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Constitutional Law as Moral Philosophy

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BOOKS

CONSTITUTIONAL LAW AS MORAL PHILOSOPHY

THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS. By Michael J. Perry. New Haven and London: Yale University Press, 1982. Pp. xi, 241. $24.00

*Reviewed by Gerard E. Lynch**

The seemingly inexhaustible debate over the proper role of the Supreme Court in constitutional adjudication concerns an issue of enormous practical importance: whether the Court has or should have the power to overturn the decision of a democratically elected legislature to, say, prohibit abortions, affects not only the allocation of significant political power, but also the moral lives and indeed the very bodies of millions of citizens. For this reason, many contributions to that debate, from academics as well as from practicing politicians, have burned with the passion of political commitment, seeking to influence events directly by persuading judges (or those who might have power to constrain them) to adopt particular policies.

Michael Perry's *The Constitution, the Courts, and Human Rights* is not such a book. I don't mean that Perry lacks political commitment, or does not sincerely wish that the courts would adopt the program he proposes. But both his substantive conclusions and his writing style suggest not only that the book is not directly addressed to an audience of judges and legislators, but also that his project is fundamentally detached from what political institutions actually do. Perry brings to his book a thoughtful intelligence and a comprehensive knowledge of the academic literature on the questions he addresses, and he has much to say that is interesting and valuable. But I think that few will find his conclusions satisfying as a program for the Supreme Court to follow.

I.

Perry's purpose is to consider (and, ultimately, to defend) "the legitimacy of constitutional policymaking (by the judiciary) that goes *beyond* the value judgments established by the framers of the written Constitution" (p. ix). To Perry, both *Brown v. Board of Education*[1] and *Roe v. Wade*[2] are examples of such extraconstitutional policymaking because "neither ruling . . . was really the outcome of 'interpretation' or 'application' of any value

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1. 347 U.S. 483 (1954).

2. 410 U.S. 113 (1973).

judgment made by the framers and embodied by them in the Constitution. In each case the Court's ruling represented the Court's own value judgment" (p. 1). The choice of examples prefigures the course of Perry's argument: Perry wants ultimately to claim that *Roe* is no less legitimate than *Brown*. His strategy is first to attack any theory of adjudication that would defend *Brown* by linking it to some source of constitutional authority other than the Supreme Court's own moral reasoning, and then to rehabilitate *Brown* by legitimating the Court's imposition of its own values in human rights cases, including, of course, the abortion cases. Perry rightly assumes that we will not give up *Brown* (p. 167 n.8). By tying *Brown* and *Roe* to each other and insisting that both sink or swim together, Perry invites us to a radical conception of judicial review.

Perry begins by setting the classic problem of the legitimacy of judicial review. The problem is that the institution of judicial review is "at least in serious tension" with the principle that "governmental policymaking . . . ought to be subject to control by persons accountable to the electorate" (p. 9). And of the two, the latter is primary: "In our political culture, the principle of electorally accountable policymaking is axiomatic; it is judicial review, not that principle, that requires justification" (id.) (footnote omitted).

One sort of judicial review is easily justified. Besides "the principle of electorally accountable policymaking," "[w]e are committed as well to the principle that [such] policymaking is constrained by the value judgments in the constitutional text" (p. 12). This interpretive review, however, is very narrowly conceived. First of all, the task of the interpreter of the constitutional text is "to ascertain, as accurately as available historical materials will permit, the character of a value judgment the framers constitutionalized at some point in the past" (p. 11). Perry, like Raoul Berger, denies the independence of the constitutional text from its historical context. The text merely evidences the intentions of the framers; the mind of the lawgiver, rather than the enacted text, is controlling.

Moreover, Perry rejects as sophistic efforts like those of Ronald Dworkin to distinguish between the broader and narrower intentions of the framers of a constitutional provision, so as to give primacy to a broad "concept" over the particular "conception."[3] When the framers enshrined "equal protection of the laws," the value judgment they embodied in the Constitution was not some general idea of equality whose precise contours were left open for future generations to define and redefine. Rather, Perry asserts, the content of the value judgment they intended to constitutionalize is nothing more than the sum of the prohibitions of practices they themselves viewed as inconsistent with the proposed amendment. If, for example, they did not specifically intend to prohibit segregated public schools, then it cannot be said that segregated public schools are inconsistent with the value judgment they consti-

3. See infra text accompanying notes 7–9.

tutionalized (pp. 68–75).[4] Any judicial review that looks beyond such original expectations is classified by Perry as noninterpretive, for it does not consist of interpreting and applying the specific value judgments of the framers.[5]

Interpretive review, then, is justified by first principles. We expect our political decisionmakers to be constrained by constitutional value judgments, and in designing the Constitution as fundamental law, the framers obviously intended their value judgments to be enforced. Noninterpretive judicial review, on the other hand, cannot be so justified. Therefore,

> [t]he justification for the practice, if there is one, must be functional: If noninterpretive review serves a crucial governmental function that no other practice realistically can be expected to serve, and if it serves that function in a manner that somehow accommodates the principle of electorally accountable policymaking, then that function constitutes the justification for noninterpretive review. (P. 24).

No such functional justification exists, according to Perry, for noninterpretive review in most cases raising questions of federalism and separation of powers. Where the courts act to protect unexercised congressional power against encroachment by the states, they may go beyond explicit constitutional value judgments, but, being subject to congressional reversal, they are simply engaged in ordinary interstitial judicial lawmaking, and not the sort of judicial review that raises problems of electoral accountability. And where federal legislation encroaches on the states, Wechsler's "political safeguards" make it unnecessary for the Supreme Court to defend federalism (except to the extent

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4. One important qualification to this principle is that certain practices could not have been present to the minds of the framers. Thus, the interpretivist "need not oppose Supreme Court decisions subjecting wiretaps and electronic surveillance to the same fourth amendment standards as physical 'searches and seizures,'" (p. 33) for although these wonders of modern technology were not within the contemplation of the framers, they are (arguably) "different in no significant respect from those the framers banned" (p. 32 (footnote omitted)). But segregation and miscegenation are different: "those practices were present to the minds of the framers but the framers chose not to ban them" (p. 33). As we will see below, however, this distinction is more slippery than Perry seems to think. See infra notes 28–29 and accompanying text.

5. Central to Perry's conclusion is his explicit endorsement of what I have elsewhere called the historian's view of what it means to interpret a document. See Lynch, Book Review, 63 Cornell L. Rev. 1091, 1095–96 (1978). Thus, Perry insists that the key to interpreting the 14th amendment is an understanding of the period in which it was written. In support of this view, Perry cites Garry Wills's observation that we must guard against reading Jefferson as "'our contemporary,'" for to understand what he meant we must "'forget what we learned . . . in the interval between our time and the text's,'" and "'resurrect beliefs now discarded'" (p. 62) (quoting G. Wills, Inventing America 259 (1978)). Although Perry mentions that Wills's comment was made "in a different context," (p. 61) he does not seem to see that the context makes all the difference. Even if Wills is right about what we must attempt in order to understand, as a matter of history, what Jefferson thought and why, it seems to me a profound mistake about the purposes of law to insist that we read the Constitution that continues to order our society today in terms of "beliefs now discarded." See infra text accompanying note 30.

that the legislation offends a specific constitutional command).[6] Noninterpretive review only has a role in cases involving government structure or the allocation of lawmaking authority, Perry contends, where the federal executive is pitted against the legislature. In such cases, the Court, as umpire, must break the deadlock, whether or not Perry's interpretivism yields a clear answer. Here, however, Perry argues that noninterpretivism is not inconsistent with electoral accountability, since the outcome will be one favored by at least one accountable branch of government (pp. 37–60).

But these are mere preliminaries. Perry's principal concern is with noninterpretive review in human rights cases. In this area, he proposes a novel theory of review, which he justifies by posing a dilemma that, he claims, no previous theory of judicial review adequately resolves.

Perry first seeks to demonstrate that interpretive review cannot justify the vast majority of recent constitutional decisions, most of which Perry finds politically desirable. For example, in Perry's view, any judicial review of state legislation inhibiting free expression cannot be justified on interpretivist principles, since the framers of the fourteenth amendment did not, as a matter of historical fact, intend to make the first amendment applicable to the states. Moreover, very little of the first amendment doctrine now held to limit state action is in any case the product of interpretive review, because it was not the intention of the framers of the first amendment to put subversion and defamation, for example, beyond the reach of the legislature (pp. 63–64). If we want to have the federal courts protect us from a state law jailing anyone who teaches evolution or Marxism, we must be noninterpretivists.

This difficulty cannot be escaped, Perry insists, by what was once called "loose constructionism." It won't do for Bork to argue that the whole Constitution establishes a system of "representative democracy," to which constitutional protection for political expression is necessarily incident.[7] The framers did not constitutionalize any such broad idea; all they actually wrote into the Constitution was a very limited protection against federal action abridging certain particular liberties of expression (as they narrowly understood them) (pp. 65–66). Nor can Dworkin help us with his notion of "concepts" and "conceptions."[8] The historical evidence does not permit a conclusion that the framers of the fourteenth amendment constitutionalized whatever courts or philosophers would ultimately conclude equality means; they constitutionalized only civil equality as they understood it (pp. 70–75). Finally, we cannot, with Ely, cabin noninterpretivism into our favorite constitutional areas.[9] We must swallow the whole hog, substantive due process and all, for Americans have no stronger consensus about process and participa-

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6. See Wechsler, The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government, 54 Colum. L. Rev. 543 (1954).

7. See Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 26 (1971).

8. See R. Dworkin, Taking Rights Seriously 132–37 (1977).

9. See J. Ely, Democracy and Distrust: A Theory of Judicial Review 73–104 (1980).

tion—and certainly not about the precise policy requirements of whatever consensus there may be that process should be fair and political participation open—than about substantive liberties (pp. 76-90).[10]

Thus far, Perry's arguments essentially parallel the originalist interpretivism of Raoul Berger: most of our current constitutional law goes beyond the limits of constitutional interpretation, and we cannot easily confine noninterpretive review to areas like free speech and equal protection where it has yielded desirable outcomes.[11] Faced with the choice between freewheeling judicial constitution-making and jettisoning *Brown*, the two part company. While Berger throws out the baby,[12] Perry keeps the bathwater. After a quick rehash of reasons why tradition, consensus, and neutral principles cannot serve as acceptable sources of constitutional values (pp. 91-96), Perry proceeds to articulate a theory justifying judges in writing their own systems of moral philosophy into the Constitution.

The theory is a curious one. Although Perry explicitly rejects the idea that Americans hold "any traditional or consensual values . . . sufficiently determinate to be of use to the Court in resolving particular human rights conflicts" (p. 96), he draws significant support for his conclusions from a very particular reading of the ideology he finds immanent in the American tradition. Thus, he is able to identify "a particular conception of the American polity that seems to constitute a basic, irreducible feature of the American people's understanding of themselves" (p. 97). This conception, according to Perry, is that Americans believe ourselves a "chosen" people (id.), with the responsibility to realize and to exemplify to the world a higher moral law, especially in regard to human rights. Moreover, Americans are aware that, like an earlier chosen people, we will collectively fail, from time to time, to live up to this high calling, as we struggle to achieve an "evolving, deepening moral understanding." The function of calling us to this deeper understanding, by conducting an ongoing moral dialogue—the function of "prophecy"—Perry would locate in the Supreme Court (pp. 97-100).[13]

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10. Perry sees Ely's emphasis on process and participation as derived from consensus (p. 79), although he acknowledges that Ely's argument may more naturally be read as being based on the text and structure of the Constitution itself (p. 202 n.105). The difference is immaterial for present purposes, however, since the text of the constitution also offers no real support for Ely's sharp distinction between process/participation and substance, and surely provides no usable guidelines for applying such a distinction to particular cases. See Lynch, Book Review, 80 Colum. L. Rev. 857, 860-62 (1980).

