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I especially wish to thank my colleagues Paul Horton and Maimon Schwarzschild, Bob Bennett of Northwestern, and research assistant Cathy Stephenson for reading earlier drafts of this article. Their criticisms were quite helpful. I also wish to thank my secretary, Rubi Payne, for her patient typing and retyping of this article.

PAINTING WITHOUT THE NUMBERS: NONINTERPRETIVE JUDICIAL REVIEW

*Larry A. Alexander**

I. INTRODUCTION

The publication of Michael Perry's book, *The Constitution, the Courts, and Human Rights*,[1] marks a significant point in the recent outpouring of literature addressing the issue of judicial review.[2] For the first time, constitutional scholars have a fully elaborated defense of "noninterpretive" judicial review—that is, constitutional policymaking by the federal judiciary in the realm of individual rights that is not limited by the constitutional text.

Unlike John Ely's defense of noninterpretivism, Perry's theory does not rest on some dubious invitation from the Framers to transcend the specific values they embodied in various constitutional clauses.[3] Neither does Perry follow Ely by confining his noninterpretivism to values inferable from the constitutional text taken as a whole.[4]

Perry also abjures the nihilistic posture, frequently assumed in defense of noninterpretive judicial review, of denying any determinate meaning to the constitutional text.[5] Instead, Perry accepts the meaningfulness of an interpretivist approach to the Constitution, agrees with Raoul Berger that most modern constitutional decisions protecting individual rights cannot be justified on interpretivist grounds, and then attempts to justify the form of judicial review that accounts for those decisions—i.e., noninterpretive judicial review. He does all this without romanticizing the Supreme Court, villainizing Congress and state legis-

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

2. I date the most recent reexamination of judicial review from R. BERGER, GOVERNMENT BY JUDICIARY (1977). Two other major contributions to this reexamination are J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980) and J. ELY, DEMOCRACY AND DISTRUST (1980). Articles in law reviews and other journals spawned by these books are legion.

3. *See* Alexander, *Modern Equal Protection Theories: A Metatheoretical Taxonomy and Critique*, 42 OHIO ST. L.J. 3, 10 (1981) (referring to this type of position as "quasi-interpretivism").

4. *Id.* at 9-10 (referring to such a restriction on constitutional value sources as "neo-interpretivism").

5. *See, e.g.*, Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980).

latures, or rejecting the primacy of majoritarian decisionmaking. Surely any book that purports to pull off such an ambitious trick is more than worthy of the attention this Symposium signifies.

In the following section I shall set forth a brief sketch of Perry's principal arguments. In the subsequent section I shall raise some questions about and criticisms of Perry's noninterpretivist theory and then conclude with general remarks about the interpretivism-noninterpretivism debate and its relation to what I call "the dilemma of law."

II. PERRY'S NONINTERPRETIVISM

In order to stake out a realm for noninterpretive judicial review, Perry defines the method of interpretivism as the search for the specific value judgments constitutionalized by the Framers.[6] Judicial invalidation of a present day political practice cannot be considered "interpretation" if such practice (1) "was not present to the minds of the framers of . . . [a particular constitutional] provision" and "is not analogous to any practice that was present to their minds" or (2) "was present to their minds but [was a practice] that they did not mean to ban. . . ."[7] A present day analogue of a past, banned practice is simply a practice that anyone who banned the past practice on moral-political grounds would have to ban to be logically consistent and morally coherent.[8]

Given his definition of interpretation, Perry maintains that most modern "constitutional" decisions in the realm of individual rights cannot be justified as interpretations of the constitutional text.[9] In this respect Perry allies himself with Raoul Berger.[10] Perry, however, believes that saying that most modern individual rights decisions are noninterpretive—that is, extra-constitutional—is not to say that those decisions are contra-constitutional.[11] I shall return to this latter point below.

Perry believes the noninterpretive judicial review manifested in modern individual rights decisions is a justified practice. Briefly—for I am sure the components of Perry's justification will receive ample attention in the contributions to this Symposium—Perry contends that noninterpretive review is justified because it works more effectively than the more restrictive interpretive review in realizing correct moral

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6. M. PERRY, *supra* note 1, at 10-11, 71-75.

7. *Id.* at 71.

8. *See id.* at 74.

9. *Id.* at 61-70, 92. *See also* Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981) (*quoted in* M. PERRY, *supra* note 1, at 75 n.*).

10. M. PERRY, *supra* note 1, at 63.

11. *Id.* at 114 n.97.

and political values.[12] He argues that noninterpretive review is the most functional form of judicial review, particularly if we permit Congress the role Perry would have it play in a judicial-legislative "dialogue" over human rights.[13]

> In the constitutional dialogue between the Court and the other agencies of government—a subtle, dialectical interplay between Court and polity—what emerges is a far more self-critical political morality than would otherwise appear, and therefore likely a more mature political morality as well—a morality that is moving (inching?) toward, even though it has not always and everywhere arrived at, right answers. . . .[14]

Perry believes that placing the implementation of all nontextual values solely in the hands of the political branches and beyond the ken of the courts will not get us where we ought to go nearly so well as will noninterpretive review.

