Book Reviews

The Constitution, The Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary. By Michael J. Perry.[1] New Haven: Yale University Press. 1982. Pp. xi, 241. $24.00.

Reviewed by Carl A. Auerbach[2]

Professor Michael J. Perry has written an ambitious and important defense of the "legitimacy" of "fierce" judicial activism in advancing the rights of the individual against government. His thesis is that the Supreme Court neither has been nor ought to be confined to enforcement of the value judgments expressed by the framers in the constitutional text. Such "interpretive" review, says Perry, is relatively unimportant today. Most of the major decisions of recent decades were "noninterpretive;" they derived not from the language of the Constitution or the values of the framers, but from the Justices' own values. Rejection of this kind of review, he maintains, would entail a massive overhaul of modern constitutional law. Even if such drastic surgery were feasible, argues Perry, it would be undesirable. For noninterpretive review is "legitimate" in human rights cases because it is "functionally justified" and can be made compatible with the democratic principle of electorally accountable policy making. It is functionally justified because it "enables us to keep faith (or try to) with our commitment to moral growth—or . . . with the possibility that there are right answers" to political-moral questions.[3] Without such review, our government would lack this moral leadership, because the political branches cannot supply it.

Perry maintains that the propriety of noninterpretive review varies from one constitutional context to another. It is "legitimate" in cases challenging state action on federalism grounds because in that context it is "functionally justified" and the Court's decisions may be overturned by act of Congress. Congress may not only set aside state laws regulating commerce that the Court

1. Professor of Law, Northwestern University.
2. Professor of Law, University of Minnesota.
3. M. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS 125 (1982).

has upheld; it may also authorize the states to regulate commerce in a manner the Court would declare unconstitutional in the absence of such authorization. Noninterpretive review in separation-of-powers cases in which there is a conflict between the legislative and executive branches of the federal government is also "legitimate" because it is "functionally justified" and consistent with electorally accountable policy making since in resolving such conflicts "necessarily the Court defers to the the political judgment of at least one electorally accountable branch of the national government"—either the Congress or the President.[4] But in the contexts of challenges to congressional action on federalism grounds, and separation-of-powers cases in which there is no conflict between the legislative and executive branches, Perry sees no need for noninterpretive review.

Constitutional policy making by the courts can be reconciled with the principle of electoral accountability, says Perry, by conceding that article III does indeed grant to Congress authority to limit the appellate jurisdiction of the Supreme Court and the original and appellate jurisdiction of the lower federal courts so as to deprive them of the power to engage in *noninterpretive* review of specified classes of cases or questions.[5] He maintains, however, that Congress may not limit the Court's power to engage in interpretive review.[6]

This is an impressively elaborated theory. In developing it, Professor Perry offers some telling criticisms of other constitutional theorists. His book has provoked me, as this review will demonstrate, but it has not converted me to the civil religion of judicial activism.

I.

In the first place, I have great difficulty with Perry's definition and use of the concepts which are so important to his thesis—"legitimacy," "interpretive" versus "noninterpretive," "extra-constitutional" versus "contraconstitutional," and "functional justification."

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4. M. PERRY, *supra* note 3, at 59.

5. Article III, section 1 of the Constitution provides that the "Judicial Power of the United States shall be vested in one supreme Court, and in such inferior courts as Congress may from time to time ordain and establish." Article III, section 2 states that in all cases other than those in which the Supreme Court has specified original jurisdiction the Court "shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make."

6. M. PERRY, *supra* note 3, at 130.

1. *"Legitimacy."* Perry's use of this concept is confusing. In connection with noninterpretive review, he requires the functional justification that gives it "legitimacy" to meet two criteria—it must serve "a crucial government function, perhaps even an indispensable one, that no other practice can realistically be expected to serve" *and* it must do so "in a manner that accommodates the principle of electorally accountable policymaking."[7] But the functional justification that gives *interpretive* review "legitimacy" does not have to meet the second criterion, because "[n]o one . . . contends that our commitment to the principle of electorally accountable policymaking is exclusive." "We are committed as well to the principle that electorally accountable policymaking is constrained by the value judgments embodied in the constitutional text. . . ."[8]

I doubt that it is useful to describe particular lines of Supreme Court decisions as "legitimate" or "illegitimate." Different groups may wish to do so, depending upon whether they share the values constitutionalized by the Court. But the "legitimacy" of the Court as an institution may be unquestioned, even when there is sharp disagreement with particular decisions that are the product of "illegitimate" types of "noninterpretive" review, in Perry's sense. This was demonstrated by the defeat of President Roosevelt's Court-packing plan. The Court's legitimacy has also been demonstrated at various times by the defeat of congressional proposals to limit its jurisdiction over specified classes of constitutional claims. The American people and our political leaders have generally accepted the Court as an institution, regardless of whether it was engaging in interpretive or noninterpretive review, and even though it has not really been subject to formal, democratic control.

The Court's legitimacy in this sense is also a matter of degree. It may be relatively high or low, increasing or declining, depending upon the reaction to its work as a whole. But the extent of the Court's legitimacy at any particular time does not justify the continued exercise of its power. Whether and how the Court should be subject to democratic control is an issue every generation may raise anew.

2. *"Interpretive" versus "noninterpretive" review.* Perry treats this distinction as critical. Yet the more it is expounded, the more illusive it becomes. He defines "interpretive" review as the ascertain-

7. *Id.* at 92-93.
8. *Id.* at 12.

ment of "the constitutionality of a given [governmental] policy choice by reference to one of the value judgments of which the Constitution consists—that is, by reference to a value judgment embodied, though not necessarily explicitly, either in some particular provision of the text of the Constitution or in the overall structure of government ordained by the Constitution."[9] "Noninterpretive" review is the ascertainment of constitutionality by reference to "a value judgment other than one constitutionalized by the framers."[10] This distinction, between value judgments constitutionalized by the framers and the Justices' own value judgments, seems clear enough. The trouble begins when we turn to the criteria Perry uses to differentiate between the two. He does not look solely to the text of the Constitution, but repeatedly emphasizes the original historical understanding of various provisions, implying that this is what interpretivism requires. Perry says, for example, that the purpose of the first amendment was "to prohibit any system of prior restraint and . . . modify the common law of seditous libel by making truth a defense and by permitting the case to be tried to a jury."[11] Yet the constitutional text, here as elsewhere, is broad and grandiose, providing ample room for the Justices to be guided by their own values in filling it with content. As Professor Leonard Levy pointed out, the fact that the first amendment "was not originally intended to mean what it has become to mean does not derogate from the statesmanship of its Framers, who formulated its language in words of such breath, however ambiguous, that we have been able to breathe a liberality of meaning into it, in keeping with the ideals of our expanding democracy."[12] Searches for the framers' intentions often encounter disagreements among historians, or are distorted by the searcher's own values. Even if this were not so, it would make no sense to permit the framers' meaning to control. Again, Levy put it well: "[D]esigned by an eighteenth-century rural society," he writes, the Constitution "serves as well today as ever because an antiquarian historicism that would freeze its original meaning has not guided its interpretation *and was not intended to*."[13]

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9. *Id.* at 10.

10. *Id.* at 11.

11. *Id.* at 63-64.