11. See R. Berger, Government by Judiciary 407-18 (1977).

12. Although Berger is quite clear in *Government by Judiciary* that he would not overrule *Brown v. Board of Education*, id. at 412-13—a position Perry rightly considers a "failure of nerve" (pp. 67-68)—he has recently eliminated this inconsistency in his position, in a reply to my review, Lynch, supra note 5. See Berger, A Study of Youthful Omniscience: Gerald [sic] Lynch on Judicial Review, 36 Ark. L. Rev. 215, 217 (1982).

13. Perry identifies this conception of the American enterprise as "religious," although he stipulates that he uses the word "in its etymological sense, to refer to a binding vision—a vision that serves as a source of unalienated self-understanding, of 'meaning' in the sense of existential orientation or rootedness" (p. 97). Like Philip Bobbitt, who advances a mode of reasoning he

Having advanced this interesting notion, Perry quickly scrambles back to more conventional ground, asserting that his justification for noninterpretive review is functional and distinct from his understanding of the American civil religion (pp. 99–100). The justification is not unfamiliar, resting as it does on the idea that the Court is institutionally better adapted than the elective branches of government to cope with moral issues, although its precise formulation here is keyed to Perry's religious theory. Many political issues are charged with fundamental moral content, but "[o]ur electorally accountable policymaking institutions are not well suited to deal with such issues in a way that is faithful to the notion of moral evolution or, therefore, with our religious understanding of ourselves" (p. 100). The basic function of noninterpretive review is to remedy this gap by grappling with political issues raising moral problems, "not simply by invoking established moral conventions but by seizing such issues as opportunities for moral reevaluation and possible moral growth" (p. 101). Thus, the Court can help us accommodate our commitment to majoritarian policymaking with our religious commitment to "the possibility that there may indeed be right answers—*discoverable* right answers—to fundamental political-moral problems" (p. 102).[14] Not that the Court will inevitably find the right answers, but the country is better off for having an institution that can at least temporarily check the majority's reactions and force it to engage in a moral dialogue before having its way.

Noninterpretive review is ultimately supportable, then, because the answers to moral-political questions that we collectively arrive at after a dialectical interaction between the majoritarian political branches of government and a Supreme Court that is (in the short run) politically unaccountable are "more likely to be morally correct than are established but untested, unreflective moral conventions" (p. 111). But if this morally creative dialogue is to work, the "determinative decisional norms" must be not value judgments constitutionalized by the framers, but "the value judgments of the individual justices, judgments reached in their search for right answers" (p. 119). Not only should the justices rely exclusively on their own consciences in deciding the moral acceptability of policies adopted by majoritarian institutions, they should say

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wishes to call "ethical," also in an "etymological" sense, see P. Bobbitt, Constitutional Fate 94, 140–41, 163 (1982), Perry wants both to trade on the connotations of the word and at the same time somehow to distance himself from it. Cf. Farber, Book Review, 67 Minn. L. Rev. 1328–32 (1983) (discussing Bobbitt). The disclaimer is unnecessary as well as confusing. Perry's imagery in this section of the book is straightforwardly religious, in only a slightly extended or metaphorical sense.

14. While the last clause is put in the subjunctive, the argument really requires that right answers be more than a "possibility," as Perry acknowledges elsewhere (p. x). Indeed, Perry argues at considerable length that the "interpretivism" of such thinkers as Bork and Rehnquist is "rooted in a deep moral skepticism" (p. 103), which he contends is not only wrong but "fundamentally at odds with our understanding of ourselves as people committed to ongoing moral reevaluation and moral growth" (p. 106). Thus, despite his disavowal, Perry's justification for judicial review does lean significantly on his description of the American "religion," and on the philosophical claim that discoverable right answers to moral questions exist.

so: the Court should be candid in announcing that it is striking down such policies on the basis of its own developing doctrine, and not in the name of value judgments derived from the Constitution (pp. 139–44).[15]

All that remains for Perry is to square this conception of judicial review with his initial axiom of electorally accountable decisionmaking. This harmony is essential, for, to Perry, the demonstration that noninterpretive review is "salutary" is only necessary, and not sufficient, for its justification (p. 125). According to Perry, freewheeling judicial review of the sort he proposes is not inconsistent with the axiom of political control, because Congress has full power to limit the courts' policymaking by limiting their agenda under the power given by article III of the Constitution to make exceptions to the Supreme Court's jurisdiction and to regulate inferior federal courts (p. 128). This power is effective, for the courts' precedents will be without force in the absence of the power to decide future cases in accordance with them.[16] It is practicable, for the rarity of its exercise bespeaks congressional approval of the courts' decisions rather than any lack of capacity to act on rejection of them. And it is constitutional, for it is explicity confcrred by the language of article 1II (pp. 128–35).[17] Thus, the bold power to conduct moral dialogue, assigned by Perry to the Court, is not finally unaccountable, because it is subject to the full and immediate control of the political branches of government, should they choose to exercise it.

II.

I do not find Perry's argument very persuasive. First, I believe he exaggerates the difficulty of legitimating judicial review with respect to both the theoretical problem of countermajoritarianism and the practical consequences of creative interpretation. Second, 1 do not believe he has demonstrated that

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15. "Perry would permit" continued use of the "linguistic convention" by which such policies are called "unconstitutional," so long as the Court is "candidly clear" that the word is used as a convention (p. 143 n.*).

16. Perry acknowledges that Congress has no such jurisdictional control over state courts, but he fails to address how to stop state courts from following the federal precedents that Congress has tried to eviscerate. He notes that most state judges are electorally accountable and that "even if they are not electorally accountable, presumably the state legislature has power over the jurisdiction of the state judiciary analogous to Congress's power over the jurisdiction of the federal judiciary" (p. 131). The first argument fails to recognize that under the supremacy clause the state courts must follow the federal precedent. And the second fails to address the argument that it is unconstitutional for state legislatures to eliminate state courts' jurisdiction concerning federal constitutional claims, particularly where no other forum is open. See Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1401 (1953).

17. Perry also finds his theory consistent with Henry Hart's proposition that "the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan," Hart, supra note 16, at 1365, because Perry does not permit Congress to interfere with *interpretive* review, which is, after all, the only review that the framers presumably would have considered part of the Court's essential role. In other words, the jurisdiction-limiting power is the remedy for unaccountable noninterpretive review only.

his program of wide-open noninterpretivism would be either beneficial in practice or consistent with electoral accountability.

First, then, the diagnosis. Perry is solidly in the mainstream of constitutional theory in positing the tension between majoritarianism and judicial review as a central problem; his statement is derived essentially from Alexander Bickel.[18] Unexceptionable though its parentage may be, however, the claim that electorally accountable decisionmaking is an axiom against which judicial review must be cautiously measured deserves a closer look than Perry gives it. Why is Perry, who is quick to deny that consensus or tradition can yield values that are "sufficiently determinate" (p. 96) to provide much help to the Court in deciding concrete cases (pp. 96-97), so confident that the American tradition includes consensus on a principle of electoral accountability that is "sufficiently determinate" to provide much guidance about which kinds of judicial review are legitimate?

I certainly don't mean to deny that, as Ely puts it, "We have as a society from the beginning, and now almost instinctively, accepted the notion that a representative democracy must be our form of government."[19] If there is anything about which there exists a genuine consensus, it is that our governmental institutions must be republican in form.[20] But there is something of a leap in proceeding from this premise to the conclusion that there is a strong presumption against according any kind of policymaking power to an institution that is not in the very short run responsive to electoral politics. As Eugene Rostow pointed out in a remark quoted with approval by Perry in another context (p. 112), "Popular sovereignty is a more subtle idea than the phrase 'majority rule' sometimes implies."[21] Whatever consensus there may be about the idea of popular sovereignty does not necessarily or automatically translate into unanimous agreement that life appointment to the federal judiciary disqualifies one from any but the narrowest role in policymaking.

Indeed, there is more than a little paradox in asserting basic consensus about a principle that renders presumptively illegitimate an institution that has become an established (and distinctively American) institution of republican government. While Perry is dubious about whether "the polity as a whole [could] have consented to a mode of judicial review with which many of its members were not even familiar" (p. 126), it does not seem strained to conceive of the public as having broadly consented to the growth of institutions, such as an activist Court and an activist President, that are not part of

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18. See A. Bickel, The Least Dangerous Branch 16-28 (1962).

19. J. Ely, supra note 9, at 5.

20. Indeed, one need not look outside the constitutional text to establish the proposition. The Constitution sets up a federal government that is manifestly republican in structure, and guarantees the same to every state. U.S. Const. art. IV, § 4.

21. Rostow, The Supreme Court and the People's Will, 33 Notre Dame Law. 573, 576 (1958).

the original constitutional apparatus but have grown to occupy central and generally accepted roles in our structure of government.[22]

All of this is not to argue that whatever is, is legitimate.[23] My intention, rather, is to call attention to a central feature of Perry's argument. From the very first page, Perry exaggerates the difficulties in justifying any sort of judicial review beyond the narrowest possible originalist interpretivism. The utility of this exaggeration for Perry's position is obvious: in order to justify a theory of judicial review far more radical and unconstrained than any previously put forth, Perry must begin by making more moderate claims seem as dubious as his own.

Perry's subsequent rejection of interpretivism shows this strategy still more clearly. The interpretivism that Perry derides is a straw man. It is not the case that an intelligent interpretivist cannot reach results such as that in *Brown v. Board of Education*, or that, in order to defend such results, we must free judges from any constraints imposed by the constitutional text. Perry allows no place for theories of interpretation more plausible than originalism and less radical than his own noninterpretivism.

As noted above, Perry would accept as legitimate constitutional interpretation only the application of value judgments demonstrably present in the minds of the framers, and specifically intended by them to be covered by the textual formulation they chose.[24] But law is not determined solely by the intentions of drafters. While Perry criticizes those who would take a broad view of the framers' intent, he does not adequately defend his basic assumption that intention must be controlling.

Perry misunderstands constitutional interpretation in two ways. First, in giving determinative force to the framers' intent, Perry gives insufficient weight to the independent significance of the text itself. Even leaving to one side the practical difficulties associated with identifying what, if anything, "the framers" collectively can be held to have intended,[25] it is the text itself that embodies and defines what has been agreed upon. What survived the rigorous ratification process to become fundamental law, after all, was not what Madison or Bingham believed in his heart, or even what they said on the floor of the Convention or the House, but rather what was contained in the text of the ratified provision. Thus, the text is not merely evidence from which the mind of the (perhaps partly mythological) lawgiver should be deduced; rather, the text is the definitive expression of what was legislated.

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22. The growth of activist judicial review, after all, has not taken place in secret. The Supreme Court's role has been the topic of sustained public and academic debate and the target of specific efforts at political control throughout the Warren and Burger periods.

23. Reality does have its claims, however. When an institution has thrived despite generations of academic debate over its legitimacy and the particular political debates of the last 30 years, the proposition that the institution is at bottom incompatible, or even "in serious tension" (p. 9), with the fundamental axioms of the polity, begins to look overdrawn.

