to control by persons accountable to the electorate” (p. 9) (footnotes omitted) would be too substantially undermined by the practice of noninterpretive judicial review. The relationship envisioned between such review and legislation is “dialectical” (p. 112); it involves a “constitutional dialogue between the Court and the other agencies of government” (p. 113).

But what kind of dialogue is it in which one participant can silence the other by cutting out his tongue when offended by his words? Is that the way to arrive at “discoverable right answers . . . to fundamental political-moral problems” (p. 102)?

Of course, as Perry recognizes, “[t]he Court is a fallible institution. It is capable of giving false prophecy” (p. 115). But in Perry’s world, as far as I can tell, Congress is neither as well equipped as the Court to know right answers from false prophecy nor constrained to use its awesome power over jurisdiction against only the latter.

Here, too, Perry could overcome the difficulty if he were to abandon his belief that judges are obliged to search for right answers to moral questions. But that would be to give up everything. He could, however, substantially modify his position on jurisdiction without damaging his general theory. That theory would work better — not

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be a stable, productive one” (p. 124). But it is difficult to understand how Perry’s dialectical relationship can function at all if the substance of the constitutional decision is different from what the judge believes is the right answer.

<sup>7</sup> At one point, however, Perry reasons that judges should perhaps feel constrained by community values or predictions of moral progress, and he speculates that peer pressure will restrain eccentric judges (p. 124).

<sup>8</sup> See generally Lupu, *Constitutional Theory and the Search for the Workable Premise* (Book Review), 8 DAYTON L. REV. 579, 609–18 (1983) (assessing adequacy of the jurisdictional control argument). Lupu’s article is an interesting, highly critical appraisal of Perry’s book.



well, but better — if the “dialectical relationship” relied on formal constitutional amendment in cases in which society initially considers the Court’s decision intolerable. Formal constitutional amendment does continue the dialogue on the merits, in many fora and, generally, for an extended time.

## VI.

Perry rejects reliance on formal constitutional amendment because of his strong commitment to the concept of “electorally accountable policymaking” (p. 127). Yet for Perry this concept covers, on one hand, state and federal legislation, and on the other, judicial law-making at common law and in statutory interpretation (p. 28 n.<sup>8</sup>). Indeed, it extends to noninterpretive review by elected state court judges (p. 131). The concept is so plastic that I wonder whether Perry is really worried about something else — namely, the finality of Supreme Court decisions holding legislation unconstitutional.

In the United States, major decisions are made by individuals and groups that are well insulated from accountability to voters. But if not cancellable, these major decisions can at least be modified (sometimes, however, only after a considerable period of time) should they prove to be publicly indigestible. In this sense, they lack finality. How, though, does one modify publicly indigestible Supreme Court decisions?<sup>9</sup>

The best way to approach this question, it seems to me, is to return to my earlier question concerning the sources of law available to the Court in constitutional cases. One source of law — and it is of special interest here — is the moral ideals of the community. It is of interest because it contrasts with the quest for right answers that Perry would have his Justices pursue. The moral ideals of the community do not necessarily purport to be right answers.<sup>10</sup> They constitute conventional moral obligations and aspirations — particularly aspirations. For moral aspirations may well receive too little attention in the accommodations that characterize the legislative process.

The moral ideals of the community are woven into the fabric of constitutional law in a complex, lawyerly pattern. I have attempted

<sup>9</sup> See generally Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486 (1982) (pointing out that “mistaken” constitutional pronouncements can often be amended through normal judicial processes).

<sup>10</sup> I have some reservations about Perry’s view that there may be discoverable right answers to political-moral questions. But even if I were to accept such a view, I would — given our judiciary and the way judges are selected — emphatically reject his claim that judges are charged with discovering those answers. Many judges are excellent lawyers and perform superbly on the bench. But there are few who could get away with indulging themselves in Learned Hand’s famous fantasy, which goes something like this: Hand was in heaven and in the company of a group of intellectual heavyweights who were talking with God about large political-moral issues. And the Lord said: “Shut up, Plato! I want to hear what Hand has to say.”

to describe this process elsewhere.<sup>11</sup> It has built into it a prior check on the conscientious judge. Because the source of law has its roots in the community, the judge is not apt to reach eccentric positions.

Moreover, the process has its own built-in dynamic of evaluation. Of course Justices are fallible. But when they make mistakes, they hear about them: signals are sent, groups are formed, legislation is proposed, and the public forum is heavily used. New cases will afford the Court opportunities for reevaluation. The doctrine of *stare decisis* is not strong in the constitutional realm.

There are, of course, false signals, and the judicial decision itself is not neutral in the formation of the community's moral ideals. But the art of judging involves separating false signals from real mistakes, whereas the consequences that a judicial decision has for the formation of moral opinion are completely unpredictable.<sup>12</sup>

In the end, judicial review is legitimate for the same reason that common law and statutory adjudication are legitimate: "We the People" consent. And we do so because we believe that, in one fashion or another, we have adequate control over the content of the law that governs us.

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<sup>11</sup> See Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

<sup>12</sup> The issues raised in the last two paragraphs are examined in some detail in Wellington, *supra* note 9, at 509-20.