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MORALITY AND THE POLITICS OF JUDGING

MARTIN SHAPIRO*

Michael Perry has written a book called Morality, Politics, and Law. I wish to focus for a moment on the word "politics" before moving on to "morality" and "law." From my perspective its principal value is that it helps clear up a misunderstanding that has long plagued students of the Supreme Court. No one has ever denied that the Supreme Court is one of the three great branches of American government. It would seem to follow, then, that the Supreme Court is a part of American politics. For surely government lies within the realm of politics. Yet there is a persistent tradition of opposing the judicial branch to the two political branches. The absurd political questions doctrine is emblematic of this tradition, which asserts that the Supreme Court does or ought to eschew political questions—as opposed presumably to legal ones. We are then invited to watch with a straight face as the Court treats such issues as the powers of Congress, the relation between the national government and the states, government regulation of the press, and the power of the President to appoint government officials as nonpolitical questions.

About forty years ago a group of political scientists began to argue persistently that the Supreme Court was unavoidably and undeniably a part of American politics and that constitutional law was politics.¹ In a sense they were only echoing what the lawyers of the Progressive Era school of judicial self-restraint had been saying.² The Progressive school, of course, had said that because constitutional law was really politics, the Supreme Court, which was and ought to be a court of law rather than a political agency, ought not to engage in it. The latter day members of the school continue to make this argument.³ The political scientists, on the other hand, said that the Court was part of politics even though it was a court of law, because all law,

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including constitutional law, was a part of politics. Some political scientists then concluded that the Supreme Court ought, and others that it ought not, to do various kinds of constitutional law depending on their theories of American politics. The response of academic lawyers was to dismiss political scientists as infidels, invincibly ignorant of the paths of the law.4

Twenty or twenty-five years after political scientists had begun to say that law was one of the instruments through which power was exercised and interests were served and was, therefore, politics, a group of academic lawyers began to shout the same thing. This announcement by the critical legal studies movement5 was greeted by political scientists with a quiet yawn—what else is new—or, if the political scientist happened to share the radical, anticapitalist politics of the movement, with applause. Among academic lawyers the response was astonishment, fear, loathing, and, above all, the inordinate attention that always greets blasphemy. Surely, all this attention could not have been provoked by the startling, new message that law is politics. Lawyers had been hearing and rejecting this message with a mien of blasé sophistication for quite some time. No doubt some of the fuss was occasioned by the coupling of the message with Marxism and/or utopian socialism by critical legal studies types. Most of the excitement, however, was occasioned by finding the message within the temple. Why in hell were people on law faculties proclaiming that law was politics? How could people pledged to teaching law to impressionable young students justify trashing law before their very eyes by exposing it as politics? The enemy was no longer at the gates. The infidel was now preaching in the pulpit.

All of this distress is caused by a rather simple-minded confusion about the word politics and what it means. One of my younger colleagues, a product of the Yale Law School, and thus by definition a lawyer of great sophistication, told me that as a law student reading the first couple of sentences of my first book, he was so offended that he stopped reading. The first chapter was entitled “The Supreme Court as Political Agency.” It began:

The Supreme Court is an agency of American govern-

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ment. So are the Interstate Commerce Commission and the House Rules Committee. The taxpayer who descends on Washington to have his tax status altered may turn to the Internal Revenue Service, the House Ways and Means Committee, the Supreme Court, or his own Congressman. The businessman who is worried about government regulation of his enterprise may deal with the Department of Commerce, the Supreme Court, one of the half-dozen regulatory agencies, the Justice Department, and the President himself.6

If I had written instead: “The Supreme Court is a place in which fundamental questions about the conduct of the good life and the proper role of government in the achievement of the good life for all Americans are debated,” this student might have been bored, but surely he would not have been shocked. The problem was, of course, that the word “political” connoted to him Republicans versus Democrats, partisan maneuvering, self-serving interest group pressures, and the realm of will as opposed to the realm of law, which lies above and beyond this dirty groveling, a realm of reason, neutral principles, and values. What I had written meant that constitutional law was not about rights and justice but about who won the last election. No law student of good character could accept such an abomination.

Yet, to anyone trained in the western tradition, a moment’s reflection will show that this vision of politics as maneuvering for partisan advantage is a very incomplete and misleading version of what the word “politics” has always meant. The Greeks defined politics as the affairs of the polis, the community in which the citizens participated. Without such participation, a person was, according to Aristotle, a beast or a god, that is, not truly human. Because people were social by their very nature, they could become fully human only through participation in a state that was itself in pursuit of the good. The ultimate goal, which is the only goal possible for those in pursuit of full moral development, was the good person in the good state. Politics was the pursuit of the good through participation in the life of the community and more particularly through participation in the process through which the community made its decisions about what collective actions it should take in pursuit of that goal. Arguing that the Supreme Court is political in this sense, that it participates in making decisions about what governmental actions contribute to the good of individuals in the society as a

whole, is hardly shocking or subversive. Nor does it subvert the law to say that law is politics in the sense that it is concerned with achieving the goal of the good person in the good state.

The Greek message is hardly a secret. Most lawyers have learned it somewhere along the line. It is just that they have kept it separate from their concern for law and have decoupled politics from law. Indeed, most lawyers think of this decoupling as essential to the moral health of law and of the community. These lawyers view as cynical the claim that law is politics. For the Greeks, however, the question was whether law ought to be politics of the kind preached by the Cynics, the Platonists, the Aristotelians, or the Stoics.

Michael Perry has recoupled the Greek view of politics with law in an insistent and persuasive way. He is a member of a new school of moral and political theorists who are reasserting the Aristotelian view that humans seek to perfect their humanity, or as Perry puts it, to flourish, and that they have no choice but to do so in communities. And communities require governance. Participation in the governance of one's community is, therefore, an essential ingredient of humaneness as is rationality, which is the pursuit of those means and ends that best contribute to the full development of human potential. Politics is once again defined as the affairs of this essentially moral community. Politics, then, is the pursuit of virtue, the attempt to achieve the good person in the good state. Law, being an instrument and a product of this pursuit, is indeed a subspecies of politics. Thus, the statement that law is politics cannot possibly mean that law is simply ideology, a rationalization of the will of the powerful, or that it is a mere positive instrument devoid of moral values or principles. To the contrary, the assertion that law is politics amounts to a contention that law is a record of and means of achieving humanity's highest moral aspirations.

In this form the message that law is part of politics, and that courts are political institutions with lawyers and judges as political actors, may finally become acceptable to academics and other lawyers. For in this form it allows them to admit the obvious—that law is a product of politics and that judges are governors—without seeming to abandon what appears to be equally obvious: that law contains elements of moral aspiration that transcend partisan interests. Thanks to Perry and others, the study of law—and particularly of courts—can now proceed from a more easy and natural presumption that they are part of polit-
itical regimes; academic lawyers need no longer waste their energies in desperate attempts to distinguish law from politics in order to save its virtue. The result must surely be a major advance in the understanding of courts, particularly by lawyers trained in the common law, who have been so excessively burdened by their self-imposed task of proving that an independent judiciary meant a judiciary separated from politics, as opposed to one doing a special kind of politics.7

Perry is not only helping to restore the Greek trilogy of virtue-politics-law, he is also restoring the Greek fascination with talk. Others in this symposium will no doubt deal at length with Perry’s ethics and epistemology. I need to make a few preliminary points. Perry adopts an epistemological position that was consolidated in the seventeenth century.8 The Greek position was that there were two realms of knowledge. The first was subject to direct observation and logical proofs, such as those of geometry. This realm consisted of logic—a realm in which true knowledge was possible. The other realm, which included most of human affairs, was one in which knowledge depended on the testimony of others, on inference flowing from experience. It was the realm not of logic but of rhetoric, a realm of opinion, in which the standard was not logical proof, but persuasion.

