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THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS. By *Michael J. Perry*.[1] New Haven: Yale University Press. 1982. Pp. 241. $24.00.

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The power of the courts to declare acts of government unconsitutional has been axiomatic in American law since *Marbury v. Madison,*[2] and historical research has failed to shake its foundations.[3] Serious debate has centered instead on its scope, and at the most theoretical level, on the issue of interpretation: when dealing with the more open-ended clauses in the Constitution, such as "due process," "freedom of speech," "privileges and immunities," and "equal protection of the laws," to what sources may the courts look for guidance? More particularly, is the judiciary bound in every age by the understanding of the Constitution's provisions held by its framers?

More or less affirmative answers to this question have gone by various labels: "strict construction,"[4] "neutral principles,"[5] "interpretivism,"[6]

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2. 5 U.S. (1 Cranch) 137 (1803).

3. *See, e.g.,* J. GOEBEL, ANTECEDENTS AND BEGINNINGS TO 1801, at 308-23 (1971) (showing that the most widely publicized opponents of the Constitution shared with its proponents the assumption that the Court would have such power).

4. This was President Richard Nixon's term for the judicial philosophy he intended to promote with his Supreme Court appointments, beginning with Chief Justice Burger in 1969; for an account of the politics of the early Nixon nominations see R. EVANS & R. NOVAK, NIXON IN THE WHITE HOUSE 159-72 (1971).

5. *See* Wechsler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959), *reprinted in* PRINCIPLES, POLITICS AND FUNDAMENTAL LAW 3 (1961).

> A principled decision, in the sense I have in mind, is one which rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved. When no sufficient reasons of this kind can be assigned for overturning value choices of the other branches of the Government or of a state, those choices must, of course, survive.

Id. at 27. Wechsler denied, however, *id.* at 26, that he wished to impose on the Bill of Rights "limits fixed by the consensus of a century long past, with problems very different from our own." Bork tied the notion more explicitly to "choices made in the framing of the Constitution." Bork, *Neutral Principles and Some First Amendment Problems,* 47 IND. L.J. 1, 10-11 (1971).

6. *See* Ely, *Constitutional Interpretivism: Its Allure and Impossibility,* 53 IND. L.J. 399, 399 (1978): "['Interpretivism' indicates] that judges deciding constitutional issues should confine themselves to enforcing values or norms that are stated or very clearly implicit in the written Constitution . . . ."

"originalism."[7] Usually they reflect the assumption that the Constitution is being applied by a politically unaccountable Court as a trump against current local or national political majorities; the argument is that such majorities should be given the benefit of the doubt. A negative answer is more indeterminate, of course, since it leaves open to argument just what additional sources may be consulted; but the most famous expression of it is Marshall's dictum that "we must never forget that it is a *constitution* that we are expounding."[8]

Throughout the United States Supreme Court's history one can identify controversial cases which have given fresh impetus to this debate. Did the framers intend to give Congress the power to establish a national bank and to immunize it from state law, as in *McCulloch v. Maryland*?[9] Did they intend to preclude blacks from acquiring citizenship, as in *Dred Scott v. Sanford*?[10] Did they expect the due process clause to prevent significant regulation of economic activity in the public interest, as in *Lochner v. New York*?[11] Was the equal protection clause meant to prohibit racial segregation in public schools, as in *Brown v. Board of Education,*[12] or authorize judicial regulation of legislative apportionment, as in *Baker v. Carr*?[13] Was the ninth

7. *See* Brest, *The Misconceived Quest for the Original Understanding,* 60 B.U. L. REV. 204, 204 (1980): "By 'originalism' I mean the familiar approach to constitutional adjudication that accords binding authority to the text of the Constitution or the intentions of its adopters."

8. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis added).

9. 17 U.S. (4 Wheat.) 316 (1819). See the contemporary criticism and response in JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND (G. Gunther ed. 1969).

10. 60 U.S. (19 How.) 393 (1858). The decision is given substantial credit for causing the Civil War by invalidating the Missouri Compromise. *See, e.g.,* H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW 180-202 (1982).

11. 198 U.S. 45 (1905) (invalidating state maximum-hour legislation). For critical anticipation of this line of cases invalidating economic regulation, see Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law,* 7 HARV. L. REV. 129 (1893). An account of contemporary criticism of this and other applications of the substantive due process doctrine is found in L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-6 (1978).

12. 347 U.S. 483 (1954). Perhaps the most frequently cited contributions to the debate on judicial review following this decision were A. BICKEL, THE LEAST DANGEROUS BRANCH (1962); L. HAND, THE BILL OF RIGHTS 1-30 (1958); Wechsler, *supra* note 5.