What is Perry's answer to those who cry "anti-democratic" at any mention of noninterpretive review? Perry denies that there is only one conception of democratic self-rule, i.e., "electorally accountable policymaking,"[15] a conception that excludes noninterpretive judicial review. Therefore, the possibility remains for arguing that noninterpretive review is democratic. Nevertheless, Perry rejects the familiar arguments for squaring noninterpretivism with democracy—namely, that ultimately the people will always prevail,[16] that the people have "consented" to noninterpretive review,[17] that the amendment process provides a democratic check on the Court,[18] or that the political branches' power of appointment and power over the judicial purse makes the Court democratically accountable.[19]

Instead, Perry finds the basis for reconciliation of noninterpretivism and democracy in Congress' power under article III of the Constitution to restrict the appellate jurisdiction of the Supreme Court and to control the jurisdiction of lower federal courts.[20] If the Supreme Court limits state or federal legislative power on the basis of nontextual values, Congress can respond by "silencing" the federal courts through restricting their jurisdiction to consider future cases dealing with the same subject. Although Perry tentatively accepts the view held by

12. *Id.* at 101-14.
13. *Id.* at 113-14.
14. *Id.* at 113.
15. *Id.* at 126.
16. *Id.*
17. *Id.* at 126-27.
18. *Id.* at 127.
19. *Id.* at 127-28.
20. *Id.* at 128-39.

many that Congress' power to curtail the jurisdiction of federal courts is limited by other constitutional provisions and perhaps by "the essential role of the Supreme Court in the constitutional plan,"[21] he maintains that constitutional restrictions on Congress' jurisdiction-limiting power do not apply to noninterpretive judicial review.[22] Rather, textual (interpretive) values and the Court's "essential role" in enforcing them are limits only upon Congress' attempts to circumvent textual (interpretive) values. Noninterpretive values, on the other hand, never having been formally constitutionalized, must ultimately be subjected to unrestricted review by an electorally accountable body. The mechanism for such review is Congress' article III power over the jurisdiction of federal courts.

What happens, however, to a noninterpretive Supreme Court decision that has resulted in Congress' withdrawal of federal court jurisdiction over future cases dealing with the same issue? After all, Congress cannot rewrite the past; the decision *was* rendered. Might not state courts be obligated by principles of *stare decisis* to enforce, in future cases, the Supreme Court's ruling notwithstanding Congress' action? If so, the congressional check on noninterpretive review is less potent than it might at first have appeared.

Perry's answer is that noninterpretive Supreme Court decisions—and, for that matter, *all* Supreme Court decisions—have only *res judicata* effect where the Court is divested of jurisdiction to decide future cases raising similar issues.[23] It is the retention of jurisdiction to decide similar cases that justifies giving *stare decisis* as well as *res judicata* effect to judicial decisions.

The foregoing is, then, the barebones of Perry's brief for noninterpretive review. Most of the Supreme Court decisions responsible for our present glorious panoply of individual rights, the envy of most of the world, have been noninterpretive. It should not be surprising, implies Perry, that an argument can be constructed for their legitimacy. Noninterpretive review, when checked by Congress' power over jurisdiction, is a highly functional political practice that serves our society's quest for enduring and correct moral-political values better than the more restrictive practice of pure interpretivism. Moreover, it is consistent with democratic decisionmaking, broadly conceived.

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21. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953). *See generally* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 7-34 (1980); 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 (1981).

22. M. PERRY, *supra* note 1, at 129-30, 133.

23. *Id.* at 130-31.

III. Some Questions and Criticisms Specific to Perry's Noninterpretivism

I shall defer to the final section my comments on the centerpiece of Perry's noninterpretivism, his functional argument on its behalf. In this section, I shall confine myself to some rather specific questions and criticisms directed at the details of Perry's particular brand of noninterpretive review. I, and no doubt others, raised all of these questions and criticisms with Perry in commenting upon earlier drafts of his book. The following discussion has benefited from Perry's having attempted to deal with each question and criticism in his final draft.

Most of the questions and criticisms are directed at Perry's mechanism for squaring noninterpretivism with political accountability, the article III congressional override. To begin with, the efficacy of that mechanism rests entirely on the Court's and/or Congress' ability to distinguish between noninterpretive and interpretive Supreme Court decisions. (Perry accepts the now rather orthodox view that congressional employment of the article III "silencer" to override *interpretive* decisions is constitutionally dubious. Whether or not such an override is itself subject to interpretive judicial review, some institution—Congress, if not the Court—must police such congressional attempts to evade textual values.) In order for either the Supreme Court or Congress to distinguish between interpretive and noninterpretive decisions, it must have available to it a satisfactory theory of interpretation. Perry, however, has failed to provide such a theory.