24. See supra notes 3–5 and accompanying text.

25. For a useful discussion, see P. Brest, Processes of Constitutional Decisionmaking 139–45 (1st ed. 1975).

If the text is critical, however, the nature of its language must be respected. Thus, in rejecting Dworkin's argument about "concepts" and "conceptions" on the ground that there is no historical evidence to support the belief that the framers of, say, the fourteenth amendment intended to constitutionalize broad concepts subject to later elaboration (pp. 70–73), Perry misunderstands the claim.[26] The point is not that the framers of particular constitutional provisions consciously intended to leave particular questions of interpretation open for future development by the courts. Rather, it is that by the nature of its language, legislation in general terms (for example, a requirement that states accord to persons within their borders the "equal protection of the laws") creates a different rule than legislation listing certain particular practices that the states are prohibited from adopting. Moreover, in the case of a constitution, the use of general language is dictated both by the fact that the text represents the consensus of an entire society, not all of whose members will necessarily agree on the precise scope of the provision, and by the fact that, if the Constitution is to survive, it must continue to command such assent when applied to situations unforeseen by the framers.[27] It does not matter whether or not some draftsman of Dworkinian sophistication left historical evidence that he intended to see public school segregation declared unconstitutional if at some future date it became clear that it was within the scope of the principle he was voting to constitutionalize. If the text of the Constitution is to be taken seriously, the use of general rather than specific commands can be understood in no other way.

Second, Perry undervalues the role of the reader in giving authority and meaning to legal texts. The Constitution continues to have force because it continues to command the assent of today's Americans, and it commands that assent because Americans continue to believe that the Constitution embodies the basic and enduring values of our society. It is the task of our political institutions (including the Supreme Court), which have been entrusted with

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26. I think that Perry is misled by Dworkin's rhetorical device of putting words into the mouths of hypothetical framers. See, e.g., Dworkin, The Forum of Principle, 56 N.Y.U. L. Rev. 469, 486–87 (1981) (quoted at length by Perry at p. 73). Of course the validity of my point is unaffected by whether or not I read Dworkin correctly.

27. Perry acknowledges that the Constitution covers at least some cases analogous to ones specifically intended to be covered but not yet within the framers' contemplation. See infra notes 28–29 and accompanying text. The courts, too, have always understood this. In one classic statement:

> Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it."

Weems v. United States, 217 U.S. 349, 373 (1910) (quoting Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 387 (1821)).

the responsibility for defining our collective aspirations, to read constitutional provisions in light of what they understand those basic and enduring values to be.

The need for ongoing definiton of constitutional values is shown by the failure of originalism to solve the problems posed by application of constitutional language to new technologies. Perry attempts to distinguish between practices unforeseen by the framers and those that existed when a provision was drafted but that the framers apparently believed would not be prohibited by their language. Perry grants that a modern technological development like wiretapping could be held subject to the same limitations imposed on physical searches and seizures by the framers of the fourth amendment, because the new developments are "different in no significant respect" from practices the framers directly addressed.[28] But he offers no explanation of how the new technique is determined to be similar to the old, prohibited practice. The conclusion cannot rest on original intent. An inquiry into whether the drafters—let alone the ratifiers—of the fourth amendment would have considered the electronic interception of telephone signals to be similar to a writ of assistance, if only they had known about the role of telephonic communication in modern society is a manifest absurdity: to give Madison enough information about contemporary society and technology to answer the question intelligently would be to transform him from Madison the framer to Madison our contemporary and thus to deprive him of the ability to speak to the framers' intent.

New technological developments cannot be so readily distinguished from old practices, known to the framers, newly understood in the light of social developments to be at variance with values announced in the Constitution. Assume we conclude, by whatever reasoning permits a finding of similarity between wiretapping and conventional searches, that racially segregated public education is also "different in no significant respect from [racial discriminations] the framers banned" (pp. 32–33). Does it make sense to hold that the framers intended, given their adoption of general language in preference to a specific listing of prohibitions, to ban certain inequalities but not others that are indistinguishable? If the framers of the fourteenth amendment intended such arbitrary results, what justifies our confidence that the framers of the fourth amendment, had they considered the issue, would not have chosen (due to different notions of what is a morally relevant distinction or mere ignorance or whim) to draw the line at physical intrusions, rather than extending protection to incorporeal invasions of privacy?[29]

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28. See supra note 4. Raoul Berger uses the wiretap example in a manner similar to Perry's. R. Berger, Death Penalties 72–73 (1982). Since the following paragraphs were written, I have come upon Stephen Gillers's response to Berger's concession in terms similar to my own. Gillers, Book Review, 92 Yale L.J. 731, 744–47 (1983).

29. Indeed, for a long time the Supreme Court understood them to have intended exactly this result. See Goldman v. United States, 316 U.S. 129 (1942); Olmstead v. United States, 277 U.S. 438 (1928); cf. Katz v. United States, 389 U.S. 347, 353 (1967) (overruling *Goldman* and *Olmstead*).

It makes no more sense to hold that the framers of the fourth amendment intended to require a warrant for electronic eavesdropping, or that they intended to enuciate a broad principle of privacy that would justify such a requirement, than it does to hold that the framers of the fourteenth amendment intended to require integrated public schools, or that they intended to enuciate a broad principle of equality that would justify judicially mandated integrated education. But whatever the framers thought or failed to think about such specific issues, the Constitution guarantees the "right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures," and if this language is to be taken today as representing a fundamental value of our society, we cannot but hold that the Constitution provides the same protection against electronic as against physical "searches." This conclusion rests not on imputed intent, but on our own understanding of the requirements of the values *we* find explanatory of the constitutional text. By the same token, we cannot be bound by distinctions that appeared defensible in the 1860's but that now appear impossible to support; if we are to avoid an Orwellian debasement of public language, we cannot read a Constitution that promises "equal protection of the laws" to tolerate blatantly unequal treatment on the ground that one hundred years ago, "equal" did not mean what it means now.

Of course, legislative history is not totally irrelevant. Our understanding of the Constitution is in part constructed from our reading of the major political struggles that have formed our system of govcrnment. Thus, there is much to learn from examining what was thought to be at stake during debates over the Constitution. My point is only that the understanding of the framers concerning the resolution of particular controversies that might arise under the provisions they proposed do not have controlling wcight.

Perry is wrong, then, that in order to save *Brown* we must abandon interpretation. A theory of interpretation that permits the courts to interpret the text in light of their best understanding of enduring American values both reflected and shaped by the constitutional language would have no trouble reaching most of the results that Perry finds desirable.[30] Such a theory is indeed one of interpretation. As Perry agrees, officially mandated racial segregation in public education is inconsistent with any coherent meaning that our society could give to the requirement that states not deny their inhabitants "equal protection of the laws." To give the phrase a coherent content fully consistent with our current national values is "interpretation," in a more meaningful and legitimate sense than to give it an indefensible meaning that (some of) its framers believed it had, but chose not to incorporate explicitly.

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30. Like Perry (pp. 118–19), I of course do not mean by this that I approve of each and every one of the results in question, only that interpretive arguments for such results could be framed, and that most of the activist human rights jurisprudence of the past thirty years can be satisfactorily justified in those terms.

III.

But if Perry's diagnosis is faulty, what of his prescription? After all, Perry's defense of noninterpretivism is ultimately a functional one, resting on the claim that we would be better off to adopt his principles, since the courts are well adapted to perform a vital governmental function that otherwise would not be served. Even if Perry exaggerates the consequences of sticking with constitutional interpretation, is he nevertheless correct that we would do better to assign the Supreme Court justices the function of prophets calling us to moral judgment, rather than of Talmudists creatively interpreting sacred texts?

Let me begin by saying that there is a good deal of truth in Perry's functional analysis of the Supreme Court's role. The Court, because it is free of immediate political pressures of the sort that press on those who must face the voters, is better placed to decide whether a proposed course of action that meets short-term political objectives is consistent with the fundamental moral values to which our society considers itself pledged. And Perry is right that this view does not depend on the Court always reaching the right conclusion: court-pronounced values that do not correspond to society's own evolving notions of its basic values will not survive, for the Court is in the long run a reflection of the politically dominant forces in society. But, as noted below, the ultimate resolution of a political issue is more likely to reflect a considered judgment about a policy's long-run wisdom, and its consistency with fundamental constitutional norms, if the Court can require a principled defense of the majority's policy choice and reject those choices that do not correspond to arguably established norms.

But the question is whether anything does or should restrict the Court in pronouncing such norms. Perry seems to think we are better off with a Court that views itself as teaching a continuing national seminar not in law or American values, but in moral philosophy. This view conflates two categories that ought to be kept separate. Law, even constitutional law, is not a branch of moral philosophy. When we say that a given policy is unconstitutional, I do not think we mean it is morally wrong, but that it contravenes some accepted standard of our culture. It is perfectly possible for a judge to conclude that slavery, abortion, or vivisection are morally indefensible practices, and yet to conclude that any one of them is not inconsistent with the fundamental values of his society as they have thus far developed.

Perry might well reply that he does not misunderstand that distinction, but that he intends to collapse it. That is, Perry is not asserting that immorality is analytically the same as unconstitutionality, but merely that we ought to adopt a rule permitting the Supreme Court to enforce as constitutional norms whatever principles it finds to be required by moral inquiry, at least in human rights cases. Still, the fact that our language has resolutely kept morality and unconstitutionality separate suggests that they serve separate functions, and that their confusion might have practical disadvantages.

And indeed it would. Although Perry believes that there are right answers to political-moral questions (p. 110), he implicitly acknowledges, as he must,

that such answers are not generally agreed upon, or readily accessible. (Indeed, the very claim that right answers exist is controversial.) Accordingly, in answering such questions, judges will be relying on their own individual value judgments, reached through their own moral reasoning (p. 119). There is no requirement that their answers have any general acceptability in society at all: Perry's noninterpretivist judges would have been licensed, if abolitionists, to find slavery unconstitutional even before the Civil War; if Roman Catholics, to have outlawed state policies permitting abortions; if utilitarians of a certain stripe, to abolish animal experimentation and meat-eating.[31]

I am not arguing that Perry's theory of constitutional adjudication is bad because Supreme Court majorities might reach such controversial or even idiosyneratic results. As Perry correctly notes, it would be unlikely, "as a descriptive matter," that such positions would carry the day, since most judges' moral viewpoints would "inevitably [be] rooted in the larger, pluralistic moral culture that has been formative for each of the justices" (p. 119). But Perry would have no objection in principle to judges voting as I suggest. To me, such votes would be not only wrong, but also ineffective in advancing the function Perry assigns to the courts.

Perry's expectation that Supreme Court activism will contribute to the better resolution of political-moral questions is rooted in two ideas. First, although it is not necessarily the case that the Court will *always* reach more nearly correet answers than the eleetive branehes of Government, it seems plausible that the Court is more likely, because of its insulation from immediate political pressures, to engage in detached reflection. Second, the Court's decisions, right or wrong, will stimulate better ultimate choices, because of their tendency to require the polity to think again about whether it really does wish to pursue policies rejected by the Court.