13. 369 U.S. 186 (1962). For comment critical and supportive of *Baker* and its progency establishing the "one peson, one vote" principle, see Kelly, *Clio and the Court: An Illicit Love Affair,* 1965 SUP. CT. REV. 119; McKay, *Reapportionment: Success Story of the Warren Court,* 67 MICH. L. REV. 223 (1968). Extensive documentation for the proposition that the framers of the fourteenth amendment did not intend to include the right to vote within the scope of the equal protection clause, and that therefore these decisions are wrong, is offered in R. BERGER, GOVERNMENT BY JU-

amendment intended to authorize the creation of a right to have and perform abortions, as held in *Roe v. Wade*?[14] Would the framers have understood the tenth amendment as immunizing the states from federal regulation otherwise proper, merely because they are states, as claimed in *National League of Cities v. Usery*?[15]

In the decade since *Roe* the literature on the policymaking role of the courts—already too vast to catalogue—has flourished anew with innumerable major law review articles[16] and a clutch of monographs by law professors.[17] Two of the latter jointly received the 1983 Triennial Order of the Coif Award for contribution to legal scholarship: John Hart Ely's *Democracy and Distrust* and Jesse Choper's *Judicial Review and the National Political Process,* both published in 1980 and both advocating a narrowing of the scope of judicial review in order to preserve a core of protection for individual

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DICIARY 69-98 (1977). See the response in J. ELY, DEMOCRACY AND DISTRUST 116-125 (1980), and Berger's reply in Berger, *Ely's "Theory of Judicial Review,"* 42 OHIO ST. L.J. 87 (1981).

14. 410 U.S. 113 (1973) (invalidating anti-abortion laws on the basis of a newly articulated right of privacy). The leading case for the existence of such a right was Griswold v. Connecticut, 381 U.S. 479 (1965) (protecting the right to obtain contraceptives).

15. 426 U.S. 833 (1976) (holding that imposition of federal minimum wage laws on local governments as employers violated tenth amendment's reservation of powers to states). After intervening decisions had authorized the so-called "carrot-and-stick" method of inducing states to enact regulations in order to avoid imposition of federal ones, *see* FERC v. Mississippi, 456 U.S. 742 (1982), and had excluded operation of a railroad from the "essential state functions" exempt from federal regulation, *see* United Transp. Union v. Long Island Ry., 455 U.S. 678 (1982), the Court has now virtually limited *Usery* to its facts by permitting the application of federal age-discrimination laws to state employment in EEOC v. Wyoming, 103 S. Ct. 1054 (1983).

16. Among the more frequently cited are Bork, *The Impossibility of Finding Welfare Rights in the Constitution,* 1979 WASH. U.L.Q. 695; Brest, *supra* note 7; Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920 (1973); Greenawalt, *The Enduring Significance of Neutral Principles,* 78 COLUM. L. REV. 982 (1978); Grey, *Do We Have an Unwritten Constitution?,* 27 STAN. L. REV. 703 (1975); Monaghan, *Foreword: Constitutional Common Law,* 89 HARV. L. REV. 1 (1975); Monaghan, *Of "Liberty" and "Property",* 62 CORNELL L.J. 405 (1977). *See also Symposium: Judicial Review versus Democracy,* 42 OHIO ST. L.J. 1 (1981); Cover, *The Origins of Judicial Activism in the Protection of Minorities,* 91 YALE L.J. 1287 (1982); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles,* 96 HARV. L. REV. 781 (1983). A new symposium has appeared which consists of 11 articles devoted to the book by Perry here reviewed. *Judicial Review and the Constitution—The Text and Beyond,* 8 U. DAYTON L. REV. 443 (1983).

17. *See, e.g.,* R. BERGER, *supra* note 13; C. BLACK, JR., DECISION ACCORDING TO LAW (1981); J. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980); J. ELY, *supra* note 13; J. PERRY, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982).

rights. In the work here reviewed, Michael J. Perry, drawing and expanding on a number of earlier essays,[18] offers his own painstaking but more generous defense of the function of judicial review in its most expansive form.

Professor Perry uses the "interpretivism/noninterpretivism" terminology popularized largely by Ely.[19] He assumes that the legitimacy of "interpretive reivew"—that based on values clearly established by the framers—is not seriously questioned, since the Constitution was clearly intended to bind all government (pp. 11-17). He argues, however, that none of the controversial decisions of the Supreme Court in this century can be defended as interpretive review. He accepts the conclusion most recently documented by Raoul Berger,[20] for example, that the draftsmen of the post-Civil War amendments intended only to eliminate overt racial discrimination in respect of citizenship, voting, and other fundamental rights, but not to prohibit segregation (pp. 68-69). Thus Perry rejects attempts to distinguish *Brown* from *Roe* in terms of constitutional legitimacy: if the Court exceeded its authority in the latter, it did so in the former as well (pp. 1-2). The legitimacy of "noninterpretive review"—judicial constitutional review on the basis of values not established by the framers (p. x)—is therefore "the central problem of contemporary constitutional theory" (p. 10).