Let us look again at Perry's distinction between textual and nontextual values. The key, recall, in determining whether a present day political practice is banned by a value judgment embodied in the Constitutional text is whether the practice was present to the minds of the Framers or is a present day analogue to a practice present to their minds. Because no present day practice could ever have been literally present to the minds of the Framers, let us concentrate on the determination of whether it is an analogue of a constitutionalized (or unconstitutionalized) practice. For Perry, a practice is such an analogue if one who would ban the past practice on moral-political grounds would, for the sake of coherence and consistency, be required to ban the present practice.

I submit that Perry's test for whether a value has been constitutionalized tells us absolutely nothing. In addition to neglecting the obvious problems of specifying who are to be regarded as "the Framers" and how we should go about aggregating their intentions,[24] Perry's

24. *See* Alexander, *supra* note 3, at 9; Brest, *The Misconceived Quest for the Original*

"modern day analogue" theory of interpretation begs all the fundamental questions.

In a sense, most arguments about what constitutes "interpretation" of the Constitution are arguments about whether a modern day practice P' is the analogue to some practice P that the Framers had in mind.[25] The problem is that the practice P can be described at higher and higher levels of generality. Thus, the practice of denying blacks the legal right to contract could be described at one level of generality as "racial discrimination" and at higher levels of generality as "discrimination based on morally irrelevant characterisitics," "unjust discrimination," and "injustice." Because in drafting the Constitution the Framers must have intended to promote "wise and just policy"—If they did not so intend, why attribute any authority to their intentions?—the Framers, in seeking to ban the practice of denying blacks the legal right to contract, could be said to have banned the more abstractly described practices as well.[26]

From the Framers' perspective, the specific and the abstract formulations of their intentions cannot yield opposed results. It is only from our perspective, one that reveals the Framers' factual ignorance and factual and moral mistakes, that the specific and abstract intentions may diverge. When those intentions do diverge, the question of whether a modern day practice P' is an analogue of a banned, past practice P becomes controversial. Perry has said nothing to enable us to resolve this controversy.

At some point as we ascend the ladder of generality of description and then descend again to apply the general norm to a specific, modern practice, we cross over the line from what "they" banned to what we would ban. (Continuity of personal identity undoubtedly will not survive the journey from the Framers' factual and moral understanding to ours.[27]) Perry's test for when the line is crossed—whether moral and

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Understanding, 60 B.U.L. REV. 204, 212-15 (1980); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 482-88 (1981); Moore, *The Semantics of Judging*, 54 S. CAL. L. REV. 151, 266-69 (1981).

25. *See* Alexander, *supra* note 3, at 4-9. *See also* Brest, *supra* note 24, at 204, 216-17 (1980); Dworkin, *supra* note 24, at 469, 488-91 (1981); Moore, *supra* note 24.

26. Actually, the statement in the text is somewhat misleading. The Framers may have intended the wisest and most just Constitution, but they did not necessarily intend to constitutionalize perfect wisdom and justice in any sense that would authorize judicial invalidation of any unwise or unjust legislation. Rather, their conception of wise and just policy no doubt included a perception of when unwise or unjust legislation ought to be judicially invalidated and when it should be left for repeal through the democratic processes. Still, to borrow a theme from Henry Monaghan, the Framers intended to write a "perfect Constitution." *See* Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

27. *See* M. PERRY, *supra* note 1, at 75 & n.*, 76 (quoting Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033, 1038-39, 1046, 1060 (1981)).

logical coherence requires treating a modern practice P' as an analogue to a past, banned practice P—could lead one to conclude that all present day practices that are immoral were banned by the Framers, particularly if one takes the plausible position that moral disagreements rest ultimately on factual ignorance, factual mistakes, and logical error. Noninterpretivism thus would need no independent justification because all judicial review would be "interpretivist."

Without a theory of interpretation, Perry's line between interpretivism and noninterpretivism cannot possibly be drawn. The ability to draw such a line, however, is fundamentally important to the success of Perry's enterprise. Where Congress reacts hostilely to a Supreme Court decision, it will be strongly disposed to view that decision as "noninterpretive" and thus subject to an article III "silencing." The Court on the other hand, faced with a congressional threat to overturn its decision, will be just as strongly disposed to view the decision as "interpretive" and thus not vulnerable to such a response. Consequently, Perry's democratic check on noninterpretive decisions may fail because of the Court's (or Congress') overly expansive view of interpretation; or, if the Court is acquiescent when Congress silences it, the democratic check may succeed too well, repealing interpretive decisions along with noninterpretive ones.

