

Book Review

The New Constitutional Law

THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS.
By Michael J. Perry.* New Haven: Yale University
Press. 1982. Pp. xi, 165. \$24.00.

Reviewed by
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American constitutional theory never has recovered from Justice Holmes' famous dissent in *Lochner v. New York*: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*."¹ While in retrospect it seems obvious that the fourteenth amendment is not a social Darwinist tract, it is less easy to determine what substantive content, if any, the clause does contain. If no core content exists, the Holmesian argument goes, "activist" judicial vetoing of the "democratic" results of the majoritarian process is illegitimate. Defenders of the activist decisions of the Warren Court always have found the Holmesian argument an embarrassment since it undercuts the Supreme Court's work in support of human rights.² Thousands of pages have been written in hope of furnishing a rejoinder, none with complete success.

Michael Perry's new book³ makes an eloquent response to Holmes that, to be fully appreciated, must be placed in the framework of the three intellectual positions currently at war with each other in the law reviews over the legitimacy of judicial review. I will call them the "conservative liberal," the "progressive liberal,"⁴ and the "critical" positions.

The conservative liberal position, associated with Robert Bork and William Rehnquist,⁵ accepts the Holmesian argument at face value. The Supreme Court is empowered only to interpret the Constitution;⁶ this means

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1. 198 U.S. 45, 75 (1905).

2. *E.g.*, M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* 9-36 (1982).

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

4. I hasten to add that I use "liberal" in the sense outlined by Roberto Unger in his seminal work, *KNOWLEDGE AND POLITICS* 76-77 (1975). The "liberal" mode of thought posits a radical distinction between "facts," which are objective, and values, which are arbitrary and subjective. Since liberal consciousness dominates (creates) our daily and intellectual lives, we are all (Ronald Reagan as well as Teddy Kennedy) "liberals" in Unger's sense. *See also* A. MCINTYRE, *AFTER VIRTUE* (1981).

5. *E.g.*, M. PERRY, *supra* note 3, at 29.

6. *Id.* at 28-29.

enforcing those values that the framers designated and invalidating only those political practices that the framers intended to ban or that are analogues of such practices.⁷ This interpretivist model claims the virtue of objectivity since it allegedly precludes contemporary judges from infusing their own subjective value preferences into the constitutional text. One of its weaknesses⁸ is that, if applied, it would eviscerate much well-entrenched constitutional doctrine; not only would controversial decisions like the abortion cases⁹ disappear, but decisions like *Brown v. Board of Education*¹⁰ and most decisions protecting the rights of free speech also would fall.¹¹ Since nobody wants to abolish free speech rights against the states, interpretivists like Bork have been tempted to stretch the theory to allow for free speech rights.¹² Perry, however, easily refutes Bork's attempts to save *Brown* and the free speech cases from the clear implications of Bork's own theory.¹³ A theory of judicial review that legitimizes de jure segregation and is unable to recognize free speech rights against the states has a short life expectancy.

While the conservative liberals strive to undermine most decisions of the Warren era, the progressive liberals seek to legitimate those same activist ventures in furtherance of progressive values. The most publicized recent attempt at such legitimation has been John Hart Ely's *Democracy and Distrust*.¹⁴ Ely attempts to justify activist judicial review as a complement to the majoritarian process, but he fails to explain where the constitutional text, its history, or its structure authorizes the Court to perform this (in Ely's phrase) "representation reinforcing" function.¹⁵ For this reason Ely's theory has been easily debunked not only by conservatives but also by critical scholars¹⁶ and other progressive liberals.¹⁷ Working within the liberal paradigm, which posits a basic distinction between constitutional text as fact and the judge's

7. *Id.* at 32.

8. Professor Perry finds interpretivism a very "forceful" theory, *id.* at 30, although he ultimately rejects it, *id.* at 91. I predict that Perry will regret that flattering characterization and that soon the "interpretivist" model of judicial review, like its intellectual cousin, the "economic analysis of law," will be of interest only as illustrative of the ideological assumptions of its proponents. Certainly, it has many internal difficulties as a theory. Who are the "framers"? Did the framers have any unitary "intent"? How do we determine (construct) this intent? How do we decide when a modern practice is an "analogue" of a specifically banned practice? See generally Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981).

9. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973).

10. 347 U.S. 483 (1954).

11. It is now generally accepted that the framers of the first amendment "intended" very few restrictions on government regulation of speech (see L. LEVY, *LEGACY OF SUPPRESSION* (1960)) and the framers of the fourteenth amendment, none at all (see R. BERGER, *GOVERNMENT BY JUDICIARY* (1977)).

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

13. M. PERRY, *supra* note 3, at 65-69.

14. J. ELY, *DEMOCRACY AND DISTRUST* (1980).

15. See M. PERRY, *supra* note 3, at 77-90.

16. *E.g.*, Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980).

17. *E.g.*, Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

activist interpretation as subjective value, a progressive liberal like Ely inevitably is trapped by his own theoretical assumptions.

The critical writers reject both liberal positions. They are best known for two types of claims. First, they contend that the area of indeterminacy in constitutional adjudication is so great as to rob it of any claim to objectivity.¹⁸ It is ironic that this stand implicitly reinforces the conservative attack on the legitimacy of the Warren Court's activism.¹⁹ Second, critical writers argue that constitutional law does not just mask brute power; it acts as a tool that the powerful in society wield to legitimate their privilege.²⁰

Traditional constitutional scholarship owes much more to the critical school than it has yet been willing to acknowledge. In demonstrating the malleability of key constitutional concepts and pointing out the ideological assumptions behind allegedly neutral constitutional methodology, the critical writers have performed an invaluable service. The critical thesis, however, is unsatisfying in several ways. First, the argument about indeterminacy is painted with too broad a brush. Granted, a clearly determinable "right" answer is not present in every "hard" constitutional case (especially at the Supreme Court level where stare decisis is a less rigorous restraint), but one need not conclude that a "right" answer never exists. The truth is somewhere in between; the binding power of precedent is sufficient to justify judicial review in human rights cases, especially since no other effective method of protecting individual rights from majoritarian incursion exists.²¹ Second, the critical position tends to slide towards a moral nihilism that is in tension with its own egalitarian political program.²² Third, the critical writers appear unable to distinguish between the conservative and progressive liberal positions; a principal critical pastime has been "trashing"²³ progressive liberals like Ely, Laurence Tribe, and Ronald Dworkin.²⁴ Whatever the limitations of Laurence Tribe as a social thinker, his political vision stands in dramatic contrast to that of Robert Bork, and a truly "critical" theory should be able to appreciate the differences. Last, critical theory blinds itself to the utopian aspiration central to law, especially constitutional law. Constitutional law

18. E.g., Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979). "[B]oth experience and the cases provide us with law that is manipulable and fragmented to the point of anarchy." *Id.* at 1322.

19. It is interesting to note that, while rejecting "liberalism," writers like Tushnet assume the validity of the liberal paradigm in their discussion of judicial review. Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411 (1981).

20. See Freeman, *Legitimizing Racial Discrimination Through Anti-Discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1051 (1978).

21. See generally R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); Denvir, *Professor Dworkin and an Activist Theory of Constitutional Adjudication*, 45 ALB. L. REV. 13 (1980).

22. Tushnet acknowledges the tilt towards nihilism and attempts to outline a "post-nihilist" Marxist alternative, but one he offers "with a great deal of skepticism and some sheer hope." Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307, 1309 (1979).

23. E.g., Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229 (1981).

24. See, e.g., Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 694 (1980).

obviously reflects social power, but it also tempers and transforms that power in an attempt to show itself to be something more—a search for justice. We may enjoy only “advanced capitalist” human rights in the United States, but those rights are not negligible and the courts are the forum in which they have been won.²⁵

Michael Perry’s book provides a theoretical bridge between the progressive liberal and critical positions by transcending the fact-value distinction that has paralyzed all liberal scholarship. This breakthrough announces a new era in constitutional jurisprudence.

