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The Turn toward Functionalism in Constitutional

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THE TURN TOWARD FUNCTIONALISM IN CONSTITUTIONAL THEORY

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Traditional justifications of judicial review, which can be defined as the authority of a court to refuse to enforce a legislative command by declaring it constitutionally prohibited, are predicated on the ability of judges to interpret, and to be confined by, the comprehensible text of our written Constitution.[1] As belief in that comprehensibility becomes even harder to maintain,[2] however, there has been a concomitant move toward what might be termed "functional" theories of judicial review.[3] That is, one no longer addresses such old chestnuts as the intentions of the Framers regarding judicial review or the historical meanings of specific patches of text. Instead, the question becomes what function does (or ought) judicial review serve in our present political system other than the either tautological or implausible function of simply "enforcing" the Constitution?

"I prefer to let the framers sleep," says Michael Perry in his ambitious attempt to reorder our constitutional discourse. "Just as the framers, in their day, judged by their lights, so must we, in our day, judge by ours."[4] To be sure, we might be interested in what they had to say, but only as equal participants in a continuing dialogue, not as privileged communicators of constitutional essence. "[T]he framers, after all, were not gods, but, like us, merely human beings."[5] They are no longer even our "fathers," whose founding vision must be carried out by us, their children. We are now adults, with responsibility for shaping our own political possibilities and speaking our own political languages.

That the judiciary may play roles wholly at odds with the original vision of the framers is beside the point, if *we*, as a collective order,

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1. *See* Levinson, *Judicial Review and the Problem of the Comprehensible Constitution* (Book Review), 59 TEX. L. REV. 395 (1981).

2. Though see the important essay by my colleague Douglas Laycock. Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343 (1981).

3. *See, e.g.*, J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); J. ELY, DEMOCRACY AND DISTRUST (1980) (both reviewed in Levinson, *supra* note 1). See also the forthcoming review of Michael Perry's work by Thomson, *An Endless Debate—But a Productive Dialogue: Some Reflections on Efforts to Legitimize Judicial Review*, 61 TEX. L. REV. ___ (1983).

4. M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 75 (1982).

5. *Id.*

decide that we wish to have such a judiciary.[6] This in itself might not raise profound difficulties if the new-model judicial review were easily subject to legislative modification, as is the case with traditional common law adjudication and its susceptibility to (potential) legislative review.[7] But, of course, the American political system emphasizes Constitution-based judicial review, which makes decisions impervious to the ordinary legislative process. Encomia to the dialogue or "national seminar"[8] conducted by the Supreme Court tend to ignore the fact that the rest of us are treated as distinctly unequal partners, especially as the Court increasingly insists on its status as "ultimate interpreter" of the Constitution.[9] Functionalist argumentation needs to address not only the merits of judicial activity *per se*, but also the claims of such activity, when invoking constitutional labels, to privileged status.

Perry leaves no doubt as to his own view that almost all modern Supreme Court decisionmaking in the area of human rights, by which he means "simply the rights individuals have, or ought to have, against government under the 'fundamental'—constitutional—law,"[10] cannot be justified by plausible relation back to the documentary Constitution itself. Instead it "must be understood as a species of policymaking, in which the Court decides, ultimately without reference to any value judgment constitutionalized by the framers, which values among competing values shall prevail and how those values shall be implemented."[11] Perry's aim, though, is not to bury the Court by such pronouncements,[12] but to establish a foundation from which to praise it.

That foundation ultimately takes the form of an extended metaphor around the notion of our American "civil religion" and its aspira-

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6. *See* Cover, Book Review, THE NEW REPUBLIC, Jan. 14, 1978, at 26 (reviewing R. BERGER, GOVERNMENT BY JUDICIARY (1977)).

7. See G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) for a vigorous defense of judicial activism at the same time that the author just as vigorously bewails the tendency of courts to be overly willing to use the Constitution as the basis of invalidating statutes. Calabresi would accord courts much more freedom to modify statutes as time reveals their difficulties, while allowing legislatures to retain their right to modify judicial judgments in turn. See the review of Calabresi by my colleague Grover Rees which focuses on the implications of Calabresi's work for constitutional adjudication. Rees, *Cathedrals Without Walls: A View from the Outside* (Book Review), 61 TEX. L. REV. 347 (1982).

