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Judicial Review and Moral Progress: Searching for the Better Angels of Our Nature

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COMMENTARIES

Judicial Review and Moral Progress: Searching for the Better Angels of Our Nature

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Judicial review is an anomaly in a democratic republic. This fact is an embarrassment to the Supreme Court of the United States and to those who champion an activist policy-making role for that tribunal of nine unelected, politically unaccountable Justices. As a result, virtually every aspect of judicial review as practiced by the Supreme Court has been constantly questioned and debated, even in a society which has, for the most part, acquiesced in the judgments of this nation's traditional court of last resort.

Many critics of the Court—and there have been many critics of the Court throughout American history—have challenged the legitimacy of judicial review. Their arguments are well known to every student of constitutional law. The Framers of the Constitution in 1787 probably had no clear-minded intention of vesting a power of review over Congress and the President. And, even if some judicial review was contemplated, there was certainly no intention to vest in the Court a sweeping power to declare federal legislation void based on abstract principles of justice. The Court's antidote to the confusion and disbelief stirred up by these persistent criticisms has been the promise of self-restraint. The Court has defended judicial review as a scholastic and legalistic assessment of what the Constitution "means."[1] Also, the Court

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1. For example, in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall's defense of the power of judicial review rests on an assertion that the judicial function is primarily interpretive.

> It is emphatically the province and the duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

Id. at 177.

A less distinguished description of the judicial function has been scorned by modern commentators. In United States v. Butler, 297 U.S. 1 (1936), Justice Roberts offered a description of constitutional interpretation that echoes Marshall's.

> When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch has only one duty,—to *lay* the article of the Constitution which is invoked beside the statute which is challenged

repeatedly has disclaimed any intention to arrogate for itself a broader power to articulate a public morality for the Republic. The Court, so it says, is not empowered to roam at will through the public controversies of any era imposing its own policy or its own sense of justice on the political institutions of the Republic.[2]

Professor Michael Perry rejects the conventional wisdom that the Supreme Court should keep to a limited role of interpreting the Constitution. Instead, he favors a provocative, idealistic conception of judicial review as a vehicle for America's moral growth. Professor Perry has written a book, *The Constitution, The Courts and Human Rights,*[3] setting forth a justification for a "fierce" judicial activism, in which he attempts to defend those characteristics of judicial review that so often have engendered great controversy and criticism.[4]

In Professor Perry's view, judicial review is not confined to the search for the meaning of text or for the intent of the Framers. He argues that the Supreme Court has always exercised a power to decide constitutional cases on the basis of logic, moral philosophy, ethics, and "traditional values" that were not incorporated in the Constitution by its authors. According to Professor Perry, the Court has never been "interpretive" in its focus; it is "noninterpretive" in its search for values that can only be discovered by looking beyond a static interpretation based on the text and the Framers' thinking. Moreover, Professor Perry believes the Court's search for the right answers to fundamental moral and political problems is a legitimate and necessary function. In Professor Perry's view, America is committed to a process of moral growth through ongoing moral reevaluation. The American Republic is not only committed to the principle that policy should be the product of electorally accountable policy makers; it is also committed to the ideal that the entire nation should remain faithful to a higher law.[5]

> and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment.

Id. at 62-63.

Despite these descriptions, the consensus among judges, lawyers, and commentators is that "the notion of mechanically laying statutes beside the constitutional text to see if they 'fit' was properly discredited long ago." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 452 (1978).

2. *See, e.g.,* Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting) (arguing that the Constitution embodies no particular political or economic philosophy); West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937) ("Even if the wisdom of the [challenged] policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment."); Ferguson v. Skrupa, 372 U.S. 726, 731-32 (1963) ("We refuse to sit as a superlegislature to weigh the wisdom of legislation. . . . Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours."); Dandridge v. Williams, 397 U.S. 471, 486 (1970) (Constitutional standards give "the federal courts no power to impose upon the states their views of what constitutes wise economic or social policy.").