The seventeenth-century epistemology inserted a third realm between logic and rhetoric, a realm of the probably true. When knowledge depended on testimony, indirect observation, and inference, conclusions were neither absolutely true nor mere opinion. Instead, they were more or less true depending on the weight of the evidence and the persuasiveness of the arguments. Common-law lawyers have encountered this seventeenth- and eighteenth-century epistemology in the criminal jury instruction “beyond a reasonable doubt and to a moral certainty.” Those phrases were intended to denote the highest level of probabilistic knowledge that could be achieved in this intermediate realm.

This intermediate realm was driven into the background by the scientism of the nineteenth and first half of the twentieth century, which refused to admit anything even to the realm of probable knowledge unless it could at least be partially demonstrated logically or partially inferred from sense data. Thus, the

Greek rhetoric, that is, knowledge based in experience, was demoted to mere opinion, and the intermediate realm of probable knowledge was reserved for the kind of probabilistic statements that can be derived from sense data and expressed statistically. As a result ethics came close to disappearing. For if an ethical proposition could not be logically demonstrated or empirically proven then it could not be true in the way science was true, and scientific truth was the only truth that counted. After World War II, in the guise of the "new rhetoric" and many others, the intermediate realm was reasserted; it stated that just because no moral statement could be proven to be absolutely true did not mean that all morality was a matter of opinion. Surely some moral statements were more true than others, and the relative degree of the probable truth of various moral statements was to be determined by the weight of argument, testimony, experience, and inference that lay behind them. As Perry demonstrates, this revival of our belief in the possibility of moral knowledge is the necessary foundation for the great outburst of postconsequentialist ethics that has occurred in the last several decades.

This new outburst of ethics has, however, had to be reconciled with the philosophic developments that occurred during the period in which ethics seemed to be dying. At first these developments appeared to be replacing ethics but have now been cleverly turned to its service. By the 1920s and 1930s, as philosophers despaired of achieving ethical proofs comparable to scientific proofs, they hoped that at least they might clear up the uncertainties and imprecisions of the language that plagued ethical argument. Language philosophy flourished. For a time it seemed to replace ethics, but now it turns out that it plays an important role in the reconstruction of ethics.

The word "discourse" appears like polka dots in Perry's writing as it does in the writings of many other contemporary students of ethics, politics, and social theory. An outsider must immediately wonder why all these academics place such faith in discourse. It is worth inquiring why the current fashion for dis-

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10. See R. Rorty, Philosophy and the Mirror of Nature (1979); B. Williams, Ethics and the Limits of Philosophy (1985). I owe some of the points in this paragraph to Professor John Stick.
11. See Berry, Book Review, 88 Yale L.J. 629 (1979) (reviewing C. Fried, And Who is My Neighbor? (1977)).
course in which Perry participates has arisen because such an
inquiry reveals some difficulties in Perry's prescription for the
judiciary. No doubt the causes and intellectual roots of the cur-
rent fascination with talk are multiple and tangled, and I will
only look at the few that serve my own purposes here.

Perry stays with the Greeks, viewing modern discourse as
related to the dialogue, that classic way of developing moral phi-
losophy. It is a cliché that the Platonic dialogue is a reflection in
literary form of the philosophy schools in which students and
teachers spoke together using the Socratic method. Yet, despite
this strong oral stamp on its origins, we often view philosophy as
the realm of introspection, contemplation, and solitary intellec-
tual labors. Certainly this view may be exaggerated because we
now see the great books of Bacon, Kant, Hegel, and Spinoza on
library shelves rather than in the intellectual surroundings in
which they were created. Hegel's books are, of course, often the
lecture notes of his students, and Hume's obviously grew in part
out of a milieu of rich and continuous conversation. In consid-
ering the great nineteenth-century philosophers, however, we
more commonly picture them as thinking than as talking.
Indeed it is difficult to conceive how their richly complex, elabo-
rate, and complete systems of thought could have been con-
structed in the give and take of conversation rather than in
solitary cogitation, drafting and redrafting manuscripts in their
studies.

We view nineteenth-century philosophy this way because
that is how it saw itself. The nineteenth century was the century
of Romanticism and thus of the romantic hero. By his very
heroic qualities, the nineteenth-century hero was set apart from
his fellows. He\(^2\)\textsuperscript{12} spoke, but he did not discuss. He proclaimed
his inner thoughts and feelings in part simply because he needed
to create and in part to elevate the sentiments of lesser men. For
these very reasons his language was as elevated and complex as
the poetry of Byron or the prose of Nietzsche. Styles of philoso-
phy follow more general intellectual styles.

The nineteenth-century philosopher was introspective, pro-
claiming, and, above all, elevated. He was a solitary hero.
Perry's twentieth-century philosopher lives in an antiheroic

\textsuperscript{12} The nineteenth-century hero was a he and so he is referred to in that way here. In
the remainder of this Article I have sometimes employed the impersonal he because Perry
uses she throughout his book and thus has laid up a goodly store of credits in the feminist
heaven against which I will make a mere handful of withdrawals.
period of intellectual history. He is a small and modest person who does his philosophy in groups, the same form in which he probably does his therapy. He knows that it is better to talk things out than to keep them bottled up. He is not above others but wants to share with others in the give and take of show and tell. The fashion for discourse is part of the twentieth century's rejection of the extraordinary and striving individual in favor of the democratic, egalitarian mediumness of the product that emerges from social interchange in groups rather than solitary idiosyncracy. Perry speaks often of moral leadership, even of prophecy, but it is not Moses in the desert solitudes speaking to God, but a group of people in a room speaking to one another that he has in mind. Is this faith in the truth of group product any more justified than the nineteenth-century faith in individual introspection?

One reason to be suspicious is the degree to which the shift from introspection to group product reflects socioeconomic changes in the organization of intellectual life. It may not be a coincidence that the towering, isolated figures of nineteenth-century German philosophy arose in the context of an educational system in which universities were widely scattered, each with its own relatively small and provincial town and each with a single professor of philosophy. One reason that philosophical discourse is now so popular is that today an awful lot of people earn their living as philosophers. Universities have not one philosophy professor but a philosophy department and philosophy seminars. In the Harvard to Princeton corridor at least, not to mention the endless foundation-sponsored conferences, philosophers converse with one another a good bit. Discourse in the seminar room provides the intellectual space in which many quite small philosophic flowers may bloom rather than a few mighty oaks grow. The mighty oaks, of course, always have the New York Review of Books. We sometimes derogate scholarly work by saying "it has the smell of the lamp." This phrase is used to suggest that the work is not sufficiently in touch with the real world, but the content of the trope also implies the idiosyncracy of the isolated scholar reading and writing alone in his study late at night. The fascination with discourse smells of the seminar room. Before we submit ourselves to the prophecy and moral leadership of discourse, we must ask ourselves whether we have as much faith in philosophy seminars as a source of truth as do the philosophy and law professors who partake of them.
Perry is aware of this problem and quotes a number of philosophers to the effect that those who are dubious about how much agreed moral truth can flow from discourse have not given it a chance. Like the child in the cereal commercials, if they tried it they might like it. But it is not enough to say that the proof of the pudding is in the eating. You must actually produce the product. Have the seminar rooms actually produced a product that we like, indeed a product sufficiently unified and identifiable that we can know whether we like it? I don't think so, although shortly I will consider the clever, but ultimately unsatisfactory, way that discoursers seek to finesse this problem.

If changes in literary fashion and educational economy account for much of the current vogue for discourse, ultimately that vogue is responsive to certain dynamics integral to the development of ethics and moral and political philosophy themselves. Perry's work is part of a major new development in moral philosophy often labelled postconsequentialism. By the late 1930s moral philosophy was at a low ebb. Natural law had been destroyed by the assaults of Kant and Hume. The dominant moral philosophy was utilitarianism, which in a certain way represented a denial of moral philosophy. It had a moral standard, the greatest good for the greatest number, but the good in greatest good was defined in a nonmoral way. A good was anything a person wanted. The goal was not the good person in the good state. Instead politics sought to give all people as much as possible of whatever they wanted. Reason or rationality was reduced to economic efficiency, achieving the highest level of preference satisfaction at least cost.

