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THE AIMS OF CONSTITUTIONAL THEORY

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I. INTRODUCTION

In *The Constitution, the Courts, and Human Rights*,[1] Michael Perry examines the basis, if any, of the constitutional legitimacy of judicial review and the judicial expansion of constitutional guarantees characteristic of the modern period.[2] Perry's argument explores the tension of what he takes to be the central dilemma of constitutional theory today. First, modern constitutional doctrine goes beyond any reasonable conception of the historic "original understanding" of various constitutional clauses; but, second, modern constitutional doctrine is so clearly necessary to the justice of government in the United States that its legitimacy must be grounded in some way. For Perry, the latter aspect is especially true in the elaboration of basic conceptions of human rights.

Perry's critical energies are absorbed on two fronts. First, against the strict constructionists who embrace the first horn of the dilemma and argue that modern constitutional doctrine is illegitimate. Second, against those who defend judicial expansion of human rights either incompletely,[3] or without a full intellectual justification which a complete defense requires.[4] His constructive program calls for an open-ended appeal to independent moral vision, in the Biblical tradition of religious prophecy, as the morally required complement to democratic accountability.

Since I believe Perry's argument rests on a false dilemma, I focus here on his critical, rather than his constructive, arguments. In order to do so, I examine Perry's theory, consistent with his own methodology, in comparison with a range of other constitutional theories, all of which combined establish the terms of the contemporary dialogue of constitu-

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

2. Perry's book is in striking contrast to his many incisive and admirable articles on substantive aspects of constitutional law doctrines. *See, e.g.*, Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023 (1979); Perry, *Abortion, The Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 UCLA L. REV. 689 (1976); Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977).

3. J. ELY, DEMOCRACY AND DISTRUST (1980).

4. R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977); D. RICHARDS, THE MORAL CRITICISM OF LAW (1977).

tional theory, in which Perry is an important participant. My goal will be to show that, in a comparative examination of the aims of constitutional theory, Perry's theory rests on certain telling misconceptions. Nonetheless, I urge that we not regard the invalidity of Perry's dilemma as a defeat of an important constructive intuition, posed by Perry on the model of moral prophecy. This idea, properly developed, may be of seminal importance in understanding constitutional law.

II. THE AIMS OF CONSTITUTIONAL THEORY: A COMPARATIVE ANALYSIS

What, then, are the aims of constitutional theory? Why has the whole subject undergone a rebirth of serious attention from lawyers, philosophers, and political theorists? In order to understand the moral and intellectual excitement of this field of inquiry, we may usefully start with Ronald Dworkin's "Nixon's Jurisprudence."[5] Dworkin examines then President Nixon's claim that decisions of the Supreme Court must be bent to majority will. What, Dworkin asks, are the philosophical premises, the jurisprudence, of this claim? They appear to be of two kinds, neither of which can be conscientiously sustained. First, that democratic majorities, expressed in the legislative process, are better judges of constitutional guarantees than federal courts in general, and the Supreme Court in particular. Second, the value skeptical position that rights are forms of moral superstition, necessitating the conclusion that the power of judicial review, which rests on the elaboration of such rights, lacks any defensible foundation.

But, Dworkin argues, Nixon's jurisprudence, so described, is either indefensible or incoherent. Indefensible because the argument about the superior judicial capacities of legislators fails to take account of one of the central principles of constitutional government, namely, that one shall not be a judge in one's own case.[6] This principle would be egregiously violated by allowing Congress, for example, to be the final judge of the constitutionality of legislation it has passed. Nixon's jurisprudence is incoherent because, in fact, value skepticism is not a position which Nixon, of all people, espoused. For Nixon, questions of morality are all too self-righteously and moralistically clear. How could Nixon, or the learned profession he took pride in, produce such arguments, Dworkin asks? Here, Dworkin adverts to the background consti-

5. The essay, originally entitled *Nixon's Jurisprudence* when it appeared in the *New York Review of Books*, appears as *Constitutional Cases* in R. DWORKIN, TAKING RIGHTS SERIOUSLY ch. 5 (1977).

6. The principle appears prominently in the arguments of the Federalist Papers. *See, e.g.*, THE FEDERALIST NO. 10, at 79 (J. Madison) (C. Rossiter ed. 1961) [hereinafter cited as THE FEDERALIST NO. 10].

tutional theory which Nixon's arguments assume, and which lacks any philosophical sophistication in the discussion of rights. He concludes:

> Constitutional law can make no genuine advance until it isolates the problem of rights against the state and makes that problem part of its own agenda. That argues for a fusion of constitutional law and moral theory, a connection that, incredibly, has yet to take place.[7]

Dworkin concedes the lawyer's distaste for moral philosophy is understandable, since rights appear to "threaten the graveyard of reason."[8] However, new and better philosophy is now available, namely, John Rawls' *A Theory of Justice*.[9] Now "[t]here is no need for lawyers to play a passive role in the development of a theory of moral rights against the state . . . any more than they have been passive in the development of legal sociology and legal economics."[10]

In order to deepen our exploration of the tasks of constitutional theory which Dworkin's seminal essay touches on, we must, I think, take seriously that state of constitutional theory against which he is reacting. I believe it is a general truth about the construction of theory, whether in science or ethics, that theory construction is always comparative. We judge the adequacy and power of our theories by comparison to other theories in the field. This is true whether the comparison is between Ptolemaic and Copernican celestial mechanics,[11] or between utilitarian and autonomy-based theories of ethics.[12] Accordingly, any new construction of constitutional theory, of the kind Dworkin urges, must take as its benchmark the reigning theories in the field of constitutional law. These theories are of two kinds, court-skeptical and rights-skeptical.[13] While rights-skeptical theories tend to be court-skeptical as well, court-skeptical thinkers are sometimes not rights-skeptical.