To what extent was noninterpretive review contemplated by the framers themselves? Berger[21] has argued that they clearly intended to preclude it, because they expressly rejected a proposal that would have authorized a judicial veto: Perry simply notes that rejection of noninterpretive review does not follow from rejection of an absolute veto (p. 21). Ely,[22] on the other hand, claims that a limited range for arguably noninterpretive review (that based on the value of increased participation in the political process) can be found within the four corners of the Constitution itself and therefore presumably ascribed to the intention of the framers. Perry finds this argument, which relies heavily on the ninth amendment's disclaimer of intent to disparage rights other than those enumerated,[23] ultimately unpersuasive because the ninth amendment does not clearly authorize *judicial* recognition and enforcement of such rights (p. 22). Perry concludes that there is neither

18. *E.g.,* Perry, *Noninterpretive Review in Human Rights Cases: A Functional Justification,* 56 N.Y.U. L. REV. 278 (1971); Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process,* 23 U.C.L.A. L. REV. 689 (1976); Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government,* 66 GEO. L.J. 1191 (1978).

19. *See* Ely, *supra* note 6; J. ELY, *supra* note 13.

20. *See generally* R. BERGER, *supra* note 13.

21. *Id.* at 300.

22. J. ELY, *supra* note 13, at c.3.

23. *Id.* at 34. The ninth amendment reads as follows: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

historical nor textual support for noninterpretive judicial review and that the justification must be *functional*—that is, based on the need for such review and the special qualifications of the judiciary to undertake it (pp. 24-25).

The main burden of Perry's argument is that such a functional justification can be made for noninterpretive review in separation-of-powers cases (pp. 44-45)[24] and in human rights cases (pp. 91-145). Before offering us an extended exposition of this justification, however, he devotes perhaps a third of the book to clearing away various inadequate claims made by others. A number of functional arguments for noninterpretivism are dismissed as unpersuasive (pp. 30-36),[25] including that for tenth amendment protection of the states against federal encroachment (pp. 41-45).[26] Cases limiting the power of the *states* on federalism grounds are deemed unproblematical because they are not truly noninterpretive, being subject to congressional redefinition (pp. 38-40).[27] Jesse Choper's proposals to jettison all federalism and separation-of-powers cases as nonjusticiable political

24. Perry points out that there is a need for the Court to resolve interbranch stalemates to preserve the government's viability, and that in any event the impact of choosing between politically accountable branches is less damaging than trumping them both would be.

25. Perry deals with the following arguments, among others: (1) that the political branches may not be any more responsive to majorities than the judiciary (accountability, not responsiveness, is the test); (2) that "literalism" is impossible (most interpretivists are not literalists but insist only on confining *value judgments* to those of the framers); (3) that the intent of the framers can't always be ascertained (interpretivists accept analogical reasoning); (4) that interpretivism prevents organic interpretation of the Constitution to adapt to new circumstances (the organic argument is strongest in connection with power-*granting* provisions such as the commerce clause, which require majoritarian exercise, but weakest in connection with power-*limiting* provisions such as equal protection, which are antimajoritarian).

26. The leading pre-1937 cases were United States v. Butler, 297 U.S. 1 (1936) (invalidating the Agricultural Adjustment Act's subsidy for reducing productive acreage); Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) (invalidating federal tax on employers of child labor); Hammer v. Dagenhart, 247 U.S. 251 (1918) (invalidating federal child labor laws). In each case, federal laws were found to invade the states' reserved power to regulate production as distinguished from commerce. Perry rejects them and the new tenth amendment doctrine of National League of Cities v. Usery, 426 U.S. 833 (1976), as lacking in historical or textual foundation and unnecessary to protect the states, which are adequately represented in the political process.

27. The leading modern case is Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) (invalidating state law limiting length of trains operating within state as undue burden on interstate commerce despite absence of any specific federal law inconsistent with it). *See also* Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978) (invalidating state truck length law on similar grounds). The proposition that the commerce clause embodies a policy of free interstate trade, which Perry finds unsupported in the adoption history (p. 38), is most clearly articulated in H.P.

questions, so as to preserve the Court's institutional capital for individual rights cases,[28] are rejected because they unnecessarily include *interpretive* review which poses no discernable threat to the Court's effectiveness (pp. 54-56). *Limited* concessions by interpretivists of the legitimacy of noninterpretive review in free expression cases[29] and in desegregation cases[30] are spurned as no more supported by text, tradition, or consensus than any other form of noninterpretivism (pp. 66, 69). Similar reasoning disposes of Ely's elaborate defense of the "representation-enhancing" value[31] as a basis for sustaining activist decisions in the areas of free speech and equal protection while rejecting "substantive due process" cases like *Roe v. Wade* (pp. 77-90).[32]

Perry takes Robert Bork as his model interpretivist and uses the following as a succinct statement of the position: "Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution."[33] Perry summarizes his own response to the various forms of interpretivism:

> I prefer to let the framers sleep. Just as the framers, in their day, judged by their lights, so must we, in our day, judge by ours. This is not to deny that the framers have anything to say to us, only to insist that in the end the answers the Court gives are (most often) its own, and not the framers'. [p. 75].