8. A. BICKEL, THE LEAST DANGEROUS BRANCH 26 (1962) (quoting Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952). Bickel, of course, later had doubts about the capacities of the Court as a seminar leader. *See* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970).

9. *See, e.g.* United States v. Nixon, 418 U.S. 683, 704 (1974); Powell v. McCormack, 395 U.S. 486, 521 (1969); Cooper v. Aaron, 358 U.S. 1, 18 (1958).

10. M. PERRY, *supra* note 4, at 2 n.†

11. *Id.* at 2.

12. *Compare* Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Bork, *The Struggle over the Role of the Court*, NAT'L REV., Sept. 17, 1982, at 1137.

tions to create (by evolving into) a political order that could withstand the most scrupulous moral judgment.[13] According to Perry,

> [t]he 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.'
>
> The significance of this religious American self-understanding for our purposes is that it supplies the crucial context in which the function of noninterpretive review [i.e., judicial decisionmaking not plausibly based on the constitutional text] in human rights cases is finally clarified. *Such judicial review represents the institutionalization of prophecy.*[14]

I suspect that Perry is correct in asserting that most of our fellow citizens do not accept the premises of modern philosophy in regard to the impossibility of proving the validity of moral claims, and thus, in this sense, leaving such claims open to the charge that they are "arbitrary."[15] To put it mildly, though, it does not follow that these citizens perceive the Supreme Court as their ally. Indeed, the contemporary political scene features all sorts of candidates and officials—one of them currently in the White House—who at a rhetorical level share Perry's understanding of what our nation is about, and who generate from this understanding a severe critique of the very decisions Perry is at pains to defend. It is not that we are divided into two self-conscious national groupings—one of which is committed to moral evolution and "liberty and justice for all," the other overtly opposed to these bromides. Instead, of course, we share the rhetoric while substantially disagreeing as to the actual content that gives shape to the otherwise empty words.

"The American people," as described by Perry, is a wholly reified entity, totally separated from the flesh-and-blood citizens who have the appalling judgment to elect the legislators and Presidents who do the things that call forth judicial intervention. Like all fundamental rights or consensus theories, Perry's argument must confront, more than it does, the fact that the "people" do not appear to embrace the decisions made in their name.

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13. M. PERRY, *supra* note 4, at 97-102.

14. *Id.* at 98 (emphasis in original & added) (footnotes omitted).

15. For a short review of modern philosophy see Rorty, *The Fate of Philosophy*, THE NEW REPUBLIC, Oct. 18, 1982, at 28-34. *See also* A. MACINTYRE, AFTER VIRTUE (1980).

The snide reference to "some members of the intellectual elite" cannot successfully hide the fact that Perry's prophetic function for the Court puts enormous power in the hands of an elite—intellectual or otherwise—that need not answer to the people for what they do. There is more than a hint of similarity between the prophetic metaphor of Perry and the Platonic metaphor of the "guardians," those few members of the Republic whose characters were sufficiently "golden" to enable them to rule over the merely "brass" ordinary people.[16]

Plato, however, was a consistent anti-democrat. He was wholly unconcerned with the political rights of the brass masses, and future guardians were chosen not by election but by the existing rulers themselves. Perry, however, declares from the outset his devotion to the principle of official accountability to the general electorate.[17] Even if Perry were not so inclined, though, the fact is that judicial selection in this country requires the exercise of judgment by electorally accountable officials. One can imagine a self-perpetuating judiciary (similar, perhaps, to other self-perpetuating elite groups like the Bohemian Club or the Board of Trustees of the Rockefeller Foundation), but, for better or worse, that is not the path taken in this country.