Utilitarianism survived largely because it appeared to be the only moral system compatible with a psychology and epistemology that seemed to make moral philosophy impossible. Logical positivism flourished. It denied the possibility of any objective knowledge of the good because such a knowledge would have to rest on a bridging of the gap between fact and value, between statements of what is and what ought to be. Finding it impossible to bridge the gap, the logical positivist asserted that any statement of values, any moral assertion, was a mere statement of personal preferences resting on nothing more than entirely subjective personal taste. Moral philosophy was thus reduced to "I like chocolate. You like vanilla." It was up to each individual to choose or posit whatever moral values he or she wished to pursue. The task of philosophers was to bring as much logic or
clarity or precision to empirical and normative statements as possible so that people could understand one another. Moral philosophy was reduced to the linguistic task of making clear and logically consistent statements of individual preferences rather than seeking to tell anyone what they ought to prefer.

Utilitarianism and logical positivism were accompanied by a rich psychology, one dominated by Freudianism and its emphasis on the irrational. The thirties were also the great period of Behaviorism and Gestalt psychology, which focused on an individual's independent perception, learning, emotional development, and adjustment to other individuals. There was little place in such psychology for what the philosophers of mind, the predecessors to psychologists, called moral sentiments or practical reason. An individual's moral beliefs were treated as personal and subjective intuitions.

Each individual was entitled to consult his or her own intuition in order to construct statements of purely personal and subjective preferences that philosophers would then strive to make as linguistically clear and internally consistent as possible. Politicians would seek to maximize the achievement of the individual preferences reflected in these statements. Indeed, coherent individual statements of preferences were not necessary. A democratic system of elections and representation might turn individual preferences into the greatest good for the greatest number with no need for articulation beyond simply pulling the crank for the Democrat or Republican column on the voting machine.

World War II, the death camps, and the Soviet terror told us that something was wrong with positivism. There was a considerable revival of natural law after the war. Natural law, however, foundered again for precisely the same reasons it had foundered before: Someone would challenge the concept by saying "okay, tell us precisely what your natural laws are. Write them down and we'll see whether we agree to them." No one is able to write a code of natural laws sufficiently precise to guide human conduct, at least not one that possesses the level of self-evidence or universal assent that would persuade us of its status as a code of natural law as opposed to a set of statements of individual preference. The epistemological problem seemed

13. This revival may be traced by consulting the volumes of The Natural Law Forum.
insurmountable. Even if someone wrote the natural laws down, how would we know that they were the true natural law?

Natural law continues to appeal to some, and it is possible to evade some of its problems, by such notions as Lon Fuller's natural law with changing content. But the natural lawyers have not gained anything close to universal assent. As Perry indicates, there has been a revival of contractarian moral philosophy that historically has been closely allied to natural law. For reasons noted by Perry, social contract theory is not very successful either, essentially because even if it can be shown that no society can exist without widespread consent and obedience to its moral rules, that alone does not prove the truth of any particular society's moral rules.

By the 1960s there was a great urge to engage in moral philosophy and to reassert the primacy of Judeo-Christian ethics for the western democracies. The insurmountable problem, however, seemed to remain. How could we know that those ethics were true? Various epistemological forays were attempted. First it was argued that the gap between fact and value is not really there because no pure statement of fact is ever possible. Showing that even hard scientists inevitably mix their empirical observations with some of their own value preferences does not really persuade us, however, that value statements are true. It may only show us that fact statements are false. We then play the probabilistic knowledge gambit, arguing that the search for absolute or objective truth is both a misunderstanding of science in particular and human knowledge in general. Just because in ethics, as in the natural sciences, we do not achieve absolutely true statements does not mean that we cannot achieve some statements that are more true than others. They are not all simply assertions that I prefer one moral statement over another as I prefer one flavor of ice cream over another. Even if we grant this epistemology, however, we are still stuck with the question: How do we know which moral statements are the more true ones? When philosophers are confronted with such problems, they often attempt to specify a procedure for arriving at truth. The solution to the problem of truth now sweeping the world of philosophy is moral deliberation, which is the procedure Perry espouses. Philosophy seminars will produce moral truth.

Against the background we have sketched, the appeal of

deliberation or discourse becomes clear. At its low point, moral philosophy was deeply troubled by three problems. The first was moral relativism. Because all absolute or natural moral systems had been thrown into doubt, and under the impact of modern anthropology, it was widely believed that ethics was ultimately conventional. Each society had its own set of moral traditions. None was more right or wrong than another. Indeed the belief in absolute, universal moral principles was itself merely a convention of the Judeo-Christian tradition. The second problem was intuitionism. Ethics were no more than the moral intuitions of particular individuals.

Moral deliberation confronts both of these problems. Deliberators arrive at more true ethical statements by reasoning together. This process consists of using language with great care and precision to avoid misunderstanding and using it to reason logically from one premise to another. Of course the base premises must come from somewhere, but that is the nature of all human thought. At some point each base premise will also be tested by deliberation. Such deliberation appears to bridge the gap between conventionalism or moral relativism on the one hand and absolutism or realism on the other. The ethical deliberators are more than anthropologists or intellectual historians discovering what the moral traditions of a particular society are. They are asserting the normative truth of certain propositions, not simply the empirical truth that they are widely held by a society. Indeed they can conclude that a particular ethical convention of their own society is wrong, or at least less true than some alternate position. At the same time deliberators operate within the community of discourse and interpretation of their own society, use its moral traditions as the tools of their discourse, and check their truth product against the product of earlier deliberators. Moral traditions—that is, the results of earlier deliberation—serve as the building blocks of moral truth and

15. Throughout the remainder of this Article, I stress the verbal and collective aspects of deliberation, frequently employing the metaphor of the philosophy seminar. I do so because I believe that this is the paradigm of human action that really lies behind the appeal of deliberation to so many contemporary thinkers. I want to make clear, however, that the deliberation school counts written as well as oral communication as ethical discourse and is not arguing that collective ethical statements are required or are necessarily superior to individual moral statements. Its position rests far less on notions of collective rationality than on individual moral knowledge checked by the moral knowledge of other individuals. If each participant improves his or her moral knowledge, then the seminar has been a success even if it does not arrive at a consensus.
check against that which the product of current deliberations can be tested. Moral truth is neither conventional nor absolute. It consists of the ongoing attempt to arrive at more true moral statements. Our assurance that we are arriving at more true statements is that each is tested against previously accumulated truth. Or, to put the matter differently, ethics are natural in the sense that they rest on moral sentiments that dwell in every human being; but ethics are also conventional in the sense that conventions are important evidence for the deliberators to consider when they turn moral sentiments into ethical statements.

Similarly, deliberation cures the problem of intuitionism. The danger of intuition is, of course, that it produces idiosyncratic moral truth, so idiosyncratic that in the end it seems to come down to mere personal preference. The deliberators of the philosophy seminar purge moral philosophy of this idiosyncracy by testing the moral conclusions of each participant against those of the others. It is often puzzling to outsiders why so many postconsequentialists say they are not intuitionists when the arguments of the philosophy seminar so often turn on the question. Does it not seem more right and just to you to believe X rather than Y? The emphasis on group talk rather than solitary contemplation is the attempt to triumph over the charge that ethics is, in the final analysis, a matter of purely personal, idiosyncratic preference. By bringing individual moral assertion under the critical scrutiny of others, deliberation rises above intuition.