A. Court-Skeptical Theory

In order to explore these two kinds of theories, let us begin with the classic exemplar of a court-skeptical theorist, James B. Thayer.[14]

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7. R. DWORKIN, *supra* note 4, at 149.
8. *Id.*
9. J. RAWLS, A THEORY OF JUSTICE (1971).
10. R. DWORKIN, *supra* note 4, at 149.
11. *See* Lakatos, *Falsification and the Methodology of Scientific Research Programmes*, in CRITICISM AND THE GROWTH OF KNOWLEDGE 91-196 (1970). *See also* L. LAUDAN, PROGRESS AND ITS PROBLEMS (1977).
12. *See* J. RAWLS, *supra* note 9. *See also* Daniels, *Wide Reflective Equilibrium and Theory Acceptance in Ethics*, 76 J. PHIL. 256, 256-82 (1979).
13. *Cf.* Sager, *Rights Skepticism and Process-Based Responses*, 56 N.Y.U. L. REV. 417 (1981).
14. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7

Thayer's argument is in three stages. First, he insists the power of judicial review by the Supreme Court is inferential, not explicit. Second, that judicial review is clearly limited to those judicial contexts where a court is able to formulate and apply a justiciable standard of constitutionality to a case or controversy, and in which the just disposition of some particular controversy necessarily requires that the constitutional issue be decided in order to do justice. Third, even assuming the requisite case or controversy and justiciable standard of decision, the standard of review should be deferential.

The gravamen of Thayer's first two historical arguments is to mark the exceptional nature of judicial review. That it is a power inferentially assumed suggests it should be limited to wherever the inference is most clear. That its exercise is circumscribed to contexts of judicial necessity and adversariality suggests it must not have a controversially political character. Thayer's third argument is not historical at all. Indeed, it may contradict the kind of courageous judicial independence which the Founders, or at least some of the more prominent ones, wanted from judicial review. The argument for deferential judicial review certainly is not supported by the history of judicial review since Chief Justice Marshall asserted it in *Marbury v. Madison*.[15] But, history here is not Thayer's concern, and correctly so, in my judgment. Rather, he invokes general considerations of democratic political theory in support of his deferential standard of review. The standard Thayer asserts is one of clear mistake—a court should exercise its power of declaring a law unconstitutional only if the legislative body has clearly made a mistake. The judiciary is only to exercise its power of judicial invalidation in the most extreme cases of blatant legislative disregard of constitutional constraints. As long as any constitutional basis for the legislature's action can be found, the legislation is to be sustained.

Thayer's argument in support of this deferential standard of review does not rest on rights skepticism. There is no indication that he supposes rights to be nonexistent, or that he believes rights are not important constitutional constraints on legislative power in the United States. Rather, Thayer argues in the Jeffersonian tradition, a tradition which has no doubts about the status and force of rights as constraints on legislative power, but which is opposed to judicial review as an adequate way to enforce these rights.[16] This tradition is, after all, that of Rousseau and the French democratic constitutional tradition, in which

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HARV. L. REV. 129 (1893).

15. 5 U.S. (1 Cranch) 137 (1803).

16. *See, e.g.*, A. KOCH, JEFFERSON AND MADISON: THE GREAT COLLABORATION 174-211 (1950).

the historic norm was that a bill of rights was not enforceable by courts, but binding directly on the legislature. The legislature, then, is the ultimate judge of the compliance of proposed legislation with constitutional guarantees.[17] Thayer is not, however, a radical Jeffersonian. He concedes the place of judicial review in egregious cases, which Jefferson and the French tradition might not. The ground for Thayer's modified court-skeptical theory is what he takes to be the basic postulate of democratic constitutionalism-popular sovereignty. Since popular sovereignty is the font of constitutional legitimacy, those agencies of government which are more in tune with the popular will should enjoy the preeminent role in the elaboration of constitutional guarantees. Otherwise, the sovereignty of the people will be controlled by those agencies that are not responsive to popular will.

The conclusion of Thayer's argument can then be clearly drawn. Courts, being remote from the popular will, are not the main enforcers of constitutional constraints. Rather, the main enforcers are legislators, who are closer to the people, and the people themselves who exercise the franchise to enforce their rights, or as Jefferson believed, regularly revolt (every 19 years).[18] The rule of clear mistake rests on no skepticism about rights, but on a skepticism about courts as the preeminent enforcers of those rights. Thayer argues that aggressive judicial review has resulted in the greatest loss a republic may suffer—the enervation of the spirit of constitutional democracy, the republican virtue of a vigilant citizenry aggressive in the defense of basic human rights. A citizenry accustomed to aggressive judicial review is rendered torpid, no longer alive to their duties of republican citizenship, merely a passive and besotted consumer of interest group politics. The rule of clear mistake would preserve a narrow role for the judiciary in the areas of gravest constitutional abuse; but, otherwise, it would return the role of constitutional monitor to the people, where Thayer argues it properly belongs.

Thayer's argument is one from democratic political theory, but, as such, it begs the question it so urgently raises. For, surely, if so much weight is placed on the normative force of popular sovereignty as the ground for democratic legitimacy, we fundamentally require a theory of popular sovereignty. Certainly, the constitutional concept in "We, the People" is not, self-evidently, an idea of continuing populist acclaim. The Founders appear to have been acutely conscious of the

17. *See* M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 176-211 (1967).

18. *See* A. KOCH, *supra* note 16, at 62-96. *See also* D. BOORSTIN, THE LOST WORLD OF THOMAS JEFFERSON 204-13 (1948).

abuses of power worked by majority factions,[19] and regarded the constitutional structure as a complex design of interlocking institutions which could cabin these abuses with appropriate constraints. And if, following Rousseau,[20] popular sovereignty is explained in terms of some idealized conception of freedom, rationality, and equality, then again it is hardly clear that the Founders thought of these values as best realized by direct popular democracy.[21] Perhaps, there are other forms of court-skeptical argument which can more plausibly sustain Thayer's position. For example, judicial deference in certain kinds of questions in which constitutional values do not require aggressive judicial scrutiny, like the commerce clause[22] and substantive economic due process.[23] But, Thayer's general argument will not do.