This embedding of judicial selection in democratic accountability poses a problem for Perry. I have pointed this out previously in regard to Jesse Choper's rather similar functionalist approach to the Supreme Court, which also emphasizes the duty of the Court to protect putatively unpopular individual rights against majority hindrance.[18] There is no reason to believe that a public which has departed from the faith of its fathers (or is simply unwilling to honor the rights of unpopular minorities) will be very interested in supporting the appointment of judicial prophets who will deny them the pleasures of their decadent ways. An electorate committed to the old-time ways, or to moral evolution, scarcely needs prophets. Had ancient Israel complied with the covenant, there would have been no need for Isaiah. Perhaps this explains why prophets were traditionally appointed, if at all, only by God. Contemporary politics demonstrates, however, that much of the public can be aroused to support or reject candidates precisely on the basis of the kinds of judges they will try to appoint, or whose nominations they will support.

Moreover, there is something quite bizarre in the notion of institu-

16. *See* S. WOLIN, POLITICS AND VISION 58-63 (1960). Perry is well aware of the "Platonic Guardian" metaphor. See M. PERRY, *supra* note 4, at 99. (quoting L. HAND, THE BILL OF RIGHTS 73-74 (1958 Atheneum ed. 1963)). He rejects the linkage between that metaphor and his own.

17. M. PERRY, *supra* note 4, at 9.

18. Levinson, *supra* note 1, at 403.

tionalized prophecy, whether appointive or self-perpetuating. Historically, it is the process of institutionalization itself, with its generation of organizational imperatives, that often leads to the dilution of the pristine demands of the initial faith, whether religious or political.[19] To seek for prophets among the denizens of established institutions compares in potential futility with a search for rich men in the kingdom of heaven. There may be, to be sure, occasional exceptions. Louis Brandeis was indeed called "Isaiah" by his friends, though one gathers this was at least partly in reference to his essentially humorless mien, but there have been exceedingly few Brandeises on our bench—and even he, fulfilling the maxim, was a prophet without honor (or a Supreme Court majority) for most of his career.

It is perhaps unfair to take Perry's metaphor quite so seriously. More to the point may be two other aspects of his argument. The first concerns the relationship of Perry's language to the present "ordinary language" of legal analysis. The second involves the implications of functional analysis, whether Perry's or anyone else's, for the role of Congress in exercising independent constitutional interpretation.

Perry emphasizes throughout his book the distinction between "interpretive" and "noninterpretive" review. This distinction, of course, is now a basic part of the discourse of constitutional law professors, insofar as it contrasts traditional judicial oversight which can plausibly be said to follow closely from "value judgments, made and embodied in the Constitution by the framers"[20] with those whose provenance is quite outside the confines of the document, its authors, or ratifiers.[21] But law professors are speaking their own special language here, for it is singularly undescriptive of the way that judges talk to us or of the way the laity understands the judicial task.

Save for an occasional reference to "traditions" of "our Nation,"[22] the operative code of judicial writing seems to require a profession that judicial views are indeed linked, in just the way described by interpretivism, with the foundation document itself. As Robert Bork puts it in a passage quoted by Perry, the Court "regularly insists that its results . . . are supported, indeed compelled, by a proper understanding of the Constitution of the United States. Value choices are attributed to the Founding Fathers, not to the Court. The way an institution advertises

19. For a sustained elaboration of this theme, see S. HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY (1981).

20 M. PERRY, *supra* note 4, at 2.

21. But see the forthcoming book review by Walter Benn Michaels of P. BOBBITT, CONSTITUTIONAL FATE (1982), which challenges the meaningfulness of this distinction. Michaels, Book Review, 61 TEX. L. REV. ___ (1983).

22. *See, e.g.*, Poe v. Ullman, 367 U.S. 497, 522 (1961) (Harlan, J., dissenting).

tells you what it thinks its customers demand."[23] Neither producers nor consumers of judicial decisions seem willing to use the language of prophecy, or any other strictly functionalist language, to describe what they are doing.