Deliberation, then, addresses the two problems of relativism and intuition. The third problem with moral philosophy is the one that has seemed once again to have torpedoed natural law when it experienced some revival after World War II. If there are natural laws, then write them down and let us see whether we can agree to a set specific enough to guide social action. When nobody is able to meet this challenge, enthusiasm for natural law dissipates. The solution of Perry and other deliberators is to substitute process for product. Moral truth is not a fixed set of rules but inheres in striving to know and do good. So what is trotted out is not a set of moral rules but the philosophy seminar itself. Whether enthusiasm for this variety of moral philosophy will persist after we have all had a chance to spend a semester or two in philosophy seminars is the great question of the hour.

Closely allied to Perry's enthusiasm for deliberation is his theory of constitutional interpretation. This theory also arises
out of changes in the organization of intellectual life and leads us back to the seminar room. The enormous flowering of post-structuralist literary theory is easily explicable as a French domestic phenomenon. For many years, every secondary school teacher of literature in France was offering exactly the same centrally approved interpretation of the same text. To this day French university students spend their real energies not on true learning but on discovering what potential examining professors proclaim to be the correct interpretation of the particular text set for that year’s exams. In this context of authoritative—if not authoritarian—textual interpretation, to insist that a text has not a fixed meaning, but one that is constructed by each of its readers, is a healthy reaction to a stultifying educational tradition. The risk of intellectual anarchy and denial that any meaning can be conveyed by the writer of the text is obvious. In light of this obvious danger, it is hard to see why French literary theory has made such a clean sweep of the American intellectual world. Indeed the sweep has been so clean that two of my Berkeley colleagues have made a tremendous reputation for themselves as innovative thinkers by writing an article daring to suggest that the writers of literary texts must have meant something by them.  

The reason why this French herring is on the plate of every American English department is neatly revealed by something that I was told when I first arrived at the University of California, at San Diego, to help start a new political science department. That campus began as a graduate science facility and became a general university by adding departments one at a time. From its inception it had been run by and for natural scientists. In relating the birth pains of other departments, the faculty told me that they had great difficulty with the English department. Of course, they said, they had originally tried to hire great novelists and poets. I said that was strange because most universities hired English professors who were essentially literary critics and historians, not creative writers. The response was that the faculty hired physicists and chemists who did original research, not those who commented upon other people’s research. Why should they hire English professors who commented on other people’s writing rather than writing them-

selves? Eventually they gave in and followed the orthodox pattern, but they still were not happy.

There is a vast establishment of literature departments and literature teachers in American universities, consisting of thousands of independent, tenured professors under no central direction. Far more people make a living by teaching literature than by creating it. Yet in the eyes of most people, and in earlier days even in their own eyes, they lived in the shadow of the creative writers. The message of French poststructuralism is that the truly creative act comes not from creating text but from interpreting it; that every reader is entitled to his or her own interpretation but, of course, some interpretations are far more interesting than others; and that interpretation is in part the product of "interpretive communities." If this message is accepted, the interpreter achieves dominance over the writer, and the most skilled interpreters gain dominance over the average readers. Thus, the keys to coherence are held not even by those who study the writers, that is, the critics, but by the experts on the interpretive communities of literary critics. And because of its emphasis on individual, particular interpretation, this literary theory gives appropriate living space to all the professors, not just a handful of the best. In short, English professors—not novelists and poets—are the truly important people. The San Diego tables are turned. And what is on the table is a fish rather than a text.

Perry devotes a major portion of his book to the debate in constitutional law between originalists, who argue that judges are bound to follow the original intent of the framers, and the nonoriginalists who posit that it is permissible for judges to look beyond the original intent. He provides yet another persuasive attack on the original intent school and a new version of the jurisprudence of values based on his broader views on moral deliberations. The Constitution is a text supersaturated with moral aspirations. Interpreters of that text are moral deliberators who participated in developing, elaborating, and applying some of those aspirations. The deliberators are guided and checked by continuities of interpretation that have grown up in the interpretive community that has concerned itself with this text. Deliberators are also aware of their duty to provide moral leadership, to move the meaning of the text forward in the development of the good person in the good state. In other words, the
interpreting the community creates and continuously recreates and modifies the meaning of the text.

In this way the philosophy seminar becomes simultaneously the literature seminar. The framers of the Constitution, just like the novelists and the poets, lose their place to the critics, in this instance the host of judges, constitutional litigators, and law professors. It is more glorious to make the Constitution by reading it and talking about it than by merely attending to what its authors intended. The courtrooms and the law-school seminar rooms house an enormously larger number of people than did that hall in Philadelphia. They have now triumphed over the handful of framers just as the literature professors have triumphed over Conrad and Kipling.

Whether the endeavor is moral philosophy or constitutional politics, the Perry banner of all power to the seminar room is likely to be more attractive to some of us than others. Even many of us who are professors have not found the seminar room to be a particularly fruitful place, and some would say that law-school and philosophy-department seminar rooms are among the most depressing.

Perry's book is not, however, simply a kind of selective alma mater. It is not only a hymn to and prescription for the academic life. As we saw at the outset, constitutional law is not only group literary criticism. It is politics. If I remain somewhat less confident of academe than Perry, I remain even more deeply suspicious of his politics.

Perry falls into a rhetoric or classification of political endeavors that is so endemic to common-law lawyers that it is almost unconscious and occurs even when, as Perry does, they know better and actually say better. Perry argues that law is a form of coercion-backed policymaking. He maintains that constitutional-law deliberators are policymakers. He certainly cannot be accused of obfuscating the reality of the Supreme Court making public policies enforced by the coercive powers of the state. Yet the structure of his book and its general pattern of language is calculated to shove the rather ugly world of political force into the back of our mind when we come to pay homage to the Court.

tious Disobedience”; and “Interpreting Law: The Problem of Constitutional Adjudication.” I must confess that all this reminds me of the George Carlin routine in which he compares the pastoral serenity of baseball to the cruel wars of football. In baseball, he says, you run home. In football, you break through the line. In baseball, you try to be safe. In football, you crash through the enemy’s defense to block that kick. After a few minutes of this, the audience tends to forget that in baseball you also steal and hit while in football you take the option to pass.

In the common-law tradition legislators “make” law; courts “interpret” it. What this always comes down to is that legislatures are the realm of will and, therefore, of coercion while courts are the realm of reason and, therefore, of persuasion. While admitting that both legislators and judges play the game of policymaking and that interpretation is the choice and creation of values, Perry’s chapter on legislation is full of assertion and coercion and of cautions about the dangers of such actions. His chapter on courts is a hymn to judicial moral leadership. Somehow, one is left with the overall impression that legislators are mixing charges up the middle with end runs while the judges are trying to sacrifice all of us safely home. Why not call a spade a dirty shovel in the culminating chapter? How about “Making Constitutional Law: The Problem of Judges Shoving Their Values Down our Throats?”

Perry is unsuccessful in his attempt to finesse the problem of judges as coercive moral deliberators by briefly discussing the relation of his naturalist moral theory to coercion. If judges have coercive power, and if judges are to push forward ethical truth, then surely judges are to coerce us into following their moral values. I have read and reread the quotation from Hilary Putnam,17 which is supposed to persuade us that naturalist moral theory—the theory that there are objectively correct moral values—is not conducive to moral coercion. That quotation is simply an assertion, not an argument. Even if Perry’s moral theory does not in and of itself imply coercion to the good, his political theory acknowledges that coercion is an element in public policy and that the role of the Court is to make public policy. If the Court is a moral deliberator and a policy-maker, then it is a moral coencer and its job is to coerce us to the good, not the bad.

I am not accusing Perry of verbal trickery. I am accusing him of something far deeper. I am accusing him of the common-law lawyer's deep prejudice against legislatures and in favor of courts, a prejudice which germinated the early flower that "statutes in derogation of the common law are to be narrowly construed." When push comes to shove, when the last card is drawn, the common-law lawyer trusts himself more than he trusts the other fellow. The courts are his place. The best among him is the judge. The legislature is the other fellow's place and even the best legislators are only politicians. When Perry finally reaches the heart of the matter for him and for other constitutional lawyers, judicial review, we find that ultimately the best game, the morally superior one, is the lawyers' game. It is the lawyers, after all, who tell us—and the legislators—what is cricket.

