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Skepticism and Politics in the Domain of Rights

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SKEPTICISM AND POLITICS IN THE DOMAIN OF RIGHTS

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In the prologue to his book, *The Constitution, the Courts, and Human Rights,* Michael Perry recalls Robert McCloskey's plaint that the persistence of debate over the legitimacy of judicial review shows little progress—like "an endless series of re-matches between two club-boxers who . . . have nothing further to learn from each other."[1] Perry says that the task of constitutional theory is to escape this judgment. It may be that the problem is not the impuissance of constitutional theory, but a misconception of what constitutes progress. In McCloskey's metaphor there are no knockouts; so evidently in constitutional debate. But before we accept that as the measure of our work, we will do well to ponder these remarks of Wittgenstein's:

> Philosophy has made no progress? If somebody scratches where it itches, does that count as progress? If *not* does that mean it was not an authentic scratch? Not an authentic itch? Couldn't this response to the stimulus go on for quite a long time until a remedy for itching is found?[2]

I.

If one were writing an intellectual history of constitutional law, skepticism would emerge as a central conceptual feature with Holmes, and the continuing critical response to the Warren Court would mark its efflorescence.[3] Few, if any, constitutional scholars would carry the skeptical program to the point of doubting the very possibility of law, as some members of the loosely identified American Realist group did.[4] For most, theories of interpretation and historical claims narrow the target of the skeptical artillery to individual rights issues in which the evaluative aspect of judgment is inescapable.

Charles Black and Michael Perry are both strong defenders of judicial review, and particularly judicial review based on innominate

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1. M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 8 (1982) (*quoting* R. MCCLOSKEY, THE MODERN SUPREME COURT 290-91 (1972)).

2. L. WITTGENSTEIN, VERMISCHTE BERMERKUNGEN 163-64 (1977).

3. I use skepticism very broadly, though I think it would be possible with time and effort to identify a number of somewhat distinct forms of skepticism, including rights-skepticism, rule-skepticism, and court-skepticism, that have influenced constitutional theory.

4. *See* Rogat, *Legal Realism,* in 4 ENCYCLOPEDIA OF PHILOSOPHY 420 (P. Edwards ed. 1967).

rights.[5] Both have written books that tie the legitimacy of innominate rights review to congressional power over jurisdiction.[6] Notwithstanding this point of convergence, to which I will return, it is hard to imagine two more different books. The source of the difference is the weight that each accords the skeptical objection to innominate rights review. In the contrast between the books, we can take a rough measure of the cost for constitutional theory of taking skepticism too seriously.

Black simply refuses to allow the skeptical doubt to get off the ground. He does not make his case by stating and defending an abstract theory of law. Indeed, he insists that neither he nor anyone else is ready to provide such a theory.[7] Rather, he assumes that the ideal of lawfulness abides in the ordinary practice of judicial decisionmaking, and he proceeds by showing how the controversy that attends some exercises of judicial review can be dissipated by attention to the ways in which those decisions are like *all* exercises of the judicial art.

Deciding according to law involves "reasoning from commitment" — the commitment to general principles of political morality marked by the text and structure of the Constitution. Such reasoning inevitably requires courts to make judgments of value that cannot be passed off as choices already made in other times and places by other people. It is not adherence to the view that "constitutional decision must never be fed by any judgment of rightness, justice, or political wisdom that cannot be rigorously shown to have some kind of objective, quasi-official validation outside the minds and hearts of those who decide"[8] that marks the lawfulness of decision. It is that "the element of reasoning from commitment *plays a part important enough* to mark a serious specific difference between decision according to law and other kinds of decision."[9]

By the method of example, Black shows reasoning from commitment at work in constitutional decisionmaking. What he does not, and

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5. Black speaks of unnamed rights. C. BLACK, DECISION ACCORDING TO LAW 45-46 (1981). Perry adopts the interpretivist/noninterpretivist distinction. M. PERRY, *supra* note 1, at 10.

I do not propose to get into an argument here over which term is more appropriate. My choice reflects my belief that the interpretivist/noninterpretivist distinction depends on a theory of interpretation that is itself controversial. My view is that the issue of central importance in the cases where legitimacy seems problematic is what rights do people have? I do not believe that anything I say here about Perry's book is dependent upon which term one uses to refer to the instances of judicial review under discussion. Where employing Perry's language seems important as a matter of exposition, I will use quotation marks to indicate that I am mentioning, rather than using the terms.

6. C. BLACK, *supra* note 5, at 26, 37-39; M. PERRY, *supra* note 1, at 128-35.

7. C. BLACK, *supra* note 5, at 32.

8. *Id.* at 81.