12. L. LEVY, LEGACY OF SUPPRESSION xii (1960).

13. L. LEVY, *supra* note 12, at 309 (italics supplied). Perry's first amendment views illustrate the inevitable subjectivity of the subject. Leonard Levy concluded that the original understanding of the first amendment was that it would totally deprive Congress of power to make any law "abriding the freedom of speech, or of the press," and so leave the states with exclusive legislative authority in this area. The "prohibition on Congress,"

A careless reader might suppose that interpretive review means review guided by the "antiquarian historicism" to which Levy refers. But the boundaries of interpretive review are not exceeded, according to Perry, if the Court should "strike down political practices that were not present to the minds of the framers and that, therefore, the framers could not have specifically intended to ban," so long as the practice invalidated "is the analogue of a practice the framers did contemplate and mean to ban, different in no constitutionally significant respect from the practice the framers specifically intended to ban."[14] Interpretive review, furthermore, also includes enforcing the value judgments embodied by the framers "in the overall structure of government ordained by the Constitution."[15] As thus defined, the concept plainly gives the Court a great deal of discretion. The values of the individual Justices cannot possibly be excluded from the exercise of this discretion.

Yet Perry rarely uses this expanded definition of interpretive review in criticizing the writings of those whose conception of the proper scope of judicial review is less extensive than his own. In this connection, he reverts to an antiquarian historicism. Thus he views enforcement of the Bill of Rights against the states as noninterpretive review because the original understanding of the fourteenth amendment, according to the historians Perry accepts, was that it would not make the Bill of Rights applicable to the states.[16] On this basis and his view of the original meaning of the first amendment, Perry rejects Judge Robert Bork's position that the Court's first amendment doctrines, applied to limit both federal and state action, are "interpretive" because they safeguard freedoms essential for the democratic system of government or-

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Levy concluded, "was motivated far less by a desire to give immunity to political expression than by solicitude for states' rights and the federal principle." Levy, *Liberty of the Press from Zenger to Jefferson*, in L. LEVY, JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 136-138 (1972). Perry seems unable to accept this view of the original understanding. It "beggars belief," he writes, "to suggest that in the first amendment the framers constitutionalized a value judgment that would preclude Congress from outlawing, for example, any publication calling for the assasination of a federal official, or disclosing troop movements in time of war." M. PERRY, *supra* note 3, at 196, n.32. Although Perry points to the Sedition Act of 1798 to support his view of the original understanding, it is clear that his own values affect his historical opinion.

14. M. PERRY, *supra* note 3, at 32. Perry approves John Hart Ely's statement that interpretive review includes the identification of "*the sorts of evils* against which the constitutional provision was directed" and invalidation of their "contemporary counterparts." *Id.* at 32-33, 181, n.118 (original italics).

15. *Id.* at 10.

16. *Id.* at 63.

dained by the Constitution.[17] The framers, Perry insists, "did not establish a representative democracy in anything like Bork's sense."[18] True. But why is not Judge Bork's sense of a representative democracy a proper contemporary generalization or abstraction from the values implicit in the "overall structure of government" created by the Constitution? Granted, Bork's values will affect his formulation and application of this generalization, but nothing in the broader of Perry's two definitions of "interpretive" review would preclude this inevitable phenomenon.

To take another first amendment example, it could hardly be said that the Justices' own values did not enter into their decisions in *Richmond Newspapers, Inc. v. Virginia*.[19] Yet it would be impossible to say that they were not engaged in interpretive review, as defined by Perry, when they held that the public and the press have a constitutional right to attend criminal trials. As Chief Justice Burger said, "[n]otwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees."[20]

This difficulty pervades Perry's discussion of each of the major areas he examines. Thus he accepts Raoul Berger's conclusion that the original understanding of the fourteenth amendment was that it would constitutionalize the protections of the Civil Rights Act of 1866 but not "serve as a charter for the political and social equality of the freed race."[21] It was understood that the privileges and immunities clause would forbid "any state to deny to any of its residents on the basis of race any 'fundamental' right the state granted to its residents generally."[22] These "fundamental" rights would include rights of the sort protected by the 1866 Act—"rights pertaining to the physical security of one's person, freedom of movement, and capacity to make contracts and to acquire, hold, and transfer chattels and land—'life, liberty, and property' in the narrow original sense."[23] The historical understanding of the equal protection clause was that it too would forbid "enact-

17. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 26 (1971).

18. *Id.* at 65-66. Here again, Perry relies on Leonard Levy who concluded that "the generation which adopted the Constitution and the Bill of Rights did not believe in a broad scope of freedom of expression, particularly in the realm of politics." L. LEVY, *supra* note 12, at vii.

19. 448 U.S. 555 (1980).

20. *Id.* at 579.

21. M. PERRY, *supra* note 3, at 62 (citing Berger, Government by Judiciary 23 (1977)).

22. *Id.*

23. *Id.* at 62-63.

ment or enforcement of laws denying on the basis of race any fundamental right granted residents generally," and of the due process clause that it would forbid "denial on the basis of race of any judicial protections afforded residents generally for the security of their fundamental rights."[24] This view of the fourteenth amendment, Perry recognizes, renders the equal protection and due process clauses "superfluous."[25] Therefore, in reading the principle of the equality of the races into the amendment, the Court allegedly engaged in noninterpretive review because it did not "enforce a value judgment the framers made but, instead," enforced "a value judgment of its own."[26] Interpretive review, therefore, required the result in *Plessy v. Ferguson*[27] and not that in *Brown v. Board of Education*.[28]

In light of Perry's analysis, I reread *Plessy* and *Strauder v. West Virginia*.[29] These cases were decided within living memory of the Civil War amendments. Professor Bickel concluded that the original understanding of the equal protection clause was that it would apply neither "to jury service, nor suffrage, nor antimiscegnation statutes, nor segregation."[30] Yet in *Strauder* the Court held that a state law which excluded Blacks from jury service violated the equal protection clause. The opinion reveals that the Justices thought they were engaged in interpretive review in the narrowest sense; they were construing "the spirit and meaning" of the fourteenth amendment in order "to carry out the purposes of the Framers."[31] Unanimously, they saw in the equal protection clause "a necessary implication of a positive immunity, or right, most valuable to the colored race,—the right to exemption from unfriendly legislation against them distinctively as colored,—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race. . . ."[32]

It is significant that none of the Justices on the *Strauder* Court was also on the Court that decided *Plessy*, except Justice Harlan, who dissented in *Plessy*. It is evident from Justice

24. *Id.* at 63.
25. *Id.*
26. *Id.* at 67.
27. 167 U.S. 537 (1896).
28. 347 U.S. 483 (1954).
29. 100 U.S. 303 (1880).
30. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 58 (1955).
31. Strauder v. West Virginia, 100 U.S. at 307.
32. *Id.* at 307-08.