One of the major problems of Perry's chapter on judicial review is that it takes its shape from an essentially false problem, that of interpretivism versus noninterpretivism. It is unfortunate that Bork and company chose this particular structure in which to express their views. Most real-world political questions are questions of more or less, not of either-or. Under the influence of Bickel, Bork's thinking is really dominated not by loyalty to the framers but by a consciousness of the ambiguities and difficulties of political life. As Perry rightly points out, there are activist interpretivists like Raoul Berger as well as self-restrained interpretivists. Bork's proclaimed desire to stick with the framers' intention is an awkward attempt to construct a positive rationale for a negative and prudential message. Judges ought not to attempt making policy that has wide ramifications because policymaking is difficult and big policy changes are particularly risky. Dressing up this simple and true message in a mystique of framers' intentions only invites the kind of easy debunking that Ely, Grey, Dworkin, and now Perry have done. And the ease of the debunking makes it easy to ignore the risks and ambiguities that balk so large in the minds of advocates of judicial self-restraint and that are, after all, very real.

The falsity of the interpretivist versus noninterpretivist debate is shown not only by the many concessions that Bork and others have made in acknowledging the inherent uncertainties of the interpretivist enterprise and the necessity of judges attending to precedent as well as original intent, but also by Perry's own work. No one is a more ardent champion of a jurisprudence of

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values than Perry. Yet obviously he badly wants to appropriate the banner of interpretation for his judges; and his emphasis on interpretive communities gives a place of honor to the framer's values.

Perry, of course, knows that policymaking is hard. He spends a great deal of time telling legislators who "make" law how difficult it is and even a little time telling the judges who "interpret" it. What Bork and company are saying is that much more time needs to be spent telling it to judges than to legislators because for judges, the difficulties of policymaking are compounded by the problems of democracy.

Just as the interpretivist/noninterpretivist debate is fruitless because its categories are so rigid that no sensible person believes in them, so too the debate over the democratic or undemocratic nature of judicial review often fails to acknowledge that the essential question is one of more or less rather than yes or no. At some points Perry seems to acknowledge the rigidity of the democracy debate. He recognizes the degree to which the Supreme Court is limited by the political power of the other branches, by public opinion, and by its own relatively limited powers to compel obedience. In the final analysis, however, Perry maintains the rigidity of the democracy dilemma and plants himself firmly on one of its horns. He wants a very activist judicial review precisely because the Supreme Court is undemocratic.¹⁸

Even when his discussion of interpretivism or originalism leads him to the problem of democracy and review, he sticks to his horn. He finds that the framers did not reject review in favor of democracy and, therefore, originalists should not be hesitant about review. This analysis ignores precisely what troubled the originalists: that the framers and ratifiers of the Constitution were not clear about how much of what kind of review they wanted. It may (or may not) be clear that the framers authorized the Supreme Court to declare some laws unconstitutional sometimes. But the whole of American constitutional history has been a debate about just what mix of democracy and democracy-checking review the framers intended.

Perry spends far less time on the democracy problem than the interpretation problem in part because interpretivism seems to be the more direct threat to his deliberation prescription and

¹⁸. M. PERRY, supra note 17, at 147.
in part because he has written an earlier book about judicial
review. Yet it seems to me that he has made a major mistake in
emphasis, and this error will render his work unpersuasive
except to those already so committed to activism that they do
not care why they should be committed. The interpretivism/
anti-interpretivism debate is, in my view, essentially a rather
awkward surrogate for the democracy debate. It is essentially a
debate over how much law the Supreme Court should make in
light of its particular place in the American polity. Simply to
take a radically antidemocratic position persuades most students
of review that one has nothing interesting, new, or constructive
to say about interpretivism or review.

The real problem of judicial review is what Europeans call,
in a somewhat different context, the problem of the “democratic
deficit.” Perry is very big on interpretive communities and the
pluralism of American interpretive communities. For him, our
substantive constitutional law of civil rights and liberties must be
in accord with our pluralistic value traditions. Yet he fails to
come to terms with the central American plurality—or more
precisely ambivalence—of traditions about the value of judicial
review itself. The reason so much has been written about judi-
cial review, including Perry’s work, is that Americans know that
big policymaking by nine nonelected persons is somewhat
undemocratic. They are uncomfortable about how such an ele-
ment ought to fit into American politics, which they believe is
and ought to be largely democratic. Recognizing that review is
less democratic than some other aspects of the policymaking
process, they worry about how much policy courts should make.
To tell them that judicial review is desirable because review is
undemocratic is no more likely to resolve their unease than it
has for the last one hundred and eighty years.

Perry’s syllogism for defending the legitimacy of review in
the American political system is essentially of the Marbury v.
Madison genre. The Constitution is written law. The judges
must apply the law to particular cases. Q.E.D. In offering the
Marbury gambit, Perry returns to George Carlin’s world. He
acknowledges throughout the book that judicial decision is poli-
cymaking. Yet when it comes to the defense of judicial review,
he runs home to be safe. He consistently goes back to the lan-
guage of “particular cases” and conflict resolution. This is, of

19. 5 U.S. (1 Cranch) 137 (1803).
course, the central trick of Marbury's great magic act. The function of courts is to resolve conflicts. When, in resolving a particular conflict, a court has to decide between two conflicting laws, it must necessarily choose one. Resolving conflicts of law has always been an integral part of the task of judging particular cases. Judicial review is a species of conflicts of law, resolving conflicts between the Constitution and a statute in order to decide a dispute between two parties.

Although the debate has waxed and waned at various periods in American history, this rationale has never been fully persuasive, even in the period during which Marbury was decided. And it is not fully persuasive for reasons that Perry acknowledges everywhere else in his book except in his brief, almost cryptic, rationale for review. Choosing between laws may be central to conflict resolution, but it is also a very large kind of policymaking. Because we know that a court that exercises judicial review to resolve conflict is simultaneously and unavoidably making public policy, we are uneasy about judicial review. Indeed, given that Perry's version of judicial review involves not only choosing between a pre-existing constitutional rule and a statute, but also a constitutional rule that the Court has deliberated into existence and a statute, we are even more uneasy.

In short, the reason many of us want less review rather than more is that we recognize that policymaking is an inevitable concomitant of judicial conflict resolution and that we prefer more democratic policymaking to less democratic policymaking. To suddenly reduce judicial review to a choice of law in particular cases, to go back to the vision of courts as mere individual conflict resolvers rather than policymakers, is to beg the question that is central for us.20

20. I am leaving aside here, of course, the other dimension of the Marshallian contradiction. The conflicts of law rationale of Marbury only works if the Constitution is (1) a kind of law that courts should consider to be law for conflicts of law purposes, and (2) nevertheless a higher law. If the Constitution is not a law at all, it is not part of the courts’ conflicts of law jurisdiction. If it is a law, but not a higher law, then it should always lose to the statute and not always win when a conflict arises between it and a statute. For the normal conflicts rule is that when two laws are in conflict, the more recent one wins, and all federal statutes are more recent than the Constitution. If, however, the Constitution is a higher law, then it is not the kind of law that judges deal with in their conflicts of law jurisdiction. Conflicts of law deals with ordinary laws. There has been a recent outpouring of scholarship on how Marshall and others managed to turn the Constitution into the kind of law that courts were supposed to deal with in their conflicts of law jurisdiction, and at the same time made the earlier rather than the later law trumps within that jurisdiction. This scholarship does not resolve the contradiction. It only makes Marshall's magic act
Ultimately, then, we must ask why we should suddenly accept the non- or antidemocratic aspect of judicial review completely when for almost two hundred years we have been of two minds about it. One answer might be because an undemocratic element such as review is useful or necessary in protecting individual rights against majority assault. Perry rejects that answer because he rejects its basis in liberal political theory. Leaving aside his Marshallian ploys, at various places Perry also seems to offer elements of the standard redundancy cum pragmatism (in the nonphilosophic sense of that word) rationale for review. American government has not been and was not intended to be purely democratic. It contains a mix of democratic and nondemocratic elements. The contrast between the antidemocracy of review and the democracy of legislative and executive branch decision making is unrealistic and overdone. The genius of American politics is not separation of powers but shared political powers and redundancy. There are many, many different policymaking routes, some involving judges and others not. Such redundancy enables the political system to adapt to complex and changing demands and circumstances. Judicial review is justified because it is an element in this historically successful redundancy. Thus, even though review is, to a degree, undemocratic, at least some level of review is desirable because it helps the whole political system, which is essentially democratic, to adapt to change.

