are basically optimists about the possibility of achieving civic virtue in contemporary society, while Strauss was a pessimist, at least in that he believed contemporary society could not escape degeneracy. Indeed, Strauss's distinction between philosophers and statesmen shows that he believed civic republicanism was one of those necessary fictions that philosophers could see through—thus their esoteric philosophy—but could not expose to public view—thus their exoteric philosophy.

Finally, I have suggested that Strauss gives a right-wing flip to certain positions that have also attracted the left. As summarized by Drury, Strauss's critique of modernity sounds a lot like what Horkheimer and Adorno had to say about "the dialectic of enlightenment." Indeed, the similarities in this instance extend below the surface, because Horkheimer and Adorno were at least as pessimistic about the prospects for modern society as was Strauss, although on Drury's presentation it seems that Strauss accepts modern degeneracy with a stoic resignation, whereas Horkheimer and Adorno were enraged by degeneracy even though they saw no way to reconstitute a good society.

All this adds up to the suggestion that Strauss probably does have some interesting things to say, which explains Drury's conclusion that his work is "fascinating." On the other hand, the interesting things seem to be embedded in a fog of words that, I suspect, is not worth the effort to penetrate. For students of constitutional law, perhaps the message of Straussian political theory is that they should read their texts very closely, paying particular attention to the genre and intended audience of the texts. Those of us who have spent a month or more of class time on *Marbury v. Madison* (or, in my classes, on *The Federalist Papers*) are unlikely to regard this as hot news.

MORALITY, POLITICS AND LAW. By Michael Perry.[1] New York: Oxford University Press. 1988. Pp. 323. $29.95.

Michael Zuckert [2]

If Professor Michael Perry did not exist, we would be tempted to invent him—as a paradigm of lawless jurisprudence. Professor Perry's first book, *The Constitution, the Courts, and Human Rights*, was apparently designed to liberate constitutional analysis from

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law. His new book has something of the character of *Rocky II* or *Nightmare on Elm Street 12*—it's an obvious sequel and replay of a popular work.

Perry clearly means to remedy some deficiencies of that earlier book. The two chief additions are a substantive discussion of the nature of morality and moral theory, and a "hermeneutical" discussion of legal interpretation. As a foundation for discussing these additions, I will first recapitulate the main points of Perry's first book.

I

The Constitution, the Courts, and Human Rights was an eloquent defense of non-interpretivist judicial review (N.I.R.). For those who have been out of the solar system for the past decade or so, I should explain that N.I.R. occurs "when [the Court] makes the determination of constitutionality by reference to a value judgment other than one constitutionalized by the framers." The legitimacy of N.I.R. is in question because "in our political culture, the principle of electorally accountable policy making is axiomatic." When the Court engages in *Interpretive* Review, by contrast, it does not pose the same question of legitimacy, for the Constitution itself has been adopted through democratic procedures, and widespread consensus exists in American society as to the propriety of the Court's making decisions on the basis of "value judgments constitutionalized by the framers."

Perry argued that most of the important constitutional decisions of the past three decades or so (since *Brown v. Board of Education*) had been instances of N.I.R. It follows, he claimed, that either most of what the Court has done in the modern era is grossly illegitimate or that there is some justification for the Court's exercise of this extraordinary power.

To solve this problem, Perry developed a "functional justification" of N.I.R. Such a justification proceeds by identifying "an important, even indispensable, function" the practice serves. American political life has a "self-understanding" which Perry called "religious," meaning merely that Americans believe, in the words of Robert Bellah, that "the will of the people is not the criterion of right and wrong. There is a higher criterion in terms of which this will can be judged; it is possible that the people may be wrong." Or, as Bellah restated it: "Morality is not arbitrary . . . Justice cannot be reduced to the sum of the preferences of the collectivity."