Brown's majority opinion in *Plessy* that the Justices were guided by their own values in upholding the constitutionality of state-imposed racial segregation. There is also little doubt that Justice Harlan believed he was engaging in interpretive review in the narrowest sense. He was concerned, he wrote, to implement the "true intent and meaning" of the Civil War amendments, which he described as "recent."[33] Indeed, in answer to the majority's argument that a state statute requiring segregation on the basis of religion would be held unconstitutional because "unreasonable," Harlan deplored the "dangerous tendency in these latter days to enlarge the functions of the courts, by means of judicial interference with the will of the people as expressed by the legislature."[34] He denied that, by dissenting, he was expressing merely his own view of the "policy or expediency" of the Louisiana segregation law.[35] On the contrary, he viewed the statute as "hostile to both the spirit and letter of the Constitution of the United States."[36]

Perry may say Justice Harlan's history was wrong and that Justice Brown need not have revealed his own values. But in seeking to ascertain the contemporary analogues to the values constitutionalized by the framers, the Court will have to extract principles from these values. Whether a principle will incorporate the values alleged to be the contemporary analogues will depend upon how generally or abstractly it is stated. Professor Ronald Dworkin, for example, defends judicial activism while professing fidelity to the framers' values. He achieves this feat by expressing their values with the utmost generality and abstraction. Thus his "concept" or principle of equality is a generalization or abstraction from the particular "conceptions" of equality that Perry attributes to the framers.[37] This enables Professor Dworkin to claim that the Court generally makes "substantive decisions of political morality not in place of judgments made by the 'Framers' but rather in service of those judgments."[38]

Of course, the process of generalizing or abstracting from a given value judgment permits Dworkin—and any court engaged in the same process—to smuggle their own values into the Constitution under the guise of interpreting the original intent of the framers. As Perry writes, this process always presents a choice

33. Plessy v. Ferguson, 163 U.S. at 555, 560.
34. *Id.* at 558.
35. *Id.*
36. *Id.* at 583.
37. R. DWORKIN, TAKING RIGHTS SERIOUSLY 134 (1977); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 490 (1981).
38. Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 490 (1981).

among "several different, competing political-moral visions" and the choice always imports into the Constitution the values held by the chooser.[39] And so I agree with Perry that this is what the Court has been doing in most, if not all, first amendment and equal protection cases. Nevertheless, I cannot see a basis for telling the Court that it is not "interpreting" the Constitution in such cases unless the notion of interpretive review is confined to an "antiquarian historicism." Conceivably, the Court might have restricted itself to such historicism from the time it first assumed the power of constitutional review, though it would thereby have imposed upon the nation an intolerable burden of frequent constitutional amendment. But it is inconceivable that the modern Court will acknowledge that it has been usurping power for almost 200 years by not so restricting itself, particularly in cases involving individual rights. The Court may overrule some decisions in this area, but certainly not the entire body of its work. Even a Court determined to show restraint will have to develop the well-established "noninterpretive" doctrines in new cases that invoke them. It will continue to be extraordinarily difficult, therefore, for any Court to say authoritatively when it is engaging in interpretive review and reflecting only the values constitutionalized by the framers, and when it is engaging in noninterpretive review and imposing its own values. Yet Perry demands such determinations, because the constitutionality of Congress' jurisdiction-limiting power, according to him, depends upon whether Congress is striking at interpretive or noninterpretive review.

Similar difficulties are encountered in distinguishing between interpretive and noninterpretive review in federalism and separation-of-powers cases. For example, Perry concludes that the Court's Old Guard that invalidated congressional legislation on federalism grounds in the 1895-1936 period, as well as the potential New Guard that decided *National League of Cities v. Usery*,[40] were engaged in noninterpretive review because they were not simply enforcing value judgments constitutionalized by the framers.[41] Perry sees in the commerce clause the framers' intention to give Congress sufficient authority "to deal effectively with whatever problems might arise which the states individually would not be competent to handle."[42] Granted. But the Court, according to Perry, is also engaged in interpretive review when it

39. M. PERRY, *supra* note 3, at 75.
40. 426 U.S. 833 (1976).
41. M. PERRY, *supra* note 3, at 41.
42. *Id.*

enforces the values implicit in "the overall structure of government ordained by the Constitution." Of course the Old Guard and the potential New Guard were constitutionalizing their own values. But they believed they were enforcing the framers' convictions, implicit in the federal structure, that too dominant a central government is undesirable and that the very existence of the states as separate political entities should not be threatened by the federal government. Similarly, the Justices in the *Steel Seizure Case*,[43] and Justice Brennan in *Goldwater v. Carter*,[44] separation-of-powers cases which Perry thinks illustrate noninterpretive review, thought they were guided by values constitutionalized by the framers and also reflected "in the overall structure of government ordained by the Constitution."

By saying that whenever the Court's own policy judgments affect the result we have a case of noninterpretive review, Perry makes the area of interpretive review shrink to the vanishing point. Thus he points to *Buckley v. Valeo*[45] as "one of the rare constitutional cases in which the Court's invalidation of challenged governmental action can be explained in terms of interpretive review" because there was "a manifest, indissoluble inconsistency between the challenged provision [of the Federal Election Campaign Act] and the appointments clause of the Constitution."[46] I doubt even that.[47] The Court's decision invalidating the legislative veto[48] further illustrates the difficulty of distinguishing between interpretive and noninterpretive review. Reading the majority opinion of Chief Justice Burger, one would conclude that the Court was engaging in interpretive review in the narrowest sense. But after reflecting upon Justice White's dissenting opinion and Justice Powell's concurring opinion, it is impossible to say that the values of the Justices in the majority did not affect their judgment.

My difficulty, in short, is that the Justices' own values will intrude into the process of decision making in most if not all cases, yet that process can plausibly be denominated "interpretive" review under the definitions offered by Perry.

3. *"Contraconstitutional" versus "extraconstitutional" noninterpre-*

43. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

44. 444 U.S. 996 (1979).

45. 424 U.S. 1 (1976).

46. M. PERRY, *supra* note 3, at 58.

47. *See* Burkoff, *Appointment and Removal under the Federal Constitution: The Impact of Buckley v. Valeo*, 22 WAYNE L. REV. 1335 (1976).

48. Immigration & Naturalization Serv. v. Chada, 103 S. Ct. 2764 (1983).

tive review. Perry defends "extraconstitutional" but not "contraconstitutional" review by the Supreme Court. Both are noninterpretive, but "extraconstitutional" review merely "goes *beyond* the value judgments established by the framers of the written Constitution" while "contraconstitutional" review "goes *against* the framers' value judgments."[49] Perry maintains that virtually no constitutional doctrine promulgated by the modern Supreme Court has been "contraconstitutional." But he acknowledges that enforcement of this body of doctrine against the states is arguably contraconstitutional because "*contrary* to the *federal* character of American government established by the framers."[50] He promises to deal with this issue in a forthcoming essay.

A full consideration of the suggested distinction will have to await the promised essay. In the meantime I shall venture some doubts. Perry seems to be saying that the Court engages in "contraconstitutional" review when its decision is directly contrary to that required by interpretive review.[51] So, for example, if the Court had decided in *Buckley v. Valeo* that the original provisions of the Federal Election Campaign Act regarding the appointment of the members of the Commission did not violate the appointments clause of the Constitution, it would in Perry's opinion have engaged in contraconstitutional review. This he distinguishes from extraconstitutional review, which is neither derived from nor contradictory to the values embedded by the framers in the constitutional text. Thus the number of "contraconstitutional" decisions may be small or large, depending on how broadly "interpretive" review is defined. In any event, the Court itself is hardly likely to believe that it is engaging in "contraconstitutional" review, and therefore the admonition to abjure this practice tells it nothing.