Having devoted a prologue, introduction, and the first three chapters of this book to the task of refuting the arguments of others against the interpretivist position, Perry finally comes in chapter 4 to his own argument. He offers it not as proof that the interpretivists are wrong but as a "reasonable

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Hood & Sons, Inc. v. DuMond, 336 U.S. 525 (1949) (invalidating state denial of milk receiving station permit to out-of-state processor).

28. J. CHOPER, *supra* note 17, at 175-76 ("The Federalism Proposal"), 263 ("The Separation Proposal"). Choper would retain judicial review of *state* encroachment on *federal* powers under the supremacy clause, *id.* at 205, but, like Perry, characterizes this as not "true judicial review", *id.* at 206.

29. Bork, *supra* note 5, at 26 (arguing for the need, in a representative democracy, for *open* and *vigorous* debate about officials and their policies).

30. Bork finds that the fourteenth amendment was "intended to enforce a core idea of black equality" which, in conjunction with the principle of neutrality, supports *Brown*'s overruling of *Plessy*. Bork, *supra* note 5, at 14-15. Berger concedes that expectations aroused by the desegregation decisions and "confirmed by every decent instinct" preclude reversal of *Brown* although it was wrongly decided as a matter of judicial legitimacy. R. BERGER, *supra* note 13, at 412-13.

31. J. ELY, *supra* note 13, at 87.

32. Perry points out that Ely finds a democratic value *implied* in the document as a whole which is at odds with the criteria of representative democracy *expressed* there. Perry specifically rejects the distinction between "participational" and "nonparticipational" values (pp. 119-22).

33. Bork, *supra* note 5, at 10-11.

alternative"[34] to interpretivism. He characterizes it as a "functional justification" of noninterpretive review (p. 91), which relies not on tradition or consensus but on "our collective self-understanding" (pp. 93-97),[35] and which is principally applicable in human rights cases. That self-understanding, says Perry, consists of two often conflicting elements: (1) democracy, and (2) moral progress. The former is a commitment to policymaking subject to control by electorally accountable persons; the latter is a commitment to moral evolution, to the notion that we are a "chosen people" "standing under transcendent judgment" (pp. 97-98). Interpretivism is a position of moral skepticism, which Perry believes not only to be difficult to maintain but also to be rejected by most Americans today (pp. 103-05). On the other hand, the idea that there are right answers to moral questions does not require that the Constitution be understood as embodying any *particular* moral system; an institution passing moral judgment on the product of the political process can properly proceed from a theory of "convergence," that the right answer is that given by a *variety* of moral systems (pp. 109-11). Since the function of subjecting political decisions to moral judgment is not appropriate for the electorally accountable institutions themselves, the courts are the institutions best suited for the job (pp. 100-01).

In Perry's vision of the role of noninterpretive review in human rights cases, this calling of the polity to moral account is provisional, not final (p. 99). The courts do not sit wholly apart from the political process but operate in a dialectical relationship with it (pp. 112-14). Other policymaking agencies have their say as well; the courts are only one of a number of checks and balances (p. 126). The crucial question becomes, therefore: what are the responses available when the Court gives "prophecy"[36] of which the polity disapproves? Are there political controls sufficient to the task of correction, so that noninterpretive review can be reconciled with the principle of electorally accountable policymaking? Perry is unenlightened by the hope that the polity will overcome unpopular decisions "in the long run" and unpersuaded by the claim that failure to correct a particular decision constitutes acceptance of it (pp. 126-27). He looks instead to institutional controls established by the Constitution itself.

The amendment process is not a sufficient mechanism to vindicate

34. "[M]y aim is less to convert than to establish that my justification is a reasonable one and that, therefore, interpretivism represents only one reasonable constitutional theory and, contrary to what its proponents sometimes claim, *not the only one.*" (P. 91). (Emphasis added).

35. He characterizes this self-understanding as "religious in its etymological sense" (p. 97), derived from the Latin *religare*, "to bind together that which was once bound but has since been broken asunder."