3. M. PERRY, THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS (1982) (New Haven: Yale Univ. Press 1982) [hereinafter cited as PERRY].

4. *Id.* at 138.

5. *Id.* at 101.

> The American people still see themselves as a nation standing under transcendent judgment: They understand—even if from time to time some members of the intellectual elite have not—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."[6]

Professor Perry advances the view that judicial review—more particularly, "noninterpretive review" in human rights cases—fulfills an essential "function" as judges review the policies of government against the judges' own notions of right and wrong. This "functional" argument grows from the idea that the Supreme Court is a superior instrument of moral progress: The Court is more likely to lead the nation to a "right" answer to controversial moral issues. After all, Professor Perry argues, electorally accountable policy makers respond "reflexive[ly] . . . to established moral conventions of the greater part of their respective constituencies." By contrast, an independent judiciary is free to offer "provisional judgments" on the morality of policies adopted by electorally accountable politicians.[7]

> Noninterpretive review has served an important, even indispensable, function. It has enabled us, as a people, to keep faith with two of the most basic aspects of our collective self-understanding: our democratic understanding of ourselves as a people committed to policymaking that is subject to control by electorally accountable persons, and our . . . understanding of ourselves as a people committed to struggle incessantly to see beyond, and then to live beyond, the imperfections of whatever happens to be the established moral conventions. . . . Noninterpretive 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.[8]

This "tolerable accommodation" is achieved by an ongoing "conversation" between the Supreme Court and other political institutions of the Republic. Political institutions and the electorate learn from judgments of the Supreme Court.[9] In Professor Perry's almost biblical formulation of this dialectical relationship, "a people, even a chosen

6. *Id.* at 98.
7. *Id.* at 100-01.
8. *Id.* at 101-02.
9. *Id.* at 112.

people fail in their responsibility and need to be called to judgment—provisional judgment—in the here and now. That is the task of prophecy,"[10] and, in Professor Perry's view, it is also the task of judicial review.

> The relationship between noninterpretive review and electorally accountable policymaking is dialectical. The electorally accountable political processes generate a policy choice, which typically reflects some fairly well established moral conventions; at least typically the policy choice does not challenge these conventions. 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 processes 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.[11]

In summary, Professor Perry defends judicial review as an instrument of progress toward a more enlightened moral vision. His formulation of the case for a moralistic activism is bold, but it is also flawed. Professor Perry's vision assumes that there are discoverable right answers to the fundamental moral-political issues that should be presented to the Supreme Court. However, as Professor Perry concedes, the Court is fallible, as all lawyers must surely understand after even a moment's reflection on the significance of the infamous *Dred Scott*[12] and *Lochner*[13] decisions. His case for judicial activism never quite rises above his concessions that the Court makes mistakes—serious mistakes. Moreover, his own approach, if followed, would create another anomaly that he never resolves: How is the Supreme Court to proceed in this quest for moral reevaluation and moral growth if the task of judging is committed to the hands of Justices who do not share Professor Perry's vision?

Searching Beyond the Ambiguous Past of Court and Country

Professor Perry contends that virtually all of the Supreme Court's modern decisions are exercises of judicial review based on "value judgment[s other than those] constitutionalized by the framers."[14] As examples, he cites the application of the equal protection clause to segregated schools,[15] all free expression cases involving state, rather

10. *Id.* at 98.
11. *Id.* at 112.
12. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
13. Lochner v. New York, 198 U.S. 45 (1905).
14. PERRY, *supra* note 3, at 2.
15. Brown v. Board of Educ., 347 U.S. 483 (1954); PERRY, *supra* note 3, at 2, 64.

than federal, action,[16] as well as all so-called "privacy" cases up to and including *Roe v. Wade*.[17] Since neither the text nor the Framers' thinking governs the results in any of these cases, the Court's search beyond mere interpretation of the document is reasonable and legitimate, or at least not unusual.