Perry's discussion of *Brown v. Board of Education* illustrates some of the difficulties of applying the distinction. This decision, he writes, was not "contraconstitutional" because "[n]o one suggests that the framers meant to require segregated public schooling."[52] He concedes, however, that "the proposition that the framers intended the equal protection clause not to prohibit segregated schooling is equivalent to the proposition that they intended such schooling not be proscribed in the name of the particular, narrow value judgment they embodied in the clause."[53] "But," he

49. M. PERRY, *supra* note 3, at ix (original italics).
50. *Id.* (original italics).
51. *Id.* at 74.
52. *Id.*
53. *Id.* at 200, n.80.

adds, "in *Brown* the Court avoided acting contrary to *that* intent by not relying on the claim that its invalidation of segregated public schooling merely represented enforcement of the framers' intention. Rather, the Court suggested that no one could tell whether the framers meant to prohibit segregated public schooling."[54]

Perry, of course, thinks the Court's agnosticism about original intent was wrong—that the framers did not mean to prohibit segregated public schooling. But if the Court may avoid engaging in "contraconstitutional" review by resorting to an erroneous conception of the framers' original understanding of a constitutional clause, it will never be acting contraconstitutionality. I also find it difficult to see why "the proposition that the framers intended the equal protection clause not to prohibit segregated public schooling" is not equivalent to the proposition "that they intended such schooling not to be proscribed." Period. Would the framers have been content to learn that segregated public schooling was being proscribed by the Court but not "in the name of the particular, narrow value judgment they embodied in the [equal protection] clause"? Weren't they more interested in the consequences of what they were doing than in any particular way of explaining these consequences? Though he belabors Raoul Berger's brand of interpretivism on the ground that it makes *Brown* "illegitimate," he advances no good reason why *Brown* should not be regarded as the product of "contraconstitutional" review and therefore also "illegitimate" from his own point of view.

Perry also regards a decision as contraconstitutional if it was "reached in the exercise of a mode of judicial review the framers intended to foreclose."[55] He agrees that the framers of the Bill of Rights and the fourteenth amendment did not intend to delegate to the Court the power "to exercise noninterpretive review under any open-ended provision."[56] He also agrees that the "historical record [Raoul] Berger examines[57] does in fact establish that the framers decided against giving the judiciary any part of a certain sort of veto over acts of Congress, a negative to be used, like the presidential veto, on any ground whatsoever."[58] But because noninterpretive review is more circumscribed than "an all-pur-

54. *Id.* at 200-01, n.80 (original italics).

55. *Id.* at 74.

56. *Id.* at 23.

57. R. BERGER, GOVERNMENT BY JUDICIARY 300 (1977) (the framers rejected a specific proposal that the federal judiciary participate in a Council of Revision "to examine every act of Congress and by its dissent to constitute a veto.").

58. M. PERRY, *supra* note 3, at 21.

pose veto," Perry concludes that "it cannot be said that the framers intended the judiciary not to exercise such review."[59] In other words, *"no historical materials suggest that any group of framers ever constitutionalized any theory of the proper scope of judicial review, whether narrow, like interpretivism, or broad."*[60] But if the framers wanted the Court to eschew noninterpretive review under the open-ended provisions, isn't it implicit that they wanted the Court to limit government action only to the extent originally understood? Isn't noninterpretive review also contrary to the "overall structure of government ordained by the Constitution," which was not intended to give the Court power to legislate so as to limit the powers of the other branches of government? Why isn't all noninterpretive review contraconstitutional?

4. *The "functional justification" for constitutional review*. According to Perry, interpretive review of the acts of the other branches of the federal government is always "functionally justified" because neither of the other branches "has as great an institutional capacity as the judicial branch, much less a greater capacity," to enforce the framers' value judgments and thereby fulfill their intention that the Constitution be the supreme law of the land.[61] Interpretive review of the acts of the states is justified because no other organ of the federal government can so effectively assure "the uniform construction and application of the Constitution as against inconsistent state law throughout the country."[62] Noninterpretive review is also functionally justified, but only when it "serves a crucial governmental function, perhaps even an indispensable one, that no other practice can realistically be expected to serve."[63]

Perry's concept of functional justification suffers from two serious flaws. First, there is no consensus about the relative capacities of the three branches of the national government to achieve particular constitutional objectives. Second, after nearly two centuries of constitutional review by the federal courts, it is impossible to say what alternative institutions our society could have developed, in the absence of judicial review, to further constitutional values. As Robert Dahl has written, "To assume that this country has remained democratic because of its Constitution seems to be an obvious reversal of the relation; it is much more

59. *Id.*
60. *Id.* at 74 (emphasis in original).
61. *Id.* at 16.
62. *Id.* at 13 (quoting A. BICKEL, THE LEAST DANGEROUS BRANCH 13 (1962)).
63. *Id.* at 92.

plausible to suppose that the Constitution has remained because our society is essentially democratic."[64]

Let me illustrate these points. Perry argues that interpretive, but not noninterpretive, review of the scope of the power of the national government vis-a-vis the states is functionally justified. While he relies upon Professor Herbert Wechsler for his conclusion regarding noninterpretive review,[65] it is clear that Professor Wechsler also had interpretive review in mind when he wrote that "the national political process in the United States—and especially the role of the states in the composition and selection of the central government—is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states."[66] Agreeing with Wechsler, Dean Jesse Choper urges that the Court refrain from any review, on federalism grounds, of the scope of federal power.[67] Perry never adequately explains why Dean Choper's view is incorrect in light of the relative capacities of the three branches of government to accomplish constitutional objectives *in this area*. He simply invokes the justification for interpretive review in general: that without it the norms constitutionalized by the framers would be unenforceable.

Perry regards interpretive and noninterpretive review of state regulation and taxation of interstate commerce as justifiable because "Congress lacks the institutional capacity to attend to the details of hundreds if not thousands of local laws adversely affecting interstate commerce."[68] Yet if the Court had steadfastly refused to declare any state regulation or taxation of interstate commerce violative of the commerce clause (in the absence of congressional action), Congress might have responded by creating administrative mechanisms that might have accomplished constitutional objectives in this area more effectively than the Court has done.

A similar disagreement exists concerning separation of powers cases. Dean Choper argues that in such cases the legislative and executive branches can adequately defend their interests without judicial intervention.[69] With rare exceptions, they will arrive at workable compromises that can hardly be said to be inconsis-

64. R. DAHL, A PREFACE TO DEMOCRATIC THEORY 143 (1956).

65. M. PERRY, *supra* note 3, at 43.

66. Wechsler, *The Political Safeguards of Federalism*, in H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 78 (1961).