B. Rights-Skeptical Theory

The classic statement of a rights-skeptical argument against judicial review is Learned Hand's *Bill of Rights*.[24] Hand's argument is in two parts. First, an historical argument that, whatever the case regarding the Supreme Court judicial review of state court decisions, such review of congressional acts[25] is a usurpation of power. Second, an argument from political theory that rights are anachronistic forms of superstition; therefore, judicial review premised on them must be abandoned. Let us focus on Hand's second argument, for the first argument is very probably historically false[26] and, even if true, is one that even Hand, after so much history elaborating *Marbury*, does not regard as decisive. The real force of Hand's argument is this: Even granting the strongest arguments from history in support of judicial review, the moral ideals of human rights, which constitutional guarantees assume, are roughly as intellectually defensible as the witchcraft beliefs of the Azande.[27] Since elaboration of the meaning of these constitutional guarantees requires advertence to these superstitions, a modern politi-

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19. *See, e.g.*, THE FEDERALIST NO. 10, *supra* note 6.

20. Rousseau, *The Social Contract* in THE SOCIAL CONTRACT AND DISCOURSES 3-141 (G. Cole ed. 1950).

21. *See* THE FEDERALIST NO. 10, *supra* note 6 (expressly repudiating such a democracy in favor of a conception of a republic).

22. *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941).

23. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

24. L. HAND, THE BILL OF RIGHTS (1958).

25. *E.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

26. *See, e.g.*, C. BEARD, THE SUPREME COURT AND THE CONSTITUTION (1912); R. BERGER, CONGRESS V. THE SUPREME COURT (1969). *But cf.* L. BOUDIN, GOVERNMENT BY JUDICIARY (1932); W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953).

27. E. EVANS-PRITCHARD, WITCHCRAFT, ORACLES AND MAGIC AMONG THE AZANDE (1937).

cal theory must, in good moral and intellectual conscience, abandon the whole enterprise, or, at least circumscribe it narrowly.

Hand's argument is influenced by two factors. First, the Benthamite claim that rights are nonsense on stilts, for they substitute empty *a priori* intuitions for the careful calculations required by the utilitarian principle of maximizing the greatest happiness of the greatest number.[28] Second, the uniquely twentieth century moral philosophy, emotivism, in which ethical language has no propositional content but is roughly equivalent, in logical status, to expressions of taste governed by the maxim, *de gustibus non disputandum.*[29] The value skeptical strand in Hand's argument is strong. Since moral values are irreducibly subjective, they can hardly constitute the kind of objective standard which judicial impartiality requires. Hand concedes strong substantive moral values of human rights were assumed by the great founding documents—the Declaration of Independence, the Constitution, the Bill of Rights. But, following Holmes,[30] he argues that a sound jurisprudence (legal positivism) requires that law be cynically washed in acid to remove all such moral ideals. When we do so, given the substantive dependence of judicial review on such values, judicial review is left without content. We cannot, as judges and lawyers, give expression in our work to anachronistic conceptions of natural law for which we are unable to give any rational basis.

Hand summarizes his general attack on judicial review in terms of the argument of a third legislative chamber. He argues that the Constitution calls for two legislative chambers and expressly limits the judiciary's role of constitutional monitor to cases of judicial necessity. However, since the earlier argument indicated the mandated judicial role is grounded on something without any solid basis, the judiciary's actual performance was simply another form of policymaking no different from that of the two concurring houses of Congress. This means the power of judicial review, in essence, makes the judiciary a third legislative chamber, which restrikes the balance of policy earlier struck by the democratically elected and accountable representative bodies. Since the judiciary has no special competence in policy matters superior to that of Congress, and since its other role is empty, judicial review essentially indulges the subjective and incompetent policymaking of persons who lack the minimal accountability of electoral responsibility. In effect, since modern political theory reveals judicial review as a third legisla-

28. *See* Bentham, *Anarchical Fallacies*, in THE WORKS OF JEREMY BENTHAM, 491-529 (J. Bowring ed. 1843).

29. *See, e.g.*, A. AYER, LANGUAGE, TRUTH AND LOGIC (1936).

30. O.W. HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167-202 (1952).

tive chamber, fidelity to the residual spirit of rationality in the Constitution requires us to retain the legislative bodies that make sense and to lop off this moral monstrosity.

C. *The Theory of Neutral Principles*

The focus of response to Hand's argument has been to his claim that the judiciary's work is that of a constitutionally illegitimate third legislative chamber. The classic response, which frames all later articulations of the aims of constitutional theory, was made by Herbert Wechsler.[31] Wechsler answers both Hand's historical and political theoretic arguments. The historic argument is eloquent, but, since Hand himself did not regard it as decisive, it need not detain us here. The response to Hand's political theory is functionally framed in terms of the different kinds of justification required of the judiciary in contrast to legislatures; in particular, the requirement that courts justify their decisions in terms of neutral principles.

Wechsler's argument for neutral principles bypasses Hand's claims about the status of moral values in general and rights in particular, focusing instead on juristic method. The judiciary, consistent with *Marbury v. Madison*,[32] does not exercise policymaking discretion in deciding when, whether, or how to decide cases in the way Thayer suggests when he offers reasons for taking some but not other cases, or in the way Hand radically supposes all judicial decisions to be policy-based. Rather, the place of the judiciary in the constitutional scheme, as well as the values of due process of law required by the fifth and fourteenth amendments,[33] require that aggrieved parties have mandatory access to courts to hear their claims. If it is necessary to do justice between the parties, the courts should address whether the law relevant to the rights and duties in dispute is consistent with the supreme law of the Constitution. In addressing this latter constitutionally necessary role, the judiciary must decide in terms of general principles, applicable to the case at hand, but also consistent with comparable cases which have arisen in the past. This characteristically judicial methodology is distinctive from the familiar processes of legislative reasoning. Legislatures are not required to justify their actions in any way analogous to the judicial method of following accepted precedents establishing a line of binding authority. Rather, legislatures have broad discretion to weigh considerations of the public interest and the claims

31. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

32. 5 U.S. (1 Cranch) 137 (1803).