Perry assures us, however, that

> [w]hile it is possible to conjure up imaginary cases like [the ones above], those imaginary cases will not cause any trouble—at least, not a significant amount of trouble—in actuality. Recall that in very few consequential human rights cases of the modern period can the Court's decisions *even plausibly* be explained as products of interpretive review.[28]

However, in the absence of a well-constructed theory of interpretation (rather than the question-begging definition Perry offers), it *is* plausible that most of the Court's decisions should be deemed interpretive. Perry's assurance that interpretive-noninterpretive line-drawing will cause little trouble in practice rests only upon his *ipse dixit* and, in my opinion, is incredibly naive, both politically and psychologically.

Moreover, the absence of a sound theory of interpretation leaves *interpretive* decisions, and their invulnerability to congressional overrule, in need of a justification that Perry nowhere provides. Why should political practices which were banned by the Framers continue to be banned by the Supreme Court in the face of popular approval reflected in Congress when other political practices that the Court believes to be immoral are subject to Congress' article III overrule? A sound theory

28. *Id.* at 130 (emphasis in original).

of interpretation would tell us not only what the Framers did, but also why what they did is authoritative, and to what extent. Put somewhat differently, without a theory of interpretation, one who disagrees with a Supreme Court decision can always claim that she accepts a ban on all practices banned by the Framers, but that *any* practice banned by the Court in their name will differ in some significant way from the practices they banned and should not be banned over popular opposition. Perry's position would be to treat some modern practices as having been banned by the Framers and thus suitable for banning by the Court despite popular opposition and attempts to silence under article III; but he has offered no *justification* for that position. Merely calling Supreme Court decisions "interpretive" will not do the trick in the absence of a theory of interpretation.

Perry has thus entered the interpretivism-noninterpretivism fray, as so many others have done, without a cogent theory of interpretation.[29] Because his justification for judicial review treats interpretive

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29. *See* Alexander, *supra* note 3, at 5. Joseph Grano has recently attacked noninterpretivism of the fundamental values type that Perry espouses because, like John Ely, Grano doubts the ability of Supreme Court justices to discover principles of political morality that have a greater claim to respect than those endorsed by popular majorities. Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1, 18-50 (1981). *See* J. ELY, DEMOCRACY AND DISTRUST 43-72. Grano correctly perceives, however, that this argument against noninterpretive judicial review also implicates interpretive judicial review. Why should the Framers, but not the Supreme Court, have authority to bind us to value judgments not endorsed by contemporary popular bodies? *Id.* at 61-62. It is a good question, but Grano's answer is unsatisfactory. Grano says that we cannot reject the binding authority of the Constitution and interpretive judicial review without inviting constitutional anarchy. *Id.* at 5-6. I think, for reasons more fully elaborated in the final section of this Article, that such a consequentialist argument is the right kind of argument. But given Grano's arguments against judicial discovery of fundamental values, one would expect Grano to advocate a very narrow, niggardly form of constitutional interpretation, leaving as much room as possible for the values of contemporary majorities consistent with some non-majoritarian constitutional structure. Curiously, although Grano recognizes this logical implication of his position (*Id.* at 61-62), he rejects it. He argues instead that given the initial commitment to a written Constitution, we are required to "interpret" quite broadly so as not to render the Constitution a narrow, anachronistic code. *Id.* at 62-63.

Quite simply, Grano's response is a *non sequitur*. As I have pointed out elsewhere, there is some value in being guided by a set of formal rules, even if they are not ideal, because of the certainty and stability they bring. *See* Alexander, *supra* note 3, at 14-16. There is also, of course, value in being guided by abstract principles of political morality so long as they are correct from our point of view. There is no value, however, in being guided by someone else's abstract principles if we do not agree with them. Incorrect principles have neither the virtues of formal rules—certainty and stability—nor the virtue of being correct. Thus, to the extent we view a constitutional provision as embodying a principle, then, if we think the principle correct, we go ahead and do what noninterpretivist review would have us do anyway—apply correct principles of political morality, not because they are the Framers', but because they are correct. If the provision embodies an *incorrect* principle, however, then we should indeed restrict its application to the specific practices the Framers had in mind—that is, we should convert it into a narrow, formal rule.

Grano in fact adheres to his own prescription by characterizing the purposes behind various

and noninterpretive decisions fundamentally differently, it is doomed to failure in the absence of such a theory.