67. J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE SUPREME COURT 175 (1980).

68. M. PERRY, *supra* note 3, at 39.

69. J. CHOPER, *supra* note 67, at 281-308.

tent with the framers' judgments about separation of powers. Perry contends that Choper underestimates "the utility of judicial arbitration of interbranch conflict," though he concedes that "such arbitration is not literally indispensable."[70] He concludes that there is a functional justification for even noninterpretive review in such cases.[71]

What if the Court had refused to intervene in the most celebrated of the recent separation-of-powers cases? Certainly, for example, the method of appointment to the Federal Election Campaign Commission agreed to by Congress and the President was better suited to monitor the campaign finances of presidential candidates, one of the principal objectives of the Federal Election Campaign Act, than the method mandated by the Court in *Buckley v. Valeo*. I doubt that in this case the Court was institutionally more capable than the President and the Congress, electorally accountable as they are to different constituencies, to determine the application of the appointments clause.

To take another example, if the Court had refused to order President Nixon to turn over the Watergate tapes—which it did, according to Perry, in the exercise of noninterpretive review—the impeachment process would have proceeded to a conclusion and the country might have been better served.

Finally, I doubt that the Court, in holding the legislative veto to be unconstitutional, was better able than Congress and the President to delineate the values implicit in the presentment clauses and bicameralism requirements of the Constitution, in light of the "contemporary needs" of the "modern administrative state."[72]

Human rights issues present similar difficulties. I shall return to them after examining more fully Perry's functional justification for the imposition by the Justices of their own values when the Court engages in noninterpretive review in human rights cases.

Perry rejects "tradition and/or consensus" as a "plausible source of norms for constitutional adjudication" because there is "no single, predominant American tradition . . . so determinate" and "no consensual values sufficiently determinate" as "to be of much help in resolving the particular human rights conflicts that have come before the Court in the modern period and are likely to

70. M. PERRY, *supra* note 3, at 57.

71. *Id.* at 59.

72. Immigration & Naturalization Serv. v. Chada, 103 S. Ct. at 2798, 2801 (White, J., dissenting).

come before it in the foreseeable future."[73] Traditions and values in our pluralist culture are "severely fragmented . . . and they include denial of freedom of expression, racial intolerance and religious bigotry."[74] He is right that American traditions and values are not sufficiently determinate to give specific answers to the many human rights issues the Court is called upon to resolve. Nevertheless, the American people do share fundamental values which the Court should take account of in its decisions. Indeed, Perry builds his justification for noninterpretive review in human rights cases on the assumption that there are such shared values, but he describes them rather mystically.

Perry writes that there is a "['religious'] conception of the American polity that seems to constitute a basic, irreducible feature of the American people's understanding of themselves"—religious not *"in any sectarian, theistic or otherwise metaphysical sense"* but in the sense of "a binding vision—a vision that serves as a source of unalienated self-understanding, of 'meaning' in the sense of existential orientation or rootedness."[75] In short, a civil religion. According to Perry, the "great bulk of those who have been responsible for establishing, developing, and maintaining the principal institutional constituents of the American political community . . . have understood themselves to be 'chosen' in the biblical sense of that word; that is, they have understood themselves to be charged with a special responsibility, *an obligation*, among the nations of the world . . . to carry out God's will on earth."[76] Alas, however, "even a chosen people . . . fail in their responsibility" to realize the "higher law" and need prophets to call them to "provisional judgment . . . in the here and now."[77] The Supreme Court Justices are the latter-day prophets of our secular religion, and noninterpretive review represents the "institutionalization of prophecy" for the purpose of calling "the American people, actually the government, the representatives of the people—to provisional judgment."[78] The same American people whose traditions include denials of freedom of expression, racial intolerance and religious bigotry, according to Perry, "still see themselves as a nation standing under transcendent judgment" who "understand—even if from time to time some members of the intellectual elite have not—that morality is not arbitrary, that justice cannot be re-

73. M. PERRY, *supra* note 3, at 93-94.
74. *Id.* at 93.
75. *Id.* at 97 (original italics).
76. *Id.* (original italics).
77. *Id.* at 98.
78. *Id.* at 98-99.

duced to the sum of the preferences of the collectivity."[79] These same American people "persist in seeing themselves as a beacon to the world, an American Israel, *especially in regard to human rights* ('with liberty and justice for all')."[80] Accordingly, "they still value, even as they resist, prophecy—although now it might be called 'moral leadership.' "[81] Their "religious self-understanding has generally involved a commitment—though not necessarily a fully conscious commitment—to the notion of moral evolution"—to "an ever-deepening moral understanding and to political practices that harmonize with that understanding."[82]

Our electorally accountable policy-making institutions need to be called to provisional judgment by the prophet-Justices because they "are not well suited to deal" with human right "issues that challenge and unsettle conventional ways of understanding the moral universe and that serve as occasions for forging alternative ways of understanding" in a manner "that is faithful to the notion of moral evolution or, therefore, to our religious understanding of ourselves."[83] These issues include "distributive justice and the role of government, freedom of political dissent, racism and sexism, the death penalty, human sexuality."[84] On these issues, the electorally accountable policy makers, because of their "concern for remaining in office," sometimes "tend simply to rely on established moral conventions ['of the greater part of their particular constituencies']" and to "refuse to see in such issues occasions for moral reevaluation and possible moral growth."[85] The "practice of noninterpretive review has evolved as a way of remedying what would otherwise be a serious defect in American government—the absence of any policymaking institution that *regularly* deals with fundamental political-moral problems other than by mechanical reference to established moral conventions."[86] In other words, the justification for an anti-majoritarian Supreme Court is precisely that it is anti-majoritarian.

What is gained by presenting the Justices as prophets of a secular religion? The prophets of Israel were always dissidents calling the powerful to account in the name of the Lord or an ideal morality. The Justices, by contrast, are a tiny minority exer-

79. *Id.* at 98.
80. *Id.* (original italics).
81. *Id.*
82. *Id.* at 99, 101.
83. *Id.* at 100.
84. *Id.*
85. *Id.*
86. *Id.* at 101.

cising political power. They need prophets to call *them* to account. They are hardly suited to the role of prophets either by training or professional experience. As Perry says, they "tend to be more or less conventional members of the class that comprises legislators and other policymaking officials."[87] They assume their high office at a time of life when their values are fairly set. Elevation to independent, lifelong positions of power, largely as a result of their past political associations, does not suddenly qualify them as prophets. If Perry's view of the function of the Court is accepted, why shouldn't preachers, or moral philosophers and theologians, rather than lawyer-politicians, become Justices?

Reluctant to put his case entirely on the alleged "religious aspect of American self-understanding," Perry also justifies noninterpretive review in human rights cases on the ground that Americans "as a society . . . seem to be open to the possibility that there are right answers to political-moral problems."[88] Even "if evidence were slight that we are open to that possibility, we *should be* open to it."[89] Noninterpretive review "enables us to keep faith with" with this possibility. He acknowledges that there "is so much disagreement among philosophers and theologians over basic moral principles" that no "single authoritative moral system, whether philosophical or religious," can be looked to for "right answers."[90] Yet a "right answer frequently represents . . . a point at which *a variety* of philosophical and religious systems of moral thought and belief converge."[91] Thus, Perry's justification for noninterpretive review is based upon a consensus, not reflecting fundamental values shared by the American people, but rather reflecting those values shared by the presumed moral leaders of our society. He claims that as "a matter of comparative institutional competence, the politically insulated federal judiciary is more likely, when the human rights issue is a deeply controversial

87. *Id.* at 124.