Perhaps the most amusing (or bemusing) examples of the strength of this code come from the ritual exchanges found in various confirmation hearings. Consider Justice Brennan's assurance that "[t]he only way to amend the Constitution of the United States is by the method provided by the Constitution,"[24] or Justice Marshall's endorsement of the proposition that "Justices of the Supreme Court must place themselves as nearly as possible in the position of the men who framed" the Constitution.[25] Finally, there is the terse answer of Justice Fortas upon being asked "To what extent and under what circumstance do you believe that the Court should attempt to bring about social, economic, or political changes?" "Zero, absolutely zero."[26] It both impugns the integrity of honorable men and, perhaps equally important, underestimates the force of the codes that are deep within the consciousness of Americans, whether lawyers or laity, to dismiss these exchanges as mere posturing.

That Perry would require us to speak a new language does not argue against the cogency of his analysis. If one accepts, as I generally do, the implausibility of an interpretivist defense of the Supreme Court's handiwork, then one must indeed try to find an alternate lan-

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23. M. PERRY, *supra* note 4, at 139 (quoting Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 3-4 (1971)). *See also* Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975). "[I]f judges resort to bad interpretation [of the purported 'written Constitution'] in preference to honest exposition of deeply held but unwritten ideals, it must be because they perceive the latter mode of decisionmaking to be of suspect legitimacy." *Id.* at 706.

24. 6 R. MERSKY & J. JACOBSTEIN, THE SUPREME COURT OF THE UNITED STATES NOMINATIONS 1916-72 (Nomination of William Joseph Brennan, Jr.) 40 (1975). The examples in this paragraph are drawn from Powe, *The Senate and the Court: Questioning a Nominee* (Book Review), 54 TEX. L. REV. 891 (1976) and G. Rees, Questions for Supreme Court Nominees at Confirmation Hearings: Excluding the Constitution (unpublished manuscript). *See also* Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 781-82 (1983).

25. 7 R. MERSKY & J. JACOBSTEIN (Nomination of Thurgood Marshall), *supra* note 24 at 50.

26. 9 R. MERSKY & J. JACOBSTEIN (Nominations of Abe Fortas and Homer Thornberry), *supra* note 24, at 105-06. It should be emphasized that not *all* judicial nominees have remained within the traditional code. G. Harrold Carswell, who of course was not confirmed by the Senate, admitted that "no matter what one's views are about the responsibility of administering laws under justice as judge, there is a grain, almost inevitably, of law-making power in the judge. To be intellectually honest about it, this is inescapable." 11 R. MERSKY & J. JACOBSTEIN (Nomination of George Harrold Carswell), *supra* note 24, at 20. There is no indication that the source of the Senate's opposition to Carswell lay in his heretical views about the legitimacy of an activist judiciary.

guage of justification, at least so long as the speaker rejects the argument that this handiwork is simply illegitimate because noninterpretivist.

The alien status of Perry's language, relative to commonly accepted discourse about constitutional adjudication, does not make it exceptional. From its origins in nineteenth-century social science, "functionalism" has always involved the rejection of ordinary understandings and descriptions in favor of deeper structural explanations of social activity. If followers of Marx and Durkheim agreed on little else, they joined in viewing ordinary consciousness as an unreliable guide to explaining what was "really" going on in social practices. Perry's function, prophecy, may strike his readers as a bit odd, but it shares with other functionalisms—including such latter-day efforts as Choper's protection of individual rights[27] or Ely's representation reinforcement[28]—the fact that full embrace of its analysis would require extensive modification, if not outright repudiation, of the way we ordinarily talk about our Constitution, beginning with the emphasis we have placed on the importance of its writtenness and thus susceptibility to constrained interpretation. Again, I emphasize that this point is not meant as criticism, for one aspect of our contemporary cultural crisis is surely the sense that our ordinary language is no longer adequate to our situation.[29]

Indeed, perhaps the main achievement of Perry's work is its implicit encouragement to its readers to let *their* minds probe as broadly and as adventuresomely as he himself has. There is an aura of audacious risk-taking about Perry's argument. There are surely some readers who will simply regard the prophetic metaphor as foolish, if not downright dangerous. But this is a time for intellectual riskiness, and any rejection of Perry's particular ideas is not at all criticism of the spirit that animates his work. There, he is truly an example to the rest of us.