But neither of these claims has force when the Court speaks through the medium of moral philosophy. First, there is little reason to expect judges to be more likely than legislators to reach correct answers to moral questions. After all, judges possess no particular training or expertise that gives them better insight than other citizens into whether abortion is a fundamental right or an inexcusable wrong. Disinterestedness alone does not determine success in intellectual endeavor: the Supreme Court's freedom from politieal pressure and opportunity for calm reflection apparently have not been satisfactory substitutes, in resolving antitrust issues, for a sophisticated understanding of economics. Judges are, however, posessed of special training and experience in deriving principles from a body of legal material. Sifting a mass of past constitutional choices (including the selection of constitutional language, judicial decisions, and formative legislative and electoral outcomes) for immanent

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31. Objection to the last two examples on the grounds that Perry limits the scope of his noninterpretivism to "human" rights (p. 2 n.†) would hardly qualify as principled in the eyes of the posited judges. See Pope Paul VI, Humanae Vitae *in* 13 Pope Speaks 305-16 (1969) (arguing that fetuses are human); P. Singer, Practical Ethics 48-71 (1979) (arguing for extension of moral principle of equity to treatment of animals).

values is a problematic exercise, and one undoubtedly heavily influenced by the political philosophy of the judge conducting it, but such sifting is at least the intellectual discipline in which the judge is proficient. In short, the Court is more likely to find correct answers to questions like, "Is the prohibition of abortion consistent with a value of individual automony instinct within our institutions?" than to questions like, "Under what circumstances, if any, is the act of abortion morally justified?" The former question may be easy (as it would be if a "human life amendment" were added to the Constitution) or difficult (if the relevant legal materials are ambiguous and conflicting), but there is little reason to expect better results by shifting the mode of discourse from law to philosophy when the going gets rough.

Second, the dialectical process is not likely to be enhanced by such a shift. Any judicial review of morally controversial policy choices, on whatever principles it is exercised, will force a second look at policies rejected by the courts, if only by delaying their implementation until and unless the majority position demonstrates sufficient force of numbers, commitment, and durability to alter the composition of either the Constitution or the Court. But if, like Perry, we hope that this political interplay will "lead[] to a far more self-critical morality, and likely, therefore, to a more mature political morality as well" (p. 115), we must be counting in some part on the teaching function of what the Court says in provoking genuine reflection about the political-moral choices made by the majority. In my view, that teaching function is ill-served when the Court merely adopts a position on the moral question, like any other participant in the public debate, with no special claim to privileged knowledge. In such a case, the Court at best can contribute another view, perhaps better reasoned and better publicized, of the moral question that has already been discussed in the public media and the political branches of government. Particularly given the widespread belief among Americans—and especially among political and technocratic elites—that questions of moral judgment are mere matters of taste, and that all values are "subjective," the response of the voter whose policy preferences have been pronounced immoral by five members of the Court is likely to be a simple "Says you."

The teaching function is maximized, however, when the Court can plausibly maintain, using a methodology in which it can claim some special competence, that the policy choice adopted by the majoritarian branches does not represent the true commitments of society. This response is far more likely to stimulate genuine dialogue, because it evaluates policy choices on the basis of shared values rather than of moral theories that may be more controversial than the questioned choices themselves.[32]

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32. I recognize that some forms of moral philosophy, particularly some forms of pragmatism, would recommend a method of reasoning similar in many ways to the legal reasoning from shared values I outline above. But Perry's judges are free to adopt whatever method of philosophical inquiry appeals to them, and his insistence that the existence of "right answers to political-moral problems" (p. 102), is central to his scheme of judicial review suggests that pragmatism is not the mode of moral reasoning he himself would find most satisfactory.

The inability of the Court, in Perry's schcme of noninterpretive review, to say more to the majority than that it agrees with the minority on the political-moral merits brings us naturally to the last point I would make about that scheme. Having started from the proposition that a rather narrowly conceived electoral accountability is so axiomatic as to render problematic any but the narrowest form of constitutional interpretation, Perry winds up with a Court—no more electorally responsive than it was at the outset—that is free to set aside policy choices made by the accountable branches of government without reference to any externally imposed standard whenever those policy choices offend the moral convictions of a majority of the judges. One might well argue that the creative reinterpretation of constitutional texts in the light of subsequent political events or continuing political traditions (such as I have proposed) inadequately constrains the antimajoritarian actions of the Court. But, applied with any intellectual honesty, such a system plainly rules out at least some judicial outcomes.[33] By freeing judges from *any* tether to even the most general constitutional language or even the most tenuous interpretation of the American political tradition,[34] Perry dramatically expands both the range of questions that may be deemed fit subjects for judicial review,[35] and the range of answers that may legitimately be given. The power of the politically unaccountable Court is thus enormously expanded by Perry's theory.

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33. Henry Monaghan has made this point:

> Let's assume that the Constitution contains some generalities like freedom of speech . . . . Even if [a judge interpreting such provisions] has to rely on some external political theory, which can't be fairly related to or thought to underlie the constitutional text, at least the first amendment is a stopping point: it limits the subjects about which judges ought to be concerned. But take the question of abortion. There's nothing in the constitutional text or in its history or in the precedents that suggests that *this* is an appropriate area to "constitutionalize." Nor is the theory that would authorize review containable.

Commentary, *in* Symposium: Constitutional Adjudication and Democratic Theory, 56 N.Y.U. L. Rev. 525, 526 (1981) (remarks of Henry Monaghan).

34. It may be objected that Perry does not free the judiciary from *all* textual requirements; his theory permits only constitutional policymaking "that goes *beyond* the value judgments established by the framers of the written Constitution" and does not legitimate review "that goes *against* the framers' value judgements" (p. ix). But even if the latter type of "contraconstitutional" review were prohibited (a question Perry leaves open), Perry's narrow view of interprctivism guarantees that the range of judicial policymaking that would be excluded by any such stipulation is minimal.

35. It may be argued, of course, that any flexible interpretation of constitutional language to guarantee "equality" or to give substantive protection to undefined "liberty" already effects such an expansion. But the argument ignores the incrementalism imposed by a commitment to some form of interpretivism. The Court must tread somewhat carefully when it must overcome the skepticism that necessarily greets the pronouncement that broad economie rights are granted by a vague requirement of "equal protection of the laws," or that previously unperceived rights of reproductive freedom lurk in language that would appear to say only that you cannot be put in jail without fair procedure. Thus, such new areas of rights are built (or disestablished) step-by-step, as the Court slowly constructs the very consensus and tradition it may one day draw upon to consolidate a broad new right. Judges who were asked simply whether a given governmental imposition was morally right or wrong would have little place for such constraints.

Perry's answer to this problem—that the Court's jurisdiction is subject to congressional control, so that the majority could limit noninterpretive review by taking away portions of the Court's docket—is terribly weak. Even assuming that constitutional questions about the jurisdiction-limiting power are adequately answered by confining its exercise, as Perry does, to noninterpretive review,[36] Congress's power to control the Court's docket simply does not render the Court electorally accountable in any meaningful way. Removing the Court's jurisdiction to hear a category of cases is no substitute for altering the substantive rule announced by the Court to govern their disposition. Why should the majority be forced to choose between having a category of cases decided contrary to its wishes (without sanction by the Constitution) and not having any cases in that category decided at all? As a practical matter, political minorities favoring the Court's decisions would have their hands significantly strengthened by shifting the debate from the merits of the Court's decision to the wisdom of a jurisdictional limitation: they could point not only to the price that would be paid by preventing the Court from deciding certain kinds of cases but also to the offended sense of fair play when the losing side tries to change the (previously neutral) jurisdictional rules because it didn't like how the case came out.

Moreover, Perry's restriction of result-oriented jurisdiction limitation to cases of noninterpretive review raises difficult constitutional questions. Perry says that it will be easy to distinguish between interpretive and noninterpretive review, because practically every controversial constitutional decision in the modern period has been (in his view) noninterpretive (p. 130). Nothing, however, requires the Court to accept that characterization. The Court would have considerable incentive under Perry's regime to cast its decisions in interpretive terms (much as it does now), to avoid congressional response.

This is not the place to engage in a general discussion of the nature and limits of the power to restrict the Court's jurisdiction. My point is only that the existence of such power, even giving it the full theoretical scope outlined by Perry, seems a rather dubious basis for the claim that Perry's expansive conception of judicial review is consistent with electoral accountablity as Perry defines it. Perry elsewhere applies a strict standard to claims that judicial review is consistent with a commitment to democratic policymaking. For example, he dismisses rather easily the claim that the appointment process and the likely congruence between judges' values and those of other members of the governing classes will "ultimately" enable strong majorities to prevail, arguing that even limited frustration of majority will is undemocratic (pp. 126-28). Reviving a somewhat rusty and little understood power to attack the Court indirectly (at considerable cost to other majoritarian objectives) seems

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36. Perry does not comment on the possibility that Congress could overturn his whole system by passing a law prohibiting the federal courts from entertaining *any* claim that governmental action was invalid on any ground other than inconsistency with a particular value judgement embodied in the Constitution.

still less effective to "dissolve[ ] the tension" (p. 127) between majoritarian principles and judicial review.

IV.

In short, provocative as this book occasionally is, and thorough as is the author's careful reading of the cases and commentators, I find its central propositions seriously flawed. On the one hand, I think Perry is mistaken in his rejection of interpretivism, because he adopts a notion of textual interpretation that makes little sense as an account of how a court should apply old legal materials to new problems, and that surely does not reflect what the courts seem to be doing when they undertake to interpret constitutional provisions. On the other hand, his defense of noninterpretivism does not persuade me that we would gain by authorizing the Supreme Court to create a constitutional law of human rights based on the justices' own moral reasoning, unconstrained by text or tradition.

But apart from these substantive issues, Perry's book leaves me with a troubling feeling about the nature of academic writing on judicial review. Partly this is a question of style, for Perry's writing is not always easy. Clarity is too often purchased at the expense of repetitive definitions and overelaborated distinctions. The format of the book (for which his Yale editors must share the blame) hardly makes reading easier: the fairly slender text (165 pages) is salted with so many endnotes (741, covering 65 pages) and footnotes (45, some covering nearly a page) that it becomes difficult to follow both the argument in the text and the running commentary of digression, elaboration and refutation in the notes.[37] *Pace* Oscar Wilde, substance is more important than style, but the elaborate scholarly apparatus does little to make Perry's argument clearer or more persuasive, and much to deter the nonspecialist reader.

The academicism here is more than stylistic, however, as Perry gives little indication of realizing how profound a change he is proposing in the way our institutions of government function, and in the way we understand them to function. Of course, he is aware that his theory is unusual among academic theorists. At one point, Perry quotes Sam Estreicher's assessment that he stands alone in proposing constitutional adjudication "without the slightest tether to the constitutional text or the usual sources or modes of interpretation" (p. 124 n.*).[38] Perry disputes this assessment, pointing to Terence Sandalow as another to whom Estreicher's description might apply (id.).

But the constrast between Perry and Sandalow only emphasizes how radical Perry's conception of noninterpretive review is. It is true that Sanda-

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37. If there is any principle distinguishing the endnotes, many of which are long and substantive, from the footnotes, it has escaped me. And, if I may be permitted to raise a more personal quibble about format: Does every monograph on constitutional law require two epigraphs, a preface, a prologue, and an epilogue?