36. "An integral component of the American people's religious understanding of themselves is the notion of prophecy. Invariably a people, even a chosen people, fail in their responsibility and need to be called to judgment—provisional judgment—in the here and now. That is the task of prophecy . . . ." (P. 98).

electorally accountable policymaking because its procedural hurdles are too high to allow a simple electoral majority to prevail (p. 127). The appointment process is too imprecise, and must take into account too many political factors, to allow for focus on correction of a single decision (p. 127). The impeachment process is too clumsy to be helpful (p. 128). The judicial budget is too important to the system as a whole to permit manipulation for correction of particular decisions (p. 128).[37]

In Perry's view, the only political control which is both manipulable by electoral majorities and precise enough to reach particular decisions is the power granted by article III, section 2, to regulate the jurisdiction of the federal courts, including the appellate jurisdiction of the Supreme Court (p. 128). Only by conceding to the political branches the power to remove the subject matter of an unpopular decision from its jurisdiction can the Court reconcile its noninterpretive review with the democratic principle (p. 137).

Perry would limit this concession to noninterpretive review, thus presumably leaving the Court free to invalidate jurisdiction-removing legislation designed to frustrate a decision which the Court had based on framers' values (p. 130).[38] Although jurisdiction removal is indirect and would not overrule the offending decision, it can practically neutralize its precedent value (p. 131) while preserving the institutional independence of the judiciary with respect to specific cases. State courts cannot be reached by Congress's jurisdictional controls, to be sure; but they are presumably subject to state political control and in any event could hardly be regarded as binding the federal government by a noninterpretive invalidation of federal action, if the federal judiciary lacked appellate jurisdiction over the state court's decision (pp. 131-32). The fact that Congress has not actually used this power since *Ex parte McCardle*[39] over 100 years ago, as likely as not, indicates that its disagreement with controversial decisions is not often so profound as to justify removing the Court's power to make them (pp. 133-35).[40]

Perry believes that the Court would be more candid about the sources of its decisions if it were to accept both the power of Congress over its jurisdiction and the legitimizing effect such power has on the exercise of

37. On these points Perry cites similar but more extensive discussions by Ely and Choper. *See* J. CHOPER, *supra* note 17, at 49-52; J. ELY, *supra* note 13, at 46-47.

38. Perry notes that his position is thus consistent with the argument of Hart, *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic,* 66 HARV. L. REV. 1362 (1953), that the power must stop short of destroying "the essential role of the Supreme Court in the constitutional plan," since that role can only be that of enforcing the values constitutionalized by the framers, i.e., interpretive review (p. 133).

39. 74 U.S. (7 Wall.) 506 (1869) (holding that repeal of a jurisdictional statute deprived the Court of jurisdiction over a case pending at time of repeal, and that it could do so under U.S. CONST. art. III, § 2).

40. Choper rejects any inference of acceptance from failure to act and concludes simply that the jurisdictional control is ineffective. J. CHOPER, *supra* note 17, at 52-55.

noninterpretive review (pp. 139-43). That candor, in turn, would encourage the legitimate exercise of such political controls as do exist (p. 143). Then questionable decisions such as *Roe v. Wade* can be resolved with a clear conscience—if indeed, which Perry doubts, the polity now disapproves of them strongly enough to warrant corrective action (pp. 144-45).

Perry's book is the most thorough defense in the current literature, in terms of constitutional theory, of what is surely institutional reality: that the Court often decides cases on the basis of contemporary value judgments not contemplated by the framers and that public and political response has various effective channels through which to modify them. It is not the first to rely on the jurisdiction-controlling power of Congress to reconcile such value judgments with the democratic principle,[41] nor is it the first to characterize the Court's more active role as aspirational or prophetic.[42] It has the virtue, however, of focusing on the question of judicial legitimacy as such, without attempting to defend the merits of any particular decision.[43] Its thesis is sounder, in this reviewer's judgment, than those of Ely (who would limit such review to the single value of representation, which is both too limiting and too open-ended to help future Courts) and Choper (who would have the Court abandon major areas of the Constitution to the free play of electoral politics).

The book's substantive weaknesses flow from its virtues. Defense of a *function* allows Perry to avoid deciding what values the Court should be implementing. Moreover, he does not attempt a theory of interpretation which would permit us to agree on what values *were* constitutionalized by the framers, beyond telling us that none of the Court's controversial decisions can plausibly be defended as interpretive.[44] Presumably he thinks this definition also avoidable when one wishes to justify the broadest range of judicial review. Nonetheless it *is* necessary, because his only limit on the power of Congress to regulate jurisdiction under article III is that it is not available to neutralize "interpretive" decisions. Thus the Court will have to say the last word on the framers' intentions after all, and Perry's book offers no guidance other than a strong presumption against today's values having been constitutionalized. For this reason, his invitation to jurisdiction-paring is a sobering one, which we may hope Congress does not enthusiastically accept. The lesson to be learned from Perry's book, therefore, may well be cautionary: perhaps the best solution for the Court's political problems

41. *See* C. BLACK, JR., *supra* note 17, at 26-27, 37-39.