Indeed, at one important juncture in his argument Perry seems insufficiently audacious. That point concerns the power of Congress to revise at least noninterpretive judgments of the Supreme Court. As already suggested, Perry's argument requires that judges themselves acknowledge the distinction between interpretive and noninterpretive judgment. Presumably a Perrian judge would clearly label her opinion as one or the other. I do not share Perry's optimism that clear criteria exist for this demarcation, even assuming that one accepts the possibil-

27. J. CHOPER, *supra* note 3.

28. J. ELY, *supra* note 3.

29. *See* Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982).

ity of interpretivism in the first place, about which I am skeptical.[30] However, granting the distinction *arguendo*, it is important to note the consequences for Perry's argument.

Since noninterpretive decisionmaking, by definition, requires going beyond value judgments that can plausibly be attributed to drafters and ratifiers of the Constitution, it is vital—whatever the merits of prophecy—that the electorate have some ability to respond meaningfully to the decisions. Even traditional judicial review adheres to the overriding norm of popular sovereignty insofar as it is predicated upon popular ratification of the constitutional text that later turns out to block popular desire. Noninterpretive review can make no recourse to popular sovereignty.

Adopting the suggestion of Charles Black,[31] Perry argues that Congress has plenary authority to structure the jurisdiction of federal courts, at least in regard to noninterpretive decisionmaking.[32] This "significant political control" acts both as a source of potential constraint of a "false-prophet" court and, just as importantly, as an indirect means of legitimizing noninterpretivism, since Congress now becomes a joint partner in the noninterpretivist enterprise insofar as it chooses to tolerate it. Perry emphasizes "the limited scope" of his argument: "My position is not that Congress may use its jurisdiction-limiting power as a means of preventing the federal judiciary from enforcing value judgments constitutionalized by the framers. . . ."[33] Orthodox theory (i.e., interpretivism) privileges *those* judgments, though Perry does not present a full-scale argument as to why Con-

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30. Perry writes:

> Some readers might object that in constitutional adjudication the line between interpretive and noninterpretive review is not always as hard and fast as my argument about Congress's jurisdiction-limiting power implies. There might be classes of cases in which the Court truly thinks it is simply enforcing one of the framers' value judgments while Congress thinks the Court is really enforcing one of the Court's own value judgments, with the consequence that the Court disagrees with Congress's position that legislation withdrawing jurisdiction over some such class of cases is aimed at controlling only noninterpretive review.
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> While it is possible to conjure up imaginary cases like that, 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.

M. PERRY, *supra* note 4, at 130 (emphasis in original) (footnote omitted). But, as already indicated, the decisionmaking judges themselves scarcely have adopted Perry's proffered distinction, and they continue, however naively and unconvincingly, to claim that their decisions indeed follow from honest construction of the text. This is only a practical objection to Perry's argument. For theoretical objections to the notion of interpretivism, see Levinson, *supra* note 29; Tushnet, *supra* note 24.

31. C. BLACK, DECISION ACCORDING TO LAW 18-19, 37-39, 77-79 (1981).

32. M. PERRY, *supra* note 4, at 128-35.

33. *Id.* at 129-30.

gress' control is limited even in that area. Black, for one, does not adopt such a distinction, and I am inclined to accept the view that Congress indeed has power, subject to extremely few constraints, to determine federal jurisdiction however it sees fit.[34]

The principal point, though, is that for Perry, acceptance of the legitimacy of noninterpretivist review at all entails an equal acceptance of congressional supremacy over jurisdiction. Addressing the argument of Henry Hart and his latter-day devotees that the Supreme Court cannot be subject to jurisdictional limitations which "will destroy the essential role for the Supreme Court in the constitutional plan,"[35] Perry notes:

> My position is not necessarily inconsistent with Hart's, for it seems to me self-serving in the extreme to suppose that 'the *essential* role of the Supreme Court in the constitutional plan' is anything more than to enforce the value judgments constitutionalized by the framers, and I am not suggesting that Congress may exercise its jurisdiction-limiting power to interfere with interpretive judicial review. . . . My claim is merely that it may exercise its power to control noninterpretive judicial review.[36]

The "merely" is a bit misleading, I might point out, insofar as Perry predicates his entire book on his observation that almost none of the significant work of the Supreme Court over the past fifty years can be justified on an interpretivist basis.