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

of conflicting power and pressure groups, in the light of broad fact-finding powers which enable them to sift complex facts in an exploratory way. Legislatures may also exercise their power by mandating complex statutory schemes, involving detailed rules and regulations and precise definitional schemes.

Wechsler contrasts the open-endedness of such legislature procedures with the constraints of judicial method. Judges have no broad fact-finding power. They are limited to the disposition of a particular case before them, as the facts of the case have been presented at trial, and make a decision in terms of a limited range of remedies. Most importantly, decisions of law must be based on and be compatible with established precedent. Legal decisions involve intricate written opinions subject not only to appellate review but to an open and critical scrutiny by the profession in general, including the academic legal culture of the American law school. Because of these distinctions between legislative and judicial decisionmaking, courts are not a third legislative chamber.

Wechsler's response to Hand assumes it is not necessary to address Hand's accusations about the moral vacuity of the values implicit in constitutional guarantees. Wechsler's argument almost glories in the purely legal, as opposed to ethical, component of the search for neutral principles. Thus, it is no accident that Wechsler chooses to exemplify the demands of the requirement of neutral principles by testing it against the legitimacy of *Brown v. Board of Education*.[34] The reasoning of the Supreme Court in *Brown* and subsequent cases does not satisfy the requirement of neutral principles, for the cases cannot be squared by a general principle of acceptable form. The antidiscrimination principle stated in *Brown* appears to focus on the peculiar importance of a fundamental right like education. But later cases, without explanation, extend the principle to areas which cannot reasonably be supposed to be fundamental rights.[35] If the neutral principle in question turns on the presence of a racist motive actuating the law or policy in question, how is the judiciary reasonably to infer such a motive? If racial motive is unconstitutional, is sexist motive as well? Finally, if the Court has in mind a neutral principle simply of the form, "no state-sponsored use of racial classifications," then how can it permit what surely will reasonably be required for the foreseeable future: the use of racial classifications in affirmative action programs designed to undo the effects of the now unconstitutional and unjust heritage of racial

34. 347 U.S. 483 (1954).

35. *E.g.*, Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (golf course); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955).

discrimination?[36] Wechsler concludes the available cases have not answered these questions and thus lack a neutral principle. Wechsler tentatively proposes the principle that the state cannot stop the associational rights of black and white parents to send their children to school together, but, since this associational liberty should be extended to parents who do not want their children integrated, it would not yield the result in *Brown.*

Wechsler appears to concede that *Brown* is a *morally* right and just decision. His argument is that it is not *legally* acceptable because it lacks the requisite form of a publicly articulated and tested neutral principle. In contrast, Wechsler suggests that *Plessy v. Ferguson*[37] does have a neutral principle; namely, that all whites will be segregated to one state facility, and all blacks to another, if the facilities are equal in quality. This principle (separate but equal) is neutral because it may be impartially applied in terms of its content, and is not applied in terms of particular characteristics of people irrelevant to the content or purpose of the principle. In short, cases similar in relevant respects from the point of view of the content or purposes of the legal rule are decided similarly; like cases are treated alike. In contrast, *Brown* and its progeny lack any such stated content which courts would apply to all similar cases. The consequence is that a putatively just decision, like *Brown,* is not legally acceptable because it lacks a neutral principle. While a clearly unjust decision, *Plessy,* is legally acceptable because it has a neutral principle supporting it.

Wechsler sidesteps Hand's accusation of moral vacuity by stating a method (where the judiciary is not a third legislative chamber) which can be elaborated upon independently of moral values; for it may legally validate the unjust and invalidate the just. The test of neutral principles is, for Wechsler, a formal one, which Lon Fuller called the "internal morality of law,"[38] but that is precisely its problem. If Hand's accusation of moral vacuity goes unanswered, then the method of neutral principles is simply consistent superstition; yet, more outrageously so, for judges and lawyers are bound by it, even in the face of validating what they know to be unjust, and invalidating what they know to be just. If the method has no internal moral justification other than consistency, and if it throttles democratic politics in an illegitimate way (Wechsler fails even to address the democratic objection), then Hand appears clearly unanswered.

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36. *See, e.g.,* Fullilove v. Klutznick, 448 U.S. 448 (1980); United Steelworkers v. Weber, 443 U.S. 193 (1979); University of California Regents v. Bakke, 438 U.S. 265 (1978).

37. 163 U.S. 537 (1896).

38. *See* Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart,* 71 HARV. L. REV. 630, 645 (1958); *cf.* L. FULLER, THE MORALITY OF LAW (1964).

There appears to be little advancement on these issues in Alexander Bickel's *The Least Dangerous Branch.*[39] On all essential points, Bickel retains Wechsler's theory of neutral principles as a test of the legitimacy of judicial decisions on the merits, modifying the full force of Wechsler's demanding principles only at the stages of deciding whether to decide. At this latter stage, Bickel suggests that the Court may correctly entertain reasons of policy, using the "passive virtues" of standing, mootness, ripeness, political question, and the like, to avoid taking cases whose disposition on grounds of principle appears unwise. Thus, of the variant possible neutral principles for *Brown,*[40] Bickel opts for no state-sponsored racial classifications. He deals with the putative unconstitutionality of affirmative action programs in terms of this principle by calling for use of the "passive virtues," at least until such time as the political goods from these programs have been adequately worked out.[41] Bickel's attempt to qualify the force of neutral principles in this way does not appear well supported by the law.[42] It is also morally objectionable because it would allow the Court to avoid precisely the hardest and most controversial cases in which the constitutional order most demands a principled disposition. Bickel does add to Wechsler's procedure of the search for neutral principles by a reference to the examination of background moral traditions of Western civilization,[43] but the account is not elaborated. In his later books, the remark is amplified in terms of a vague conception of populist acceptance[44] or Burkean tradition,[45] neither of which advances much beyond Thayer's invocation of popular sovereignty.