The foregoing discussion of Perry's approach to distinguishing interpretive from noninterpretive review leads me to a related, though quite narrower, criticism of Perry's particular version of noninterpretive review. Here I focus on the status of Supreme Court decisions that have been "silenced" by congressional action under article III. Perry, you will recall, grants such decisions only *res judicata,* not *stare decisis,* effect. Suppose, however, the Supreme Court refuses to accept the arguments of most modern commentators that Congress' power to restrict jurisdiction under article III is not plenary.[30] Suppose, instead, the Court follows *Ex Parte McCardle*[31] literally and acquiesces in every congressional attempt to silence it. Are *all* Supreme Court decisions thus silenced deprived of *stare decisis* effect?

Perry says *stare decisis* effect is only justified for decisions the Supreme Court has jurisdiction to enforce.[32] Does he intend that statement to apply to *interpretive* as well as noninterpretive decisions? Or would he give *stare decisis* effect in the state courts to silenced interpretive decisions? If the former, he needs a better account of the rationale for *stare decisis* than he has given. (Predictability and fairness seem better rationales than the first court's ability to review future decisions.) If the latter, the absence of a noncontroversial boundary dividing interpretive from noninterpretive decisions will make matters very complicated indeed, especially if we are dealing with federal law. (Congress could not constitutionally deny jurisdiction to *both* federal and state courts to consider the constitutionality of federal legislation;[33] thus Congress and some or all of the state courts could be at loggerheads over the [interpretive] constitutionality of federal laws without the availability of the Supreme Court as final authority.)

Consider another situation that might arise under Perry's scheme. The Supreme Court bans practice X, and Congress reacts by withdrawing the Court's appellate jurisdiction to review cases involving X. Suppose a state supreme court believes that X should be banned on noninterpretive grounds, but the state constitution expressly forbids such noninterpretive review. Suppose, in addition, that the state court

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provisions at such a high level of generality that they are tantamount to an overall purpose to constitutionalize correct principles of political morality. *See* Grano, *supra,* at 62 *et seq.* Of course, at this level of generality there is nothing left of the distinction between interpretivism and noninterpretivism, between our values and those of the Framers.

30. *See, e.g.,* Hart, *supra* note 21.

31. 74 U.S. (7 Wall.) 506 (1868).

32. M. PERRY, *supra* note 1, at 131.

33. *See* M. REDISH, *supra* note 21, at 26-28 (1980); Sager, *supra* note 21, at 80-84 (1981).

believes the federal Constitution bans X on interpretive grounds, though the court is unsure whether the Supreme Court's decision rested on interpretive or noninterpretive grounds. In that situation, the state court will ban X—*stare decisis* aside, article VI of the Constitution binds it to follow interpretive commands—and the Supreme Court will not review the state court's decision. This failure to review will be ambiguous, however, because it could either reflect the Supreme Court's agreement on interpretive grounds or its contentment with the state court's decision on noninterpretive grounds. Until a state court upholds X, effectively forcing the Supreme Court's hand, there will be uncertainty as to whether X violates the (interpretive) Constitution.

Of course, the Supreme Court might help matters by granting *certiorari* and disclosing whether its initial decision banning X was interpretive or noninterpretive, though its motivation for doing so would be inexplicable, unless, that is, the Court now believes that it was morally mistaken in originally banning X. But that possibility leads to another question: Why not allow Congress to overrule noninterpretive decisions directly rather than force it to proceed by the untidy route of tampering with jurisdiction?[34] Would not such a direct congressional overrule actually function in Perry's model just as effectively without all the loose ends left by denying jurisdiction? Doesn't Perry intend for silencing to have the effect of an overruling? If Congress could just out and out overrule noninterpretive decisions, noninterpretivism would become a problem of federalism rather than one of democratic theory.

Perry gives two reasons for rejecting a congressional power to overrule noninterpretive decisions.[35] First, the Constitution grants Congress the power to limit jurisdiction but not the power to overrule.[36] Second, "[t]he moral authority of the Court's voice would be diminished" and the "inter-institutional tension . . . that is the reason to value noninterpretive review in the first place" would be undermined.[37] Although intuitions may differ, I cannot see how, if we follow Perry and adopt candor about the Court's role as our policy,[38] it matters much which course Congress chooses in order to establish its moral views as supreme.

Indeed, there is very little difference between legislative overrules

34. *See* Sager, *supra* note 21, at 39-40 (1981).

35. M. PERRY, *supra* note 1, at 135-37.

36. Perry acknowledged in a precursor law review article that this particular reason is a strange one for him to invoke being a proponent of noninterpretivism. Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification*, 56 N.Y.U. L. REV. 278, 340-41 (1981).

37. M. PERRY, *supra* note 1, at 135-36.

38. *Id.* at 139-44.

of judicial decisions and legislative withdrawals of jurisdiction.[39] Of course, legislative overrules of the courts may violate interpretive constitutional provisions, such as those against bills of attainder, *ex post facto* laws, or abridgements of freedom of speech and religion. So, too, however, may congressional attempts to curtail noninterpretive judicial review through the use of Perry's article III "silencer." (I assume Perry would allow the courts to resist curtailments of noninterpretive review that violated interpretive provisions because of the underlying motives or effects.)