Here is the one point in his argument, though, where it is possible that Perry is not bold enough. If one grants the basic premises of his argument, which are (1) the ability meaningfully to distinguish between interpretive and noninterpretive review and (2) the importance of maintaining political accountability at least in the latter, then one should be prepared to go further and bite the ultimate bullet of American constitutional theory—the power of Congress to overrule or revise substantive decisions of the United States Supreme Court. Perry is aware of the problem, noting that it is a "fair question" whether anyone like himself, who "feels constrained by the principle of electorally accountable policymaking to concede to Congress such a broad jurisdiction-limiting power, should not go a step further and concede" as well the power to overrule at least those noninterpretive decisions which

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34. The literature on this subject is, of course, enormous. For a recent review of the players (and their positions), see Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U.L. REV. 143 (1982) (responding to Sager, *The Supreme Court 1980 Term—Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of Federal Courts*, 95 HARV. L. REV. 17 (1981)).

35. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1365 (1953).

36. M. PERRY, *supra* note 4, at 133.

"Congress determines are substantively—morally—incorrect."[37] Perry offers several answers to the question, but I find them lame:

> First: The Constitution, in Article III, gives Congress the jurisdiction-limiting power, but not the power legislatively to reverse. Second: Were Congress to be conceded the power to reverse, we would come to view the Court, in its noninterpretive role, as a sort of delegate of . . . the legislature. . . . Such a change in the relationship between Congress and the Court would tend to undermine the very inter-institutional tension—the dialectical interplay between Court and Congress—that is the reason to value noninterpretive review in the first place. The moral authority of the Court's voice would be diminished; its opinions would be essentially only advisory.[38]

There is something distinctly odd about an author whose major theme is the propriety of noninterpretivist functionalism adopting an essentially interpretivist limit when conceptualizing the role of Congress. Who cares, frankly, about the text of article III if one is able to accept the legitimacy of noninterpretivism in the first place? There is no reason to view Congress as peculiarly constrained by the text of the Constitution at the same instant that one is endorsing the freedom of the Court to go well beyond the text in the name of social evolution. One might feel differently if the text stated explicitly that Congress shall have no authority to revise Constitution-based judgments of the Supreme Court, but, of course, there is no such patch of text.

Moreover, there is the equally obvious fact that we have already adopted a fully functionalist jurisprudence in at least one area of constitutional adjudication, involving alleged state infringement of interstate commerce. Since the *Wheeling Bridge* case,[39] Congress has been accorded the right to overturn Supreme Court decisions with which it disagrees. The common-law role played by the Court in this particular doctrinal area has scarcely coincided with a diminution of its general authority, and there is no reason to think that recognition of congressional power would necessarily limit the stature of the Court, at least if it is worth respecting because of the cogency of its argument and illumination provided by its moral insights.[40] "Dialectical interplay" is

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37. *Id.* at 135.

38. *Id.* at 135-36.

39. Pennsylvania v. The Wheeling and Belmont Bridge Co., 59 U.S. (18 How.) 421 (1855). *See* P. BREST & S. LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 145-48 (2d ed. 1983).