Bickel's account does not address Hand's rights-skeptical argument any better than Wechsler. To the extent Bickel continues to depend on neutral principles, such principles remain consistent superstitions. To the extent Bickel advocates the utility of the "passive virtues" to free courts from the constraints of neutral principles, he compromises the whole functional theory of the judicial versus the legislature role. And to the extent the substantive values of the judicial role are rooted in populism or tradition, it is unclear why the Court better expresses the former and how it discriminates between valued and disvalued parts of tradition, and yet facilitates just social change.

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39. A. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

40. *See supra* text accompanying note 34.

41. Bickel was hoist on his own petard in Defunis v. Odegaard, 416 U.S. 312 (1974), when he urged the Court to invalidate affirmative action programs, and the Court invoked the "passive virtues" of mootness to not decide the issue.

42. Gunther, *The Subtle Vices of the "Passive Virtues,"* 64 COLUM. L. REV. 1 (1964).

43. *See* A. BICKEL, *supra* note 39, at 236-37.

44. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970).

45. A. BICKEL, THE MORALITY OF CONSENT (1975).

D. *Rights-Based Theory*

These forms of constitutional theory set the stage for Dworkin's appeal for a new departure in constitutional theory, one which takes account of the "better philosophy . . . now available"[46] which takes rights seriously. The great virtue of this new departure is that it takes seriously the basic arguments of political theory which underlie both the court-skeptical and rights-skeptical arguments. Neither Thayer nor Hand, the leading exponents of each position, rest their arguments on history. Rather, they rely on certain propositions of political theory against which they test judicial review and find it wanting. Hand expressly grants that the Founders contemplated that rights exist, and constitutional guarantees were to be elaborated consistent with their normative requirements. However, he argues that modern political theory compels the rejection of such superstition, and the concomitant reconstruction of constitutionalism on rational grounds. We see, then, the primacy of political theory over constitutional theory; the power of the one controls, modifies, rearranges the other. But, are the political theories of Thayer and Hand defensible? Is popular sovereignty the soundest theory of constitutionalism? Are rights so indefensible as normative constraints that the Constitution must be washed of them in cynical acid?

Dworkin's argument suggests that these questions, fundamental to the soundness of constitutionalism, can now be perceived in the light of the rebirth of serious rights-based political theories, marked by the publication of John Rawls' *A Theory of Justice*[47] in 1971. Rawls argues that Kant's autonomy-based theory of ethics is, in its essential idea, sound. The basic principles of ethics and of justice in politics, economics, and society are organized around the controlling idea that Kant expressed as the principle of autonomy—that principles in all these areas should be ones that free, rational, and equal persons can impose on themselves as standards of conduct, and propose to other such persons to accept and impose on themselves, all persons being conceived as free, rational, and equal members of the kingdom of ends. This idea is expressed by Rawls' ideal contractarian hypothesis, in which those principles are accepted as ultimate standards of conduct in life which rational persons from a position of equal liberty, each concerned with preserving their higher-order interests in freedom and rationality (rational autonomy), would accept under a veil of ignorance which prevents them from taking account of the special characteristics

46. R. DWORKIN, *supra* note 4, at 149.

47. *See* J. RAWLS, *supra* note 9. *See also* D. RICHARDS, A THEORY OF REASONS FOR ACTION (1971); Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515 (1980).

of who they are. Rawls argues, at length, that the contractors, conservative in their drive to preserve their autonomy, would use the maximin criterion of rational choice, gravitating to the principles which would maximize the situation of the worst-off classes. The structure of principles agreed to would thus converge on the first principle of justice, requiring in the basic constitution an equal liberty of certain rights, fundamental to rational autonomy, and consistent with a like liberty for all. A second principle of justice, only to apply after the first principle is satisfied, requires that wealth, status, and opportunity are to be distributed in such a way as makes the worst-off classes best off.

Rawls' construction, consistent with the canons of theory construction earlier discussed, is comparative. He argues that the account and principles of justice he offers are superior to the main available theories of justice (variant formulations of teleological ethics, utilitarianism and perfectionism) because his theory better preserves and explicates the structure of judgments of justice. In the mutual interaction of theory and judgment that philosophical inquiry calls for, it is his theory, at least in comparison with the alternatives, on which the process converges (reflective equilibrium). For example, the two principles of justice under Rawls' theory give weight to constraints of equal distribution in a way that classical utilitarianism, with its focus on aggregates, does not.

Rawls' book has given rise to an outpouring of critical literature of enormous complexity which cannot be fully canvassed here. Some, like Robert Nozick,[48] accept the antiutilitarian paradigm of rights which Rawls formulates, but argue that, in the difference principle, he calls for the violation of rights, since persons must surrender the exercise of their natural ability for the good of others. Others, like R.M. Hare,[49] question whether the contractarian construction, or something quite like it, would not yield some form of utilitarian principle which, suitably interpreted, may capture many of the important intuitions of justice that Rawls' two principles express. But, I believe it is clear to serious students of the literature that Rawls' book has initiated a paradigm shift in political theory, as H.L.A. Hart recently called it,[50] from the long dominance of utilitarianism (with its skepticism, at least in its Benthamite formulation, about rights) to a rights-based political theory. Rawls' first principle of justice, for example, establishes certain basic rights of the person which cannot be sacrificed to the demands even of the difference principle, let alone to the utilitarian principle. To

48. R. NOZICK, ANARCHY, STATE, AND UTOPIA (1974).

49. R. HARE, MORAL THINKING: ITS LEVELS, METHOD AND POINT (1981).

50. Hart, *Between Utility and Rights*, in THE IDEA OF FREEDOM 77 (A. Ryan ed. 1979).

the extent Hand's criticism of rights rests on the utilitarian paradigm in its crude Benthamite form, its assumptions are unwarranted. To the extent Hand's position rests on a considered form of value skepticism, which is probably in fact doubtful,[51] the position today appears hardly to be the kind of dominant paradigm which Hand assumes. To the contrary, moral relativists, like Harman[52] and Williams,[53] clearly are arguing against the dominant stream of work in ethics today.