9. *Id.* at 34 (emphasis in original).

perhaps cannot, show is the conclusion that reaches out and compels agreement. Black embraces the fact that our constitutional commitment is to general principles, necessarily vague, and, therefore, to uncertainty.[10] That he can do this without apparent discomfort is perhaps the clearest sign that he has evaded the siren call of skepticism.

With Perry it is very different. He allows the challenge of skepticism to take hold, and attempts to defeat it on a battlefield it has chosen. The result is a kind of conceptual schizophrenia, in which the positions taken in opposition to skepticism destroy that which they were designed to defend.

The skeptical camp in constitutional argument is usually pitched on the ground of the supposed nonobjectivity or nondemonstrability of normative judgments supporting innominate rights claims. Perry purports to reject skepticism by adhering to the view that society does and should "take seriously the possibility that there are right answers to political-moral problems."[11] But the difficulty he has in shaking the insidious influence of skepticism shows through some aspects of the quite extraordinary defense of innominate rights review that he presents.

First, Perry deploys what he calls "functional justifications" for both "interpretive" and "noninterpretive" judicial review. "Interpretive" judicial review is justified because it serves the function of fulfilling the framers' intent that the Constitution be treated as law.[12] "Noninterpretive" judicial review is justified because it allows us "to keep faith with two of the most basic aspects of our collective self-understanding:" — namely, commitment to democracy and commitment to moral growth.[13]

The sense of *justification* in both instances is obscure. The fact that something serves a particular function does not directly justify it. It may have been a fact that cannibalism provided a vital protein supplement to the Aztec diet. If so, that fact certainly did not justify the practice.

In fact, if the functional justifications justify, it is because they are enthymematic, containing suppressed normative premises that, if exposed, might open Perry's argument to skeptical criticism. With regard to "interpretive" judicial review, the suppressed premise is that we ought to comply with the framers' intent. This proposition is not likely to draw much fire from the skeptics like Bork and Rehnquist who have Perry's attention. But the difficulties with intentionalism that Paul

10. *Id.* at 80.

11. M. PERRY, *supra* note 1, at 107.

12. *Id.* at 15.

13. *Id.* at 101. The "commitment to democracy" function is served only by subjecting innominate rights review to congressional control over jurisdiction.

Brest has identified are real.[14] Henry Monaghan, no friend of free-wheeling judicial review, has said: "It may very well be that those people who believe in the theory of original intent, like I do, will suffer their ultimate downfall because they can't establish [a theory of original intent] with enough coherence to satisfy anybody."[15] If this justification escapes skeptical criticism, it will be evidence for the opportunism of the skeptics rather than for the invulnerability of the premise.

As for "noninterpretive" review, the inarticulate presupposition is that we ought to keep faith with both mentioned aspects of our self-understanding, rather than, say, working to rid ourselves of the silly belief that there is such a thing as moral progress. This is just the sort of premise with which the skeptics would have a field day. Perry anticipates this, and attempts to set it aside, saying that he will "not defend the proposition that we should take seriously the possibility that there are right answers" because his book is not "a metaethical treatise."[16] However, it is not just skeptics who have grounds for objecting to his functional justification. If Perry were to write the "metaethical treatise" to confound the skeptics on the existence of right answers to moral questions, he would have shown just that there are right answers to moral questions. The justification for "noninterpretive" judicial review would remain to be made.

This point may be illuminated by recalling Learned Hand's famous remark regarding Platonic Guardians.[17] Of course, Hand did not believe in the Forms. But, his objection to rule by Guardians would still have cogency if he did know how to pick them. "If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs."[18] Just as the fact that science is objective does not provide an objective justification for pursuing science, so knowing that there are moral truths does not itself justify making their pursuit a part of law.[19]

The attempt to avoid skepticism by functional justifications simply leaves some work to be done — the work of establishing the acceptability of the suppressed normative premises. Perry's other nods to skepticism are much more pernicious. He undermines the role of reason in

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

15. *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 535-36 (1981) (remarks by Professor Monaghan).

16. M. PERRY, *supra* note 1, at 102.

17. "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." L. HAND, THE BILL OF RIGHTS 73 (1958).

18. *Id.*

19. *See* B. WILLIAMS, MORALITY 30-31 (1972).

innominate rights review, and he takes up the position that a judge ought to decide cases according to his own values. The consequence is that innominate rights review is no longer law in any meaningful sense. One is left wondering why, if *this* ought to be done, it ought to be done by judges.