38. Estreicher, Platonic Guardians of Democracy: John Hart Ely's Role for the Supreme Court in the Constitution's Open Texture (Book Review), 56 N.Y.U. L. Rev. 547, 549 n.7 (1981).

low rejects the kind of interpretivism that seeks to elaborate the intentions of the framers, and even denies that the language of the Constitution imposes an intrinsic limit on our ability to create constitutional law.[39] But Sandalow begins the very essay cited by Perry by emphasizing that "[t]here is not the same freedom in construing the Constitution as in constructing a moral code."[40] Accordingly, Sandalow proceeds to elaborate two kinds of limits that Perry entirely rejects: First, the *sources* of the values Sandalow would permit to be read into the Constitution are history and consensus.[41] Second, the *method* by which these values come to be seen as fundamental is the traditional incremental method of the common law. As Sandalow emphasizes, "[t]he point is not that we should expect the historical meaning of a constitutional provision to be immediately ignored if an army of social scientists were suddenly to demonstrate that the well-being of the nation would be served thereby"[42]—or, presumably, if a gaggle of philosophers were to demonstrate that it would lead to moral growth. I take this point not merely as descriptive, but as prescriptive: legitimacy and correctness are enhanced if the judge is not free to follow his own moral philosophy wherever it leads, heedless of the "limits . . . that have developed over time in the ongoing process of valuation that occurs in the name of the Constitution";[43] rather, judges should respect those limits, in the form of conventional understandings about constitutional values embodied in precedent. Sandalow's effort is to identify constraints that prevent judges from doing what Perry wants them to do.

If Perry is alone among theorists, he is still further removed from the conventions of constitutionalism as proclaimed and practiced by the courts and the public generally. This is hardly invalidating. One would imagine, however, that such a radical theoretical overhaul would be supported by some vision of concrete benefits to be obtained from the change. What kinds of rights will be enhanced? What morally superior outcomes can be expected from this mode of interpretation? Only for a few pages (pp. 99–102)—in which, incidentally, Perry's style becomes much less academically heavy, and briefly glows with conviction—do we get more than the rather abstract claim that the courts will more likely reach morally correct answers if they are free to pursue moral questions unconstrained.[44] Putting aside doubts about

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39. Sandalow, Constitutional Interpretation, 79 Mich. L. Rev. 1033, 1054–55 (1981).

40. Id. at 1033.

41. It is implicit in Sandalow's repeated references to "current values" and the values "each generation . . . holds fundamental," see, e.g., id. at 1055, 1068, that the judge must treat as constitutional only such values as are somehow *shared*, and not whatever moral constructions he himself values. And Sandalow is explicit that while current values take precedence over traditional ones, the relevant history against which we must check our current insights includes "the entirety of our history," as well as the legislative history of particular constitutional provisions. Id. at 1071.

42. Id. at 1063. See generally id. at 1063–66.

43. Id. at 1054.

44. Perry does devote a short chapter (pp. 146–62) to the application of his theory to the practical issues of institutional-reform litigation, but this analysis is put forward simply as an

whether that is the case, the argument is somewhat bloodless; more is required before people can be expected to adopt a theory that has generally been treated as the *absurdum* to which other theories should be reduced in order to be refuted.[45] If Perry would elaborate on the brief sketch he gives of a religious polity in which a nonelected body pursued moral truth with the prophet's insistence, I suspect we would have a much more interesting (and deeply controversial) case for change.

In short, Perry does not seem to make a serious effort to persuade the reader at a political level. This may be a function of more than Perry's own predilections. Although discourse on the Supreme Court's proper function may go on forever, the real constitutional struggle is over (for the time being, at least; institutional evolution never permanently rests). The activist court, like the imperial presidency or the administrative agency, is part of the accepted framework of American government. As Anthony Lewis has recently written, summing up a book of essays on the Burger Court, the justices who might have been expected to lead the counterrevolution against the activism of the Warren Era have instead consolidated and in some ways extended the institutional aggrandizement of their predecessors. Moreover, the public and other political institutions, as well as academic legal commentators, appear to have accepted the Supreme Court's interventions into the lawmaking process as legitimate and, on the whole, worthy contributions. As Lewis concludes, "We are all activists now."[46]

If it is true that the legitimacy of activist judicial review is no longer a matter of devisive political import, the enterprise of constitutional theory may have become inevitably more scholastic. Constitutional lawyers are no longer called upon to legitimize or anathematize an institution struggling to emerge. Rather, their task is to explain and rationalize an established part of our system of governance. The question is not whether the institution is consistent with what is postulated as the fundamental principles of our political system, but what, given this as well as our other institutions, can be taken to be those principles. To the extent that the activist court is generally accepted, this kind of theorizing will have little immediate political interest; to the extent that its role in our government becomes more complicated, the theories advanced may be less than fully satisfying, and may become highly personal efforts to make sense of contradictory realities.

Still, whether or not the enterprise retains political significance or offers any prospect of a finally satisfactory intellectual resolution,[47] those of us who

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example of how his theory would work in a particular context of contemporary significance (p. 146). Perry does not attempt to argue that his constitutional theory reaches results in these cases that are both morally compelling and unavailable through other theories of interpretation.

45. See, e.g., J. Ely, supra note 9, at 44–70.

46. Lewis, Foreward, *in* The Burger Court: The Counterrevolution that Wasn't ix (V. Blasi ed. 1983).

47. See Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 Yale L.J. 1063 (1981).

puzzle over contemporary American constitutionalism must continue the effort to reconcile our preferred accounts of American values and institutions with the evidence of constitutional history in a manner sufficiently satisfying to get us through the night, and perhaps even to persuade others. Despite my many disagreements with Perry, I am grateful to him for his thoughtful and original argument. All who continue to grapple with the peculiar American institution of judicial review will profit by reading his book.

FREE SPEECH AND THE DEMISE OF THE SOAPBOX

TECHNOLOGIES OF FREEDOM. By Ithiel de Sola Pool. Cambridge, Mass.: Harvard University Press, 1983. Pp. 299. $20.00.

*Reviewed by Frederick Schauer**

Legal rules and principles commonly contain not only normative determinations about what ought or ought not happen under certain circumstances, but also background factual assumptions about the nature of the world. This dependence on empirical assumptions pervades the full variety of lawmaking. Legislation relating to driving while intoxicated, for example, assumes a causal relationship between consumption of alcohol and the incidence of automobile accidents. The common law principles governing contracts under seal presuppose that people will be especially likely to honor their contractual obligations when they have performed a particular ceremonial act.[1] And constitutional decisions often rely on express or implied empirical conclusions, such as the effect on children of segregated education,[2] or the relationship between the exclusionary rule and police practices.[3]

Although assumptions are different from assertions, the most common reason for making an assumption is still the likelihood that it accurately depicts existing reality. To the extent that the assumptions underlying legal principles reflect a false picture of the world, the value of the principles is reduced in direct proportion. In some circumstances an underlying factual assumption may be false ab initio, but much more often an initially accurate assumption becomes less so as the portion of the world it portrays is transformed. Thus, to take an example just mentioned, changes in human belief in the inherent power of ritual have decreased the plausibility of placing special faith in the ability of a seal on a contract to secure compliance.[4] Although some lag time is inevitable, society has a right to expect that the law can and will be changed to reflect a fluid reality.

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1. See 1A A. Corbin, Corbin on Contracts § 240 (1963).

2. Brown v. Board of Educ., 347 U.S. 483, 494 n.11 (1954).

3. Mapp v. Ohio, 367 U.S. 643 (1961). I do not deny that often, as perhaps in *Mapp*, the underlying empirical proposition is unnecessary to the decision. See Kamisar, Does (Did) (Should) The Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?, 16 Creighton L. Rev. 565 (1983). The same can be said in *Brown*, for the Court's virtually automatic application of *Brown* outside the context of the schools, e.g., Holmes v. City of Atlanta, 350 U.S. 879 (1955) (per curiam) (golf course), establishes that *Brown*'s normative holding can be and was freed from its empirical moorings. See Cahn, Jurisprudence, 30 N.Y.U. L. Rev. 150 (1955).

4. See 1A A. Corbin, supra note 1, § 254.

I.

In *Technologies of Freedom*, Ithiel de Sola Pool, a political scientist, has attempted to assess the extent to which the first amendment is responsive to changes in the underlying social and technological factors that determine how we communicate with each other. His thesis, briefly, is that traditional first amendment doctrines, particularly those pertaining to the coverage[5] of the first amendment, have been designed around a model in which the spoken word and the printed page comprise the primary modes of communication in the United States (pp. 11–22, 55–74). Because of the predominance of these channels of communication, we remained relatively comfortable in adopting principles that left electrical and electronic media, including not only radio and television but also telephone and telegraph, either partially or completely beyond the protection of the first amendment (pp. 75–150). But the world has changed. There is a "convergence of modes" of communication, caused by technological advances (pp. 23–42). No longer is it possible to draw a distinct line separating the print media from the electronic media. Rather, innovations like cable television, optical fiber, and electronic publishing are causing previously separate forms of communication increasingly to become part of one technologically homogeneous and consequently indistinguishable mass. Moreover, and as a result of the same technological phenomena, the traditional print media are being relegated to second-class status behind newer electronic forms of communications.[6] Because of the explosive growth in the capabilities

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5. An activity is covered by the first amendment, although not necessarily protected by it, when the regulation of that activity is measured against first amendment standards. For full elaboration of the distinction between coverage and protection, see F. Schauer, Free Speech: A Philosophical Enquiry 89–92 (1982); Schauer, Codifying the First Amendment: New York v. Ferber, 1982 Sup. Ct. Rev. 285, 302–04 [hereinafter cited as Schauer, Codifying the First Amendment]; Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand. L. Rev. 265, 267–82 (1981) [hereinafter cited as Schauer, Categories].

6.

> Networked computers will be the printing presses of the twenty-first century. If they are not free of public control, the continued application of constitutional immunities to nonelectronic mechanical presses, lecture halls, and man-carried sheets of paper may become no more than a quaint archaism, a sort of Hyde Park Corner where a few eccentrics can gather while the major policy debates take place elsewhere. (Pp. 224–25).

Pool's entirely accurate description of Hyde Park Corner is a powerful image, but it requires closer analysis. Has the mode of communication changed making Hyde Park an anachronism, or has society changed? Why is it that most of the speakers at Hyde Park Corner are crackpots and most of the listeners are tourists: Is it because Mrs. Thatcher and the leaders of the Opposition choose to carry on their debates elsewhere? If so, is that a function of the existence of the mass media? But couldn't the mass media cover debates (in the broadest sense) from Hyde Park Corner? Are the British people interested in hearing "major policy debates"? Is anyone? Wouldn't most people rather watch *Dallas*? I don't purport to have answers to any of these questions, but it is a mistake to think we can avoid them. Implicit in Pool's characterization is that somewhere a major policy debate, in some way involving the public, is taking place. I am not at all sure that such is the case. If my intuition is correct, then what does this say about the underlying theory of the first amendment, in particular the Meiklejohn, town-meeting model? See generally A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948). On these

and pervasiveness of all forms of electronic communication, Pool argues, it is becoming increasingly necessary to ensure that these forms of communication are protected by the first amendment.[7] Yet because of our traditional technological assumptions, premised on the primacy of print, much of the new technology enjoys at best only truncated first amendment protection.[8]

Pool's theme is therefore the way in which these technological changes are threatening to make the first amendment irrelevant. In order to prevent this, he maintains, the first amendment must be taken to include all of the new technology—radio, television, cable television, video displays, electronic publishing, and so on—to the same extent that the print media have traditionally been included (p. 246). Only in this way can the first amendment serve as a barrier to pervasive governmental control of the channels of communication. To Pool, this broadening of the coverage of the first amendment is the only way to preserve it from obsolescence, an obsolescence that is the inevitable by-product of refusing to change legal doctrines to keep up with a changing world.

II.