Professor Perry's "functional justification" disclaims any debt to the conventional myths and misunderstandings that constitute the popular view that judicial review is the invention of farsighted Framers who acted to secure liberty and order by strict enforcement of a written constitution. The Framers of the Federal Constitution in 1787, Perry argues, never intended judicial review.[18] Even if they did intend some indistinct power to review the acts of states or even Congress, they certainly intended no broad power to declare policies of Congress or the states void because of the judges' own values.[19] The legitimacy of noninterpretivism cannot rest on history or the Framers' original understanding because there is simply no evidence that the Framers foresaw judicial review as practiced in the modern era. Instead of resting his case for judicial activism on alleged decisions at the founding of the Republic, Professor Perry demands that the Court rise above its own past and that of this nation to lead America's search for a more enlightened philosophy of human rights.

Perry defines the lines of controversy in a way that serves his cause perhaps too well and too conveniently. The older school of judges who would merely "interpret" the Constitution are defined as those who would decide all cases solely on the basis of the text and the specific understandings of the Framers in 1787, 1791, 1868, or any other year of constitutional creation.[20] Activists or "noninterpretivists" are those who would resort to any method other than interpretation of text or original understanding.[21]

Unfortunately, if the lines of controversy are as Professor Perry has drawn them, he would be doing nothing more than demonstrating that ambiguous text and obscured original history cannot be the sole sources of guidance for constitutional decision makers. Few commentators defend so rigid a "clause-bound interpretivism"[22] as Professor Perry at-

16. *See, e.g.*, Gitlow v. New York, 268 U.S. 652, 666 (1925) (The Court "assume[d] that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the states.").

17. 410 U.S. 113 (1975). *See also* Griswold v. Connecticut, 381 U.S. 479 (1969).

18. PERRY, *supra* note 3, at 11-23.

19. *Id.* at 21-24.

20. *Id.* at 10-11.

21. *Id.*

22. J. ELY, DEMOCRACY AND DISTRUST 11-41 (1980) [hereinafter cited as ELY].

tacks. Also, many commentators have outlined the dangers of relying on original understanding to the exclusion of experience, logic, and judicial perception of growth and evolution in society's fundamental concepts of justice and liberty.[23] Professor Perry does allude to the possibility of more moderate forms of interpretivism, which allow judges to find general "concepts" or "values" in the text or in the Framers' understanding, while assuming that judges will turn to "neutral principles" for detailed "conceptions" of law.[24] For example, judges who find the value of "equality" in the textual phrase "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws" are arguably more faithful to the legitimate judicial mission to interpret the Constitution than those who purport to find the value of "privacy" in penumbras,[25] traditions, or their own visions of ordered liberty.[26]

Moreover, history is not quite so clear as Professor Perry would have us believe. The idea of judicial review was inferred from the purposes of the written Constitution. Even prior to *Marbury v. Madison*, the issues of judicial activism which have persisted throughout the Court's history were debated.[27] If Perry cannot prove that the Framers were ardently and explicitly "interpretivist," he need not turn his back on the conventional observation that judicial review quickly and surely became linked to the idea that the Constitution is "capable of growth."[28]

23. Brest, *The Misconceived Quest for Original Understanding*, 60 B.U.L. REV. 204 (1980).

24. PERRY, *supra* note 3, at 70.

25. Griswold v. Connecticut, 381 U.S. 479, 484 (1969).

26. *Id.* at 501 (Harlan, J., concurring); Poe v. Ullman, 367 U.S. 497, 542-45 (1961) (Harlan, J., dissenting).

27. In Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798), for example, Justice Chase wrote an opinion that boldly declared that the courts had the power to invalidate "an act of the Legislature . . . [if it is] contrary to the great first principles of the social compact." *Id.* at 388. Justice Iredell replied to the basic premise of Justice Chase's argument:

> It is true, that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government, any Court of Justice would possess a power to declare it so. . . . If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the general scope of their constitutional power, the Court cannot pronounce it to be void merely because it is, in their judgment, contrary to the first principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature, possessed of an equal right of opinion, had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.

Id. at 398-99. From this exchange, it is easy to see that the basic differences between so-called interpretivists and noninterpretivists is at least as old as the idea of judicial review.

28. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 63 (1955).

James Madison, who most deserves the credit for writing the Constitution, understood that subsequent experience might validate growth in national legislative power and evolution in constitutional doctrine.[29]

Professor Perry's focus on the first amendment provides an illustration of his unnecessary certitude that current jurisprudence can draw no strength from the Framers' understanding. Perry endorses historical scholarship proving that the first amendment as enacted in 1791 adopted a theory of free expression no broader than the established conventional wisdom of the day that liberty of the press consisted only of a prohibition against prior restraints.[30] The Framers anticipated and approved prosecution for seditious libel and other "abuses" of the liberty to speak or publish. The first amendment is not so restrictively interpreted today.[31]

Still, Professor Perry restricts the admissibility of historical data on the question of noninterpretivism to a needlessly narrow point: what did the Framers intend as they drafted, proposed, and ratified a given constitutional provision? Thus, Professor Perry ignores the broader theories of expressive liberty asserted by the Jeffersonians in self-defense against the Sedition Act of 1798.[32] The point is not that the lessons learned in a crisis of freedom seven years after ratification can fairly be attributed to the understandings of the earlier period. The point is that the new theories grow as a result of an evolutionary process that might have been anticipated as necessary for a constitution "to be adapted to the various crises of human affairs."[33] In any case, the subsequent experiences of the Framers, their responses, their enlightened understanding, provide an objective basis for distinguishing between,

29. A. KELLEY & W. HARBISON, THE AMERICAN CONSTITUTION 255 (1970).

30. PERRY, *supra* note 3, at 64, *citing* L. LEVY, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION (1960) [hereinafter cited as LEVY].

31. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1965).

32. LEVY, *supra* note 30, at 258-79.

33. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819). *See also* LEVY, *supra* note 30, at 308-09;

> [T]he Framers had a genius for studied imprecision. They were conscious of the need to phrase the Constitution in generalized terms and without a lexicographical guide, for they meant to outline an instrument that would serve future generations. . . . [T]he Constitution was purposely made to embody first ideas and sketchy notions. Detailed codes, which become obsolete with a change in the circumstances for which they were adopted, are avoided by men trained in the common law. They tend rather to formulate principles that are expansive and comprehensive in character. The principles and not their framers' understanding and application of them are meant to endure. The Constitution, designed by an eighteenth century rural society serves as well today as ever because an antiquarian historicism that would freeze its original meaning has not guided its interpretation and was not intended to.

first, judicial elaboration of a general "value" fairly inferrable from text, and second, judicial manufacture of a "fundamental right" from penumbras, emanations, and creative imagination.[34]

Just as Professor Perry disclaims any support from decisions made during the formative years of the Republic, he denies that the nation's experience with judicial review is evidence of whether activism really serves its mission of moral leadership. For example, even as he builds his case for the judiciary as a prophet in an American nation committed to moral progress, he admits to past Court errors of great significance. Nevertheless, Perry also suggests that such errors as *Dred Scott v. Sandford* and *Lochner v. New York* really tell us nothing about the Court's superior capacity for moral insight.

> [W]e must resist specious historical generalizations about the performance of the Supreme Court. . . . The issue for the present generation of constitutional theorists is not—not principally, at any rate—how noninterpretive review worked in the last half of the nineteenth century or even in the first half of the twentieth century, but whether noninterpretive review has served a salutary, perhaps crucial governmental (policymaking) function during the modern period. . . .
>
> Of course, it would be both foolish and dangerous to ignore the relevant lessons of the past. When Justice Rehnquist buttresses his theoretical critique of noninterpretive review by reminding us of *Dred Scott* and *Lochner*, we should not take lightly his historical point—the absence of any guarantee that noninterpretive review will in fact serve, during any given period, as an instrument of moral growth. But neither should we fail to appreciate that examples drawn from one historical context can have a rather diminished significance in a different context.[35]