This American commitment to non-arbitrary morality, more-

over, "has generally involved a commitment—though not necessarily a fully conscious commitment—to the notion of moral evolution." The "important function" to be played by the Court comes to light at this point: it is necessary for a society with such a commitment to moral evolution or growth to have an agency which can sponsor or foster that growth. In selecting that agency, we should bear in mind that although the commitment to growth is part of the moral self-consciousness (more or less) of American society, any given instance of growth is perforce a matter of changing the regnant morality and therefore a matter of going beyond or even against the regnant morality. Those who call society into the moral beyond play a prophetic role, as the Biblical prophets did for the Hebrew people. The more democratic political agencies, precisely because they are accountable to the people, are kept loyal to the regnant morality to such a degree that they cannot be expected to play this prophetic role. From this perspective, the Court's non-democratic character is an advantage: the Justices, unlike the politicians, can serve as our prophets. Not being accountable to those who adhere to "conventional morality," the Court is free to speak for the evolving moral consciousness of society. Thus, "non-interpretive review in human rights cases enables us to take seriously—indeed is a way of taking seriously—the possibility that there are right answers to political-moral problems."

That formula captures very nicely the chief premises of Perry's thesis, and also points to its chief vulnerabilities—weaknesses that he has attempted to remedy in his new book. There are three such premises: (1) "There are right answers to moral-political problems"; (2) those answers should be translated into law; and (3) courts are entirely suitable agents for doing so.

Despite its centrality to his argument, Perry handled his first premise in a notably unsatisfactory manner. He was, in the first place, most unclear as to whether he meant to ground his premise on a truth about morality or merely on American views about morality. He noted, for example, that "as a society we seem to be open to the possibility that there are right answers to political-moral problems," and at times he seemed to build his N.I.R. on that societal openness alone. But that foundation is problematic on several counts. What evidence is there that such a societal commitment actually exists? Perry presented none (apart from a quotation or two from Robert Bellah's controversial work on civil religion in America), and conceded that such evidence may not exist, and isn't decisive in any case: "But even if evidence were slight that we are open to that possibility, we *should be* open to it." That, of course, is

an entirely different claim, and must be defended on different grounds.

Perry's shift from "is" to "should" reflects two further problems with his appeal to moral consensus. Even if there is such a consensus, it does not clearly follow that one can appeal from that consensus to positions beyond or contrary to it. If the authority is moral conventionalism, it becomes deeply problematic to use some parts of the conventional morality against other parts, for as convention all parts are of equal authority. Remaining merely within conventions, Perry cannot find the fulcrum to move the conventions as he wishes to do.

The justification of N.I.R. as he developed it seems to depend in fact on the proposition that there *really are* right answers to political-moral problems. That is evident from the position Perry identified as his strongest opposition, the Bork-Rehnquist jurisprudence, which tied the Court to Interpretivist Review precisely because "there are no right answers to the various political-moral questions presented to the Court in human rights cases—no right answers, that is, when no value judgment constitutionalized by the framers is determinative—and that any answer the Court gives, short of simply resolving . . . the constitutional claim on interpretivist grounds, is ultimately nothing more than a matter of taste." An appeal to popular opinion does not even begin to invalidate the Bork-Rehnquist view of the proper judicial role, for that view rests on claims about the actual cognitive status of moral claims, and not on claims about what some people believe about the cognitive status of moral claims. That the Bork-Rehnquist view has difficulties of its own, some of which Perry exposed, does not invalidate the point that Perry's conventionalist appeal to (a possibly non-existent) moral consensus is insufficient.

Perry conceded the inadequacy of the conventionalist appeal when he reformulated his claim in terms not of consensus but rather as the moral claim that "we *should be* open to . . . the possibility that there are right answers to political-moral problems." That moral claim, presumably meant as a true claim, makes sense only if one can affirm that there may really be right answers. On that critical issue all he said was, "I shall not defend the proposition that we should take seriously the possibility that there are right answers: this is not a meta-ethical treatise. . . . I want merely to emphasize that the proposition, *if sound*, is altogether adequate for the purposes of the functional justification I develop." Yes, perhaps so. But then if the proposition "the President is divinely inspired" is sound, then that is "altogether adequate for purposes" of proving

that he ought to be vested with dictatorial powers. The soundness of the proposition asserted is precisely what is at issue. Sliding back and forth between a conventionalist claim which was inconclusive, and a realist claim which was unsupported, Perry ended up merely asserting that moral questions are as he wishes them to be.

