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# Murder in the Cathedral—The Supreme Court as Moral Prophet

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# MURDER IN THE CATHEDRAL—THE SUPREME COURT AS MORAL PROPHET

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## I. INTRODUCTION

Michael Perry has been one of the most ardent contemporary defenders of the exercise of noninterpretive judicial review. His writings have consistently defended expansive readings of the due process and equal protection clauses by defending decisions striking down abortion laws[1] and various types of governmental discrimination against particular groups,[2] as well as by attacking the Court for its refusal to extend those decisions.[3] *The Constitution, the Courts and Human Rights*[4] is by far his most ambitious work. In it, Perry attempts to provide a generalized justification for the refusal of the courts—and in particular the Supreme Court—to feel bound by the intentions of the framers of the Constitution.

Any such construct is, of course, liable to be highly controversial. In the field of constitutional theory, the premises from which the various commentators proceed vary so widely that the achievement of consensus is likely to be impossible. But at the very least, any theory must reach results consistent with the preconditions which the author himself accepts as premises. On this level, Perry's argument is deeply flawed. Thus, his model lacks viability.

## II. THE PROBLEM OF LEGITIMACY

Like many contemporary constitutional theorists, Perry is concerned with the problem of the legitimacy of judicial review. He devotes his entire first chapter to "[t]he problem of legitimacy."[5] Further, in discussing his approach to noninterpretive review in so-called "human rights" cases, he describes the stakes involved in the debate

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

2. *See, e.g.*, Perry, *Constitutional "Fairness": Notes on Equal Protection and Due Process*, 63 VA. L. REV. 383 (1977); Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 70 COLUM. L. REV. 1024 (1979).

3. *See, e.g.*, Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role In American Government*, 66 GEO. L.J. 1191 (1978); Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977).

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

5. *Id.* at 9.

over the legitimacy of such review as "very high indeed."[6] Thus, Perry obviously views the question of legitimacy as being at the heart of the debate over constitutional theory.

On one level, the focus on the concept of legitimacy is quite understandable, for the charge that a given theory of judicial review would lead the courts to render decisions which are "illegitimate" has great emotive impact. Indeed, unless one can defend his approach from a charge of illegitimacy, there is little use in elaborating that theory further. For unless a legitimate role is posited for the Court, no amount of argumentation regarding the "good" results engendered by the theory will provide sufficient justification for its adoption.

But on another level, discussions of legitimacy per se can divert attention from the issues which are truly raised by particular arguments. The source of the rhetorical force of a charge of illegitimacy is the connotation that the theory at issue runs afoul of some transcendent political or moral principle. Unless one carefully identifies the principles which are the basis of the charge of illegitimacy and directs discussion specifically to those principles, the debate over "legitimacy" can rapidly degenerate into an exchange of epithets.

In Perry's case, this difficulty is exacerbated by an inconsistency in the identification of the principles underlying his conception of legitimacy. Initially, he seems to view consistency with the principle of electoral accountability as a necessary and sufficient condition for legitimacy in a theory of judicial review.[7] Recognizing the inconsistency of some exercises of interpretive review with the concept of electoral accountability,[8] however, Perry defends interpretive review in terms of what he views as a "compelling functional justification."[9] Finally, he argues that the exercise of noninterpretive review in human rights cases can only be viewed as legitimate if it is both justified functionally and

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6. *Id.* at 92.

7. M. PERRY, *supra* note 4, at 9-10.

8. *See id.* at 12.

9. *Id.* at 15.

It should be noted that this "compelling" justification rests on rather shaky ground. Perry's major premise is that "the judiciary is that branch of the federal government with the greatest institutional capacity to enforce the legal norms of the Constitution in a *disinterested* way." *Id.* at 15-16 (emphasis added) (footnote omitted). He describes this assertion as "[un]controversial." *Id.* at 16.