88. M. PERRY, *supra* note 3, at 102.

89. *Id.* (original italics).

90. *Id.* at 107-09.

91. *Id.* at 109 (italics in original). Perry would do well to reflect on what Isaiah Berlin has written:

> The notion that there must exist final objective answers to normative questions, truth that can be demonstrated or directly intuited, that it is in principle possible to discover a harmonious pattern in which all values are reconciled, and that it is towards this unique goal that we must make; that we can uncover some central principle that shapes this vision, a principle which, once found, will govern our lives—this ancient and almost universal belief on which so much traditional thought and action and philosophical doctrine rests, seems to me invalid; and at times to have led (and still to lead) to absurdities in theory and barbarous consequences in practice.

I. BERLIN, FOUR ESSAYS ON LIBERTY iv-vi (1969) (London version).

one, to move us in the direction of a right answer (assuming there is such a thing) than is the political process left to its own devices, which tends to resolve such issues by reflexive, mechanical reference to established moral conventions."[92]

Rejection of the notion that there are "right" answers does not entail (*pace* Perry) acceptance of the view that any answer is as good as any other and the choice among them is "a matter of taste."[93] A rational approach to political-moral issues appreciates the many difficulties that stand in the way of giving single "right" answers to the kinds of ethical problems that come before the Court. Ethical principles, even those upon which the moral "leaders" tend to converge, are too indeterminate to yield answers in specific cases. As a consequence of the moral growth Perry welcomes, ethical principles change and so tend to exhibit great variety at different times and in different places. The possibility of "right" answers is also diminished by the fact that the conflicting values and claims among which the Court is asked to choose or which it may seek to accommodate are often incommensurable—for example, a free press versus a fair trial, the free exercise of religion versus the establishment of religion, the environment versus jobs.

A rational approach to ethical problems clarifies the issue by showing what means will be necessary to make a particular choice or accommodation. It insists on testing alternative choices or accommodations by their consequences, in fact, for the needs of society and its individual members. It assumes that because the members of a society share some fundamental values, there is something in each person to which appeal can be made in the event of disagreement with the hope of arriving at a solution acceptable to all.

A rational approach puts the matter of relative institutional competence in a different light. It is by no means clear that the Court is better able than the other branches of government to explore the factual dimensions of moral judgments. Its heavy case load inhibits it from engaging in such exploration.[94] Furthermore, even after all these years the Court has not resolved the problem

92. *Id.* at 102.

93. *Id.* at 103.

94. In the October 1982 Term, there were 5,311 cases on the Court's docket and 141 signed opinions were issued. Chief Justice Burger commented at the 1983 meeting of the American Law Institute: "It is at the very least open to serious question whether 140 full scale signed opinions can be written and still meet the standard of quality that the bar and the public have a right to expect from the Supreme Court of the United States." Address of Chief Justice Burger to the American Law Institute, May 17, 1983, 51 L.W. 2714 (May 31, 1983).

of how to determine the facts it regards as material for constitutional decisions.

It is difficult to generalize about relative institutional competence. On the whole, the historical evidence does not support the conclusion that the Court has been a better protector of the welfare and liberties of the American people than the other branches of government. To me, the principal index of moral development is the extent of individual concern for the needs of others and the extent to which a society's horizons of sympathy are enlarging. Careful examination of the work of Congress and the state legislatures will reveal that legislation has enlarged the scope of individual freedom in this century and that this legislation has been guided by principles that are as clear and as morally and intellectually respectable as those that have been enunciated by the Court. Obviously this is true in the area of distributive justice because of the development of the welfare state. But in some areas of human rights, too, the legislatures have been more protective than the Court.[95] Perry underestimates the role of political leadership throughout our history. This is not to say that the decisions reached by the political process are always "right" any more than the decisions of the Court are always "right." But I cannot accept the view that the Court's decisions are more likely to be "right" *simply because* they are more likely to oppose the moral conventions prevailing at a particular time. Such opposition does not necessarily move us to a higher plane of moral evolution.

Perry does not deny the Court's fallibility. But he believes that "in the foreseeable future the Court is likely to hand down only few (if any) decisions destined for the widespread condemnation now visited on cases such as *Lochner*" and that "the function of noninterpretive review is *generally* salutary."[96] He pleads that "we must resist specious historical generalizations about the performance of the Supreme Court."[97] "The issue for the present generation of constitutional theorists is . . . whether noninterpretive review has served a salutary, perhaps crucial government (policymaking) function during the modern period."[98]

Perry is certain of the answer to this question—"few members of the American polity," he thinks, "would today take issue with much of what the Court has done in the name of either freedom of expression or equal protection."[99] Even the Court's mod-

95. *See* CHOPER, *supra* note 67, at 222, n.209 (cited by Perry at 46).
96. M. PERRY, *supra* note 3, at 116.
97. *Id.*
98. *Id.*
99. *Id.* at 117.

ern policy-making in substantive due process cases, which "has been aimed at according the individual's interest in sexual, reproductive and associational autonomy a constitutional status," consists mainly of "right" answers "approaching or perhaps even reaching an emergent point of convergence among a variety of systematic moral theories."[100] The Court's work in other human rights cases, such as those involving freedom of religion and criminal procedure, "has also functioned, on balance, as an instrument of deepening moral insight and of moral growth."[101] Perry recognizes that someday the Court may persistently generate policy choices that are morally infirm.[102] Because "constitutional theory must not be propounded in a historical vacuum; it must be sensitive to context—the context of our own time," the defender of noninterpretive review, should this possibility eventuate, "has the option of becoming . . . a defender of interpretive review instead."[103] The cynicism of this position penetrates the verbiage. There is no constitutional theory for all seasons. Those who believe in laissez-faire should applaud the noninterpretive review of the Old Guard in the 1920s and 1930s. Those who favor regulation of the economy may, with equal justification, attack the noninterpretive review that constitutionalized laissez-faire. Similarly, one may defend or oppose noninterpretive review of human rights issues by the modern Court depending upon whether one approves or disapproves of the resulting decisions. One may espouse noninterpretive review in some areas (human rights) and interpretive review in others (economic regulation), or vice versa. And one never knows how long one will remain a defender of either kind of review in any branch of constitutional law. It may depend upon how many appointments to the Court President Reagan will be able to make. What is the use, then, of constitutional theory?

In assessing the functional justification for judicial review in human rights cases, we cannot know how the other branches of the federal government would have behaved if such review had not been available and the responsibility for safeguarding constitutional values had been solely theirs. Perry does not sufficiently appreciate James Bradley Thayer's admonition:

> the power of the judiciary to disregard unconstitutional legislation . . . is always attended with a serious evil, namely, that the correction of legislative mistakes

100. *Id.* at 117-18.
101. *Id.* at 118.
102. *Id.* at 119.
103. *Id.*

> comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the questions out in the ordinary way, and correcting their own errors. . . . The tendency of a common and easy resort to this great function, now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.[104]

Looking abroad, it can hardly be said that civil liberties and minority rights in the areas Perry regards as crucial are protected more in the United States than in other Western democracies that do not tolerate judicial invalidation of the acts of the supreme legislature or the government.[105]

III.