42. See, for example, the more skeptical appraisal of this role in A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 173-81 (1970).

43. Ely in particular, as a former law clerk to Chief Justice Warren, seeks a value argument that will justify distinguishing *Brown* from *Roe;* he seems to admit that lack of sympathy for the philosophy of the Burger Court makes him more receptive to interpretivism. J. ELY, *supra* note 13, at 3.

44. For a critique of this weakness, see Alexander, *Painting Without the Numbers: Noninterpretive Judicial Review,* 8 U. DAYTON L. REV. 447, 454 (1983).

would be to rediscover the values of careful analysis and adherence to lasting principle, which critics such as Wechsler[45] and Bickel[46] have considered to be the essence of the judicial craft.

The book also suffers from some stylistic flaws. It is repetitive, in a way which suggsts that it was originally intended as a series of lectures. It frequently catalogs countervailing arguments only to dismiss them summarily, leaving the reader helpless to judge independently. However, the lawyer who is troubled by the issue of judicial legitimacy will overlook these blemishes and will find the work well worth reading.

45. *See* Wechsler, *supra* note 5.
46. A. BICKEL, *supra* note 42.

HOW TO REPRESENT YOUR CLIENT BEFORE THE IRS. By *Bryan Gates*.[1] New York: McGraw-Hill Book Company. 1983. Pp. 235. $24.95.

In *How to Represent Your Client Before the IRS*, Bryan Gates gives the reader a practical guide to the inner workings of the Internal Revenue Service. This book contains a substantial amount of information. In addition, it has a good index, which makes it a valuable reference tool for anyone who is going to be dealing with the IRS on behalf of a client.

First we are told who can practice before the IRS, how to become qualified to practice, and of what that practice will generally consist. Basically, one can represent a client before the IRS if he is an attorney, a certified public accountant, or an enrolled agent (p. 2). The requirements for the former two classes are fairly well understood. Being an enrolled agent is, however, unique to the IRS. According to Gates, any person can apply for this status, the primary requirement being an ability to show technical competence in tax matters (p. 3).

Once representative status is obtained, one can begin to actually practice before the IRS. This "practice" is defined as making "presentations to the IRS and its employees relating to client's rights, privileges, or liabilities" (p. 1).[2]

Before a representative can do this job effectively, he must have a good understanding of the system within which he must work. Therefore, we are provided with an explanation of the organizational structure of the IRS. Brief job descriptions for the various positions within the IRS structure, including an explanation of the "expectations" the agency has for its various employees, as well as some of the goals and frustrations that those people are likely to be experiencing are included in the book. The people who fill the various positions generally have differing motivations, and it is pointed out that only by recognizing such elements can one conduct the most effective representation possible.

The heart of *How to Represent Your Client Before the IRS* is a discussion of the various enforcement practices of the IRS. The Author begins by looking at the process for examination of tax returns. While some taxpayers have their returns selected completely at random, generally an examination is the result of an IRS computer giving a particular taxpayer's return a high "discriminant information function" score, the underlying theory being that if these particular returns are examined, the process is likely to result in additional revenue (p. 56).[3]

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1. Mr. Gates is a tax representative and an enrolled agent. Much of his expertise in this area is a result of his ten years experience inside the hierarchy of the IRS.

2. REGULATIONS GOVERNING THE PRACTICE OF ATTORNEYS, CERTIFIED PUBLIC ACCOUNTANTS, ENROLLED AGENTS, AND ENROLLED ACTUARIES BEFORE THE INTERNAL REVENUE SERVICE, TREASURY DEPARTMENT CIRCULAR NO. 230, at 2 (June 1979).

3. An example of such a return might be where taxpayer included 20% of his

There is a thorough explanation of what an effective representative should do once his client is caught up in the examination process. We are told how to help a client who has received a summons from the IRS; when and how to use the offer in compromise; and what can be done to help a client who has not paid an amount which the IRS claims is due and for which the IRS is going to or has set in motion its collection measures of levy, seizure, or the federal tax lien.

The gravity of having a client under criminal investigation is discussed. Mr. Gates points out that here "[n]o give and take, no settlement opportunities, and no recognition of taxpayer efforts to cooperate will be involved" (p. 165). As a consequence, if a taxpayer becomes involved in a criminal investigation, an effective representative should help his client to find a good federal criminal defense attorney. There are various things a taxpayer could do which would result in his coming under criminal investigation—for instance, willfully failing to file a return on time. All delinquent returns do not, however, fall into the willful category. The reader is told how to best handle a situation where a client has been delinquent, but not willfully so.