But if the course of judicial decision making from Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) through Lochner v. New York, 198 U.S. 45 (1905), and Roe v. Wade, 410 U.S. 113 (1973) makes anything clear, it is that judges will be swayed by political bias—just as are members of other branches of government. Of course, the biases of federal judges are likely to be somewhat different from those of congressmen or the President; but to suggest that the former will act "in a disinterested way" is rather naive.

consistent with the principle of electoral accountability.[10]

Despite this apparent confusion, the basic thrust of Perry's criticism of the interpretivist position and his defense of noninterpretive review in human rights cases emerges rather clearly. Interpretivism he finds unacceptable because he views it as being grounded on a theory of moral skepticism.[11] His defense of noninterpretive review, on the other hand, is based on three major points: (a) noninterpretive review in human rights cases has, on the whole, been an instrument for moral growth in the United States; (b) noninterpretive review is extraconstitutional rather than contraconstitutional; and (c) the exercise of noninterpretive review by the Supreme Court is consistent with the basic principle of electoral accountability. The remainder of this review will focus on each of these points in turn.

## III. The Efficacy of Noninterpretive Review

One of the key points in Perry's argument is his contention that noninterpretive review by the Supreme Court has, on balance, been an instrument of moral growth for the country. Perry does not claim that a refusal to exercise noninterpretive review would constitute illegitimate judicial behavior; instead, he rests his position on the proposition that interpretivism is not the only legitimate judicial philosophy, and that, in practical terms, the nation has benefited from the abandonment of the framers' intent. If the latter contention is incorrect—if in fact the exercise of noninterpretive review has not resulted in an overall benefit to society—then there would be little point in developing a theory to justify the exercise of such review.

In assessing the overall performance of the Court, Perry attempts to devalue those examples which are most damaging to his thesis. He argues that because the debate over judicial review should focus on the appropriate role to be played by the Court in *contemporary* American society, cases such as *Lochner v. New York*[12] and *Dred Scott v. Sanford*[13] should be given less weight than *Brown v. Board of Education*[14] and *Griswold v. Connecticut*[15] in assessing the performance of the federal judiciary.[16] It is by concentrating on the decisions which the Court has rendered since *Brown* that Perry is able to conclude that noninterpretive review "has functioned, on balance, as an instrument of deepen-

10. M. Perry, *supra* note 4, at 92-93.
11. *Id.* at 105.
12. 198 U.S. 45 (1905).
13. 60 U.S. (19 How.) 393 (1857).
14. 347 U.S. 483 (1954).
15. 381 U.S. 479 (1965).
16. M. Perry, *supra* note 4, at 116-17.

ing moral insight and of moral growth."[17]

The difficulty with this argument is that the association of noninterpretive review with the center/left political philosophy which Perry associates with "moral growth" is not the product of any enduring structural feature of American government. Depending largely on the shape of presidential politics, judicial activism could once again easily become associated with the political theories which produced the *Lochner* era.[18] Therefore, rather than relegating *Lochner* and its progeny to a secondary role in the discussion, any consideration of the consequences of abandoning interpretivism must take fully into account the possibility that judges will once more feel the urge to impose laissez-faire capitalism under the guise of constitutional interpretation.

Of course, the existence of this methodological flaw does not disprove Perry's assertion that noninterpretive review has been an instrument for moral growth. The question of the ultimate vitality of this conclusion is an extraordinarily complex issue—too complex to be resolved or even intelligibly discussed in the context of a book review. But in any event, under Perry's theory efficacy alone is insufficient to establish the legitimacy of such review. Parts III and IV will examine other crucial elements of his argument.

## IV. THE EXTRACONSTITUTIONAL-CONTRACONSTITUTIONAL DICHOTOMY

Perry's eagerness to avoid the claim that his theory countenances contraconstitutional review is understandable. In common with American society generally, Perry sees the Constitution as identifying values which are to be given a very high level of priority. Any theory which is contraconstitutional by definition attempts to subordinate these values, and is, therefore, subject to an extraordinarily heavy burden of justification. By contrast, the advocate of a theory of judicial review which is only extraconstitutional faces a less severe problem in establishing the legitimacy of his approach.