The elements of this rationale were brought together as early as the 1960s, and it has recently gained considerable attention in John Hart Ely's representation-reinforcing version. The rationale does not depend on a liberal theory of individual rights, but does depend on a theory of pluralist, or polyarchic, democracy. Perry rejects that theory. And his ultimate defense of review rests on its essentially undemocratic character. In the final analysis he is too firmly wedded to the antidemocratic character of review, to its isolation from partisan politics, to depend entirely on the escape from the democracy-deficit dilemma of review offered by myself, Ely, and others.


Perry has come to realize that simply asserting that the antidemocratic character of review is not a vice but a virtue, as he did in his earlier book, is not enough. In his new book he can offer us what he hopes will be a satisfying reason why we should accept an undemocratic review. Morality, Politics, and Law is built around deliberation and discourse because they provide a powerful answer to the question of why we should enthusiastically accept a high level of judicial activism given its democratic deficit.

Perry tells us that judicial activism is a good thing because constitutional law is a model or superior form of the deliberation through ethical discourse that is the route to achieving individual development or the good person in the good state. In providing this answer he places himself in the school of Owen Fiss and others who argue that litigation is a superior form of moral discourse.\textsuperscript{23}

That argument is unlikely to be persuasive to anyone but lawyers for a number of reasons. First, few people (other than lawyers) believe that adversary proceedings are a superior mode of achieving any kind of truth. Indeed, even among lawyers there has been increasing disenchantment with the adversary system and a growing interest in mediation and arbitration.\textsuperscript{24} Like most proponents of deliberation, Perry does not specify its form or operational rules very clearly, but adversary proceedings would appear to be about as far away from the discourse of the philosophy seminar room as you can get. Does our experience with constitutional litigators tell us that they seek to use language as precisely as possible to reduce the chances of misunderstanding between participants in the discourse, state ethical propositions modestly and tentatively, attend carefully to the moral sentiments of other participants, and are eager to abandon their own position for any superior one because they recognize that we are all in search of the truer position but none of us will ever arrive at the absolutely true one?

Of course, it is not only the basic structure and traditions of


\textsuperscript{24} Of course the mediation movement is largely based on a pluralist, interest-group political theory and a utilitarian ethics that Perry rejects, but the unease with adversary proceedings runs to its truth-finding as well as its conflict-resolving capacities. See Abel, \textit{Introduction}, in \textit{1 The Politics of Informal Justice} (R. Abel ed. 1982); Harter, \textit{Negotiating Regulations: A Cure for Malaise}, 71 Geo. L.J. 1 (1982); Stewart, \textit{The Discontents of Legalism: Interest Group Relations in Administrative Regulations}, 1985 Wis. L. Rev. 655, 679.
adversary proceedings that are contrary to the deliberation ethos, but also the position of the deliberators who are the paid representatives of clients who are themselves in pursuit not of ethical truth but of their own perceived self-interests. Litigation is, by its very nature, so infected by interest-group pluralism that it is impossible to see how it can be a particularly good mode of ethical deliberation. Imagine a philosophy seminar with only two philosophy professors—one holding the General Motors chair and the other the United Auto Workers chair, and each knowing that he will lose his tenure if the seminar does not reach the conclusion his donor wants.

If we focus not on the structure and functions of litigation but on its method as a discussion between lawyers, no silver lining emerges. For whatever reasons, constitutional judicial review has been most successful in common-law countries. The common law is itself noted for its preoccupation with procedural questions rather than questions of substantive justice. When it reaches substantive questions, it is prone to conceive them as questions of individual rights rather than the development of the polis. Moreover, contemporary constitutional lawyers are incredibly rights-oriented. Their most central and important skill is their ability to turn the most general issues of social, economic, and political policy into individual rights claims and to assert that those claims are therefore trumps that win, no matter what the damage to others or to the development of the polity as a whole. Common-law and constitutional lawyers do not employ the mode of discourse that Perry believes to be superior. Quite the contrary. Their discourse exults procedure over substance and rights over the good. Those of us who would loathe to consign our political fate to a Princeton philosophy seminar would be absolutely hysterical at the thought of entrusting it to two or three Harvard and Yale lawyers.

If the structure and content of traditional common-law adversary litigation seem very different from the deliberation of moral philosophers, the same can be said for what happens after the adversaries have finished with their discourse. Although constitutional appellate courts are multijudge panels, the judges of both the Supreme Court and the Courts of Appeal have been telling us for some time that little deliberation goes on among the brothers and sisters. Unlike philosophy professors, the justices do not conduct seminars with one another; they work, for the most part, independently. The phrase “nine law firms” is
much bandied about. The world of briefs, oral arguments, and clerk-drafted opinions is very far from the deliberation of the seminar room. If judicial deliberation boils down to nine separate discussions by nine busy justices and their clerks, then we are indeed in a sorry state. Remember that Perry’s own epistemology insists that moral knowledge is the outgrowth of experience. The clerks have no experience, and their legal educations are very far from ideal preparation for engaging in moral discourse about public policy. If we are not very confident about philosophy professors, and less confident about lawyers, what can we say about law clerks?

When Perry tells us that constitutional litigation is a model of deliberation or moral discourse, I cannot believe that he is referring to the nitty gritty of case briefs and oral argument and justices’ office conferences. The concrete realities here simply do not correspond with the philosophy seminar model of deliberation laid out in the earlier chapters of the book. What Perry undoubtedly means is not constitutional litigation in this narrow sense, but instead constitutional law in a general sense as an ongoing process of debate and discussion about constitutional values and aspirations among lawyers, scholars, and judges as conducted in the opinions, the briefs, the books, and the law review articles.

If we are to find Perry’s vision of moral deliberation, it must be in constitutional law as an ongoing discourse, a congeries of interpretative traditions, and so on, rather than in the particular client-driven jousts that characterize individual pieces of litigation. But if we are to make this admission, we lose the particular-case element that is crucial to the Marshallian rationale for review that Perry adopts. We would have to admit that we wanted courts not for resolving particular cases but for enacting constitutional law.

In any event, if we admit that it is not an individual piece of litigation but the whole intellectual enterprise of building constitutional law that is the model of deliberation, we have gone very far down the road to pure metaphor. A process in which many of the participants have never exchanged a word, in which many of the arguments made are deliberately ambiguous, confusing, and even knowingly false, and in which many propositions are ignored or distorted rather than responded to honestly, is said to somehow constitute ethical discourse—deliberation that will lead to better statements of the morally good.
Any severe or reductionist disaggregation of complex historical development can be employed to rob human experience of its moral significance. Nevertheless, the history of American constitutional law is far more and far less than a history of the kind of deliberation that Perry sketches as his ideal. Deliberative elements may be there from time to time, but a model of deliberation it surely is not.

In the last analysis I think Perry's great confidence in judges as moral deliberators comes not from any reasoned analysis of the structure and function of courts, the nature of litigation, or the education and experience of lawyers and judges, but from two other interrelated factors: elitism and victory. Perry has told us that he likes judges because they are insulated from mass politics. The interpretive community of constitutional law also includes the professors who teach constitutional law. Indeed, they far outnumber the judges. This elite group, sensitive to and aided by moral philosophers once it has been persuaded by Perry, is likely to do a particularly good job of pursuing moral aspirations. Throughout human history, everyone has had more faith in the moral acuity of our gang than of other gangs. Perry has a great deal of faith in his own community.