Employment and excise taxes are also discussed. These "trust fund taxes" are subject to a deposit system whereby the employer/collectors are required to make payment on a current (often weekly) basis (p. 168). If such deposits are not made, many of the same procedures for collection are followed, the difference being that in the trust fund area such procedures are somewhat more accelerated than they are when the IRS is dealing with the collection of income taxes (p. 169).

Finally, Mr. Gates makes suggestions as to how one can keep up with the ever-changing elements of the tax law. Various sources of tax information are pointed out and suggestions are made as to their utilization.

How to Represent Your Client Before the IRS is a good reference tool and would be a valuable addition to the library of anyone who does client representation in this area. One of the chapters begins with a quote from Jerome Kurtz, former Commissioner of the IRS: "[W]hile we wish for simplicity, we must administer complexity" (p. 194). This statement effectively sums up the revenue collection process and the agency that does that collection. One who must deal with this process on behalf of a client needs to understand the complexities. *How to Represent Your Client Before the IRS* does much to aid in this goal.

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gross income as a charitable contribution. It is possible that taxpayer was really this generous, but since his percentage of giving is quite a bit more than the norm, such a contribution might well trigger an examination.

THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE. Edited by *David Kairys*.[1] New York: Pantheon Books. 1982. Pp. 321. $9.95.

The United States places great emphasis on democracy. Yet a great number of society's important decisions are made by nonmajoritarian courts. Society justifies this by a perception that the decisionmaking process is purely objective. According to this perception, a judge bases his decision on clearly outlined rules of law which are applied to a set of facts to reach the correct result.

This analysis, according to David Kairys in the Introduction to *The Politics of Law: A Progressive Critique*, is an idealized model of the judicial process which fails to recognize the social and political content of law. *The Politics of Law* is a collection of essays which rejects this idealized model. Rather than criticizing the legal system for deviating from a distinct mode of legal reasoning, these authors claim that unbiased legal reasoning is a myth. This myth gives the law its power by legitimizing the court's dominance which in turn legitimizes domination by a small corporatized elite. This collection of essays describes the legitimization process in selected substantive issues and fields of law and the resulting dominance. The book is divided into three parts. Part One considers the idealized model and includes an analysis of legal education. Part Two consists of ten essays which deal with social and political impact on the law by focusing on major social and legal issues and specific fields of law. Part Three suggests a variety of progressive approaches to the law.

Each essay presents a progressive, critical analysis which Kairys acknowledges is drawn from Marxist thought. An analysis of the legal system from this perspective is a provocative approach rarely presented by legal texts or traditional legal writings. In the first essay, Kairys uses a trio of United States Supreme Court cases dealing with free speech rights in privately owned shopping centers to illustrate the problems in justifying decisions by claiming a duty to follow precedent.[2] Rather than relying on stare decisis, Kairys emphasizes the need to understand the role of public policy in the decisionmaking process.

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1. Kairys, Rudovsky & Maguinan, Philadelphia, Pa.

2. In Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968), the Court upheld the constitutional right of union members to picket a store involved in a labor dispute in the shopping center where it was located. Four years later, Lloyd v. Tanner, 407 U.S. 551 (1972), held that an antiwar activist had no constitutional right to distribute pamphlets in a shopping center. The *Lloyd* Court distinguished *Logan Valley* by noting that a labor dispute is more closely related to the activities of a shopping center than is antiwar activity. Finally, in Hudgens v. NLRB, 424 U.S. 507 (1976), the Court held that union members involved in a labor dispute with a store in a shopping center do not have a constitutional right to picket in the center. The reason given for not following *Logan Valley* was that it had been overturned by *Lloyd*. The Court said it must follow *Lloyd*'s precedent.

The chapter on the "History of the Mainstream Legal Thought" analyzes the development of law and economics and suggests that the common law has traditionally followed the market "under the guise of protecting rights" (p. 37).[3] The essay which deals with legal education presents a highly critical view of the function of law schools and the hierarchical system they develop. The author claims that schools, in a number of specific ways, purposefully incapacitate students to enter jobs other than those relegated to them according to their standing in the hierarchy of schools. In addition, the essay deals with the manner in which teachers model for students the proper hierarchy of the legal system.

The second part of *The Politics of Law* deals specifically with the claimed injustice law creates when applied to labor, race and sex discrimination, free speech, contracts, torts, the criminal system, and welfare benefits. According to Richard L. Abel in his essay on "Torts", "tort law under capitalism equates money with labor, possessions, care, emotional and physical integrity, and ultimately love." (P. 87). His theory is that under capitalism labor must be sold for wages, so compensation for injury becomes loss of earning capacity. In addition, mass production makes money the equivalent of any chattel, and money is therefore adequate compensation for loss of any possessions. As the family dissolves, medical care can only be provided outside the home so that even physical injuries "cost" money. This logic extends to equating money with emotional distress and loss of consortium.