Perry's argument rests at this point on a careful underestimation of past Supreme Court error. If the nation is to endorse judicial review as a bulwark of our liberties, if the Court is to serve as a prophet, we must look to the only available facts to measure Professor Perry's claim that a "politically insulated federal judiciary is *more likely* when the human rights issue is a deeply controversial one to move us in the direction of a right answer . . . than is the political process. . . ."[36] Perry buttresses his claim with the observation that noninterpretive review has served, "on balance," "tolerably well" in the modern period.[37] Unfortunately, this assessment falls far short of any reasonable

34. See *supra* text accompanying notes 25-26.
35. PERRY, *supra* note 3, at 116.
36. *Id.* at 102 (emphasis added).
37. *Id.* at 116.

assurance that the judges' own moral values will effectively promote moral progress. In the words of Professor Leonard Levy, whom Perry has cited in other contexts: "A single generation's experience with judicial review over Congress does not wipe out the experience of a century and a half. Indeed the libertarian instances of judicial review hardly antedate the Warren Court."[38] The Court imposed *Dred Scott* against the will of a more enlightened Congress which sought to restrict slavery and to compromise in order to avert a civil war. The Court struck down progressive legislation regulating hours and wages,[39] child labor,[40] and collective bargaining[41] on the basis of a value choice Professor Perry apparently rejects.

The case for judicial activism rests on a faith that an independent judiciary can resist the passions of the majority. Judicial courage should be most beneficial when the issue is a "deeply controversial one."[42] The idea is at once ancient and at the heart of any case for judicial power in a democratic republic. Thomas Jefferson, in one of many famous letters to James Madison, defended the Bill of Rights as a "legal check . . . [in] the hands of the judiciary. This is a body, which, if rendered independent . . . merits great confidence for their learning and integrity. . . ." Judges with the necessary qualities could resist "the '*civium ardor prava jubentium*'"—the zeal of citizens commanding wrong.[43] However, the sternest test of judicial capacity to defend unpopular minorities are those times of crisis when fears are heightened and the self-confidence that sustains our liberties are at an ebb. In such times, the Court has earned little credit as a defender of liberty. In *Korematsu v. United States,*[44] the Court approved executive action stripping American citizens of Japanese ancestry of their fortunes, their property, and their rights to equal treatment. In the aftermath of the presidential election of 1876, the Supreme Court acquiesced in the "compromise of 1877," which permitted the reconstruction of white supremacy in the South. The *Civil Rights Cases*[45] and *Plessy v. Ferguson*[46] were two in a long line of decisions by the Supreme Court that denied the promise of "equal protection of the laws" to genera-

38. Levy, *Judicial Review, History and Democracy,* in JUDICIAL REVIEW AND THE SUPREME COURT 23 (1967).

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

40. Hammer v. Dagenhart, 247 U.S. 251 (1918).

41. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

42. PERRY, *supra* note 3, at 102.

43. Letter from Thomas Jefferson to James Madison, Mar. 15, 1789, in THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 462 (A. Koch & W. Peden eds. 1944).

44. 323 U.S. 214 (1944).

45. 109 U.S. 3 (1883).

46. 163 U.S. 537 (1896).

tions of blacks. These and many other cases are evidence supporting John P. Frank's observation: "The dominant lesson of our history in the relation of the judiciary to repression is that courts love liberty most when it is under pressure least."[47] If this is a fair characterization of the Supreme Court's past record, Professor Perry's argument begins to deteriorate into a mere hope that an independent judiciary will live up to its potential as moral prophet for the nation.

The Likelihood of Moral Progress Through Judicial Review: A Failure of Proof

Professor Perry's principal objective is to articulate a reasonable case for noninterpretive review in human rights cases. His emphasis in the quest for this case is "functional": Noninterpretive review is justified because of the service it performs for American society. Thus, Professor Perry's approach purports to be practical as well as moralistic. He defends judicial review, as discussed above, for its potential based on an assessment that "on balance" it will be an instrument that will serve the conflicting American commitments to morality and to democracy "tolerably well."[48] At one point in his effort, Professor Perry criticizes Professor Owen Fiss for the ambiguity of Fiss's assertion that "the task of the judge is to give meaning to constitutional values. . . ."[49] Perry sets standards for evaluation of his own "compelling functional justification" for noninterpretive review: "The essential problem with [Fiss's] view is that it begs the crucial question whether, beyond rhetoric, there even are any traditional or consensual values —"public values"—*sufficiently determinate* to be of use to the Court in resolving particular human rights conflicts."[50] At another point, Perry quotes Alexander Bickel for a more comprehensive list of standards to evaluate the functional role of the Supreme Court.