In any event, whether Congress restricts jurisdiction or just plain overrules noninterpretive decisions, we are unlikely ever to witness the Court-Congress dialogue over correct principles of political morality that is the *raison d'etre* of Perry's version of noninterpretive review. For if Congress is told that it will have the last word on noninterpretive values, the first time it disagrees with the Court it will undoubtedly enact a broad, wholesale, or even total elimination of judicial jurisdiction to render noninterpretive decisions. To doubt this is to doubt that Congress will use every constitutional power at its disposal to see that its moral judgments prevail.[40]

There is one more weak link in Perry's argument that I wish to identify. For Perry, noninterpretive decisions to be justifiable must be *extra*-constitutional but not *contra*-constitutional.[41] That is, neither the Supreme Court nor Congress may appropriately override the Framers' value judgments, except through the amendment process. To prevail with his theory, then, Perry must show that there is a realm of value judgments about political practices that the Framers took no position on in setting forth the authority of the political branches of the federal and state governments. For instance, Perry deems the Supreme Court's decision striking down anti-abortion laws[42] as noninterpretive.[43] For that decision to be an appropriate exercise of noninterpretive review, the Framers must not have intended to constitutionalize a permission to Congress and the states to determine for themselves whether or not to allow abortions.

I submit that there is no reason to assume that the Framers did not constitutionalize the value of the political supremacy of Congress and the states except in those areas where the Framers constitutional-

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39. *See, e.g.*, United States v. Klein, 80 U.S. (13 Wall.) 128 (1871).

40. Congress has sufficient power under article I and other enumerated powers to check those moral judgments of the states with which it disagrees; it need not rely on noninterpretive review by the Supreme Court for that purpose.

41. M. PERRY, *supra* note 1, at 132 n.*, 136 n.*.

42. Roe v. Wade, 410 U.S. 113 (1973).

43. M. PERRY, *supra* note 1, at 1.

ized values limiting the power of Congress and the states. In other words, there is no reason to assume that extra-constitutional Supreme Court decisions are not also contra-constitutional.

Indeed, the tenth amendment and article III specifically appear to render all extra-constitutional decisions contra-constitutional. The tenth amendment's reservation of all non-delegated powers to the states and the people clearly rules out congressional legislation enforcing noninterpretive decisions. (There is no power delegated to Congress under article I or the enforcement provisions of the Civil War Amendments to enact legislation enforcing values not constitutionalized.) However, the tenth amendment is not only a limitation on Congress; *it is a limitation on the powers of the federal government, including the Supreme Court.* This is strong evidence that all noninterpretive decisionmaking by the federal judiciary violates a value judgment constitutionalized by the Framers. Similarly, article III grants the federal courts power to decide cases "arising under the Constitution," but it does not grant the power to decide cases involving extra-constitutional value judgments.[44]

If the line between extra- and contra-constitutional decisions cannot be drawn, then Perry's model collapses unless (1) he concedes the Supreme Court the broad power to render contra-constitutional decisions, in which case he has to grant Congress an equally broad checking power and thus give the two branches ultimate authority to repeal constitutional norms, or (2) he can distinguish among those constitutional norms, such as the tenth amendment, that the Supreme Court may override and those that it may not. In any event, Perry's model needs extensive work to make it responsive to the restraints of textual values.

IV. THE INTERPRETIVISM-NONINTERPRETIVISM DEBATE IN PERSPECTIVE

At this point I want to draw back from the particulars of Perry's argument in support of noninterpretive judicial review and offer some comments on the interpretivism-noninterpretivism debate in general. That debate—the debate over the conditions of legitimacy of judicial review—can be viewed as a dispute over what authority should be given to the political morality of present popular majorities, past and present Supreme Court justices, the various persons, committees, conventions, and legislatures associated with the framing of the Constitution, the words of the Constitution themselves, and so forth.

The debate over authoritative sources for constitutional law is really, then, just another way of debating the content of our "Rule of

44. *See* Grano, *supra* note 29, at 4-6, 14 n.66.

Recognition,"[45] i.e., the rule or set of rules that identify our legal rules and institutions and their respective authorities. To use Richard Kay's felicitous term, the debate over the proper function of judicial review is a debate over competing "preconstitutional rules."[46]

Arguments over preconstitutional rules must perforce be arguments derived from theories of political morality, as Ronald Dworkin has repeatedly and convincingly contended.[47] The arguments, however, are not derived from such theories in precisely the way Dworkin suggests, as merely concrete instantiations of background political/moral rights. Dworkin is correct, of course, to assume that preconstitutional rules, such as rules defining "interpretation" of the Constitution, will vary depending upon the political and moral beliefs held. However, even if everyone held the same political and moral beliefs, the debate over preconstitutional rules might persist because that debate is essentially over what rules are most functional in implementing a political morality; and that debate is likely to rage even in the absence of disagreement over the content of the political morality.