Perry comes to the evisceration of innominate rights review by a tortuous path. He begins by asserting that the task of innominate rights review is to seek right answers to moral questions.[20] But he rejects the claims of all existing systematic moral theories to provide right answers, and is "reluctant to assume that a single moral system will ever have an exclusive claim on the mind of man."[21] From that, he moves to the view (hesitantly stated) that "the correctness of a given answer to a human rights problem inheres in something other than the particular set of reasons — the particular rationalization or explanation — offered in support of the answer."[22] Reasons are not to be dispensed with, but they are to be understood as serving a function similar to myth ("Man . . . seems to require rationalization, just as he seems to require myth")[23] rather than as doing the work those who employ them seriously take them to be doing. A bit of crude relativism creeps in here: particular rationalizations are apparently untrustworthy because they are " 'relative to linguistic and theoretical schemes which are historically and culturally conditioned and therefore reformable.' "[24]

The closest thing to a criterion of judgment that emerges from all this is that "a right answer . . . frequently represents, in the United States [is it only in the United States that moral theory is deficient?], a point at which *a variety* of philosophical and religious systems of moral thought and belief converge."[25] Such convergence at least counts as evidence for "orthopraxis" — "right" action that transcends particular rationalization.[26]

One might expect that Perry would commend to the judges the method of examining the major religious and moral theories for points of convergence, in order to determine what rights people have. Instead, he gives them license to look into their own hearts. I will have more to say about this in a moment.

It would appear that the corrosive effect of skepticism has eaten away all the ground under Perry's defense of human rights, leaving him

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20. M. PERRY, *supra* note 1, at 102.
21. *Id.* at 109.
22. *Id.*
23. *Id.* at 109-10.
24. *Id.* at 110 (footnote omitted).
25. *Id.* at 109 (emphasis supplied).
26. *Id.* at 110.

only the belief. His response is akin to the traditional fideistic counter to skepticism — where reason fails, faith alone sustains. The judge is called to prophecy.

Not much can be said once things get to this point. Either one hears the call, or one does not. There is evidence, however, that even Perry does not hear it clearly.

The judge's prophecy is to serve as *moral critique*. The practice of giving reasons is not to be jettisoned, though the sense in which they are *reasons* — can be understood to function as reasons — would seem to have been fatally compromised. That this is so is exhibited in the way Perry discusses judicial enforcement of personal values.

Perry chides Owen Fiss for failing to follow the "logic" of his view, that judges ought to pursue truth, right, and justice, to the conclusion that they ought to act on their personal views of what is true, right, or just.[27] But the "logic" of Fiss' position leads to Perry's conclusion only on the skeptical premise that there is nothing to morality except personal will or taste.[28] If that premise is accepted, Perry's adjuration that judges enforce "values ideally arrived at through, and tested in the crucible of, a very deliberate search for right answers" and values derived "not in an unself-critical way" surely sets them to a hollow task.[29]

The skepticism that Holmes bequeathed to constitutional theory cannot be understood apart from his attachment to the premises of 19th-century scientific positivism.[30] His view that the "true science of the law . . . consists in the establishment of its postulates from within upon accurately measured social desires"[31] and his view that judges ought not interfere with the natural outcome of dominant social opinion[32] stand on each other's backs. Science conceived on the positivist model may seem, across a narrow front of observable, regularly recurring phenomena, to defeat skepticism. But as a richer understanding of science renders the positivist version of the fact-value distinction untenable, we may draw a different lesson from the apparent success of science: not how to defeat skepticism but how fruitfully to ignore it — recognizing that while the claim to truth has limits, it is nonetheless

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27. *Id.* at 123.

28. It is possible, I suppose, that Perry means only to insist on the fact that the inevitable *location* of moral judgment is with the individual. But no one, and certainly not Fiss, is likely to deny that. If that is Perry's point, the emphasis he puts on it is perverse.

29. M. PERRY, *supra* note 1, at 123.

30. On the significance of positivism for Holmes' thought, see Gordon, *Holmes' Common Law as Legal and Social Science*, 10 HOFSTRA L. REV. 719 (1982).

31. O. W. HOLMES, *Law In Science and Science In Law*, in COLLECTED LEGAL PAPERS 225-26 (1920).

32. *See* Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

worth making.[33]

We might start the business of defusing skepticism by asking the skeptics among us to live by their premises. Holmes often spoke of purifying the law by purging it of every term of moral significance.[34] Along that line, we could suggest that arguments over the legitimacy of instances of judicial review be abandoned in favor of a normatively dentured term like "validity."[35] If we then set out to rigorously define the criteria of validity for the system, we would, I suspect, soon find the skeptics among us characterizing the nature of the constitutional system by deploying just the kind of judgments that they insist cannot be made. (It would, of course, be bad faith to insist that they give the kind of justification for their judgments that would satisfy a skeptic.)

Few of Holmes' modern disciples would be willing to follow him as far as a remark to Lady Pollock suggests he went: "I feel in these days that I would pay a dollar and a half and go across the street to see a good stiff prejudice of any kind."[36] The representative skeptics of Perry's book speak of personal moral judgments and values, rather than simple prejudice.[37] Where skepticism drives Perry, to the abandonment of law, even Holmes would not go.

II.