Even more obviously, Perry's faith in the judges is the faith of a winner. He dates the modern court from 1954. He excludes everything the court does except for civil rights and liberties. Although he notes that modern justices have occasionally been wrong, he basically finds that the Court's moral record is glorious. Perry was born in 1945. In another essay, I noted the tendency of court commentators to divide into the generation of 1937 and the generation of 1954 on the issue of self-restraint versus activism. Beyond this phenomenon of generations lies a particularly strong reason for activism among those who, like Perry, combine a belief in moral deliberation with the particular political and social beliefs that are usually labelled liberal. From that particular perspective, the Court has not only been a good deliberator that has come up with pretty good ethical decisions, it has also been more right than other branches and partic-


26. I obviously do not mean by this the political philosophy of liberalism of the Locke-Mill variety but rather the cluster of values that is labelled liberal, as opposed to conservative, in common American usage and survey research.
ularly more right than the majority of Americans. A majority of Americans oppose busing, oppose affirmative action, and, while professing an aspiration for racial justice, act and vote otherwise. Perry repeatedly emphasizes the plurality of moral traditions in America. What he fails to state with sufficient specificity is that on the moral issue that has counted most in America during his lifetime—the issue of racial injustice—an undemocratic court has imposed his community's moral preferences on the majority who obviously held different moral preferences. The Court is Socrates armored against the Athenian demos, armored so strongly that it can impose its moral teachings on the polis.

Of course from Perry's point of view what I have just said reflects a commitment to an incorrect moral epistemology. It states moral aspirations as individual preferences. Perry has emphasized that moral truth is not fixed but aspirational, in a state of continuous revision and development requiring vision and leadership. He has also stressed that America is a morally pluralist national community, that it contains a number of moral traditions but that these traditions are linked by sufficient commonalities to constitute a single polis. And he has argued that within this pluralist moral community some values, some moral visions and aspirations, are more true and further along the route to human flourishing than others. For him the Supreme Court has reached more true moral statements on race matters than have others. Nevertheless, precisely because the proponents of moral deliberation reject fixed moral truth in favor of the pragmatic search for more true moral statements, one must always remain suspicious that their confidence in any particular arena of discourse is likely to be determined post hoc on the basis of whether their particular moral truths of the moment have been winning.

The confidence of Perry and company has clearly been bolstered by the transition from the Warren to the Burger Courts. That transition left the ethical gains of the Warren Court intact and even added to them. They have a response to the warning that their teachings on judicial activism are simply a rationalization for their love of the Warren Court that will come back to haunt them when the Court falls into other hands. They say they have already nicely survived such a transition and indeed that the transition proves their point. No matter who appoints them, judges are by and large good guys. Of course that argument works best if you stick to the civil rights and liberties
Supreme Court since you were born, and you were born after 1937.

To me, Perry's position on judicial activism remains a hymn to victory. Even if one fervently believes in the moral epistemology, deliberative procedure and faith in discourse set out in the first half of the book, the case that the Supreme Court is a bully combined-philosophy-seminar and pulpit is not persuasively made. Nor is the coercion that it employs sufficiently disguised by Perry's invocation of the particular-case talisman and the segregation of its policymaking in a separate chapter to make us forget that the Court is imposing its policy choices on people to whom it is electorally unaccountable.

Perry is somewhat sensitive to these concerns. He says that the constitutional theory of the role of the Supreme Court is "indeterminate" given the American commitment to some kind of democracy. But because he sets the debate over review in originalist/nonoriginalist terms, he is content to dismiss this indeterminacy problem since it is equally difficult for originalists and nonoriginalists. He says he believes in judicial self-restraint, but then claims that "[i]t is probably impossible to articulate sensible criteria of judicial self-restraint . . . ." although he has been willing to articulate quite a number of criteria for legislative self-restraint.

He does offer a sop. He says that judges should be prudent. They must be aware of the plurality of moral traditions and the endemic potential for error in moral discourse. They must attend to the need for continuity in moral development and pragmatic (in the nonphilosophic sense) adjustment to political exigencies as well as to the difficulties of data collection, analysis, and prediction that are integral to all policymaking.

Are judges likely to attend to this counsel of prudence, embedded as it is in the more general message that Perry is sending? From his earlier book Perry repeats the message that the Constitution is, like Scripture, overfilled with meanings. He demolishes interpretivist constraints. He tells judges to work at the leading edge, to develop the moral aspirations of the polity.

27. M. Perry, supra note 17, at 169.
28. Id. at 171.
He tells them that precisely because they are not subject to electoral constraints they are better deliberators and that judicial deliberation is a superior kind of politics in which the judges are "representatives" of the community. But by "representatives," he means something particularly Burkian. He is extremely careful to show judges that they are not anthropologists gathering and reporting community values. Instead they are philosophers constituting the polity's values and prophets leading the community to a flourishing land. At one point he says that judges are not prophets in the Biblical sense but by the end of the same paragraph he is saying that they are "institutionally advantaged \ldots to play a prophetic role." He argues that some aspirations embedded in our multiple traditions of constitutional interpretation are better than others. It is the job of courts to choose the best of those aspirations, not to develop all of them.

Indeed, ultimately it is difficult to see why judges must stick to the Constitution at all. Is it only because the chapter is called "Constitutional Adjudication"? The judges are to choose only the best aspirations from the Constitution. They are completely free, and actually morally obligated, to ignore and even oppose the others. The judges are moral deliberators engaged in moral discourse. Why must they be treated like literary critics or theologians rather than philosophers? Philosophers don't start from a text. Why should judges be limited to the best aspirations expressed in the constitutional text when they are free to ignore other aspirations in the text? Why shouldn't they just pursue the best aspirations—period—whether they are expressed in the text or not? Are they confined in this way simply to save the "writtenness" of the Constitution building-block in the Marbury rationale for review that Perry adopts?

Of course it actually doesn't matter whether they are confined to the text because, as the slightest acquaintance with modern literary criticism will show, a clever interpreter can get anything at all from any text and the subsequent work on it by the interpretative community. If the Yale English department can achieve the wonders that it does, surely the Supreme Court can get anywhere, text or not. And the Supreme Court at least gets there in a language that a few people can understand. Even if one does not take such a cynical view of the art of literary

\[30. \] M. Perry, supra note 17, at 159-60.

\[31. \] Id. at 147.
criticism, one reaches the same conclusion. If the Constitution is a Bible-like text overfilled with moral aspirations, some good, some bad, and each elaborated by one or more of our plural interpretive traditions, then it would be an unimaginative judge indeed who could not find whatever value he wanted to find in the constitutional canon.

This judicial discretion is carried to an ultimate extreme in Perry's teachings by his insistence on two theorems about ethics. The first is that the good precedes rights. He joins the Straussian attack on liberal theories of constitutional rights, an attack that, like his political theory, is grounded in the Greek tradition. If the goal of humankind is the good person in the good state, then the ultimate role of the state is to teach and to do good. Individual rights flow from and thus are subordinated to this search for the good. It follows that the judge as preeminent state moral mentor is not limited by pre-existing, independent rights of the citizens. The central job of the Supreme Court justice is to shape and reshape those rights according to whatever vision of the good has been reached in the justices' deliberations. The justices are not there to protect rights but to give us whatever rights are good for us.

The second theorem is that in reality there are no general moral principles, but only relatively particular moral beliefs. So the judge is not even limited by the need to announce neutral moral principles. He may announce a particular moral rule for any particular case in the full confidence that, if convenient, he may announce a different particular moral rule for some future particular case.