To reconcile noninterpretive review with democracy, Perry acknowledges Congress' authority to limit the appellate jurisdiction of the Supreme Court and the original and appellate jurisdiction of the lower federal courts so as to deprive them of the power to engage in such review of specified classes of cases or questions.[106] If this reconciliation is to be more than a debater's point, it must be shown that Congress' exercise of its jurisdiction-limiting power can be effective. Perry tries to demonstrate that this is

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104. J.B. THAYER, O.W. HOLMES & F. FRANKFURTER, JAMES BRADLEY THAYER, OLIVER WENDELL HOLMES AND FELIX FRANKFURTER ON JOHN MARSHALL 85-86 (1967).

105. Perry sees signs of the American system of constitutional review spreading in Europe. He cites an article written by Anthony Lester, a Queen's Counsel, expressing the hope that by 1989 "fundamental rights will be enforceable in UK courts under a written constitution forming the paramount law of the nation in harmony with the paramount law of the new community of Europe." I venture to guess that this hope is doomed to disappointment. In any case, there is nothing in Mr. Lester's article to indicate he espouses anything like Perry's brand of judicial activism. The European Court of Justice at Luxembourg, which was created to help implement the Treaty of Rome that established the European Community, has been likened to the United States Supreme Court. But it is already being criticized "for transcending the limits of what 'according to common opinion' are the functions of courts" and "though trying to conceal it, . . . acting as a lawmaker." The lack of a strong legislative organ of the European Community provides a justification for the work of the European Court of Justice in the interest of European integration that does not apply to the United States Supreme Court.

106. M. PERRY, *supra* note 3, at 219, n.164. Professor Perry erroneously cites Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869) as authority for the proposition that Congress may specify the classes of cases over which the Court may exercise appellate jurisdiction. When *McCardle* is read together with Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1869), it appears that the 1868 Congressional act upheld by the Court in *McCardle*, which repealed the 1867 act authorizing McCardle to petition a lower federal court for habeas corpus and then appeal the denial of his petition to the Supreme Court, was not an act depriving the Court of appellate jurisdiction over a specified class of cases. It was only an act that closed one route to the Court for appellate review, leaving another route open. Never in our history has Congress withdrawn the Court's appellate jurisdiction over specified classes of constitutional claims. It should also be noted that, on Perry's reading of *McCardle*, the Court was trying to engage in interpretive review, and Perry does not acknowledge that Congress' jurisdiction-limiting power may constitutionally control such review.

so, though he trusts that the power will not be used frequently. He considers the reasons why Congress has not exercised this power in the past. In the first place, doubts about the constitutional scope of the power have inhibited its use. Perry argues that these doubts would be removed by acceptance of his views.[107] But this sanguine prediction ignores the great difficulty of distinguishing between interpretive and noninterpretive review, an issue that would perpetuate constitutional doubts.

Legislative inertia may also explain why Congress has not used its jurisdiction-limiting power. Perry contends that the burden of setting Congress in motion must be borne by all who seek some action from it; those who want Congress to curb the Court are no worse off than those who want other kinds of legislation. This is a persuasive argument; but it must be tempered. In all other areas, legislative inertia tends to perpetuate a status quo produced by electorally accountable policy making. Inertia resulting in failure to exercise the jurisdiction-limiting power perpetuates the constitutional policy making of the Justices speaking in the name of fundamental law. The burden of moving Congress to exercise this power will be heavier than that carried by the proponents of any other type of legislation.

To Perry, this fact is not displeasing. He emphasizes that "frequent, unreflective resort to the jurisdiction-limiting power would reduce to little more than a transient whisper the now powerful, not easily ignored voice of the Court" in the ongoing "dialogue between Court and polity."[108] "The burden of legislative inertia serves to enhance the Court's voice by enhancing the allied voice of those in Congress, likely only a minority, who are prepared to defend—or at least to take very seriously, to the point of not disturbing the Court's position on a given, deeply controversial political-moral issue."[109] Thus Perry thinks that a principal reason why the jurisdiction-limiting power has not been used is that there usually are enough members of Congress who approve of the Court's human rights decisions to be able to kill any jurisdiction-limiting proposal. This observation, which may be true, tends to show that the jurisdiction-limiting power is not an effective way to reconcile noninterpretive review with electorally-accountable policymaking. For a "minority" in Congress is able to uphold the action of a handful of Justices in nullifying legislation that was passed after overcoming the weight of legislative inertia.

107. M. PERRY, *supra* note 3, at 134.
108. *Id.* at 135.
109. *Id.*

I am not at all certain that Perry is correct in supposing that Congress would continue to be so passive if his theory were generally accepted. In the first place, he thinks it is "obligatory as an ethical matter" that the Court candidly indicate when and why it is engaging in noninterpretive review.[110] He would not deprive a Justice of the "linguistic convention of saying that the action violates the Constitution [the equal protection clause, for example], so long as the justice is candidly clear that by that he or she means not that the action offends the original understanding of the clause, but that it contravenes the Court's developing equal protection doctrine, which is itself not explicable in terms of any value judgment constitutionalized by the framers."[111] Perry rejects the view of Professor Martin Shapiro that it would be "suicide" for the Court "to disavow publicly the myth upon which its power rests."[112] Be that as it may, candor on the Court's part is more than an ethical matter under Perry's constitutional theory. Only its candor would enable Congress to know whether it may constitutionally exercise its jurisdiction-limiting power and thereby inaugurate the public discussion of the Court's constitutional policy making that Perry values. We may then look forward, with dubious pleasure, to 5-4 and 3-3-3 decisions not only on the merits, but also on whether the decision was "interpretive" or "noninterpretive."

Under these circumstances, Congress probably would use its jurisdiction-limiting power more frequently than Perry anticipates. Indeed it is not fanciful to suggest that Congress might even act to do away with noninterpretive review entirely and in a manner that Perry would be forced to accept as constitutional. It might enact a statute depriving the Court of appellate jurisdiction and the lower federal courts of original and appellate jurisdiction over any class of cases or questions that the Court itself concluded could not be decided without noninterpretive review. Under such a statute any candid effort by the Court to engage in noninterpretive review would instantly self-destruct, because the Court would be compelled to dismiss such a case for lack of jurisdiction.

The consequences of exercising the jurisdiction-limiting power are the principal obstacle, in my opinion, to Congress' use of this power. Perry discusses them most casually. To deprive the federal courts of jurisdiction to pass upon the constitutionality of a federal law, Congress would have to forego the use of those courts

110. *Id.* at 143.

111. *Id.* at 143-44.