Perry’s connection with the progressive liberal tradition is most obvious; his past writings reflect moderate left political values²⁶ and he employs the dispassionate style of analysis favored by traditional academics. Yet Perry’s intellectual honesty forces him to reject the liberal claim that constitutional adjudication can be a science in which courts discover meanings that inhere inertly in the constitutional text. He describes the Supreme Court’s role as “prophetic” and argues that judicial review plays “an important, even indispensable function” in American politics just because it goes beyond “facts” such as text and history into the realm of values.²⁷ American political culture has never seen politics as only the calculation of the selfish preferences of a temporary majority of voters; it also has viewed itself as a moral enterprise committed “to an ever-deepening moral understanding.”²⁸ Perry argues that it is the role of the Supreme Court to deal with the “fundamental political-moral problems” that this enterprise—“the search for justice”²⁹—produces. In this secular sense the Supreme Court acts as a prophet calling on an evolving inchoate social vision, and judicial review “represents the institutionalization of prophecy.”³⁰ It is a role that the more democratically accountable departments of government are not suited to perform, just because they are so sensitive to transient majorities.

I suspect that Perry will be subjected to some ridicule because of his use of religious imagery,³¹ even though he stresses that his use of “religious” refers only to a social “binding vision” and should not be understood in any theistic sense.³² Yet because terms like “prophecy” make clear that he is operating outside the fact-value dichotomy of liberal discourse, he should be applauded.

25. See R. KLUGER, *SIMPLE JUSTICE* (1976); see also E.P. THOMPSON, *WHIGS AND HUNTERS* 258-69 (1975); Denvir, *Towards a Political Theory of Public Interest Litigation*, 54 N.C.L. REV. 1133 (1976).

26. See, e.g., Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540 (1977).

27. M. PERRY, *supra* note 3, at 99, 101.

28. *Id.* at 101.

29. *Id.* at 101, 106.

30. *Id.* at 101.

31. See, e.g., Sager, *Rights Skepticism and Process-Based Responses*, 56 N.Y.U. L. REV. 417 (1981). Sager has commented that Perry “would . . . have the Court hurl bolts of moral prophecy.” *Id.* at 420 n.6.

32. M. PERRY, *supra* note 3, at 97.

At a functional level Perry's views on judicial review are close to those of sophisticated progressive liberal thinkers like Ronald Dworkin and Owen Fiss.³³ Fiss, for instance, argues that constitutional interpretation is "neither a wholly discretionary nor a wholly mechanical activity," but rather a "dynamic interaction between reader and text, and meaning the product of that interaction."³⁴ Both Fiss and Dworkin, however, attempt to force their analyses to fit within the liberal paradigm,³⁵ while Perry's analysis forthrightly asserts that judicial review is sometimes more akin to contemplating a mystery than solving a puzzle.³⁶ He recognizes that the Supreme Court is an institution whose morality is "'open,' not 'closed'—an institution that . . . [looks] ahead to emergent principles in terms of which fragments of a new moral order can be forged."³⁷

Perry's move beyond the liberal paradigm brings him closer to the critical position. For example, he implicitly accepts the critical position that some indeterminacy is present in constitutional law; prophecy is not an exact science.³⁸ Also, Perry, like the critical school, has no patience with the claim that constitutional law can be apolitical; he sees constitutional law as an indispensable element of politics.³⁹ Perry's characterization of constitutional law is strikingly parallel to that of critical writer Richard Parker. Parker states: "[W]e must work, too, from a vision of a possible perfection of a political life. In this sense 'vision' connotes a hypothesizing, or prescriptive depiction, of a political life better than we know, a political life to which we aspire."⁴⁰ Perry calls constitutional law "an ongoing struggle to bring our collective (political) practice into ever closer harmony with our evolving, deepening moral understanding."⁴¹

Certainly, Parker's and Perry's positions are not identical. The contexts of the two statements show that while Perry is relatively optimistic about the possibility of bringing the reality into accommodation with the vision, Parker believes that the ideal is used mostly as a mirage to legitimize the unsavory reality. Yet the two are both speaking outside the liberal paradigm in terms comprehensible to each other.

More important, the proponent of each position can learn from the other. Critical writing would offer a more comprehensive view of law if it included

33. See Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

34. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 739 (1982).

35. Fiss' recent article is entitled "Objectivity and Interpretation." See *supra* note 34. Dworkin has spent much time showing that there is (almost always) "one right answer" to constitutional issues. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* ch. 13 (1977).

36. M. PERRY, *supra* note 3, at 98-99.

37. *Id.* at 111.

38. *Id.* at 109-11.