Unfortunately for Perry, the contraconstitutional/extraconstitutional distinction rests upon an unduly narrow view of the function of the Constitution itself. Most of the Constitution is not directly concerned with the establishment of "human rights" at all; rather, much of the document is devoted to the description of the structure of government and to the definition of the powers of various branches. These structural provisions are concerned with two basic issues—the distribu-

17. *Id.* at 118.

18. *Cf.* National League of Cities v. Usery, 426 U.S. 833 (1976) (Congress cannot impose minimum wage requirement for state employment).

tion of authority between the state and federal governments, and the allocation of federal power between the various branches of the central government. By determining the allocation of power, the provisions implicitly define the appropriate role of the Court in review of state and federal actions, respectively. In both cases, the relevant provisions indicate that the Court should not strike down governmental action unless directed to do so by the framers' intent.

With respect to judicial review of state action, the limitations on judicial review are quite clear. The Constitution nowhere enumerates the power of the states; instead, certain limitations are imposed, and all other powers are explicitly reserved to the states by the tenth amendment. Since in the exercise of noninterpretive review the Supreme Court—a branch of the federal government—limits the powers of the states in a manner not contemplated by the Constitution, the exercise of such review must violate this amendment.

No such explicit provision governs the relationship between the Court and Congress. However, the Constitution does make a clear distinction between those powers granted by Congress by Article I, section 8, and those granted to the courts in Article III. Further, the Article I powers are plainly intended to be plenary, limited only by extrinsic provisions within the Constitution itself. Thus, when the Court imposes restrictions based upon values not derived from the Constitution—in other words, exercises the power of noninterpretive review—the justices violate the principles of separation of powers which are implicit in Articles I and III.

One might attempt to meet these arguments by conceding the technically contraconstitutional nature of noninterpretive judicial review, but contending that the need for protection of individual rights somehow outweighs the structural concerns inherent in the Constitution.[19] The difficulty with this position is that arguments based on structure in fact implicate the interests of individuals. *Committee for Public Education & Religious Liberty v. Nyquist*[20] provides a clear illustration of this point. *Nyquist* dealt with a New York statute which provided for a number of different types of assistance to nonpublic schools. Those schools whose student bodies included a high percentage of low income families received direct monetary grants for maintenance and repair. In addition, low and moderate income families whose chil-

19. Perry does not explicitly make this argument in the context of his discussion of the extraconstitutional/contraconstitutional distinction. However, in his discussion of judicial review of matters of allocation of authority between the state and federal governments, he explicitly rejects the claim that "federalism issues are, at bottom, human rights issues of one sort or another." M. PERRY, *supra* note 4, at 45 n.*.

20. 413 U.S. 756 (1973).

dren attended nonpublic schools were entitled to both tuition reimbursement from the state and a graduated tax credit. Because the aid benefited church-sponsored schools, the Court found that all portions of the New York statute violated the first amendment prohibition on the establishment of religion.

Certainly, one cannot imagine a more personal interest than the right which in *Nyquist* was denied by the Court to the erstwhile beneficiaries of the New York program—the right to receive money. Further, at least in the absence of a federal statute, once the right to receive funds had been established by legitimate state processes, the tenth amendment forbids federal judicial interference in the absence of some extrinsic constitutional command. Thus, if Perry is correct in his assertion that the framers of the fourteenth amendment did not intend to incorporate the bill of rights,[21] then *Nyquist* emerges as a classic case of contraconstitutional action—the denial of an individual right in contravention of a constitutional prohibition.