Moreover, Perry's failure to analyze or discuss the political-moral matters allowed him to overlook many important distinctions that would have to be made even if he were able to make out a case for his position on "right answers." His functional justification assumes without any argument that the "prophetic function" is properly played by a political agency. But the very paradigm from which he drew undercuts that suggestion: the Hebrew prophets were not men of authority and power, but "voices in the wilderness." That there are right answers, that these right answers may develop or deepen the regnant morality, does not imply that some group of rulers should be designated to discern and impose these moral answers on the community. The Hebraic pattern would seem a better model. If the new "right answers" are truly deepenings of the regnant morality, then they should be able to make their way without being imposed by prophet-judges. This may not happen as quickly as Perry would like, but even he conceded that the Supreme Court can cause moral regress as well as moral progress. The Court has contributed its share of regressive decisions: Dred Scott, many decisions shackling governmental efforts to protect people against massive economic dislocations, and the systematic gutting of the post-Civil War amendments are obvious examples.

Perry maintained that courts are entirely suitable bodies to play the prophet-statesman role. Here the *Nightmare on Elm Street* character of his prescription becomes very evident. Perry's courts would no longer be courts of law; they would instead have that proverbial "roving commission" to right all moral wrongs that they espy. Their standards for decisions would not be a corpus of rules more or less made by another group of authorities, validated and authorized over time through the power of precedent and the force of legal inertia, but the new moral insights they themselves arrived at, independently of and even against both the law and the regnant moral consensus. This is a nightmare vision, for sure, but there is a more prosaic problem as well: if courts derive their authority to make binding decisions from their connections to the law, what gives them authority when they no longer have any particular connection to law? Merely the fact that they are not elected? Or the fact that during a particular period they are controlled by lawyer-politician-prophets with whose political beliefs one agrees?

II

Perry's new book implicitly seeks to remedy some of these grave deficiencies. *Morality, Politics and Law* attempts to defend Perry's assertion that there can be right answers to moral and political questions, and to sketch the outlines of what such answers might look like. Perhaps sensing that that effort fails, Perry then proceeds to attempt to reconnect the Court to the law by representing the Court's role not as mere prophet-statesmanship, but as a form of interpretation of legal texts. Unfortunately, this effort also fails.

Like the hero of *Rocky II*, Perry has a return match against his old foe: the interpretivist approach to the Constitution championed by the likes of Robert Bork and William Rehnquist. Perry rightly identifies their approach as resting on moral skepticism, on the belief that no knowledge about moral goods is available: all moral judgments are mere "value judgments," or statements of preference. From that perspective, the political issue becomes: whose preferences are to rule? Perry rightly rejects this account of politics, and attempts to supply the grounds for an alternative view, authentically moral in character. That alternative view is developed mainly for the sake of grounding N.I.R., which he now dubs "non-originalism."

Perry's attack on moral skepticism is a worthy enterprise, but on the whole an unsuccessful one. He identifies the audience for his book not as philosophers, but as "lawyers and law students, judges and other public officials, and, in general, citizens." He writes as though he is aiming at a legal audience, offering a pastiche of claims made by various "authorities" in the field of ethics, strung together like an appellate brief. Lacking the sustained argumentation which distinguishes a work of philosophy, it has very much the *ipse dixit* character of some judicial opinions—laying out claims with very little discussion and even less concreteness in the discussions that do occur. This last is ironic, for one of his chief claims concerns the priority of the particular over the general in moral argument. Nonetheless, I can hardly recall a book or article on a moral topic so doggedly general, so abstractly vague, so little engaged with specific instances as this one. Moreover, Perry exhibits some of the least attractive qualities of current legal scholarship. As Richard Posner recently pointed out, law professors tend to be importers of thoughts from other disciplines. As such, they often lack mastery of their material.