Pool's message is crucially important, and needs to be considered carefully by serious students of the first amendment.[9] It is unfortunate, therefore, that this book is likely to strike that audience as a much less serious contribution than it is. For Pool's level of sophistication and appreciation of subtlety about first amendment theory and doctrine can in no way keep pace with his technological and sociological insights. Rather, too much of this book repre-

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issues, see also Bollinger, Elitism, the Masses and the Idea of Self-Government: Ambivalence about the "Central Meaning of the First Amendment," *in* Constitutional Government in America 99 (R. Collins ed. 1980).

7. Intriguingly, the problem, if there is one, is caused only partly by the newness of the technology. Most of the problem, it seems to me, is the consequence of the very *lack* of complete novelty in the revolution in communication technology. Only because this technology, in some form or another, has been around for some time have we had occasion to contemplate regulation. And because that technology was not for most of its early years a significant part of the "marketplace of ideas," we were unconcerned with the first amendment as we contemplated various modes of regulation. But now because that same technology has advanced, making it a significant vehicle for the communication of political and other normative commentary, we find that the kind of discourse that is the focus of the first amendment is shifting into an already regulated medium. However, if political and related communication were to shift in the near future from the present fora to "splonks," there would be less of a problem. That is precisely because there is today no such thing as a splonk, and thus no mechanism for regulating them. Dealing with a clean slate would be far easier than dealing with a half century of entrenched regulation.

8. See infra text accompanying note 25.

9. Pool is not, of course, the first one to consider the first amendment implications of changes in technology. See, e.g., R. Cass, Revolution in the Wasteland: Value and Diversity in Television (1981); Bollinger, Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media, 75 Mich. L. Rev. 1 (1976); Powe, Mass Speech and the Newer First Amendment, 1982 Sup. Ct. Rev. 243.

sents a classic example of the "one more nail in the coffin of the first amendment" genre of free speech commentary. This approach, well known to readers of the editorial pages of many major newspapers,[10] sees the first amendment through one window only. Cases are either "won" or "lost," depending solely on whether the first amendment claim is or is not upheld, and the first amendment serves as a backdrop for a contemporary version of the type of medieval morality play in which good and evil were as distinguishable as night and day.[11]

Pool's book contains all of the hallmarks of the type. The reader is initially confronted by quotations on the jacket warning of "alarming" threats to the "survival of democracy," with the spectre of the "regulation of technology reach[ing] for the throat of the press."[12] Once we are inside the book itself, we realize quickly that Pool has established himself as a master of the art of appealing to baser first amendment passions.[13] All of the obligatory terminology is present. We hear of "ominous" and "alarming" "erosion" of our first amendment freedoms (pp. 1, 4, 271). Indeed, the ways in which our first amendment freedoms are "endangered" is like a "shadow" that continually "darkens" (p. 1).

Complementing the emotive language is the standard cast of characters. John Milton, Hugo Black, and William Douglas are the leaders of the good guys (pp. 3, 15, 55, 60, 61, 62, 65, 74, 80, 89, 132–34).[14] The bad guys are

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10. The phenomenon I am discussing is powerfully described in Franklin, Reflections on *Herbert v. Lando*, 31 Stan. L. Rev. 1035, 1049–58 (1979).

11. One especially disconcerting feature of this genre is the tendency to confuse one's own view of the first amendment with the strongest view of the first amendment. I may not share the first amendment vision of the access theorists, e.g., Barron, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641 (1967), but it seems to me simply wrong to suggest that their view of the first amendment is any less strong than the view of those who reject access theory.

12. The jacket quotations are by Daniel Schorr and William Safire.

13. That Pool is not a lawyer is to me quite irrelevant. This book is about *legal* regulation, about how laws and the legal system should respond to technological change. Thus the book's discussion of law, as law, cannot avoid evaluation with reference to the standards of that discipline. Sophisticated first amendment theory and doctrine are by no means inaccessible to the intelligent and educated nonlawyer. And to the extent that some, whether lawyers or not, find the complexities of first amendment theory too forbidding, there is always the alternative of remaining on the sidelines. See L. Wittgenstein, Tractatus Logico-Philosophicus § 7 (1921). But one who writes about the law cannot claim lack of formal qualifications as grounds for some special indulgence. Moreover, the implicit message of this book is that both Congress and the Supreme Court, neither extensively populated by individuals with professional expertise in communications technology, ought to be more aware of that very technology. If this is an attainable goal, then so too is the possibility that those whose primary expertise is in communications can know more about the law.

14. When Justice Douglas is mentioned on fourteen different pages, often multiply, and Justice Brennan is mentioned on only three occasions, quite a bit is said about the author's view of first amendment theory.

represented by the FCC, Felix Frankfurter and his notorious balancing standard, and Warren Burger, leader of the "puritanical" Burger Court (p. 67).[15]

Finally, most of the standard themes appear frequently. "Academic freedom" and "reporters' rights" are treated as established legal doctrines (p. 217). The language of the first amendment is plain and unequivocal, "explicitly" excluding Congress from any regulation of the process of communication (p. 3). To hold otherwise is to ignore the "clear intent" of the Constitution (p. 3) and thus jeopardize the "free marketplace of ideas" (p. 209). Yet hope need not be abandoned. At times the courts have been willing to "blow the whistle" (p. 3, 134, 189)[16] on those who would ignore the "face meaning of [the] words" (p. 57)[17] of the first amendment. But new vigilance is needed as we experience the revolution in communication technology.

As might be expected from a book written in this style, the sophisticated student of the first amendment will gain little in the way of understanding of first amendment theory from reading this book. And, unfortunately, the unsophisticated reader will come away with serious misconceptions about the scope, strength, underlying theory, and judicial interpretation of the first amendment.[18]

III.

Pool does not, of course, purport to be offering an advanced treatise, or even a primer, on first amendment theory and doctrine. Thus, the consequences of his simplistic treatment of first amendment theory are most apparent when this theory is applied to the primary empirical and sociological theme of the book. That is, Pool's theory of the first amendment supplies easy—too easy—answers to the problem of technological change in the way that society communicates, but it is not immediately apparent that those easy answers are correct.

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15. Justice Frankfurter bears the heaviest attack (pp. 57, 60, 61, 62 ("Frankfurter's pragmatic reinterpretation of [the words of the first amendment] into vacuity"), 66, 104, 105, 160 ("pernicious" opinion), 262 n.34, 267 n.57). The high point is when a position with which Pool disagrees is described as "Frankfurtian" (p. 291 n.6).

16. If the courts get tired from all that whistle-blowing, they can rest their lips while they put their "finger[s] in the hole in the constitutional dike" (p. 91).

17. That the words of the first amendment are in no way clear is by now a settled proposition in first amendment scholarship. See, e.g., A. Bickel, The Least Dangerous Branch 88-90 (1962); J. Ely, Democracy and Distrust 105 (1980); Greenawalt, Speech and Crime, 1980 Am. B. Found. Researeh J. 645, 731; Mendelson, On the Meaning of the First Amendment: Absolutes in the Balance, 50 Calif. L. Rev. 821 (1962); Van Alstyne, A Graphic Review of the Free Speech Clause, 70 Calif. L. Rev. 107, 110-28 (1982).

18. Apart from his treatment of "literalism," see supra note 17, Pool's reliance on devices such as "four . . . tests" (p. 59), "nine . . . rules" (pp. 62-66), the time-worn absolutes-versus-balancing oversimplification (pp. 55-74), and the rhetorical "Where should the line be drawn?" (p. 69), should provide sufficient indication that a distorting simplification pervades his description of first amendment doctrine and theory.

The main theme that runs through all of Pool's prescriptions is that government regulation need not be the inevitable solution to the problems, such as scarcity and conflicting uses, that are in some ways unique to the electronic media (pp. 226–51). In fact, it is becoming increasingly apparent, if it was not so before, that cable television and related developments have rendered technologically obsolete the scarcity rationale for the regulation of broadcasting.[19] Becausc there is no longer a technologically imposed shortage of available broadcast spectrum, there is no reason to base a regulatory approach on the assumption that there are far fewer broadcast bands than there are broadcasters who want them. But even were that not the case, regulation based in part on content need not be the only response to the allocation of scarce resources. One possible alternative is a content-blind common carrier system, in some respects similar to that in force for telephone and telegraph (pp. 75–107, 136–38, 246). Thus, the telephone companies serve all comers in a nondiscriminatory manner, but a company's governmental license[20] is not dependent on the extent to which individual telephone calls, or the aggregate of them, contain content that is in the public interest.[21] Another possibility is to accommodate scarcity by the operation of the market, in much the same way that we do for many other scarce resources (p. 138–48).[22] Under this model, government serves solely as auctioneer and policeman, conducting the bidding and ensuring that no one takes away what the high bidder has secured.[23]

From this perspective, Pool perceptively describes three different models of governmental response to types of communication. One is the no-regulation model, premised on the first amendment, and most notably embodied in the treatment of newspapers, magazines, and books (pp. 55–74). The second model is the common-carrier model, used with the telephone and tclegraph industry, and susceptible of both monopoly and nonmonopoly variations (pp. 75–107). Finally, there is the regulatory model, paradigmatically represented by FCC licensing and regulation of radio and television, and incorporating a

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19. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). As Pool notes, scarcity had ceased to be a technological barrier even at the time that *Red Lion* was decided (p. 151). Even if and when broadcast-band scarcity is obtained, there remains the question of whether technological scarcity in the broadcast context is relevantly different from practical-resource scarcity with respect to the print media. See Bollinger, supra note 9, at 10–12.

20. Common-carrier systems can exist in either monopoly or competitive variations (p. 81).

21. Ironically, the very decision to treat a system in common-carrier fashion seems to presuppose some public interest in the activity in general.

22. An especially powerful explanation of this view is found in Van Alstyne, The Möbius Strip of the First Amendment: Perspectives on Red Lion, 29 S.C.L. Rev. 539, 560–65 (1978). See also Coase, The Federal Communications Commission, 2 J.L. & Econ. 1 (1959); De Vany, Eckert, Meyers, O'Hara & Scott, A Property System for Market Allocation of the Electromagnetic Spectrum: A Legal-Economic-Engineering Study, 21 Stan. L. Rev. 1499 (1969).

23. See Van Alstyne, supra note 22, at 565.

considerable degree of the very kinds of content regulation that would be impermissible if imposed upon books or newspapers (pp. 116-35).[24]

Of these three models, Pool has little doubt that the regulatory model is the worst. From this springs the recurring message of his prescriptions. Although it may not always be possible to treat every form of the newer electronic media in the same way that we have treated the print media, the regulatory model must be considered a last resort (p. 246). To the extent that there are unavoidable needs for control, such as the impossibility of simultaneous transmission over the same band, then we must search at all costs for the way of dealing with the problem that avoids any possibility of government regulation of the content of communications.

Pervading these prescriptions is Pool's presupposition that less is better when it pertains to government regulation,[25] that government regulation is likely to lead to regulation of content, and that regulation of content is likely to be used as a way of suppressing the expression of diverse points of view, particularly those points of view seen as threatening to the government. The corollary of this, of course, is that any extension of the first amendment is eo ipso salutary, and that any failure to extend the first amendment is similarly the first step on the road to tyranny.

IV.