40. Compare Andrew Jackson's comment in his veto of the bill renewing the charter of the Bank of the United States: "The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence

only a euphemism where one of the parties has the last word; it is comparable to a marriage where only one party is authorized to file for divorce. Interplay there would be, to be sure, but whether it could properly be described as dialectical is another matter.[41]

Perry is scarcely dogmatic on this point. "Perhaps in the end there is not an adequate reason for refusing to go further and concede to Congress the power to reverse."[42] He confesses his reluctance to make such a concession, but I am afraid he does not provide adequate reasons to refrain from doing so. Indeed, even if one feels confined by article III, as Perry professes he does, there is no bar to suggesting a constitutional amendment that would forthrightly establish a more desirable constitutional order. During the period of controversy that swirled around the (anti-) New Deal Court, Felix Frankfurter, among others, proposed a constitutional amendment that would authorize Congress to overrule Supreme Court decisions under certain circumstances.[43] I do not regret that such an amendment was never officially

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as the force of their reasoning may deserve." A. Jackson, Veto Message (July 10, 1832), *quoted in* P. BREST & S. LEVINSON, *supra* note 39, at 53.

Much contemporary defense of the Supreme Court's supremacy is based more on what can only be termed authoritarian argument than on respect for the quality of judicial reasoning. *See, e.g., Testimony and Material: Hearings on S. 158 Before the Senate Subcomm. on Separation of Powers*, 97th Cong., 1st Sess. 193, 195, 248, 310 (1981) (statements of Professors Kurland, Wright, Bork, and twelve other constitutional law professors).

41. My colleague Douglas Laycock has pointed out that I am scarcely endorsing genuine "dialectical interplay" myself, insofar as I am willing to assign Congress the last word. He is, of course, correct. Perhaps the central point, therefore, is that the notion of "dialectical interplay," like "checks and balances" or the *r'envoi* problem in conflicts, leads to an infinite regress unless one puts a stop to the back-and-forth at some point. Democratic theory requires, I believe, that the stopping point be the most democratic branch of the polity, unless special reasons can be offered to defend a different solution.

Professor Laycock has suggested that this bow toward democracy is bothersome in those instances where the Court has used its power to protect minorities who would presumably be threatened by unlimited majority power. Here, too, Laycock has a valuable point. I think a preliminary answer can be found, though, by differentiating between such protection of minorities (interpretivist or otherwise) and assertions as to the existence of "fundamental rights" protected from almost all state regulation. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965). In the latter instance, which protects a majority from itself, I see no good reason for limiting legislative power to override. *See* Levinson, *supra* note 1, at 411. This distinction between minority-protection and fundamental rights is, of course, similar to John Hart Ely's own functionalist emphasis on representation-reinforcement as the role of the Court. To the extent that one finds Ely's notion helpful, I think it could serve as well to satisfy at least some of Professor Laycock's objection to my comparison between the functionalism we have long accepted in the commerce clause area and the new functionalism suggested by Perry as modified by my argument in the text.

42. M. PERRY, *supra* note 4, at 137.

43. *See* P. IRONS, THE NEW DEAL LAWYERS 274-75 (1982). Indeed, Frankfurter had earlier declared his willingness to restrict the fourteenth amendment "to 'unreasonable' racial and religious discriminations and withdrawing from those Nine Holies the reviewing power over purely intra-state 'social legislation'." Frankfurter to Learned Hand (Apr. 17, 1924) Learned Hand Pa-

proposed or passed, but that is principally because I support the vision outlined by the so-called Warren Court, and I am glad that its decisions were impervious to ordinary legislation. Yet Perry is persuasive that that vision cannot plausibly be thought to derive in its entirety from the unamended Constitution itself, and judicial supremacy in the absence of such derivation does continue to exhibit overtones of Platonic guardianship.

I am quoted on the back cover of Perry's book as stating: "There will be many who will disagree with Perry, but few who will not find his book extremely provocative and stimulating." I trust it is clear that I do indeed disagree with many of Perry's formulations, but I hope it is equally clear that, even upon rereading, I find it the provocative and stimulating book promised the reader. Here, at least, there is no false advertising. The ability of the *University of Dayton Law Review* to put together a symposium focusing on Michael Perry's arguments is a tribute both to the continuing vitality of constitutional theory and the particular contribution of Professor Perry to the ongoing discussion (and tumult).

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pers, Harvard Law School Library, Box 104, Folder #11. *See also The Red Terror of Judicial Reform*, THE NEW REPUBLIC, Oct. 1, 1924, at 110-13 (unsigned editorial of Felix Frankfurter).