Now the question becomes precisely how will the proliferation of rights-based or rights-sensitive theories invigorate constitutional theory? Here, it is useful to remind ourselves of certain distinctions used by Dworkin in his theory of adjudication, which is the most sophisticated and accurate theory of adjudication currently available today. In "Hard Cases,"[54] Dworkin suggests that judges, whether involved in statutory, common law, or constitutional interpretation, use a method of principle (as opposed to policy) whereby they excavate from previous case law the applicable principle of law and apply it to the novel, hard case. This method has two tests; the first is one of "fit." The principle used in the hard case must fit the data of the other cases, explaining their holdings as well as the holding arrived at in the hard case. Second, in many hard cases the available precedents will be inconsistent, in tension, or ambiguous; therefore, the fit criterion will not always work. The judge must then appeal to background rights, more general rights which both explain and organize many more particular rights throughout the legal system and which have normative appeal as good arguments of rights. In the light of such rights, the previous case law may be reinterpreted, realigned, trimmed, and sometimes overruled in the interest of a deeper theory of law which the judge has managed to construct. Dworkin adeptly associates the capacity to excavate background rights with the sometimes great legal historians (Holmes), social theorists and men of letters (Cardozo), and moral philosophers (Brandeis) who are, in the American legal culture, great judges,[55] oracles of the law—people, in Dworkin's phrase, of Herculean capacity. Examples of such Herculean efforts are Cardozo in *MacPherson v. Buick Motor Co.*[56] and Brandeis as the architect of the right to privacy, first as a

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51. American theorists since Holmes have been utilitarians in their considered critical ethics, but value skeptics about conventional nonutilitarian morality. For a useful treatment of the positivist thesis of separability of law and morals, see Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

52. Harman, *Moral Relativism Defended*, 84 PHIL. REV. 3 (1975).

53. Williams, *The Truth in Relativism*, 75 PROC. ARIS. SOC. 215 (1974-75).

54. R. DWORKIN, *supra* note 4, at 81-130.

55. *See generally* Richards, *The Theory of Adjudication and the Task of the Great Judge*, 1 CARDOZO L. REV. 171 (1979).

56. 217 N.Y. 382, 111 N.E. 1050 (1916). *See also* Richards, *supra* note 55, at 200-02.

tort right, and then as a fourth amendment right.[57]

Dworkin's general line in jurisprudence is that the legal positivist canon of the analytical separability of legal and moral concepts is insufficient as an account of the adjudication of hard cases. Often the disposition of a particular hard case will require the judge to analyze and elaborate a background right, rooted in a substantive ethical concept, so that the legal task in question will require elaboration of substantive moral values as well. Dworkin is not, of course, a strong natural law theorist. Evil laws can, for him, still be laws. If fit is satisfied, the judge must apply a principle, notwithstanding her view of background rights. Even background rights must, to be judicially cognizable, be implicit in legal practice as general values which organize bodies of law.[58]

New forms of rights-based and rights-sensitive theories, which *A Theory of Justice* initiated, can, Dworkin suggests, be used in constitutional law to the extent they fit or, where fit fails, to articulate background rights. The demise of the heretofore dominant utilitarian paradigm permits lawyers to take account of the historical premises of constitutionalism in a way that is not, as it was for Hand, at war with contemporary political theory. Rather, the tasks are mutually fertilizing and illuminating, perhaps even in synthesis.

Even a superficial examination of contractarian theory will indicate, for example, that many hitherto mysterious features of constitutionalism can be explained by the theory. The legitimacy of democratic constitutionalism can be seen as resting not on an unexamined premise of popular sovereignty, or populism, or tradition, but on certain principles of justice. These principles both mandate democratic self-rule and limit it within a matrix of other values embodied in institutions like the separation of powers, the federal system of representation, and judicial review resting on constitutionally guaranteed rights. Constitutionalism appears to be a complex institutional embodiment of moral ideals of freedom, rationality, and equality, and any constitutional argument must take account of these background rights.[59]

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57. *See* Richards, *supra* note 55, at 202-05.

58. Thus, Cardozo's invocation of the duty of reasonable care in *MacPherson v. Buick Motor Co.*, which he finds inconsistent with the privity rule, is a general principle underlying much of the law of unintentional torts and crimes. *See supra* note 56. Also, consider Brandeis' excavation of the right to privacy, as underlying various extant rights of property, tort, copyright, and unfair competition, thus resonating to an independent right of tort and, eventually, constitutional law. *See supra* note 57.

59. *See* D. RICHARDS, *supra* note 4.

E. The Roles of Political and Moral Theory

These remarks are, of course, merely suggestive. It remains to be argued with care that one of the rights-based or rights-sensitive theories is better than another at this task. But, it will not do to argue, as John Hart Ely does in the remarkably superficial chapter three of his otherwise fine book,[60] that all such theories are constitutionally nugatory because there is ongoing controversy about which is the better theory.[61] The question is, rather, which theory better fits or explicates background rights. It is a remarkable feature of Ely's argument that, having debunked these theories, he adopts one of his own which is, as we shall shortly see, probably just as, if not more, controversial.

Ely's theory is in two ill-fitting parts.[62] First, the interpretivist theory, which shows the full scope of rights that could reasonably be accommodated with fidelity to text and historic expectation and intention, including the development in our law of the constitutional right to privacy. Second, the noninterpretivist theory, in which Ely denies, on grounds of sound democratic political theory, that the interpretivist model can reasonably be pursued; thus, constitutional privacy, however much contemplated by the Founders, was a constitutional blunder.

Ely's appeal to political theory is not surprising. It is a familiar move in constitutional theory, often to a much more radically skeptical effect. Indeed, in my judgment, the appeal is wholly proper, for constitutional theory is, after all, a theory of democratic constitutionalism, and thus a form of political theory. If one should find that a reasonable construction of democratic political theory, consistent with the best argument and evidence currently available, would require a revision in the forms of historically intended constitutionalism, intellectual and moral conscience would require appropriate changes in the constitutional order. If rights *were* superstitions, judicial review on rights-based grounds would be monstrous, however clearly intended. But, as lawyers and students of law, we must not merely acknowledge the primacy of political theory in controlling constitutional theory; we must be able to do political theory. In short, are Ely's arguments of political theory sound?