*Nyquist* is in some respects rather unusual. In most human rights cases, the specific individuals whose interests are endangered by judicial activism will be less easily identified. Those interests, however, still exist; they are less apparent only by virtue of being more diffuse than those which were at issue in *Nyquist*. *Metromedia, Inc. v. City of San Diego*[22] illustrates this point. *Metromedia* involved a constitutional challenge to a city ordinance which limited the use of billboards to narrowly defined circumstances. Invoking the first amendment, a sharply-divided Court found the ordinance unconstitutional.

On its face, unlike *Nyquist*, the negative effect of the *Metromedia* decision on individual interests is not obvious. That effect is nonetheless quite real. The primary motivation for the imposition of restrictions such as that in *Metromedia* is simply that a large portion of the citizenry does not wish to be exposed to billboards; in essence, the ordinance established their right not to be so exposed. Further, as in *Nyquist*, the judicial abrogation of this right plainly violates the tenth amendment. Thus, once again, judicial exclusion under the first amendment resulted in a contraconstitutional denial of individual rights.

Notwithstanding the difficulty in maintaining the extraconstitutional/contraconstitutional distinction, the heart of Perry's theory might yet survive, for he seems to suggest that even if contraconstitutional, noninterpretive review might be legitimate if consistent with the principle of electoral accountability.[23] The next subpart will examine

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21. M. PERRY, *supra* note 4, at 61-64.
22. 453 U.S. 490 (1981).
23. M. PERRY, *supra* note 4, at ix.

Perry's claim that his theory is consistent with this principle.

## V. Electoral Accountability and Noninterpretive Review

Perry attempts to reconcile noninterpretive review with the principle of electoral accountability by positing an unlimited congressional power to control the jurisdiction of the Supreme Court.[24] As conceptualized by Perry, withdrawal of jurisdiction over a particular type of issue would essentially overrule previous decisions of the Court on that issue.[25] Since the potential exercise of this power leaves ultimate control in the legislative branch of government, Perry concludes that noninterpretive review is consistent with the axiom that authority should rest with officials who are accountable to the citizenry.

In the abstract, the existence of such a congressional power might seem to inject a significant degree of electoral accountability into the process of noninterpretive judicial review. However, one is not dealing with an abstract system; rather, constitutional theorists are faced with a system which has had considerable experience with attempts to use the jurisdiction-limiting power as a check on the authority of the federal courts. And in fact, the authority of Congress over the jurisdiction of the federal courts has been virtually no check at all on judicial power. In the entire history of the United States, there is only one instance in which the jurisdiction-limiting power has been used to effectively prevent the Supreme Court from making an authoritative announcement on an issue of grave public importance.[26] Even in that case, the effect of the imposition of the limitation was only to delay the exercise of judicial authority.[27] Indeed, if one is evaluating the various checks on the Supreme Court's power, the amendment process has been far more effective as a means of controlling the judiciary; constitutional amendments have been adopted to overrule Supreme Court decisions in four instances.[28] Yet, Perry specifically rejects the proposition that the existence of the amendment process provides a significant political check on the exericse of judicial authority.[29]

In attempting to defuse this criticism, Perry might resort to two

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24. *Id.* at 128.

25. *See id.* at 130-31.

26. *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869).

27. *See Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1868). *See generally* 6 C. Fairman, History of the Supreme Court of the United States 433-514 (1971).

28. Oregon v. Mitchell, 400 U.S. 112 (1970) was overruled in part by the twenty-sixth amendment; Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429 (1895) was overruled by the sixteenth amendment; Dred Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) was overruled by the fourteenth amendment; and Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) was overruled by the eleventh amendment.

29. M. Perry, *supra* note 4, at 127.

devices. First, he could (and does) argue that so long as the jurisdiction-limiting power exists, the mere fact that the polity and its representatives have chosen not to use the authority should not be fatal to this theory.[30] But one must always remember that Perry is seeking to justify judicial review in functional terms—that is, in terms of the practical operation of the system—and in practical terms, the theoretical existence of an unlimited congressional jurisidiction-limiting power has not made the Supreme Court electorally accountable in any sense.