For those with a faith in postconsequentialist moral deliberation, let alone the nonbelievers, the biggest problem in Perry's teaching is posed by worst-case analysis. What if one or more of the justices is a morally insensitive, imprudent person, lacking in real intellectual skill and rigid in belief—the kind of person who mistakes his prejudices for ethical conclusions and the interests of the class or group with which he identifies for the public good. Whatever else the quantitative behavioral movement in jurisprudence may or may not be good for, it has shown us that a large number of justices, even of the glorious Brown and post-Brown Supreme Court, vote for particular groups and against others with amazing regularity no matter what the issues raised in the

cases are.\textsuperscript{33} Justice Brennan, who is obviously Perry's favorite, is clearly one of those justices frequently found way out at the end of the Guttman scales.\textsuperscript{34}

What happens to such a justice if we tell him or her that being undemocratic is the special virtue of the Supreme Court and that his or her job is to be a philosopher king leading the nation toward its better moral aspirations and away from its worse ones, no matter where the preponderance of the nation's own moral aspirations lie? Further, we tell the justice that the framers' intentions are not determinative and that whatever values he or she finds best are lurking somewhere in the Constitution. We also tell the justice that moral deliberation is the most elevated form of human endeavor, that constitutional litigation is the very model of moral deliberation, that legal discourse is a wonderful language for moral deliberation, that lawyers and judges are wonderful deliberators, and that his or her job is to do the moral deliberation for the nation, particularly when it seems to be straying from the best moral paths. We also tell the justice that he or she is not limited by general moral theories or rights, but must announce the best particular rule, good only for the particular case. Finally, we carefully never mention to the justice that he or she, unlike the philosopher, is coercing others into following moral teachings contrary to their own beliefs. Instead we lull him or her with constant talk of interpretation and deciding particular cases. Is all this going to make our worst-case justice a more or a less prudent person?

The response to this criticism might be that nothing could be said to either McReynolds or Brennan that would make them more prudent. Imagine instead a justice with strong tendencies toward imprudence that had, in the past, been held partially in check by qualms about the democratic deficit of the Court and the political and moral legitimacy of justices forcing their own particular moral conclusions down the throats of the American people. Reading Perry should send such a justice to the Crusades as a prophet armed. Nothing is easier for any human being than to imagine himself a moral deliberator when he is really only asserting a self-serving ideology. Among human beings none is more likely to fall into this vice than a Supreme


\textsuperscript{34} If you share Perry's affection for Justice Brennan, substitute McReynolds.
Court justice who has just been awarded the mantle and crown of philosopher king.

Philosopher king may, of course, not be quite the right title. Philosopher aristocrat might be more precise. Perry is an Aristotelian and may be giving us Aristotle's mixed constitution. The judges are an aristocratic check on and leader of the demos. Such an aristocracy is properly endowed with political power because it has acquired the experience of politics by doing politics and thus has political knowledge or prudence. Aristocratic theories of politics have rarely been greeted enthusiastically. They always carry the potential that in anything less than the best of all possible worlds the aristocracy will pursue its own class interests and enforce a class ideology in the guise of its knowledge of the good gained by experience.

In addition to this problem, which is endemic to all aristocratic theories, we must consider a problem that is peculiar to Perry's aristocracy. Constitutional interpretive and deliberative communities are going to contain a large number of law professors, because they provide most of the constitutional commentary. If political-moral knowledge/prudence comes from the experience of doing something, what political experience have these professors had? The litigating lawyers who provide the constitutional briefs have, to be sure, had far more experience, but is the experience of executing deals for corporations on the one hand, and practicing interest-group politics under the name public-interest or civil-rights law on the other, precisely the mix of experience we want to direct the polity? The justices, of course, do typically represent a wide range of experiences, but precisely to the degree that we emphasize deliberation within interpretive communities we cannot be sure that this small tail will wag the big dog of the professorate and bar.

In any event the law degree is the entry card into this aristocracy. That degree is not very difficult to obtain in this country and is not the monopoly of a narrow socioeconomic group, certainly not of any narrower socioeconomic group than the one from which legislators, executives, and government administrators are drawn. Nevertheless, legal education and law practice are a particular and peculiar experience. A legal aristocracy is not quite what Aristotle had in mind. When asked to submit ourselves to a lawyer aristocracy, our thoughts must inevitably turn again to the first hundred names in the Boston telephone directory. In part one's reaction to Perry must rest on how
much one believes, as he does, that legal education and practice is a peculiarly apt experiential background for moral deliberation leading to moral coercion.

Taken as a whole, *Morality, Politics, and Law* is evidence of a rapidly reviving and healthy confidence in the possibility of political and moral theorizing, prescription, and action. Dozens of philosophers, political theorists, and lawyers now tell us that it is possible to move beyond mere assertions of preferences to more true moral statements. They tell us that between the realms of logical demonstration on the one hand and mere personal opinion on the other lies a realm of probabilistically true, pragmatically developing, moral knowledge, a realm that can be reached by deliberation through careful ethical discourse leading to prudent policy choice. Perry is one of the many voices seeking to tell us that politics is not only the realm of interests and ideology but of reason and truth. Lawyers, therefore, need not be so reluctant to acknowledge what they have always known deep down to be true, that law is a form of politics.

I personally do not believe that this newfound self-confidence in ethical inquiry will bear much fruit that is directly applicable to political life, although I do assert that the belief that it should and can bear such fruit is already reshaping legal doctrine and political life. The optimistic message of Perry and company that law and politics can be something more than ideology, than disguised self-interest, is a more heartwarming message than the public choice theory that grows out of the "dismal science" of economics. While we may not live in the sure and certain hope, we certainly prefer to live in some hope.

Even for those fully prepared to maintain that hope, however, the grave difficulty of Perry's book lies in the connection between the first and the last chapters. Basically the last chapter does not get beyond *Marbury* and the antidemocratic horn of the dilemma of judicial review. To the extent that it tries to do so, the attempt is based on the assertion that litigation is a particularly good form of moral deliberation and that the Justices are by nature and by track record particularly good deliberators. So long as Perry is telling us that the Princeton philosophy seminar may find political truth, a hopeful agnosticism seems an appropriate response. And when he says that our Washington legislators ought to hop the Amtrak to Princeton Junction once in a

while, I for one am willing to chip in to pay for the tickets. When he tells us that the Justices ought to force us into following their moral beliefs, I get off the train.

Perry makes some progress in undermining one of the themes of the standard attack on judicial review. That theme runs as follows. Constitutional law is politics—it is policy choice enforced by coercion. Politics is a matter of will, not reason. It is the pursuit of self-interest and the coordination of such interests. Constitutional doctrine is therefore nothing but ideology disguising the pursuit of self-interest. Judicial review is nothing more nor less than the exercise of political power. Perry can respond to these criticisms that politics is not merely the exercise of will in the pursuit of self-interest. Politics has a component of reason, of the pursuit of the good through deliberation. The ethics that guides and grows out of politics is not mere preference and ideology but is moral truth. Therefore, precisely because constitutional law is part of politics it involves the deliberative discovery of moral knowledge.

Having gotten this far, however, Perry, neither makes any real advances in telling us why we should vest deliberative political power in judges rather than exclusively in elected legislators and executives nor in reassuring us that if this power is vested in them the justices and company will truly deliberate. Until we see a much more elaborate and convincing political theory justifying the antidemocratic components of American government, one of which Perry insists judicial review is, and until we have much more reason to believe we can trust the judges to be prudent deliberators consistently over long periods of time, most of us must remain where most Americans have always been. We want some judicial review some of the time—particularly if we think we have a good chance of winning. Most of us really end up where Bickel and Bork do. We want some review but not too much, and we get in a lot of trouble when we try to say how much and when.

It seems to me that Perry has markedly enriched our understanding of the moral potential of constitutional discourse but that he has not moved the debate over judicial review forward one jot. It also seems to me that his teachings will powerfully arm the worst as well as the best of our Supreme Court justices.

As General Gordon found out, and as recent experience reminds us, prophets armed are dangerous people.