The argument is this. The only sound way to reconstruct the aims of democratic politics is to think of it in terms of a certain conception of ideal democratic procedure. This conception would be one where all

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

61. *See* Richards, *Moral Philosophy and the Search for Fundamental Values in Constitutional Law*, 42 OHIO ST. L.J. 319, 321 (1981).

62. *See* Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review* (Book Review), 59 TEX. L. REV. 343 (1981).

the interests of the persons affected by the democratic polity are fairly represented and given weight in the democratic process. Constitutional law is valid to the extent it is representation-reinforcing; that is, to the extent judicial review insures democratic politics gives weight to and represents interests in a way it would not otherwise achieve. The heart of valid constitutional adjudication in this model is suspect classification, strict scrutiny analysis. For example, laws which use racial classifications, giving racist stereotypes the force of law, are the paradigm case of Ely's representational unfairness. The process imposing such racial classifications does not represent the blacks affected, indeed it is actively hostile to giving any proper weight to their interests.[63] Accordingly, such racial classifications are the just object of condemnation under the equal protection clause, which refuses to accord validity to laws which rest on such a representationally unfair process. The use of racial classifications in affirmative action programs, however, is not subject to such constitutional invalidation. This is because the process which leads to the use of such classifications does give proper representational weight to the interests of blacks. Affirmative action programs are not being used to inflict injury on blacks, but, rather, to give them a benefit consistent with undoing the long heritage of unfair treatment dealt them in the past.[64] Ely's objection to constitutional privacy is that the laws invalidated on this ground are not the product of representational unfairness, but rest on a substantive ground independent of such procedural defects. Indeed, if anything, one of these cases[65] clearly fails to accord representational fairness to a relevant group.[66] But, judicial review has, Ely suggests, no proper role outside that of judging the fairness of the underlying process of representation leading to legislation, a task of judging the fairness of procedure in which courts are uniquely competent.

Ely's theory does not rest on the mere fact that democratic politics does not insure proportional representation of minorities in the legislatures. Even if such representation were in place, democratic politics might allow minority interests not to be given proper weight or to be the object of hostility. Racial prejudice might, for example, polarize voting, and majority rule might systematically frustrate the interests of the minorities. The underlying premise, against which the fairness of the process is tested, is some form of utilitarianism. The process is unfair to the degree to which certain *interests* are not given weight or are

63. *See* J. ELY, *supra* note 3, at 135-70.

64. *Id.* at 170-72.

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

66. *See* Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1974).

given negative weight. Since democratic politics, to the extent it fails to advance these interests or actively frustrates them, fails to maximize the aggregate of satisfaction over frustration of interests, it is rendered more justifiable on utilitarian grounds—to the extent judicial review assures the interests are given their proper utilitarian weight. But, once one sees that utilitarianism is the guiding premise of Ely's political theory, the theory is, of course, not process-based at all: The judgment of representational fairness rests on a judgment of substance, namely, the utilitarian principle. If utilitarianism is the basic political theory, one surely needs some extensive defense of it against the many forms of rights-based theories currently in the philosophical field. Here, there is nothing, except Ely's dismissal of all such theories because there is controversy about their relative adequacy.[67] However, nothing can be more certain than that there is controversy, indeed almost a consensus, about the inadequacy of utilitarianism, certainly in its classical forms, as a moral theory.[68] So, Ely's account, like the accounts of Thayer and Hand, rests on premises of political theory that are, on examination, threadbare.

Yet, Ely would use this political theory to uproot many doctrines of constitutional law inconsistent with it. How, echoing Dworkin's similar question, can lawyers of considerable intellectual capacity deliver such sorry performances in their constitutional theories? The problem, I submit, is the lawyer's disease, deeply entrenched in the assumptions of American legal education, with its bias against cross-disciplinary inquiry. Particularly, lawyers fail to examine the philosophical and political theories which they readily take for granted, distancing themselves from the valuable discourse which could bring them to a better sense of the complementary aims of constitutional and political theory.[69] Certainly, our study of constitutional theory should sensitize our antennae to whenever a theorist denies the relevance of philosophy in doing law. One can be reasonably sure that the claim itself rests on a philosophy (hidden in a popular label like popular sovereignty, value skepticism, neutral principles, representational fairness) which the author is unprepared to examine in one of the salient ways an open mind can examine them, namely, philosophically.

Michael Perry wisely avoids Ely's blunder of explicitly dismissing moral theory. Perry acknowledges the central role of moral theory in cultivating the prophetic conscience which is necessary, in his view, to

67. *See* Richards, *supra* note 61.

68. *Cf.* Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1102-04 (1981).

69. *Cf.* Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

the legitimacy of American democracy, though he remains agnostic about which, if any, moral theory is better at this task. Indeed, the suggestion is made that advocacy of one moral theory, to the exclusion of any other, would denigrate the openness of prophetic conscience to new moral insight in an undesirably cramping and constraining way.

However, the very indeterminacy of Perry's conception of prophetic conscience is, I believe, its greatest problem as the fulcrum of defensible constitutional theory. It is much more problematic than the kind of indeterminacy he criticizes in those constitutional theorists who, as interpretivists, share Perry's aim of defending the legitimacy of modern style judicial review. Perry's noninterpretivism derives from an unexamined dichotomy between any constitutional concept which appears indeterminate in its specific scope of application and a concept whose application is uncontroversially clear. Roughly put, legal decisions in hard cases are noninterpretive; in easy cases they are interpretive. But, the distinction is illusory. It rests on a positivistic theory of law and an historically controversial interpretation of what the "original understanding" of a constitutional concept is and how that understanding should be judicially elaborated over time.