> The search must be for a function . . . which is peculiarly suited to the capabilities of the courts; which will not likely be performed elsewhere if the courts do not assume it; which can be so exercised as to be acceptable in a society that generally shares Judge Hand's satisfaction in a "sense of common venture"; which will be effective when needed; and whose discharge by the courts will not lower the quality of the other departments' performance by denuding them of the dignity and burden of their own responsibility.[51]

47. Frank, *Review and Basic Liberties,* in SUPREME COURT AND SUPREME LAW 114 (E. Cahn ed. 1954).

48. PERRY, *supra* note 3, at 116.

49. *Id.* at 96.

50. *Id.* (emphasis in original).

51. *Id.* at 122, *quoting* A. BICKEL, THE LEAST DANGEROUS BRANCH 24 (1962).

Professor Perry's emphasis on a *functional* justification, on noninterpretive review's *practical* contribution to American moral progress, and on *effectiveness* establishes the standards by which Professor Perry's analysis should be evaluated. The defenders of judicial activism bear a heavy burden of proof to show that such activism will serve the nation well and in a manner consistent with democratic traditions.

Even if readers tolerate Professor Perry's transparent attempt to divert attention from the historical record, it remains fair to ask for proof that the Court will serve as a prophet for a nation committed to moral progress. Unfortunately, Professor Perry's explanation of the process by which the Court serves in this office is strangely incomplete and uncertain. Of course, we know that the Supreme Court is supposed to be more free to be moral and idealistic, unlike politicians counting on their constituencies for reelection. Yet, missing from this common characterization of the differences between an independent judiciary and an elected Congress and President is an explanation of how the members of the Court will achieve Professor Perry's purpose if they reject his vision of the judicial mission.

That the Court has gone beyond text and original history to interpret the Constitution—as in *Brown, Roe,* and the other cases Professor Perry cites—is no evidence that the Court adheres to Professor Perry's peculiar brand of noninterpretivism. As he suggests, his case for noninterpretive review rests on his metaethical idea that there are discoverable right answers to all of the fundamental political-moral issues to be presented to the Supreme Court (even if it is also certain that the Court shall not always find those moral truths).

The Supreme Court's capacity to search beyond conventional and popular morality is difficult to discern as long as the members of the Court take seriously the oft-quoted pledge to refrain from applying their own personal morality (if indeed they do take it seriously). If the Supreme Court consists of moral skeptics who do not share Professor Perry's views that there are "discoverable right answers" to fundamental problems, it seems probable that the Court will not search for such answers. If the Court continues to exhibit a preference for modified interpretivism or limited noninterpretivism or even opportunistic judicial pragmatism—or if it continues to prefer traditional values or social consensus to personal morality as a source of guidance—the office and function Professor Perry proposes for the Court is "likely" to go unfilled and unperformed. In short, Perry wants the Court to serve as a prophet, to issue moral judgments calling Americans to a better ethical vision. If the members of the Court do not share Professor Perry's vision, how can they be expected to perform his task?