The content of a political morality will provide the goals toward which the preconstitutional rules are directed, and perhaps some side-constraints on the form those rules may take. For example, to implement either John Rawls'[48] or Bruce Ackerman's[49] theory of justice, the design of various legal institutions and the allocation of authority among them must surely provide some domain for majoritarian decisionmaking and some list of rights that are to be judicially enforced against the majoritarian bodies;[50] and some arrangements—for example, dictatorship by John Rawls or Bruce Ackerman—will be ruled out as violating the basic principles of the theories even if the arrangements would otherwise be quite functional in realizing the goals of the theories. Nevertheless, even in societies that unanimously endorsed Rawlsian or Ackermanian principles, the proper design of authoritative institutions may be extremely controversial as well as quite sensitive to historical and cultural contingencies.

Preconstitutional rules, the rules about basic legal institutions, are strategic. The arguments in support of them are essentially functional, usually only mildly constrained by the theories themselves and never fully determined by them. Indeed, the basic justification of all law and

45. *See* H. HART, THE CONCEPT OF LAW 97-107 (1961).

46. Kay, *Preconstitutional Rules*, 42 OHIO ST. L.J. 187 (1981).

47. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY 105-19 (1977); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 471-500 (1981).

48. J. RAWLS, A THEORY OF JUSTICE (1971).

49. B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

50. *See, e.g., id.* at 273-324 (1980); J. RAWLS, A THEORY OF JUSTICE 195-201 (1971).

legal authority is a functional one: to implement abstract political and moral values through formal, opaque rules.[51]

Because law consists essentially of formal, opaque rules—and thus norms are more or less lawlike depending upon how formal they are—law leads to two dilemmas: (1) the authority of law and its institutions is always subject to question given that a formal rule designed to implement an abstract principle may cease at any time to be the most functional rule for that purpose; and (2) even a rule that is ideally designed for implementing an abstract principle will, because of its formal nature, conflict in some of its applications with the more abstract principle it is designed to realize.[52] Formalism, the essence of law, is a strategy for implementing nonformal principles. It is, like all strategies, fallible, and it is, by its very nature, in tension with the nonformal principles it seeks to realize.

Why have formal, opaque rules? Why have law? The answer is fallibility in applying abstract political/moral principles in concrete situations. Not only are all persons incapable of applying abstract political/moral principles infallibly, but even if some were not, the fallibility of others would result in tremendous coordination problems in the absence of formal rules. Formal rules, because they refer to a few, easily identified factual circumstances and require no great ability in abstract reasoning or empirical knowledge for their application, enable ordinary, fallible human beings to come closer to realizing their abstract political/moral principles than would direct application of those principles themselves, unaided by formal rules.

The very formality of the rules, however, leads to the two dilemmas mentioned above. The authority of a rule is always open to question in the light of new information, since such information may reveal

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51. *See* J. RAZ, THE AUTHORITY OF LAW 37-52 (1979); Alexander, *supra* note 3, at 12-16. *See also* R. UNGER, LAW IN MODERN SOCIETY 203-13 (1976).

52. *See* Alexander, *supra* note 3, at 13. The two standard means of avoiding this dilemma involve (1) repudiating the Principle of Publicity, which holds that any principle of action must be capable of being publicized in order to be considered a moral principle, or (2) repudiating the Principle of Reflection, which holds that one must approve and perhaps reward acts that are morally proper, and blame and perhaps punish acts that are morally improper. Rejecting the Principle of Publicity—which then allows one to violate the rule secretly while publicly advocating obedience, results either in an elitist, secret morality, the logical extreme of which is some sort of moral solipsism, or in voluntary self-delusion or brainwashing to prevent oneself from knowing the ultimate principles that the formal rules serve. *Cf.* Hare, *Utility and Rights: Comments on David Lyons' Essay*, in ETHICS, ECONOMICS, AND THE LAW: NOMOS XXIV 148 (J. Pennock & J. Chapman eds. 1982) (making a utilitarian argument for inculcating non-utilitarian dispositions). Rejecting the Principle of Reflection, which then allows one to urge both disobedience to the rule and blame and punishment for violating it, may be psychologically impossible, except perhaps in the form of strict liability crimes. In that form it is perhaps merely tragic. *See generally* Alexander, *supra* note 3, at 13 nn. 40, 41.

that an alternative rule would more effectively realize the abstract principles. And even an ideal rule—namely, one that is optimal for realizing the abstract principles—may, because of its formality, conflict in particular circumstances with the principles it is designed to realize.[53] In such a situation, mutually inconsistent desires exist in that one wants both to have the rule and to violate it.[54]