112. M. SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT 27 (1964).

to enforce that law. For the supremacy clause prohibits them from enforcing unconstitutional laws. Perry tries to surmount this difficulty by relying upon the dubious distinction between interpretive and noninterpretive review and arguing that Congress could authorize the federal courts to enforce a federal program while denying them the power to engage in noninterpretive review while doing so. Even if one accepts this theory, the problem of state enforcement remains. The jurisdiction-limiting power of Congress cannot, of course, curb the state courts in any way. It is not clear what Perry thinks the state legislatures and courts would do if Congress deprived the federal courts of jurisdiction over a particular class of federal constitutional claims. He does not view the jurisdiction-limiting power as equivalent to the power to reverse a noninterpretive decision by the Court.[113] He would oppose giving Congress power to reverse such a decision because that would make the Court "a sort of delegate of Congress, much as a court in its common-law role is a delegate of the legislature, which may revise the common law."[114] It would diminish the "moral authority of the Court's voice;" its opinions "would be essentially only advisory;" and the "inter-institutional tension" that is the "reason to value noninterpretive review in the first place" would be undermined.[115] Thus Perry sees the exercise of the jurisdiction-limiting power as "merely silencing the Court" and not "reversing the Court on a particular issue."[116] If there is to be a significant difference between "merely silencing" the Court and reversing it on a particular issue, the Court's decisions that provoked the limitation of its jurisdiction must have some sort of after-life. Suppose that the decisions had invalidated some federal action. Would not the state courts, bound as they are by oath to support the federal Constitution, have to follow these decisions and invalidate the same federal action when it is challenged in their jurisdictions? If so, Congress' purpose in exercising the jurisdiction-limiting power would be thwarted. More than that, it seems likely that the state courts would be divided about whether the exercise of the jurisdiction-limiting power freed them from the obligation to follow the Court's previous decisions. The federal program would then be implemented in some states but not in others—an intolerable result in our federal system.

Perry attempts to meet this difficulty by asserting that "a deci-

113. M. PERRY, *supra* note 3, at 135.
114. *Id.*
115. *Id.* at 135-36.
116. *Id.* at 136.

sion by a *state* court opposing its own value judgment to that of a branch of the *national* government should not be deemed binding on the national government (or, therefore, on litigants relying on the authority—and if necessary the power—of the national government) *unless the state court's decision is subject to appellate review by the Supreme Court (or by some other federal court)*," which of course it would not be in the case supposed.[117] He is referring to the exercise of noninterpretive review ("its own value judgment") by the state courts in implementing the requirements of the Federal Constitution. But in the situation I supposed, the state courts would not be purporting to enforce their own values. Rather, they would be discharging their constitutional duty to follow the decisions of the United States Supreme Court which, Perry tells us, would not be reversed by the fact that Congress silenced the federal judiciary. Congress would have no power to prevent the state courts from implementing the Supreme Court's decisions. A President seeking to use force to prevent the state courts from doing so would face a dilemma. Is it the President's constitutional duty to execute faithfully the jurisdiction-limiting law of Congress which merely silenced the federal judiciary? What does such execution require of the President? Or is it the President's constitutional duty to execute the Court's decisions that provoked the exercise of the Congressional power but that still stand? Or are Presidents to act in accordance with their own constitutional values in particular cases?

Perry does not think these problems can arise with respect to "a congressional withdrawal of federal jurisdiction over cases involving challenges to state laws, which . . . are the cases at the center of the present controversy" concerning noninterpretive review.[118] But the only reason he gives for this conclusion is unpersuasive. He writes that "if a state court strikes down action in the exercise of noninterpretive review, there is no problem of legitimacy if in the state in question the judges are electorally accountable," and "even if they are not electorally accountable, presumably the state legislature has power over the jurisdiction of the state judiciary analogous to Congress' power over the jurisdiction of the federal judiciary."[119] Again Perry is thinking of activist state judges who read their own predilections into the Federal Constitution. But if a state court is instead implementing the decisions of the Supreme Court, then the state legislature,

117. *Id.* at 131-32.
118. *Id.* at 137.
119. *Id.* at 131.

whose members are also under a duty to support the Federal Constitution as expounded by the Supreme Court, should not interfere. Even if the state judges who followed the Supreme Court decisions were defeated in the next election, their successors would be under the same constitutional duty. Again, the most likely practical outcome is that some state courts would follow the Court's decisions while others would not. As a result, federal constitutional rights would vary from state to state.

I believe the consequences of exercising the jurisdiction-limiting power are so serious for our constitutional system as a whole and our federal system in particular, that one of two things would happen under Perry's proposal. One possibility is that Congress would be unwilling to use the power, making it only an academic way to reconcile noninterpretive review with democracy. The other possibility is that Congress would exercise the power, with results that would make the price of reconciliation unacceptably high. If, after almost 200 years of judicial review, there is a consensus that the Court's policies should be subject to the ultimate judgment of the electorally accountable branches of government, other than by constitutional amendment, the various ways of accomplishing this objective should be debated and the way chosen embodied in a constitutional amendment. I agree with Professor Sager that the "rather bizarre" jurisdiction-limiting power is most unsuited to this purpose.[120] In the discussion of such an amendment, there would be no need to distinguish between interpretive and noninterpretive review. There is no reason why the nineteenth century constitutional values of the founding fathers should be more immune from review by the politicians than the twentieth century constitutional values of the Supreme Court. By now, all constitutional law bears the indelible stamp of the Court.

IV.

Where does all this leave us? Certainly the lot of the constitutional theorist is not easy. The unnecessary religious metaphor used by Perry reflects the truth that the protection of human rights, particularly against arbitrary or discriminatory government action, is a value Americans share. And we have come to accept the idea that these rights should be protected by being set forth in a fundamental law limiting popular sovereignty.[121] Once a Court is entrusted with the task of implementing the fundamental law,

120. Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17, 39-40 (1981).

121. R. MCCLOSKEY, THE AMERICAN SUPREME COURT 12-13 (1960).

the Justices' own convictions and values will inevitably mark their efforts. But since I do not think it is healthy for a democracy to be governed by electorally unaccountable judges, theories limiting the exercise of the Court's powers appeal more to me than theories placing no principled limit on them.

Perry is not wholly insensitive to the case for judicial restraint. He ends the book by recognizing and approving several constraints in addition to the threat of the jurisdiction-limiting power: the nature of the appointment process; collegial decision-making; prudence dictated by the Court's limited political capital, its institutional competence, and the need for a considerable degree of popular assent to its decisions.[122] Yet it is hard to imagine what practical applications he envisions for these abstract constraints, given his exceedingly optimistic view of the Court's competence. He even raises the possibility that the Court may constitutionalize the rights enumerated in the International Covenant on Economic, Social, and Cultural Rights[123]—the rights "to food, clothing, housing, and education; . . . to work, leisure, fair wages, decent working conditions, and social security; . . . to physical and mental health, protection for the family, and for mothers and children; . . . to participate in cultural life."[124] Perry regards it as "[o]ne of the great open questions in constitutional law . . . whether, and to what extent, the Supreme Court and the judiciary generally have the institutional capacity to formulate and implement" these rights.[125] Since the United States has refused to subscribe to the Covenant, Perry's "open question" bespeaks an amazing degree of faith in government by the judiciary. Though we may accept the morality of the claims to well-being enumerated in the Covenant, just imagine a bare majority of the Court declaring President Reagan's program for economic recovery unconstitutional on the ground that it violates the rights set forth in the Covenant. Following Perry, the Justices in the majority would candidly acknowledge that they have incorporated these rights in the due process clause because the Covenant reflects their own values. There is something wrong with a theory that does not bar such absurdities except by counsels of tactical prudence.

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122. M. PERRY, *supra* note 3, at 146-62.

123. *Id.* at 163 (citing G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966)).

124. Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 418 (1979).

125. M. PERRY, *supra* note 3, at 163-64.