Even if the relationship between the Supreme Court and all other political institutions in the nation is "dialectical" as Professor Perry has suggested,[52] the Supreme Court's service as a prophet to a chosen people requires that the Court search beyond text and original history, beyond societal and consensual values, beyond a "reflexive, mechanical reference to established moral conventions."[53] At this point, Professor Perry fails to show that the Court sees itself as a prophet or as a moral leader. Alexander Bickel once argued that the Warren Court had tried to shape the future of the nation by fashioning its constitutional principles in accord with its best prediction of progress, or at least "what tomorrow's observers would . . . credit as progress."[54] There is ambiguity in how Professor Bickel responds to this "idea of progress." John Hart Ely believes "there was a good deal of prescription folded into Bickel's description."[55] By contrast, Professor Perry seeks only to distinguish his approach from this "predicting progress" formulation of the Supreme Court's role. Perry argues not that the Court should predict what conventional morality will be in the future; it should undertake its own search for "right" answers independent of a political estimate of which right answers will eventually be endorsed.[56] Apparently, judicial prophets need not, perhaps ought not, have any political sense. However, Professor Perry underestimates the significance of the historical thesis that the Warren Court sought progress. He overlooks the similarity between his description and Bickel's vision of the Warren Court motivations. Perhaps Professor Bickel was searching for a "function" to be served only by a Supreme Court—a "principle-prone, principle-bound"[57] function that would be the Supreme Court's reason for being. The Warren Court, according to Bickel, was pushing the nation toward a better moral vision, just as Professor Perry would recommend; the fact that the politically sensitive Justices might also feel constrained by a political calculation of the progress that is attainable and durable only points to a different problem that Perry describes and confronts in a different context—the limits of the judiciary's power to promote progress.

After all, Professor Perry's emphasis on the practical implies that the Court has the duty to be effective in promoting a better moral vision. Effective moral leadership requires more than a mere discovery

52. PERRY, *supra* note 3, at 112.

53. *Id.* at 102.

54. ELY, *supra* note 22, at 69, discussing A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970).

55. ELY, *supra* note 22, at 69.

56. PERRY, *supra* note 3, at 114-15.

57. BICKEL, cited *supra* note 54, at 175.

of "right" answers. If the Court chooses to serve as a prophet engaged in an ongoing dialectic with the rest of the nation, the Court must also be an educator, not unlike any other political leader who seeks to promote a vision of progress. The Court cannot move in its own philosophic direction at a pace and style dictated only by the collective conscience of its members; it cannot ignore the character of the public's evolution. Earl Warren certainly understood this as he crafted a consensus in *Brown v. Board of Education.* A moral leader—political or judicial—can move in a philosophic direction in a democratic republic only a little faster than the public can change. The Court can never be so far ahead of the community that it loses touch with the people and they lose sight of the Court and its leadership. Even if the Court ought not serve as a political seismograph to record shifts in popular political and moral opinion, it cannot offer its provisional judgments on the morality of government policies oblivious to realistic calculations of how those judgments will be received by the rest of the nation.

Finally, Professor Perry fails to demonstrate that a judicial commitment to the search for "discoverable right answers to fundamental political problems" will be "*sufficiently determinate*" to be of any real assistance to a judge in particular cases. In short, Professor Perry's case for judicial activism fails to address precisely what those "discoverable right answers" might be.

Professor Perry's silence on basic issues is disconcerting. For example, although he identifies the problem of racism as one of the fundamental problems the Court is best equipped to confront and resolve, he offers virtually nothing on the remaining basic issue on the Supreme Court's agenda—the problem of affirmative action. In a footnote, he brushes over the problem by suggesting that the Court's decisions in *Regents of the University of California v. Bakke*[58] and *Fullilove v. Klutznik*[59] were not inconsistent with either text or original history.[60] However, Professor Perry does not use this obvious moral problem as an opportunity to explain how noninterpretivism might help to lead the nation to a better moral solution. Should the law be color-blind? Should the law recognize the practical problems caused by the continuing effects of past discrimination? Is the Supreme Court's current emphasis on strict scrutiny tests and balancing of interests a satisfactory approach? Professor Perry is almost silent on these questions in this book.

58. 438 U.S. 265 (1978).
59. 448 U.S. 448 (1980).
60. PERRY, *supra* note 3, at 213 n.113.