Nor can it be effectively argued that the failure of Congress to directly overrule noninterpretive decisions of the Supreme Court is founded in its agreement with the moral principles underlying those decisions.[31] One need only observe the course of congressional debate over such matters as school prayer, abortion and the death penalty to realize that legislators do not feel free to vote their convictions in the face of contrary Supreme Court precedents. Instead, such precedents seem to be viewed as cloaked in a kind of mystical authority which constrains the political process rather than becoming ultimately subject to it.

Thus, Perry cannot effectively argue that, in the exercise of noninterpretive review, the Supreme Court is significantly constrained by the actions of the other electorally-accountable branches of government. This lack of an effective political check also has profound implications for another concept at the core of Perry's functional argument—that noninterpretive review enriches and focuses the moral dialogue which influences policy choices.[32] Perry is clearly correct in his assertion that the Court will at times be well-placed institutionally to participate in such a dialogue with the legislative and executive branches of government. Such a dialogue occurs when the Court is formulating common law or interpreting statutes; in such cases, the electorally accountable branches feel free to modify judicial decisions if necessary. But where the Court strikes down governmental action on constitutional grounds, moral dialogue is often (although not invariably) discouraged and inhibited.

The abortion decisions provide a classic example. Prior to the Court's holding in *Roe v. Wade*,[33] American society was in the midst of a fundamental reevaluation of its position toward the legality of abortion. Through the legislative process of exchange of views and compromise, state laws were being reformed, with a gradual but perceptible

30. *See id.* at 127-29.
31. Perry may be relying on this argument as well. *See id.* at 132.
32. *See id.* at 115.
33. 410 U.S. 113 (1973).

drift toward liberalization.[34] *Roe* effectively ended this process of discourse and compromise. In the absence of a constitutional amendment, the standards set out in *Roe* have been viewed by all concerned as the unalterable base from which further debate must proceed. Further, action by the Court has had a polarizing effect; the debate over the issues left undecided by *Roe* has become dominated by the extremes on both the pro-life and pro-choice sides of the argument, with the legislative process captured by those who would prohibit or hinder abortions in every conceivable way which might be permitted by *Roe*. The result is that rather than being a simple participant in the ongoing moral debate over abortion laws, the Court has become the ultimate authority on the subject, issuing *ex cathedra* pronouncements which are the final word on each restriction imposed by other governmental bodies.

In short, the exercise of noninterpretive review defeats the very purpose which Perry sees as the rationale for the practice. Rather than enriching the debate over controversial social/moral issues, the extension of "constitutional" judicial authority often tends to truncate and stifle that debate.[35] Thus, his functional justification for the rejection of interpretivism is ultimately unconvincing.

## VI. CONCLUSION

The unpersuasiveness of Perry's arguments derives from his unwillingness to face a simple, unalterable fact—that except within relatively narrow parameters, the exercise of judicial review is fundamentally inconsistent with the theory of electorally accountable government.[36] This fact does not necessarily condemn the practice; one can still argue that the abandonment of democratic principles leads to a better governed nation. But unless one is willing to forthrightly take this position, any defense of noninterpretive review is doomed to failure.

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34. *See, e.g.*, Doe v. Bolton, 410 U.S. 179 (1973) (striking down recently liberalized abortion law).

35. This problem is admittedly less severe in cases where the courts become deeply involved in ongoing institutional reform. *See generally* M. PERRY, *supra* note 4, at 146-62. In such cases, the exigencies of the situation require judges to engage in the kind of dialogue envisioned by Perry. *See* Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979). But such cases make up only a small percentage of those in which the federal courts have engaged in noninterpretive review.

36. In rare cases—those involving voting rights and reapportionment, for example—the exercise of judicial review might be seen as actually perfecting the democratic process. *See generally* J. ELY, DEMOCRACY AND DISTRUST (1980).