Perry's critique of John Rawls exemplifies this phenomenon. He takes issue with Rawls's effort to develop a theory of justice in

which a doctrine or conception of right is prior to a conception of good. One manifestation of this commitment in Rawls's theory is the famous "veil of ignorance" which requires, among other things, that the choice of principle of justice be made in ignorance of one's particular conception of the good. Rawls is very, very, very careful to insist that he does not believe real human beings lack a notion of the good life. The "bracketing" of particular notions of the good is a condition Rawls believes should be imposed *on our reasoning* as we think about rules of justice. His justifications for this bracketing may or may not be adequate—that is debatable—but Perry doesn't begin to touch the issue or show he understands Rawls at all when he says that Rawls "presupposes a problematical conception of the person: someone—or, better, some 'thing'—whose identity or self is prior to, rather than constituted by (even in part), her conception of the good, her moral convictions and commitments." But Rawls has repeatedly insisted, even in some passages quoted by Perry, that he does not "depend on philosophical claims . . . about the essential nature and identity of persons." Wrongly supposing that Rawls's representative individual behind the veil of ignorance reflects Rawls's conception of the human self, Perry responds: "I reject that conception of the person and accept a conception according to which a person's convictions are partly self-constitutive." But nothing in the content of Perry's "alternative" conception of the self runs counter to anything Rawls is committed to in his theory. Indeed, I suspect that Rawls would agree with Perry that a person is "partly self-constituted" by his or her convictions. Perry's "critique," in other words, is quite beside Rawls's point.

Perry's effort to rebut moral skepticism rests on a "naturalist conception" of human good. Following some recent ethical theorists like John Finnis, Perry describes the naturalist conception as "knowledge of how to live so as to flourish, to achieve well-being." As Perry sees it, naturalism answers Hume's famed Is-Ought problem: "The aim of morality is not to prove the value of flourishing. . . . The impossibility of justifying the value of flourishing does not render moral knowledge problematic or call into question the notion of moral 'knowledge.' Thus the is-ought 'problem,' the fact that an ought statement cannot be deduced from an is-statement—turns out not to be a problem at all, at least not for naturalism. Naturalism begins with the foundational commitment to flourishing." As such an "is," it is also the source of the "oughts" which morality contains.

Now there is, of course, a long tradition of naturalist ethical thinking of the sort Perry sketches, which can be traced back to

Aristotle and finds a powerful contemporary statement in Finnis's *Natural Law and Natural Rights*. Perry's treatment of naturalism, however, is far too abstract. Although he is eager to overcome moral skepticism, he is just slightly less eager to avoid the snares of moral dogmatism or moral monism. Thus while he perceives an existential commitment to flourishing as the foundation of morals, he carefully avoids giving the idea of flourishing any determinate content: "Any naturalist moral theory must acknowledge human variety as well as human commonality. That one human being has an interest in some matter does not mean that other human beings—any or all of them—have an interest in that matter too. Moreover, there are a great variety of ways in which interests—even interests common to all or virtually all members of the human species—can be satisfied." For that, and perhaps for other reasons, Perry pulls way back from what would seem the most important task: "My aim here is not to present a naturalist moral theory, only to sketch a naturalist account of moral knowledge." Perry spends his time developing a tool which he assures us can do a very fine job at its intended task, but refuses to let us see the tool at work.

Perry is confident, however, that he has done enough to rout the chief villains: "Given the naturalist conception of moral knowledge, the morally skeptical claim that there is no moral knowledge no matter how 'moral knowledge' is conceived, is manifestly implausible." Perry strikes me as overly optimistic here, for those skeptics might well (and rationally) fail to be persuaded. I can imagine the following dialogue:

Prof. Perry: Of course there is moral knowledge in the sense of at least some rationally acceptable beliefs about how particular human beings ought to live if they are to flourish—beliefs about what they should do or refrain from doing if they are to live lives as deeply satisfying as any of which they are capable. (*M.P.L.* 12, cf. 39)

Moral Skeptic: That may be so, but I wonder whether you're not being a bit arbitrary in saying that "flourishing" is the foundational commitment of all morality. I've noticed many views about morality which do not seem to be statements about means to individual well-being.

Prof. Perry: Naturalist moral theory does not purport to be a theory of what people ordinarily mean when they use moral terms. Rather, a naturalist moral theory is a theory of how to live so as to flourish. (*M.P.L.* 17)

Moral Skeptic: But isn't that just the issue, old chap? Aren't you begging the question here? As I said, I've heard much "moral-

ity talk" which does not seem to be related to individual well-being at all. In fact, very often moral claims are intended to set limits on an individual's seeking of his or her own benefit. Consider the moral virtue of justice for instance. I really do think you ought to read some David Hume, old boy.