If the dilemmas of law stem from its formality and from its strategic function, then those dilemmas, which include the dilemma over the choice of preconstitutional rules to govern judicial review, will persist so long as we remain fallible in applying our political and moral principles. Thus:

(1) The dilemmas will remain whether or not there is ill will or corruption. (No institutional design can totally protect against those in any event.)
(2) The dilemmas will remain even in the absence of class conflict. (Even a society embodying communitarian ideals would need formal structures.[55])
(3) The dilemmas will remain even if values are objective.[56] (Right answers to abstract questions of political morality do not obviate the necessity of formal rules to implement those answers. Indeed, the *absence* of right answers eliminates the dilemmas.)
(4) The dilemmas will remain even if there are no intrasocietal disagreements about political/moral principles. (This is true because there will remain disagreements about the concrete applications of those principles.)
(5) The dilemmas will remain whether we are altruists or individualists. (Although Duncan Kennedy has linked formal rules to individualistic political moralities, and their absence to altruistic political moralities,[57] altruists will still need formal rules to implement their altruism. At a minimum they will need formal rules defining adjudicatory bodies and procedures, and undoubtedly formal rules governing citizen behavior as well.)
(6) Finally, the dilemmas will remain whether our political morality is deontological or teleological. (Even a society of Nozickian libertarians[58] would need formal rules whose divergence in particular circumstances

53. Sometimes a nonideal rule is authorized by a higher-level ideal rule, in which case the nonideal rule is tantamount to a concrete application of an ideal rule that conflicts with the abstract principle that the rule ideally implements.

54. *See supra* note 51.

55. *But see* R. UNGER, LAW IN MODERN SOCIETY 203-13 (1976).

56. *But see* Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973); R. UNGER *supra* note 55, at 203-13.

57. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

58. *See* R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

from the abstract deontological principles was justified teleologically. For example, formal rules specifying moral boundaries, when contracts were formed and how they should be interpreted, when gifts were delivered, what procedures should govern dispute adjudication, and the operation of the Lockean proviso would undoubtedly be necessary to make Nozick's brand of libertarianism workable, even if the formal rules would conflict with omniscient application of Nozick's abstract principles in some circumstances. No coherent deontological theory can totally rule out a role for subordinate teleological reasoning of the type that justifies formal rules.[59])

V. CONCLUSION

The problem that Perry and others who write about judicial review are addressing is how, at the level of preconstitutional rules, we should design our fundamental institutions and their respective roles to most effectively implement our political morality, given that we cannot anticipate every future concrete application of that political morality. (If we knew what our political morality required in every possible case, we would not need authoritative formal institutions, that is, we would not need law.)

Designing institutional authority to decide future questions that are, at present, only dimly perceived is inherently uncertain and always revisable in the light of new information. Perry's Supreme Court-Congress dialogue regarding noninterpretive values and his Supreme Court supremacy with respect to interpretive values may be the most functional design, notwithstanding its problems as indicated earlier. As far as I am concerned, Perry's design violates no side-constraint of any theory of political morality that most of us would find plausible, though I realize many critics think otherwise. However, to the extent that Perry's design rests on a view that noninterpretive review has served our shared political/moral principles well for the past hundred years and thus can be predicted to do so in the future, it is, like all strategies based on empirical prediction, subject to reassessment at any moment. The real source of disquiet with Perry's noninterpretive design is its basic fallibility and the lack of anything firmer than prediction of consequences on which to ground its authority.

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59. The problem of formalism, thus, is a problem of consequentialist moral argument, not just a problem of, say, act-utilitarianism. (For this reason, Alan Gewirth is wrong to think his moral theory escapes the problem. Gewirth, *Can Utilitarianism Justify Any Moral Rights?*, in ETHICS, ECONOMICS, AND THE LAW: NOMOS XXIV 158 (J. Pennock & J. Chapman eds. 1982)). Because any coherent political morality, whether styled teleological or deontological, will have room for consequentialist arguments, formalism is a problem whatever our political morality. *See* Lyons, *Utility and Rights*, in ETHICS, ECONOMICS, AND THE LAW: NOMOS XXIV 107, 131-32 (J. Pennock & J. Chapman eds. 1982).

Indeed, because all such preconstitutional rules—from Raoul Berger's interpretivism to Perry's noninterpretivism—are strategic designs, none of them is impervious to constant reassessment and controversy. Our Constitution and the preconstitutional rules that give it meaning are authoritative only because we have decided for the moment that they shall be. All legal authority rests upon such decisions, and because such decisions are strategic, they are always up for reconsideration. The issue of judicial review can be settled only tentatively, never for all time.