The absence of discussion of possible "right" answers on a single issue—even one of great importance—would not be so significant except that Professor Perry takes no opportunity to show that his activist vision yields "determinate" tests or rules. Freedom of political dissent is another issue identified by Professor Perry as one of great importance; yet he offers little or nothing on the basic controversies that remain unresolved. Should the Court turn away from recent cases endorsing a limited censorship of so-called indecent speech?[61] Should freedom of expression be subject to the dictates of pressing public necessity and compelling state interests? Or should the Court reject such obvious ad hoc balancing in favor of qualitative formulae that cannot be evaded in times of hysteria?[62] Even on abortion questions, Professor Perry cites the importance of the issue and declines to offer specific analysis of how noninterpretivism as he defines it ought to resolve the problem. The significance of Professor Perry's silence on these and other issues is that he fails to prove that his brand of judicial activism is "likely" to achieve any measurable or definable moral progress. His silence becomes a failure of proof.

A Last Word: Judicial Activism's Corrosive Effect on Constitutionalism

As judicial activists press against established limits of law and principle to transform the Constitution into an instrument of progress rather than a bulwark of ordered liberty, they may threaten the true benefits of a written constitution. Professor Perry's inspired and idealistic vision of a Court committed to moral progress opens the door to more sweeping and unrestricted inquiries into moral philosophy. His silence on the content of objectively discoverable right answers illustrates the reality for which all litigants and lawyers are still searching, with fewer confines in the scope and directions of this search. When Learned Hand criticized Justice Holmes' famous "clear and present danger test," he identified the vices of uncertainty and unpredictability. The Court remained free to expand and contract our liberties at will. "Soft" and uncertain formulations such as "clear and present danger" left the Court without a rule of law. Instead, Judge Hand argued that the judicial search should be for "a qualitative formula, hard, conventional, difficult to evade."[63] As Alexander Hamilton argued, the problem in

61. Federal Communications Comm'n v. Pacific Found., 438 U.S. 726 (1978); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976).

62. ELY, *supra* note 22, at 111-12.

63. Letter from Learned Hand to Zechariah Chafee, Jr., Jan. 2, 1921, *quoted in* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV 719, 725 (1975).

declaring our liberties through a bill of rights has always been to find guarantees and definitions that do not leave the "utmost latitude for evasion."[64]

Americans have long believed that a written constitution is America's greatest improvement on political institutions. The emphasis on a *written* constitution that can be amended only through *extraordinary* political processes illustrates the most basic of the accepted virtues of the Constitution: constancy. The point is often expressed in different ways, but it is so often repeated and understood that the point often is lost as commentators and judges focus on newer and more exciting discoveries. We adopted a constitution to bind government, to limit sovereign power, to restrict the capacities of transient majorities to threaten our basic principles of liberty and equality. The Constitution secures the blessings of liberty and justice from the whims of factions and temporary majorities. The Constitution is designed to be supreme law, which mandates fidelity to fundamental ideals and provides a stability to the Republic. This supreme law should guarantee enough opportunity for change through political action while also retarding the dangers of faction, disorder, and disunion that so often brought down ancient republics. In this sense, constitutionalism is supposed to be conservative; it preserves and perpetuates our institutions.

Professor Perry opens the door to evasion and instability by dramatically transforming the focus from "what does the Constitution require?" to "what is right?" His silence on basic issues, his failure to identify the qualities of his approach that would be "sufficiently determinate" uproot constitutional law from precedent, tradition, text, original history, or any other self-imposed tactic of judicial self-restraint. In the final analysis, a Court that is committed to Professor Perry's sweeping conceptions of judicial freedom to search for right answers would necessarily question, overturn, and rewrite the qualitative formulae that past Courts adopted to secure a better protection for a broader liberty and a more meaningful justice. We would be required to hope, despite experience, that the Supreme Court's newer prophecies were, to use Lincoln's phrase, "touched by the better angels of our nature."[65]

64. THE FEDERALIST No. 84 at 580 (A. Hamilton) (J. Cooke ed. 1961).

65. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), *in* 4 COLLECTED WORKS OF ABRAHAM LINCOLN 271 (R. Basler ed. 1953).