Tort law is a means for the dominant class of lawyers to protect the property of the capitalist and the monopoly of expertise of the lawyer, according to Abel. This is done by the lawyer combining his expertise with the victim's injury "to product a tort (a commodity) that has exchange value both in the state-created market (the court) and in the dependent market it spawns (negotiated settlements)." (P. 188). In the end the victim receives only the essentials and the rest is the lawyer's fee, which Abel claims is the capitalists' expropriation of surplus value.

Tort law, in addition, furthers the capitalistic need to expand its market and increase consumption. Injury must be fostered due to this expansionistic approach, and the tort doctrines of contributory negligence, the fellow-servant rule, and assumption of risk, allow capitalists to sacrifice the health and safety of others.[4]

Abel suggests a socialist approach to illness and injury. He recognizes that the primary requirement to implement this approach is a radical

3. *See, e.g.*, Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015 (1978).

4. This effect of tort law on the safety of the workplace is obvious, according to Abel, in Judge Learned Hand's formula weighing the costs of accident avoidance against the costs of injury discounted by its probability. *See* United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947); Conway v. O'Brien, 111 F.2d 611 (2d Cir. 1940).

change in the division of labor. This is a traditional socialist requirement—that the workers gain control over the means of production. He does not advocate nationalizing industry, which he claims would only substitute the state for capital, but rather suggests cooperative enterprises and worker involvement in improving health and safety in the workplace. Abel further advocates ending compensation for non-pecuniary loss since this maintains inequalities in wealth and income and encourages the treatment of love and experience as commodities.[5]

The essays in Part Two each critique a specific body of law and include the author's suggestions for improvement. These specific suggestions are followed by a group of essays in Part Three advocating general approaches to reform of our legal system. Robert W. Gordon, in the first of these essays, emphasizes the need for a change in the individual's belief-system.[6] Gordon, a law professor, states that the current belief-system that the many hierarchical relations in society are natural and necessary reinforces the current legal system. Our legal system is seen as just one of the hierarchical systems which are natural and necessary. Rather than attempting to change the systems, people accept them and try to work within the belief that the structures must remain the same. According to Gordon, these conventional beliefs must be exposed through our own rational intellectual inquiry and by a realization that history, not nature, is the basis for these structures.

Victor Rabinowitz ends the collection with a positive view of the potential of our legal system. The New York lawyer states that the most critical "orthodox" Marxist view—"The Law, while pretending to be a benign, neutral force dispensing justice, equality, and due process, actually is but a fraudulent cover-up for the force through which the State rules," (p. 312)[7]—is error that tends to encourage cynicism and ignore the battle of many persons for progressive, socially desirable laws. Rabinowitz points to areas of the law in which progress has been made to better the lives of the working class. He states that due to a number of recent United States Supreme Court decisions, individuals charged with crimes now have more protection than they had previously.[8] Looking at the more distant past, he points out the effect of factory and child labor laws, the recognition by the

5. For further development of these proposals, Abel recommends his article, Abel, *A Socialist Approach to Risk*, 41 MD. L. REV. 695 (1982).

6. The process of building a belief-structure is termed "reification." *See generally* 3 P. GABEL, REIFICATION IN LEGAL REASONING, RESEARCH IN LAW AND SOCIOLOGY (1980).

7. For this orthodox view, Rabinowitz relies in part on a militant lawyer's writings in LAW AGAINST THE PEOPLE (G. Lefcourt ed. 1971).

8. *See* Furman v. Georgia, 408 U.S. 238 (1972) (capital punishment held unconstitutional in 41 states); Miranda v. Arizona, 384 U.S. 436 (1966) (persons in custody must be advised of rights); Gideon v. Wainwright, 372 U.S. 335 (1963) (those charged with serious crimes are entitled to a lawyer); Mapp v. Ohio, 367 U.S. 643 (1961) (illegally seized evidence inadmissible in court).

state of labor unions, and the progress in the struggle for the rights of minorities. In these areas he claims there is little support for the allegation that the purpose of these changes was to better the capitalist system. Instead he claims that the law develops a life of its own, independent of capitalism, due to the pressure of the people for a more bearable existence. Although the legal system will strengthen class relations and mask injustices to some extent, Rabinowitz's solution is to use the law as a vehicle to force the state to keep its promises to the people.

The authors contributing to this collection of essays develop a coherent critique of our legal system. They demonstrate a thorough knowledge of the development of our legal system as well as the substantive fields discussed. Their formulation of an alternative theory is not as thorough nor as coherent as the critiques they develop. Although *The Politics of Law: A Progressive Critique* may not have a clear solution to the problems facing our legal system, it will raise questions in the minds of today's lawyers and create an awareness of the problems facing the system in which they must function.