Prof. Perry: It is an open question whether a sound naturalist moral theory must be altruistic: how, if at all, does a person's commitment to her own flourishing support an imperative to the effect "You shall treat your neighbor lovingly, for he is like yourself." Perhaps this question brings us to the limits of any truly "secular" moral philosophy. Increasingly I doubt that any such philosophy can support an imperative to the effect that one should "treat one's neighbor lovingly." (*M.P.L.* 22)

Moral Skeptic: Exactly my point. And really, you must pardon me if I do not follow you into your religion. That is out of bounds for this discussion. Besides being arbitrary in identifying morality with the means of flourishing, I'm not sure I understand you very well when you speak of "deeply satisfying lives." Just what do you mean by this?

Prof. Perry: Well, I don't mean the satisfaction of mere preferences. (*M.P.L.* 80-81)

Moral Skeptic: So, what do you mean?

Prof. Perry: Well, I don't mean "happiness," or any mental state or experience. (*M.P.L.* 79-80)

Moral Skeptic: So, what do you mean?

Prof. Perry: Well, uh, I mean that one is flourishing *to the extent* one's "interests" are satisfied, and not flourishing *to the extent* they are not satisfied. And interests should never be confused with mere wants. A person can be quite mistaken about her interests. (*M.P.L.* 19)

Moral Skeptic: Well, what do you mean by "interest"?

Prof. Perry: Any human being who is committed to flourishing is necessarily committed to, *and in that sense has "an interest" in*, whatever is constitutive of her flourishing. (*M.P.L.* 14)

Moral Skeptic: Well, what do you mean by flourishing?

We are in what they call in the computer world a loop; let us withdraw while we can. My point in constructing the above dialogue is not to say that a naturalist perspective cannot possibly beat back the attack of the skeptic; only to stress that Perry has not succeeded in doing so.

Apart from the question of whether Perry successfully meets skeptical arguments, the naturalist position he half develops comports remarkably little with the broader project of which it forms a

part. Perry seeks to ground morality for the sake of supporting what he now calls non-originalist review, but the kind of moral reasoning he would have the Supreme Court engage in seems much more related to a problem he admits that his naturalism does not deal well with—the loving treatment of one's neighbor.

This seems to be the reason we are promised a *Rocky III* at the end of the book: "Love and power. That is a subject—an even larger subject than the one I've addressed here—for another day. The inquiry I've begun in this book . . . is merely prologue to that inquiry." As may be clear when we discuss Perry's new views on the judicial role, this other inquiry is the one more clearly related to the "aspirational" jurisprudence he advocates.

III

Perry's moral naturalism, although missing from his first book, is a logical extension of that book's thesis. Concerning the role of the Supreme Court, however, Perry now offers some ideas whose implications are apparently quite different from those of the earlier book. Readers of *C.C.H.R.* will be surprised to see him say things like: "in American political-legal culture it is axiomatic that the constitutional text is authoritative—indeed supremely authoritative—in constitutional adjudication. . . . Similarly, in American political-legal culture, 'the law' is axiomatically authoritative in adjudication." (*M.P.L.* 131-32) Those are axioms Perry seems to have discovered only since 1982.

Perry now replaces the dichotomy between interpretivism and non-interpretivism with that between originalism and non-originalism. Originalism: "a judge in deciding whatever public policy regarding some matter is constitutionally valid, ought to rely only on (1) 'original' beliefs—that is, beliefs (norms) established as authoritative through the ratification process—and (2) 'supplemental' beliefs—that is, beliefs reliance on which is necessitated by reliance on original beliefs." (*M.P.L.* 123) Non-originalism, by contrast, does not hold a judge to original beliefs.

Perry's shift in terminology is mandated by his tacit rejection of non-interpretivism as out of line with the axiom establishing the authoritativeness of the law and the Constitution in adjudication. The new book would thus seem far more moderate. What has allowed Perry to discover at last those axioms about adjudication and law is an even more fundamental discovery—HERMENEUTICS! He now presents his views on the proper role of the judiciary in terms of a theory of the nature of interpretation. The discovery of hermeneutics allows Perry to reach pretty much the same place as

he did in the first book, but on seemingly more moderate and publicly palatable grounds.