It is, however, surely unfair to Pool's insights to saddle him with the burden of his own view of first amendment theory. The issues are simply more complex than the assumption that broadening the first amendment is necessarily advantageous. But this is not to detract from the value of Pool's recognition of what are, at least on the surface, some anomalous treatments by current law of the diversity of communicative modes (pp. 1-3). And I cannot emphasize too strongly the service that Pool has performed in writing intelligently about the future of the process of public and private[26] communication in the United States, and in calling for us to assess this future in light of the

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24. One can, however, imagine a pervasive regulatory system without content regulation. The FCC could license more or less as it does now, but impose no content controls, and choose among competing applicants for the same license on the basis of, for example, the size of the area to be served, the financial stability of the applicant, the nature of the broadcasting equipment owned by the applicant, and the willingness of the applicant to serve unprofitable areas.

25. At times (e.g., p. 139) Pool seems to be suggesting that less regulation is more efficient, and that the ideal of less regulation is a worthy one even apart from the specific issue of the first amendment. This laissez faire overlay on first amendment theory seems superfluous. Implicit in any strong version of the first amendment is that some forms of regulation are impermissible even if those forms are *more* efficient. See R. Dworkin, Taking Rights Seriously 191-92 (1977); F. Schauer, supra note 5, at 7-10.

26. Although Pool writes primarily about the kinds of communication that we would be inclined to call "public," the obvious message of his discussion of technological advances (pp. 151-225), is that radical transformations could occur in the way that we engage in nonpublic communications. To the extent that some or most private communications are covered by the first

first amendment. The best way to recognize this contribution, it seems to me, is to employ it in the context of a somewhat less simplistic view of the first amendment, and I want to suggest some lines that further work might take.

I accept Pool's fully supported conclusion that many forms of communication now outside the first amendment will take on increased prominence in the future. The question is what to do about this phenomenon. The obvious answer, and the one offered by Pool, is that we should broaden the coverage of the first amendment, thus disallowing many of the currently accepted forms of regulation of communication. Yet it is not so obvious that such a strategy serves either the first amendment, taken in isolation, or society at large, which has interests other than those protected by the first amendment.[27]

Looking first at the first amendment in isolation, the issue raised is whether free speech interests are necessarily strengthened by the broadening of the first amendment. We cannot ignore the extent to which an extension may be conducive to dilution. Despite all the new technology, and the convergence of modes that Pool describes so well, much of the electronic media of communication will still be used for functions that have little if anything to do with the purposes of the first amendment.[28] We will still use the telephone to find out the time and to summon the plumber, and businesses will still use the contemporary version of the teletype to make contracts, order raw materials, and receive reports from employees in the field. Radio will still be used to enable security officers to talk to each other, and truckers to warn each other of police radar ahead. Moreover, much of the new technology is similarly distant from any plausible core of the first amendment. Maybe there is something I am missing, but the first amendment importance of the messages from an automatic teller to the bank's central computer completely escapes me, as does the first amendment importance of the mutual exchange of electronic and visual symbols between me and the Pac-Man machine.[29]

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amendment, see generally Schauer, "Private" Speech and the "Private" Forum: Givhan v. Western Line School District, 1979 Sup. Ct. Rev. 217, most of Pool's insights apply, mutatis mutandis, to private communication. Pool's description of the "convergence of modes," supra text accompanying notes 6-7, makes the point even stronger. When the same mechanism is used to call a taxi, gossip to one's neighbor, listen to the President, read a book, read the newspaper, watch a movie, and tell when to baste the turkey, many of our traditional first amendment assumptions must be reevaluated.

27. I take the last phrase in the text to be self-evident. For a discussion for those who disagree, see F. Schauer, supra note 5.

28. Regardless of which of the many underlying theories of the first amendment we choose to adopt, and even if we choose to adopt all of them, it remains clear that many forms of communication are still well outside any conceivable interpretation of the first amendment. See, e.g., Greenawalt, supra note 17.

29. Although Pool does not explicitly claim that Pac-Man or bank wires should be given first amendment protection, this is the implication of his "unified" first amendment theory. See Marshfield Family Skateland, Inc. v. Town of Marshfield, 389 Mass. 436, 450 N.E. 2d 605 (videogames not protected by first amendment), appeal dismissed, 52 U.S.L.W. 3421 (U.S. Nov. 29, 1983).

To the extent that all of these activities are covered by the first amendment, even if they are not ultimately protected by the first amendment,[30] the special force of a first amendment argument is blunted by repeated use. In the long run, the protection of freedom of speech is not in the hands of the courts, but rather in the hands of the people, upon whose acquiescence the authority of the courts rests.[31] As it is, the nature of first amendment litigation is such that most cases involve either those perceived by some as crackpots, such as the Jehovah's Witnesses, or society's ideological dregs, such as the Nazis and the Ku Klux Klan.[32] In this context, the already counterintuitive nature of the principles of free speech are put to a further test whenever someone like this prevails in the name of the longer-term protection of the first amendment. To the extent that we are required to consider first amendment arguments in a wide range of cases involving neither ideological speech nor any special danger of government suppression, we merely compound the problem. In order to assure that the first amendment is available with all of its force in "the worst of times,"[33] we must be wary in better times of using it without cause.

In some cases, including some of those mentioned by Pool, broadening the first amendment may be necessary, or at least desirable. But coming to this conclusion requires that we consider the types of speech that will be brought within the expanded first amendment, and that we consider the costs and risks involved. It is a mistake to fail to extend the first amendment to include those things that it ought to cover, but is is also a mistake, often with unseen but harsh consequences, to extend the first amendment to cover that which it ought not cover. Making the determinations suggested here is a difficult task, far more difficult than assuming simply that broader is better. But if we adopt this simple assumption instead of engaging in close analysis, we may discover too late that the first amendment is hardly there when we most need it.

The previous paragraphs look at the issues solely from the perspective of the first amendment itself. That, of course, is an unreasonably narrow view, for there are interests other than the interests in freedom of speech, and those interests will frequently conflict with the free speech interests, requiring some accommodation between the two.[34] Unfortunately, Pool's analysis does not even admit conflicting interests.[35]

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30. See supra note 5.

31. Moreover, as Lee Bollinger has pointed out to me, the values underlying free speech may represent an attitude on the part of the public that we wish to foster even when those values are not used by courts to restrict the activities of government.

32. See, e.g., Brandenburg v. Ohio, 395 U.S. 444 (1969) (Ku Klux Klan); Cantwell v. Connecticut, 310 U.S. 296 (1940) (Jehovah's Witnesses); Collin v. Smith, 578 F.2d 1197 (7th Cir.), stay denied, 436 U.S. 953, cert. denied, 439 U.S. 916 (1978) (Nazi party).

33. Blasi, A First Amendment for the Worst of Times (tentatively entitled unpublished manuscript on file at the offices of the Columbia Law Review).

34. See Shiffrin, Government Speech, 27 UCLA L. Rev. 565, 611 (1980).

35. Pool takes the notion of balancing to be "in flagrant disregard of the unequivocal language of the First Amendment" (p. 61).

In the context of the appropriate first amendment response to technological change, we must at least consider the extent to which this technological change implicates interests other than freedom of speech, or the extent to which technological change is likely to exacerbate certain harms normally considered cognizable despite the existence of the first amendment. That is, communications can cause harm.[36] In many instances we say that the free speech interests are so strong that the first amendment prevails so as to prevent the regulation of certain forms of speech despite the harm it may cause.[37] In other instances, we conclude that the harms are so great that they must prevail even against the first amendment concerns. But once we recognize the possibility that communications can and do cause harm, then we must consider the extent to which these harms are likely to be affected by technological change. For example, extending the capabilities of the electronic media may make it possible for the merely negligent defamer of a public figure, or the innocent defamer of a private individual, to cause more harm to reputation than was ever thought possible.[38] To the extent that communications can and do embarrass, humiliate, and invade privacy,[39] these unquestionably real harms can be magnified and multiplied by new technology, making it easier to invade privacy and easier to propagate the invasion. And there are other ways in which arguments for *increased* governmental regulation may be occasioned by new technological capabilities.[40] They make it possible to incite more easily more people to violent action.[41] And they may, analogously to the whole range of new "computer crimes," make it possible to cause harms to individuals and to the public at large in ways that were not previously imagined. Thus, while a single response to all first amendment problems implicated by new technology may be appealing in its simplicity, consideration of the first amendment in less parochial terms may require varied responses.

Some of these effects may lead us to want to modify existing first amendment doctrines, and some of them may justify creating separate princi-

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36. See supra note 27.

37. See, e.g., Brown v. Hartlage, 456 U.S. 45 (1982); Ocala Star-Banner v. Damron, 401 U.S. 295 (1971).

38. I incorporate here the standard of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

39. See, e.g., Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (broadcast of deceased rape victim's name); Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979) (publication of name of alleged juvenile offender). That the publication was protected in both of these cases does not in any way suggest that people were not hurt or that the state concerns were illegitimate.

40. See N.Y. Times, Sept. 8, 1983, at 1, col. 4 (describing need for new laws on "computer crimes").

41. Imagine, for example, that Brandenburg, instead of "spouting his racism and anti-Semitism to the cattle of Hamilton County," Powe, supra note 9, at 283, had broadcast that message on television to all of the residents of Selma, Alabama, in 1966. Or imagine that he had the power to display it, complete with graphics, on the same video display terminal then being used by Selma's children to do their homework for math class.

ples for different formats of communication.[42] That *Red Lion* and *Pacifica* are, respectively, outmoded and just plain wrong does not invalidate the larger point that different modes of communication may create different problems and therefore require first amendment responses different from those developed around the older print media.[43] Thus, if we look at the new technology from a somewhat broader perspective, recognizing all of its implications, we may still want, as Pool urges, to increase the amount of first amendment protection for the new technology. But it is at least possible that we might want to respond by decreasing the amount of first amendment protection. More likely, we will conclude that new responses, not necessarily more or less, are the appropriate posture. The view that first amendment responses should be every bit as novel as the technology they are attempting to track has at least a surface appeal.

V.

In the previous Part, I noted that different contexts may require different first amendment responses. There is at least some truth to this, or at least I thought so, but perhaps this difficulty is also the root of the larger problem. That is, perhaps we have too often focused on particular industries, or particular settings, at the expense of focusing on particular forms of regulation, or particular kinds of opportunities for governmental abuse. The larger problem that Pool touches upon is the imperfect fit between technological categories and the classification of first amendment concerns.

Broadcasting provides the ideal example of this phenomenon. We have, inspired both by Congress and the Supreme Court, viewed radio and television broadcasting as a distinct category requiring more or less distinct rules, both under the first amendment and otherwise (pp. 108–50). But as radio and television have developed, we see that these media are not completely different from other forms of communication, and thus people like Pool respond that

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42. See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (scarcity of broadcast frequencies as the reason for the fairness doctrine); see also FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (indecent speech broadcast may be regulated differently from print media in part because of the special intrusiveness of the broadcast media). *Pacifica* might be taken as the judicial response to the special kind of intrusiveness caused by radio and television where listeners or viewers cannot effectively avoid the offensive language by "averting their eyes." See Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980) (allowing a utility company to put political statements in bills because those offended do not have to read insert). But even if *Consolidated Edison* temporarily allayed fears about the immediate demise of Cohen v. California, 403 U.S. 15 (1971) (fining wearer of jacket bearing offensive language violates first amendment; offended viewers can "avert their eyes"), the allowance of offensiveness as a constitutionally permissible justification for regulation remains for me a dangerous development. See Schauer, Categories, supra note 5, at 282–96.