39. *Id.* at 101.

40. R. Parker, *A Call for a New Jurisprudence of Constitutional Law* 81-82 (1981) (unpublished manuscript).

41. M. PERRY, *supra* note 3, at 99.

the utopian element present in Perry's work. Perry's analysis would be deepened if he reexamined his unquestioning acceptance of the legitimacy of the majoritarian process. Perry accepts the moral legitimacy of the majoritarian process as "axiomatic" and does not attempt to justify it except on pragmatic grounds: "[A]ny constitutional theory predicated on a rejection of the principle of electorally accountable policymaking is destined to have little currency"⁴² Passive acceptance cannot give the majoritarian process moral legitimacy. Parker has demonstrated how this axiom ignores the economic inequality that tilts the results of the majoritarian process towards the interests of those with the money, time, and skill to play the game.⁴³

A cross-breeding of these two traditions could result in a constitutional theory quite distinct from and superior to the traditional writings on judicial review, a theory that could make a persuasive rejoinder to Justice Holmes' skepticism. The new constitutional interpretation would view law as a normative system that transcends the liberal distinction between fact and value. While it would concede that interpretation always results in meaning being produced by an interaction of reader and text, a judge still would be constrained by the duties of his or her craft. A judge is required to conform to what Ronald Dworkin calls the "internal ideal" of law,⁴⁴ including the duty to state facts honestly and to treat like cases alike. In certain hard cases, however, especially at the Supreme Court level, constitutional interpretation requires a judge to give meaning to, as well as take it from, the text. In such an interpretation a judge, in pursuit of an ideal of justice,⁴⁵ must rely on inter-subjective meanings outside the text, which "embody a certain self-definition, a vision of the agent and his community which is that of the society or community."⁴⁶ Clifford Geertz terms these visions ideologies. He stresses that there is no pejorative connotation in his use of the term;⁴⁷ we can no more stop conceiving of life in terms of ideologies than stop speaking prose. In a class-divided society like our own, different life experiences create and are refracted through different ideologies; different constitutional "meanings" present themselves, each having some support in legal materials. For instance, it should not be surprising that the Supreme Court reflects American society's confusion on the issue of the justness of affirmative action. Constitutional adjudication to some extent must be a debate between conflicting visions, and constitutional scholars have to evaluate the Supreme Court's product in terms of political morality as well as technical elegance. Accep-

42. *Id.* at 9.

43. Parker, *The Past of Constitutional Theory—and Its Future*, 42 OHIO ST. L.J. 223, 242-43 (1981). It appears to be Perry's acceptance of this axiom that leads him to endorse the power of the Congress to limit the jurisdiction of the Supreme Court in some human rights cases. M. PERRY, *supra* note 3, at 128-45.

44. Dworkin, "Natural" Law Revisited, 34 U. FLA. L. REV. 165, 187 (1982).

45. M. PERRY, *supra* note 3, at 101-06; see also Fletcher, *Two Modes of Legal Thought*, 90 YALE L.J. 970 (1981).

46. Taylor, *Interpretation and the Sciences of Man*, 25 REV. METAPHYSICS 3, 45 (1971).

47. GEERTZ, *THE INTERPRETATION OF CULTURES* 218 (1973).

tance by the court should never shield a principle from critical scrutiny. In law, as elsewhere, we must beware of false prophets.⁴⁸

In many ways the concrete results generated by a theory of judicial review like Perry's would not differ greatly from present constitutional practice. The idea that judges are influenced by politics is hardly novel. So, too, the new theory leaves an important role for precedent.⁴⁹ Yet it would bring at least two welcome changes. For instance, one result would be a gain in candor. Justices would feel less pressure to torture history to discover the proper (*i.e.*, preferred) original "intent"; conservatives would be forced to admit that their "strict construction" is no less political than their liberal colleagues' activism. More important, judges, lawyers, and citizens would be encouraged to think of constitutional law as a continuing moral enterprise in which power must always answer to the claims of justice.

48. See Denvir, *Justice Rehnquist and Constitutional Interpretation*, — HASTINGS L.J. — (1983).

49. See generally Denvir, *Professor Dworkin and an Activist Theory of Constitutional Adjudication*, 45 ALB. L. REV. 13 (1980).