In the present political climate, the proposition that the legitimacy of innominate rights review depends on congressional control over jurisdiction, a point on which Perry and Black agree, is likely to draw a great deal of attention. To think of Jesse Helms taking comfort and sustenance from Charles Black is to give new meaning to the trope concerning politics and bedfellows.

For both authors, congressional control over jurisdiction is a consequence of the primacy that the commitment to democracy has in our theory of political legitimacy. However, it is important not to overstate the degree of agreement between Black and Perry on the point. It is plain that Black believes the ongoing democratic validation of judicial

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33. *See generally* H. PUTNAM, REASON, TRUTH AND HISTORY (1981).

34. *See* O. W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 179 (1920).

35. While modern political scientists following Weber have tried to squeeze the normative connotations out of "legitimacy," it is clear that they survive in the battle over judicial review. *See* H. PITKIN, WITTGENSTEIN AND JUSTICE 280-84 (1972).

36. 1 HOLMES-POLLOCK LETTERS 74 (M. Howe ed. 1941).

37. M. PERRY, *supra* note 1, at 103 (quoting Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) and Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976)). Even Holmes had his "can't helps," though they are perhaps least to be trusted in a skeptic. The skepticism that gave us the dissents in Gitlow v. New York, 268 U.S. 652, 672 (1925); Abrams v. United States, 250 U.S. 616, 624 (1919); Hammer v. Dagenhart, 247 U.S. 251, 277 (1918); and Lochner v. New York, 198 U.S. 45, 74 (1905) gave way to the "burning theme" of Buck v. Bell, 274 U.S. 200 (1927).

review, provided by the failure of Congress to withdraw jurisdiction, to be essential to the legitimacy of the enterprise.[38] He displays impatience with suggestions that congressional power in this regard is not plenary, and indicates that were it otherwise he would have to consider a constitutional amendment.[39]

With Perry, the attachment to a democratic ground found in congressional control over jurisdiction is a marriage of convenience. He wants to deliver a knockout punch to those who make the democratic objection to innominate rights review. He believes he can do that by giving them their strongest case, represented by Robert Bork's political theory and Raoul Berger's historicism, and then pulling out the string of congressional control to tie his own highly problematic theory of innominate rights review together. The control goes no further than the theory requires: it extends to "noninterpretive" but not to "interpretive" review, though on Perry's account this encompasses the most important modern exercises of judicial review.[40] He is clearly prepared to abandon congressional control if the ploy does not work.[41]

The important thing to note about submission of jurisdiction to legislative control is what it does to the sense of "right" involved in innominate rights review. No longer could rights be thought of as something we have independent of majority will. There might be collateral consequences, depending on the way control over jurisdiction was exercised, which would stand in the way of making the jurisdictional question a straightforward referendum on the right. But the fact is that it would leave us only those rights that no determined majority could be mustered to oppose.

This consequence of legislative control over jurisdiction shows its structural unsuitability for a political enterprise in which the commitment to democracy must find accommodation with commitment to the sense that we do in fact have rights against the majority.[42] It is no accident that while academic debate over *Roe v. Wade*[43] has focused on the legitimacy of judicial recognition of rights not named in the Constitution, the streets have been occupied by claims and denials of rights. It is "Right to Life" vs. "Right to Choose." The "Electoral Accountability" banners are rare.

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38. C. BLACK, *supra* note 5, at 26, 37-39.

39. *Id.* at 78-79.

40. M. PERRY, *supra* note 1, at 130.

41. *Constitutional Adjudication and Democratic Theory*, 56 N.Y.U. L. REV. 529 (1981) (remarks by Professor Perry).

42. *See generally* R. DWORKIN, TAKING RIGHTS SERIOUSLY 90-94 (1977); Sager, *Rights Skepticism and Process-Based Responses*, 56 N.Y.U. L. REV. 417 (1981).

43. 410 U.S. 113 (1973).

Both Black and Perry propose legislative control over jurisdiction as a means of accommodating rights adjudication with the supposed fundamental axiom of democratic government.[44] But if, as suggested, that proposal compromises the sense in which we can think of ourselves as right holders against government, there is good reason to question the fundamentality of the democratic axiom. Rather than continue to scratch the democratic itch,[45] we might better occupy ourselves with careful thought about what rights we have.

44. Perry places a great deal of weight on the "interpretivist"-"noninterpretivist" distinction, which might be thought to preserve the sense of having rights in those areas of jurisdiction protected by the "interpretivist" label. M. PERRY, *supra* note 1, at 130. Passing objections to his argument for limiting congressional power in this way would, on Perry's own account of which decisions can be counted as "interpretivist," leave our sense of ourselves as right holders virtually contentless.

45. One source of the itch is, again, Holmes. In this context it is useful to remember that Holmes acceded to democracy not because it was right but because it was there, and provided an appropriate ground for "scientific" judgment.