His theory of interpretation, like his theory of morals, is heavily derivative from recent philosophic writings, but he gives his own twist, for better or worse, to the reigning ideas in the field. He differs from many writers touched by hermeneutical reflection in that he accepts the view that an originalist interpretation, or one close enough for practical purposes of judging, is in fact attainable. He even concedes that originalism has a powerful normative foundation. Perry parts company with many constitutional scholars, then, in finding originalism both possible and (to some degree) desirable.

He rejects originalism, however, on "comparative" grounds: non-originalism is better than originalism. In the first place, non-originalism is just as lawful as originalism. Unlike non-interpretivism, it passes the threshold test of satisfying the axiom about law and adjudication, for it is a legitimate and genuine act of interpreting, i.e., finding the meaning in, the text. Non-originalism counts as a mode of interpreting the legal text, for texts are "polysemic": they "have a meaning *in addition to* the original meaning." The additional or "excess meaning" develops over time, perhaps out of the original meaning, "as a progressive generalization of the original meaning." This developed meaning Perry calls "aspirational meaning," for it "signifies fundamental aspirations of the American political tradition." Because all interpretation is finding meaning by someone (meaning is never merely free-floating), the aspirational meaning states what the text has come to mean *for us*. It is therefore in every sense of the term a meaning or interpretation of the text. Therefore, as a matter of fidelity to the mandate contained in Perry's axiom, non-originalism is as valid as originalism.

Moreover, non-originalism is preferable to originalism. Every living tradition lives precisely in its ability to develop and respond to the aspirational and not merely the literal commitments which constitute it. The Court should play a "principal role" in this evolving aspirationalism for the reasons advanced in *C.C.H.R.*—the courts' insulation from the people make them more likely to be open to aspirational meanings. The courts are "in an institutionally advantaged position to play a prophetic role."

Perry's new defense of judicial prophetism seems to set certain limits, however, which were not present in the earlier version. Perry emphasizes now that "a judge should bring to bear, in constitutional cases, only aspirations signified by the text." He grounds this duty directly in the oath the judge takes to support the Constitution. In interpreting a constitutional clause, says Perry, the judge

can legitimately act either the originalist or the aspirational, non-originalist part, but he must select one or the other.

I suspect, however, that Perry has retreated far less than appears on the surface. The "fundamental aspirations" to which the non-originalist judge harkens are, Perry admits, "highly indeterminate." At the extreme, the aspirational meaning is something like what Justice Brennan identified as "the ideals of human dignity," or what Perry speaks of as "justice." A non-originalist judge is to give determinate meaning to these broad ideals; and what guidance should a judge follow in doing so? "The judge should rely on *her own beliefs* as to what the aspiration requires." When we add all this up, I think we are very much back where we were in *C.C.H.R.*—different title, same nightmare. The very broad moral ideals Perry finds as the aspirational meaning of the constitutional text are no different in practice from the roving commission to do good that he tried to justify in his first book.

There is something paradoxical in all this: beginning from the sole legitimacy of textual interpretation, Perry works himself to a position identical for practical purposes to one that recognizes no obligation to the text. That paradox arises because Perry misdescribes the nature of interpretation in his treatment of aspirational meaning.

Perry's hermeneutical argument depends on his claim that the aspirational meaning, what the constitutional provision has come to mean to us, is a valid meaning of the text. At least two difficulties with Perry's view come to mind immediately. He can perhaps deal with the first: he speaks of "aspirations of the American political tradition," but supplies no criteria by which one may distinguish which aspirations belong to the "tradition" as such, and which belong to subgroups or individuals. I suspect that in practice the latter is the operational meaning of the former.

More importantly, Perry treats meaning in a text as if it were a mere aggregation of separate, nugget-like, meaning-bearing entities in which some meaning-nugget or other might put on weight, so to speak, and become ever more meaningful, again as a separate little nugget, independent of the others. But texts don't mean like that. A genuinely hermeneutical understanding—in the primal sense of hermeneutical theory—recognizes the interdependencies of meaning between whole and parts, and among parts: in a text there are no meaning-nuggets. Everything means what it means within its context, and its context is, at the least, the larger text of which it is a part.