Consider one of Perry's many examples of a constitutional concept whose modern interpretation is, in his view, noninterpretive—the free speech clause of the first amendment.[70] The argument is straightforward. Leonard Levy's classic study of the history of the free speech clause indicates that, as of 1791, it would have been centrally applied to licensing as a condition of publication, but not to forms of state prosecution after publication for political criticism of the government (seditious libel).[71] Today, the core meaning of the first amendment is taken to be a constitutional prohibition of seditious libel prosecutions or anything analogous thereto.[72] Since the modern expansion of the application of the constitutional concept of free speech is not within the 1791 "original understanding," and is only indeterminately encompassed thereby, the modern development is noninterpretive. But, the implied inference here is a *non sequitur*. Perhaps, in 1791, the common interpretation of the liberty of free speech would, following Milton's *Areopagitica*,[73] have focused on licensing, not on seditious libel. But, if one inquires into the basis or ground for Milton's objection, it might appear, on deeper examination of his argument here, and in the related

70. M. PERRY, *supra* note 1, at 63-64.
71. L. LEVY, LEGACY OF SUPPRESSION (1960).
72. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964).
73. *See* Milton, *The Tract for Liberty of Publication*, in THE PROSE OF JOHN MILTON 265 (J. Patrick ed. 1967).

area of religious liberty[74] and antiestablishment,[75] that the underlying principle is one of the guarantee of independent rational conscience, which would naturally express itself in a general prohibition, *ceteris paribus*, of state-imposed restrictions on speech content. This principle, underlying the 1791 consensus on licensing, would apply to seditious libel as well. We have at least two choices here: The constitutional concept of free speech is the denotation of the clause as of 1791 (including licensing, excluding seditious libel), or it is the connotation or concept expressed by the principle forbidding content-based restrictions on speech (including licensing and seditious libel). Why is the former interpretive and the latter noninterpretive? Surely, indeterminacy will not do as the distinction. On examination, the latter choice may be a better interpretation of the deeper principle which the clause expresses, better in the sense of expressing a more fundamental intention of the clause rooted in an emerging moral conception of the rights of the person. Indeed, after historical and philosophical exegesis of basic arguments of principle, indeterminacy itself may appear illusory. This is because the Herculean excavation of background rights, in Dworkin's sense, may compel a right answer, or at least circumscribe judgment in highly determinate directions.[76] Conversely, the determinacy of the denotation of the "original understanding" may become equivocal or ambiguous, even be utterly discounted, because the explication of basic arguments of principle frames our interpretation in a more convincing and reasonable way.

Perry's argument rests on the false dilemma of his narrow conception of interpretivism versus the appeal to prophetic conscience. However, his theory of interpretation is flawed, expressing unexamined positivist premises of the meaning of legal concepts in terms of paradigm cases or denotative exemplars, as if the interpretation of broad constitutional concepts must be construed on the positivist model of obedience to the denotations of the Founders. Once one sees, however, that an alternative theory of interpretation is available, one more consistent with the judicial elaboration of constitutional doctrine over time,[77] Perry's dilemma collapses. The legitimacy of constitutional democracy does not require prophetic conscience in Perry's open-ended and indeterminate sense. Relevant principles of justice and decency can be

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74. *See* Milton, *A Treatise of Civil Power in Ecclesiastical Causes*, in THE PROSE OF JOHN MILTON 448-71 (J. Patrick ed. 1967).

75. *See* Milton, *Considerations Touching the Likeliest Means to Remove Hirelings Out of the Church*, in THE PROSE OF JOHN MILTON 478, 514 (J. Patrick ed. 1967).

76. *Cf.* Dworkin, *supra* note 69.

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

deployed in an interpretivist construction of constitutional concepts.

If there is a reasonable way for constitutional theory to avoid Perry's form of appeal to prophetic conscience, there is good reason to do so. Prophetic conscience, in Perry's sense, is radically indeterminate in a much more objectionable way than any he criticizes. If Perry is willing, as he claims, to be agnostic among moral theories (in the interest of openness to moral enlightenment) and yet support the crucial organon of moral prophecy in shaping constitutional interpretation, we need, surely, a theory of valid prophecy akin to the religious problem of distinguishing valid religion from satanic enthusiasm. By what criterion, for example, can Abraham know that an immoral order (to kill his son) is of divine origin?[78] In constitutionalism, the problem is very grave indeed. Important aspects of constitutional doctrine rests on the constraints placed upon populist moral romanticism—a view that has often resulted in much injustice since it flowered in the early nineteenth century.[79] It is deeply troubling to place a form of inarticulate moral impulse at the foundations of constitutionalism without any discipline of reasoning associated with it.

III. CONCLUSION

The use of moral theory in an interpretivist constitutional theory has the great virtue, if it satisfies canons of sound interpretation, of articulating forms of reasoning. There is no reason to think that such moral theory is less open to new forms of moral enlightenment than that proposed by Perry. To the contrary, a moral theory of equality or justice in punishment may deeply clarify the forms of evolution of constitutional doctrine characteristic of the modern period.[80]

It remains, of course, to develop and defend such a form of moral theory. I take seriously Perry's sharp remarks about the lack of historical support for the use of contractarian theory in developing constitutional theory[81] as a challenge calling for a constructive response. Paradoxically, I believe this response will show, in time, that contractarian theory can give precise expression to many of the moral intuitions which underlie Perry's conception of moral prophecy. In particular, a certain rights-based conception of the primacy of religious conscience may clarify many disparate constitutional principles and doctrines. If

78. *See* Kierkegaard, *Fear and Trembling*, in FEAR AND TREMBLING AND THE SICKNESS UNTO DEATH (W. Lowrie trans. 1941); Outka, *Religious and Moral Duty: Notes on Fear and Trembling*, in RELIGION AND MORALITY 204-54 (G. Outka & J. Reeder eds. 1973).

79. *See generally* P. MILLER, THE LIFE OF THE MIND IN AMERICA 60-61, 64-68, 186-202 (1965).

80. *Cf.* D. RICHARDS *supra* note 4.

81. M. PERRY, *supra* note 1, at 107-08.

this constructive undertaking is successful, it may preserve the important truth in Perry's ideal of moral prophecy in a thoroughly interpretivist way.