43. On diversity in first amendment adjudication, see generally Schauer, Codifying the First Amendment, supra note 5, at 299–308; Shiffrin, Defamatory Non-Media Speech and First Amendment Methodology, 25 UCLA L. Rev. 915 (1978).

the first amendment "applies to the electronic media as much as to the print ones" (p. 246). But the problem is that in some respects the electronic and print media are similar, and in some respects they are different. It is important that we not think of the various modes of communication as distinct and mutually exclusive sets of characteristics. Rather, the different modes of communication, just like the different anything elses, are likely to represent an interlocking and overlapping set of characteristics. As the convergence of modes that Pool describes increases, the difficulty of separating one form of communication from another also increases. But this does not mean that some differences do not remain, or that we need ignore those differences.

Instead, it seems that we might do best to identify certain areas that are likely to create the potential for the very abuses that the first amendment ought to prevent. If a separate tax category for a medium of communication is thought to create a potential for governmental abuse,[44] then it ought to be considered a problem whenever and wherever such taxation occurs.[45] If licensing systems are thought to be a problem, then we ought to be suspicious of licensing systems. But there is licensing, and there is licensing. I do not consider it a problem under the first amendment that the trucks that deliver the *New York Times* are required to be licensed by the State of New York. Nor do I consider it a problem under the first amendment that the cafeteria at the *Washington Post* is presumably under the jurisdiction of and subject to spot inspections by the health department of the District of Columbia. In most cases the incidental effect on communication of a generally applicable regulatory scheme is not considered to raise first amendment problems.[46] There might even be cases in which only a mode of communication were regulated, but in which the regulation would still withstand first amendment scrutiny.

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44. Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 103 S. Ct. 1365 (1983).

45. Thus, if telephone companies come to be regularly in the business of offering political commentary, and of exposing the abuses of government, much as are now the daily newspapers, it may be that *Minneapolis Star* would provide the precedent to invalidate the special telephone tax that we now take to be innocuous.

46. "It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems." Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 103 S. Ct. 1365, 1369–70 (1983); see also Branzburg v. Hayes, 408 U.S. 665 (1972) (subpoenas); Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946) (labor laws); Associated Press v. United States, 326 U.S. 1 (1945) (antitrust laws).

There seem to be substantial anomalies in the entire area of incidental effects on communication. We start with the proposition that the highest level of scrutiny is reserved for governmental action that is directed at communicative impact. See United States v. O'Brien, 391 U.S. 367, 376–77 (1968); Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 Harv. L. Rev. 1482 (1975); see also L. Tribe, American Constitutional Law 580–601 (1978). But what is the appropriate first amendment attitude towards de facto restriction on commonly used methods of communication, where that restriction is merely the incidental effect of a regulatory scheme in no way based on communicative impact? *O'Brien* suggests both heightened scrutiny, at least in the sense of evaluating the strength of the state's

Consider, for example, the unanswered question in *Metromedia, Inc. v. San Diego*[47] of whether billboards can be totally prohibited in a given locality.[48]

It is possible that we want to focus not even on particular pockets of potential abuse, but rather on particular governmental decisions.[49] Certain governmental decisions, especially but not exclusively those based on the point of view espoused,[50] might be thought to presumptively violate the first amendment. And other decisions, some possibly involving content regulation,[51]

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interest, and a least restrictive alternative analysis. This attitude of close but not extremely strict scrutiny seems to pervade the public forum cases. See, e.g., Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981); Brown v. Louisiana, 383 U.S. 131 (1966); Cox v. Louisiana, 379 U.S. 559 (1965). But in the newspaper regulation cases mentioned above, incidental effects on newspapers receive, apparently, nothing more than mere rationality scrutiny. Moreover, it is intriguing that in much of both free speech analysis and establishment clause doctrine, e.g., Lemon v. Kurtzman, 403 U.S. 602 (1971), the allegedly harmful effect alone triggers at least some heightened scrutiny, even absent any constitutionally suspect governmental intent. But with respect to equal protection doctrine, the absence of discriminatory intent brings the inquiry to a complete halt. See, e.g., Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976).

47. 453 U.S. 490 (1981).

48. Id. at 515 n.20; see also id. at 526–34 (Brennan, J., concurring). Even the plurality in *Metromedia* intimates that a total ban on such a well-established means of communication would be impermissible, id. at 515 n.20, relying largely on Schad v. Mount Ephraim, 452 U.S. 61 (1981). That conclusion seems correct, even if the total ban is based on aesthetic or environmental concerns rather than anything to do with content or communicative impact. But what if a town prohibited any structures higher than thirty feet, or higher than ten feet that was not a dwelling? Such a restriction would have the effect of eliminiating billboards, but it seems much less clear that this latter regulation would be tested against first amendment standards at all. If this is so, then there is a significant difference between those noncommunicative impact-based regulations that single out a mode of communication (imagine a total prohibition of bookstores), and those that incidentally include communication within a broader prohibition. Certainly *Minneapolis Star* provides authority for such a distinction, especially if we avoid the mistake of thinking that it is only a press case. But is the special concern for potential abuse in *Minneapolis Star* present in all contexts? It likely is present in the context of marches, parades, and demonstrations, and thus we might want to distinguish two modes of traffic, safety, and noise regulations. Those that deal in general with traffic or obstruction might be subject to lower scrutiny, even when they are applied to parades, than those that deal in terms of parades or other modes of communication. But the concerns of *Minneapolis Star*, even if valid, seem substantially less apparent in the billboard instance. I have discussed this issue, which I refer to as *format discrimination*, at slightly greater length in Schauer, supra note 5, at 299–302.

49. This, of course, is the message of the "communicative impact" approach to the first amendment. See supra note 46.

50. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948, 964–69 (1983); Stone, Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U. Chi. L. Rev. 81 (1978); Stone, Content Regulation and the First Amendment, 25 Wm. & Mary L. Rev. (1983) (forthcoming).

51. Despite occasional loose language to the contrary, e.g., Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) ("But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."), it is clear that a wide range of content-based restrictions on some aspect of communicating are not thought to create significant first amendment problems. Restrictions on perjury, price-fixing, and fraud, for example, are all content-based. See generally Greenawalt, supra note 17; Stephan, The First

might be thought not to violate the first amendment. This is not the forum to suggest analytical methods of dealing with these problems. What I am urging is that we consider at the outset the appropriate form of classification, or units of scrutiny, under the first amendment. In some contexts, an industry or even a type of communication may be the appropriate basis for distinction. In this view, however, the question becomes one of thinking about the reasons for using a characteristic, such as technology, as the means of classifying the units of scrutiny. Technology may be appropriate if it segregates those first amendment problems into a useful and constructive set of categories. But in all cases, the initial question is which units of scrutiny are appropriate for the problem. In some areas the unit might be the industry,[52] but in other areas it might be the regulatory system, and in others the individual governmental decision. It is all well and good to talk about levels of scrutiny, but unless we have some idea of the units of scrutiny to which these levels apply, and when the different levels apply, we are destined to perpetuate many of the existing anomalies that Pool points out (pp. 117–50).

VI.

Professor Pool has performed an enormous service by pointing out to students of the first amendment the ways in which technology is advancing so quickly that many of the existing empirical first amendment assumptions are becoming obsolete. But it may be that the service he has unwittingly performed is even more significant. The technological revolution in communication demonstrates that it is hopeless to imagine that we can say that the first amendment either does or does not apply to a particular industry or even to a particular form of communication. Rather, the first amendment is most significantly a restriction on governmental action. Indeed, it even reads that way.[53] Perhaps, therefore, the task is to identify those types of governmental decisionmaking[54] that offend the first amendment, whenever or wherever they

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Amendment and Content Discrimination, 68 Va. L. Rev. 203 (1982) (attacking proposals for broad content neutrality rule). For a pervasive skepticism about much of the traditional reliance on content discrimination as a useful tool in first amendment analysis, see Redish, The Content Distinction in First Amendment Analysis, 34 Stan. L. Rev. 113 (1981).

52. I am not here concerned with the claim that such inquiry might be mandated by the press clause of the first amendment. See generally Abrams, The Press *is* Different: Reflections on Justice Stewart and the Autonomous Press, 7 Hofstra L. Rev. 563 (1979); Anderson, The Origins of the Press Clause, 30 UCLA L. Rev. 455 (1983); Lange, The Speech and Press Clauses, 23 UCLA L. Rev. 77 (1975); Van Alstyne, The First Amendment and the Free Press: A Comment on Some New Trends and Some Old Theories, 9 Hofstra L. Rev. 1 (1980).

53. It is at best a subtle and overly nice point, but there are differences in tone among, for example, the "make no law" language of the first amendment and the "right of the people" and "right of citizens" language in the second and 15th amendments. See Linde, "Clear and Present Danger" Reexamined: Dissonance in the *Brandenburg* Concerto, 22 Stan. L. Rev. 1163 (1970).

54. That is, it may be that certain motives are impermissible, or certain means, or certain effects, or some combination thereof. But under any variation it is a particular decision by government that triggers at least some heightened scrutiny.

occur. If we were to do this, it would not mean that special contexts might not occasion their own special modes of analysis under certain circumstances. But we would at least have a start towards keeping the first amendment within manageable bounds and preserving its full power for when it is most needed. These suggestions are by no means original,[55] but the frequency with which they are ignored justifies their repetition.

The technological revolution is changing the ways in which we communicate with each other, and Pool properly points out that this requires some sort of first amendment response. But the history of first amendment doctrine provides considerable cause for optimism. While the reactions have not always been as fast as many would like, and have been too fast for others, the courts have in the past demonstrated the ability to adapt first amendment doctrine to new forms of technology. Whether it be the invention and then proliferation of motion pictures,[56] the central place of the street demonstration in American political life,[57] or the use of nontraditional symbols to convey one's beliefs,[58] we have a history in which the phenomena of technological and sociological change have not remained unnoticed by the courts. It is unlikely that the phenomena that Pool so perceptively describes will go unnoticed, but one can hope that the first amendment responses will be as sophisticated as the technologies that occasion them.

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55. See Ely, supra note 46; Nimmer, The Meaning of Symbolic Speech Under the First Amendment, 21 UCLA L. Rev. 29 (1973). On special modes of analysis for special contexts, see Metromedia, Inc. v. San Diego, 453 U.S. 490, 500-01 (1981); Southeastern Promotions v. Conrad, 420 U.S. 546, 557 (1975); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952).

56. Compare Jenkins v. Georgia, 418 U.S. 153 (1974) (first amendment protects all films except "hard-core" pornography), and Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (the fact that films are made for profit and entertainment does not lessen the fact that motion pictures are a significant medium for the communication of ideas), with Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230 (1915) (the exhibition of motion pictures is merely business, conducted for profit, and not entitled to freedom of speech or press).

57. Compare Gregory v. Chicago, 394 U.S. 111 (1969) (unruly onlookers may not be used as a reason for depriving peaceful demonstrators of first amendment rights), and Edwards v. South Carolina, 372 U.S. 229 (1963) (first and fourteenth amendments bar conviction for "breach of peace" for peaceful demonstration), with Feiner v. New York, 340 U.S. 315 (1951) (presence of hostile audience justifies restricting speaker), and Massachusetts v. Davis, 162 Mass. 510 (1895) (Holmes, J.) (since the state may totally bar access to a public forum, the state may therefore a fortiori prohibit a single use, such as public speech), aff'd, 167 U.S. 43 (1897).

58. See Spence v. Washington, 418 U.S. 405 (1974) (per curiam) (displaying on private property a United States flag decorated with a peace symbol is protected speech).