The parts or clauses of the Constitution are therefore not just

sentences floating free in Michael Perry's moral consciousness. They are parts of a larger document, and that document is a law. If it were not a law, the courts would have no claim to be involved in making decisions based upon it, as Marshall made clear in *Marbury v. Madison*. To be a law is to be something other than a moral aspiration as such. Legal theorists disagree about what precisely distinguishes laws from moral ideals, but we need not settle those disputes to recognize that there is a difference. An interpretation of a legal text, like Perry's, which dissolves the difference between law and moral aspiration is not a valid interpretation of that law. Just as John Marshall had recourse to the overall character of the text in order to interpret one clause when he said "we must remember it is a Constitution we are interpreting," so we must always recall in constitutional adjudication that it is a law we are interpreting. We cannot validly express the meaning of a part of a text if we interpret that part in such a way as no longer to belong to the kind of text of which it is a part. A statement in a contract and a statement in a novel must be understood each in its own way.

Moreover, aspirations do not only grow out of the legal text—as its future, so to speak; they exist from the outset as inspiration for the legal provisions contained in the text. *From the very beginning*, there is an "excess of meaning." Nonetheless, a law is not a mere expression of aspiration but a concrete embodiment of aspiration, or better, of a certain mix of aspirations. Perry says that aspirational meaning does not negate original meaning but rather includes it while going beyond it. But if original meaning includes not just the "value" in question but the boundaries to that "value," then aspirational meaning does indeed counter original meaning. One might say, for instance, that the constitutional text aspires to a strong presidency, but that would not justify concluding that an indefinitely stronger presidency would fulfill the aspirations of the Constitution even better than the weaker presidency suggested by the language of the text. For that aspiration is bounded by others which set limits to it.

All other considerations aside, doesn't Perry's obsessive concern that courts play the prophetic role of making moral aspirations vital in American society suggest a tremendous despair over the ability of Americans to respond to their own moral aspirations in any other way? Does this despair reflect a fear that most Americans do not understand their moral aspirations as Perry (along with other elite intellectuals) does? I suspect so, and this is the real subtext in both of Perry's books. But to yield to that despair is to give up on the noblest aspiration of the American tradition: self-govern-

ment. That aspiration contains many difficult tensions, to be sure, and it exacts a price, but fidelity to the aspirations of the tradition means fidelity to those tensions, and willingness to pay that price.

For all his talk about the American political tradition and its aspirations, Perry is remarkably untouched by contact with any of its wellsprings. In my opinion, he would do better to read a little less of contemporary philosophy (even here less can be more) and devote more time instead to the materials of the tradition. He might begin with *The Federalist* and read carefully what the authors have to say about republicanism and about the unacceptability of governance by "a will independent of society." He then might try Abraham Lincoln, who shared Perry's concern for the moral groundings and aspirations of the American polity, but who yet understood far better what these required for a "government of the people, by the people, and for the people." And finally, he might reread Alexander Bickel, whom he quotes from time to time, but always in a self-serving way. He might consider how Bickel came to write a book called *The Morality of Consent.*

It is easy to sympathize with Perry's desire for a moral community, but even easier to be repelled by his desire to further the rule of willfulness over the rule of law. But willfulness, no matter how dressed up in the latest philosophic theories and the most high-minded rhetoric remains—willfulness.

TAKING THE CONSTITUTION SERIOUSLY. By Walter Berns.[1] New York: Simon & Schuster. 1987. Pp. 288. $19.95.

Daniel D. Polsby[2]

Constitutions are things whose substance is language; and natural languages are alive with wormholes and pitfalls, so plastic in the hands of an interpreter that the true study of a political constitution lies not in the intentions of those who drafted the text, but of those who have interpreted it. It is people, not words, that possess meaning. Such, at any rate, is the modern fashion, against which the old convention, the Constitution as a framework of constraints and fences and walls, stands in stark contrast.

Professor Walter Berns seems entirely unaffected by the mod-

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